



**2014 CLM Annual Conference**

**April 9, 2014 – April 11, 2014**

**Boca Raton Resort  
501 E. Camino Real  
Boca Raton, FL 33432**

**Panel Session 3: Thursday, April 10, 2014 (2:00 pm – 3:00 pm)**

**What We All Share**

**I. The Business of Relationships**

**Recognition of Issues From All Perspectives**

Regardless of what had we where is litigation management professionals, we tend to view the world through the prism of our own world. Too often, we focus on what we believe is germane to our job. In doing so, we lose sight of the fact that there are so many things that are common issues. We may call him by different names, but we share them all the same.

An in-house counsel has many things to worry about on a day-to-day basis.

- Case volume
- Strategic thinking
- Tactical decisions
- Cost
- Reputational risk
- Compliance
- Risk mitigation

Do these issues sound familiar to anyone else? We get caught up in industry nomenclature (“claims” instead of “cases” etc.)

## **Benefits of Collective Thinking and Collaboration**

Everyone in the industry would benefit from using or common interests to help each other do our jobs better. Like any other type of relationship, the relationships between claims professional, in-house counsel, defense counsel, and external business partners can only be enhanced by seeing things from multiple points of view.

In-house counsel has one client to worry about, and typically demands a great deal from external counsel, whether it is responsiveness, cost containment, or protecting the brand. On the other hand, external counsel may have 50 other clients that expect the same things. They also need to remain profitable if they are going to be able to stay in business. A firm with a long-standing relationship with the client (and therefore is able to really understand the needs and issues of their client) is not worth much if they are insolvent.

Claims professionals have many factors that determine how they manage claims. However, there are also client considerations they have to manage, just as in-house or outside counsel do. They have to weigh the needs of the business relationship against the needs of their employer to find a place where both are given consideration. External business partners have similar considerations. In a market where service providers are growing exponentially, they need to not only do it better/smarter/faster, they have to make the relationship with their clients important.

## **Establish a Broad Framework of Understanding**

Bottom line, our entire industry is built on relationships in common considerations. Instead of focusing on the differences (claims, costs, specific claim considerations, cost containment metrics for specific case types, etc.), we would do better to focus on what we all share and all benefit from the experience.

## **II. The Times They Are a-Changin!**

### **The End of an Era**

Historically, law firms provide legal services for hourly fees. Insurance companies and our corporate clients appeared to have an unlimited amount to spend and never really seem to care about the bottom line. But what you did 10 years ago may not be relevant today. Why? Because the times they are a-changin!

We all miss:

- Telephone calls
- Time to contemplate an answer to a question and draft an appropriate long response instead of a quick email
- Paper files
- Stating a fee for legal services, and not having to justify
- No budgets
- No litigation plans

### **The New Reality**

Law firms are now businesses. Yes, while it is still about the “relationship“, the glut of lawyers on the market coupled with technological advances have changed the profession dramatically. While the amount

of litigation may have increased the number of trials are way down. And individuals seeking the services of lawyers has decreased significantly.

Think about it, there is no mystery in what lawyers do anymore. When was the last time any of you actually went to the law library to do research? Average folks who need legal services can access them to take the risk and pay a small sum to the Internet rather than pay a lawyer to print the form and file it. People are savvy and a brief risk-benefit analysis may say the risk is worth the cost. We Why pay a lawyer to print the form and file it when you can do it yourself?

As more traditional legal services become available on the Internet, more lawyers are looking around to see where they can pick up some work. And they are looking at you...

### **A New Generation**

With the end of a generation a new business model is needed. Think about it: would you be happy if your plumber said it would cost \$1000 to complete a repair and then handed you a bill for \$5000? I don't think so. Our clients want cost effective results too. How much does it cost to put a young lawyer in the seat? How much does it cost to put her legal assistant in the seat? Are the lawyers coming out of law school, even worthy of the seat? Who pays the cost of training? Is a young associate a glorified paralegal with \$200,000 in student loans? What can be done?

