



2014 CLM Annual Conference

April 9, 2014 – April 11, 2014

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

Roundtable 1: Thursday, April 10, 2014 (10:10 am – 11:10 am)

A Time to Change: Effectuating Change and Developing Laws with Long Term Goals

I. Building the network

a. Maintaining a network to identify need and opportunity for change

One of the most important aspects of attempting to change the law is building a network to exchange information relating to developments in the law and problems in application. Lawyers or carriers are often so focused on handling a specific case that they may never pause to examine the possibility that there are dozens of similar or identical cases in a jurisdiction where parties are struggling with the same issue. In order to determine the correct circumstances, the affected parties and the concerns with the law, it is important to have a communication network to exchange information. This also allows some level of framework and team to take action once an opportunity arises. As an example, many state defense associations have amicus and legislative committees, as do business interest groups, trade associations and professional organizations. Often, they are willing to help, including having appointed attorneys to write briefs or advise on legislation, if they are simply contacted. Often, insurers have committees that examine these issues, but it may be up to the attorney to seek out that committee

b. Continuing communication to find the right circumstances

Once a network is established and affected parties identified, those interested may have to wait on the right circumstances to arise. In regard to legislation, political climate is vitally important, as can be seen with the current U.S. Congress. In judicial contexts, it is important to identify the right case to be able to focus on the specific issue that needs to be addressed. Creating a record for appeal on a single, specific issue is often difficult, and it may take a great deal of focus in pre-trial motions and trial pleading to properly preserve an issue to be addressed on appeal.

c. Developing trusted relationships that can impact change

The opportunity to change legislation or file amicus briefs may only be present in limited windows. It is important to continuously maintain trusted relationships with affected parties, trade groups, legislators, and lobbyists for those that are interested in pursuing change.

II. Circumstances bringing about change (15 minutes)

a. Identify which part of the law needs to be amended and why

One of the first issues which must be discussed prior to engaging in the legislative process to bring about change is to identify exactly what it is you want changed. What are your long term goals and how will amending the law bring about those goals? There are examples of these laws in every jurisdiction with a number being change recently through tort reform.

Kansas Worker's Compensation Statutes: In 2009 the Kansas Supreme Court came down with a decision which imposed strict construction on the Kansas Workers' Compensation Act. However, the Act was worded in such a way that Claimant's were allowed to be compensated for injuries through wage loss without the requirement that they mitigate these losses. As a result, Employers and Insurance Companies were losing significant amounts of money due to Claimants' choosing not to return to work. Therefore, it became apparent that the law needed to be amended to include more precise language to protect employers. With this specific goal in mind, the campaign to amend the law had a clear direction.

Alabama Road Contractor Liability: Prior to 2012, Alabama law allowed liability to be placed on road contractors for accidents that occurred long after a road was constructed or repaved. In many instances, a plaintiff only had to show that a road's physical condition did not conform with the plans and specifications in place for a contractor to be responsible for injury. Often, these deviations were slight or were due to the maintenance failures of the state following completion. In 2008, the Alabama Road Builder's Association began to focus efforts to identify cases to ask the Alabama Supreme Court to re-examine the judicially created law as well as to continue to push for legislative change which was defeated in committee annually due to a strong lobbying effort by the plaintiff's bar. Alabama's 2010 elections resulted in its first Republican state house since Reconstruction, opening opportunity for legislative reform, and eventually, a new statute. Additionally, in Fall 2010, a trial resulting in a \$7.5 million wrongful death verdict created the opportunity for appellate review of the law. Following amicus briefs and oral arguments by the ARBA, the law was successfully modified.

b. Organize your strategy

After identifying why the law needs to be changed, the campaign to garner support for the amendments becomes easier. It is important to identify which groups within the state have sway within the legislature and to elicit their support. The legislature is much more likely to amend the law in your favor if you have powerful groups backing you. Additionally, it is important to collect the objective information to allow the legislators, lobbyists or trade groups to argue on your behalf. In the context of road builders, this included gathering information on rising premiums paid by road contractors, which were 20% more than in some neighboring states, as well as the fact that a number of carriers simply declined to write the coverage in the state.

c. Take note of the political climate

Timing is key! If you want to make comprehensive changes to the law with long lasting effects, you might need to wait until the right political party has control of the legislature. If you introduce a bill before the time is right it could be killed in the committee, never make it to a hearing, or substantially re-written by the legislature and your goals will be lost. For example, in Kansas the Supreme Court issued its decision requiring strict construction of the Workers' Compensation Act in 2009, however it was unlikely amendments would be passed with the Governor at that time and the makeup of the legislature. In 2010, as with Alabama, the political winds had shifted and a wave of conservatives took control of the legislature and the governorship, thus it was the perfect opportunity to pass amendments to protect the employers' interests.

III. The Right People (10 minutes)

a. Outside Support

Identify the major groups who have an interest in the amendments to the Law and engage them in the process. Have them contact legislators, make recommendations regarding changes they would like to see, and even include them in the bill writing itself. In the context of amicus briefing, reach out to the right trade and business groups.

b. Legislative Support

It is important to develop relationships with legislators early on in the process. Be sure to have two to three legislators who will champion your bill for you throughout the legislative process. Educate those legislators on why the amendments are important, so that they can make a strong argument to the rest of the legislature. They will also ensure the bill is introduced in the correct committee and taken to a hearing; otherwise a bill could easily die on the committee chairman's desk.

c. The Right Drafting Committee

To legitimize your bill you need input from all interested parties including your opposition. However, it is best to involve the most reasonable and moderate members of both sides who are willing to negotiate in order to draft a bill which will satisfy the majority of the parties involved. For example, in drafting the 2011 changes to the Kansas Workers Compensation Act we included several reasonable members of the Claimant's bar to represent their interests in the changes to the law.

IV. Writing the Law (5 minutes)

a. The logistics

Logistically, in order to allow input from supporters and interested parties you should organize a large committee with representatives from all parties and set goals they would like to see accomplished. Then you should assemble a smaller group (4 to 5 people) who will actually draft the bill. Sometimes it is even helpful to nominate one person from within the smaller group to draft provisions based on discussions within the group and then the group can edit the provisions as they see fit. After a workable draft is in place, present the draft to the larger committee for suggestions and revisions. Then redraft as necessary.

It would be nearly impossible to draft a bill with a large committee, but this method still allows your supporters and other interested parties to be involved in the process in a meaningful way.

b. Negotiations

In order to get a bill passed through the legislature with minimal changes it needs to represent all interested parties. Thus as stated above it is important to involve your opposition in the legislative process. You will likely have to allow some provisions which help your opposition's interest become part of the law, but keep your eye on your long term goals to determine what you will allow to be stricken and what you insist upon becoming part of the new law. The political climate can be a very strong asset during this portion of the process. For example, in drafting the 2011 amendments to the Kansas Workers' Compensation Act, the legislature was very conservative and likely would have passed amendments to the workers' compensation act with or without input from the Claimant's bar, thus the Claimant's bar had little leverage in the negotiations since