Some suggestions are:

- Understand your client's business
- Embrace technology
- Accept the fact that some tasks can be done by a paralegal, but may need a senior attorney to supervise
- Make use of outsourcing opportunities
- Use a collaborative team approach to litigation
- Understand that being a lawyer is both a profession and a business. And in this new world order both must be redefined
- Know industry trends in your area

### **It Is Not Just About Dollars and Cents**

A successful business is measured by more than dollars and cents. Of course, you have to be solvent, but there is more. Define your value and operate under a value driven model. This model should include a clearly defined goal, low overhead and a means to measure effective legal representation to ensure that you are meeting your customer's needs. In general, your value proposition should take into consideration all costs, noneconomic results and some intangibles. Intangibles may include survey results, audits, and even testimonials. All of these are elements that define your business and can be used in your marketing efforts.

Remember that technology does not render a lawyer, useless. We still need the knowledge base, as well as common sense.

## **III. The Fourth Leg on the Chair**

### **Claims Management**

The claims adjustment industry wears many hats and in the life of a claim can have multiple partnerships. First, we have a relationship with the client and when applicable, the clients carrier. Our initial charges to investigate, evaluate and fairly negotiate claims which fall within a client program. However, a most critical piece for our clients is to set up a program for economic efficiency while maintaining the integrity of the claims handling process.

To ensure the most efficient and economical organizational structure for clients, an extensive analysis of the historical claims data is required.. This includes determining the concentration of claims and litigation by frequency and severity, as well as by state venue. Building a team where adjusters have “subject matter” expertise by line of business and jurisdictions further facilitates the timely and effective handling. Examples of specialties are:

- pharmaceutical
- products
- contracts/construction defects
- Asset protection
- Automobile
- premises

Additionally, a legal baseline is determined by analysis of past fees, costs, indemnity payments, and outcomes. Management of the baseline includes continued measurement and evaluation of performance of both counsel and adjusters.

Another key is to ensure rapid and effect of response to major loss events is the establishment of an emergency response team to handle catastrophic events. As most of us know a small percentage of loss can result in 80% of the indemnity dollars paid for a client. Rapid response teams preserve evidence, make early liability and damage assessments, as well as engage defense counsel early to ensure attorney-client privilege over the investigative process.

### **Pre-Litigation**

Litigation has its cost and is sometimes unavoidable. However, a claims team also has the charge of avoiding litigation wherever possible. Getting the case to the decision point as early as possible is key. However, once there, if a claim is one to compromise, then some outside of the box initiatives can make a positive impact. Thinking about economic efficiency... Here is one thought: when an adjuster travels to an arbitration or settlement conference, or is planning on doing so, they should look at a client’s pending claims and identify those claims which may be ready for negotiations. This is especially true in geographic areas where there is a high concentration of claims. Borrow a room from local counsel and reach out to all of the attorneys or unrepresented claimants in the area with potential settlements and set up a face-to-face settlement conference. The extra days stay will be well worth the effort.

Upon receipt of a new lawsuit, the client and claims professional to review and evaluate the case to determine if the case is one to be resolved or assigned to counsel. However, if the case cannot be resolved, then it is essential that a strong bond and communication bridge be built among all of the stakeholders-client, carrier, claim professional, and defense counsel. This bridge is critical if optimal results are to be obtained in solving litigated claims.

### **Litigation**

For economic efficiency, it is important that all players are rowing in the same direction. The following are some suggested guidelines:

- Litigation policy/procedures/manual
  - Approach for handling litigated matters
  - Expectations of handling attorney
    - Key depositions (especially plaintiff) must be handled by lead attorney
    - Case evaluations completed by lead attorney
  - Uniform reporting formats/timelines

- Consistency throughout all litigation
- Define roles and responsibilities – attorney/claims adjuster/client – client paralegals/outside vendors
- Develop a partnership with counsel...however, keep claims tasks to the claims adjusters – not paralegals
- Keep attorneys consistent – especially if the firm receives multiple assignments.
  - Retain the attorney – not the “firm.”
  - Needs to understand the client’s business model.
- Consensus on direction! Defend or resolve
  - If one to resolve – agree on what actions need to be taken in order to get prepare for resolution...do only required discovery to get to a “settlement window.”
  - Effective use of roundtables/committees with client/carrier/attorney/adjuster
- Settlement Negotiations – Generally adjuster driven except on major self-insured or other cases where consensus is that counsel should handle.
  - Proactive usage of Mediations/ADR

### **Post Litigation Assessment**

In the claims business there can be a “close claim is a good claim” syndrome. For all parties, there is a sigh of relief that the claim is over and done. However, economic efficiency does not end with the final payment on a claim file. History does repeat itself. It is critical that every litigated claim be “debriefed” before changing that claim status from open to close. Elements for this process are:

- Attorney/adjuster/client provide a candid overview
- What went right
- What could have been done better
- Make any modifications to the program accordingly
- Legal fees + expenses + indemnity payment = cost
  - Perform analysis of costs vs. results
  - Monitor billing compliance per Litigation manual

### **Loss Control**

A good partner always looks for ways to help a client become better at what they do. Not only can this reduce frequency and severity of claims, but also can affect future premiums paid to carriers. To achieve economic efficiency, it’s incumbent upon partners to provide feedback on loss control, particularly if continuing business as usual will result in greater harm to the client. Both the claims professional and defense counsel must share with the client any legal ramifications of continuing business as usual. The client then can assess the company’s own risk tolerance to either change the process/procedure or maintain the status quo. Elements for loss control steps are as follows:

- Communication with client when a policy, procedure, property design results in multiple claims...or a need to change a product
  - Example design of curbs/sidewalks/entranceways
  - Adding a warning label to a piece of equipment
- Continuous monitoring and measurement of outcomes

## **IV. Out of the Box**

### **Stick to Core Competencies**

It is important to recognize needs when it comes to managing a business, a case, or a situation. However, it is more important to recognize if we have the skills or other resources necessary to meet those needs in-house, and if not, how we can proceed otherwise. Finally, even if we think we can address our needs on our own, the question is, is it our core competency? Does it fit into what our primary reason for being is or will we be distracted from our core competency by addressing this need ourselves?

### **Know Your Resources AND USE THEM**

Given the advent of technology, economic realities, and major cultural shifts, there are innumerable ways to conduct our businesses differently today than ever before. The role of the claims professional has changed from a jack of all trades to a more specialized role. Core competencies (resolving cases) have been retained and other tasks that had been routine are now outsourced to niche firms or individuals that have chosen to make those specific tasks their core competencies (medical record review, bill compliance reviews, analytics, etc.). Naturally, this frees the claims professional to focus on other key needs more effectively (case investigation, evaluation, negotiation, and resolution).

Likewise, as we have heard earlier, the marketplace has dictated that law firms view in a very fundamental way how they can better manage the business of law. Some have seen the future and hired experienced business management executives to handle all the non-legal aspects of managing the business. Others still, have outsourced dictation, preparation of routine legal documents and even some more complex legal work. Some of this work is done overseas at a fraction of the cost of what it would be to retain people on staff for what may otherwise be occasional assignments. And still others are taking a very hard look at the very structure of compensation plans and all other operational costs with a keen eye to squeezing every ounce of excess out of their total cost to improve margins, since a simple rate increase is no longer that simple.. Then and only then will they be able to realistically price services and market the firm more effectively.

### **What Happens Overseas Does Not Stay Overseas**

In some European countries and Australia there has been a major change with regard to the ownership of law firms. It is now permissible for non-attorneys to either own outright or to have a significant investments directly in law firms. As we are in the world economy it is improbable to believe that such a change will not come ashore here in America. The question is simply when? A change of this magnitude will place great pressure on the competitive nature of the marketplace.

So, how does one prepare? Where do we even begin? It takes information. Data. And data is not just numbers, but research. It is combined with keen insight and vision. It is rare for firms to have all of these skill sets in place. Some firms have great systems that have tracked the past and can deliver results and insights of what has been. But what do you know of the competition and how you stack up? What are the current trends? And what can or should you do to get that edge?

Make it a priority to prepare. Identify what you desire for the future of the firm and then research how to get there. A sizable body of information exists on the internet and there are workshops and gatherings on how to reinvent law. But of course, is all this research, analysis, and planning within your core competency? No. It is not the practice of law. Find consultants or vendors that can provide you with the certain aspects of assistance you will need to make enlightened decisions.

## **WHAT WE ALL SHARE**

We all know that the longstanding tried and true days of the past have been waning for some time. And as we have set out today, regardless of what discipline you are involved with, we all share the same issues and concerns, really. We share a market that is demanding, and economy that is fickle, and we have the constant need to improve our margins all the while ensuring the best quality outcome for our clients. By recognizing this sameness, we can effectively move forward together.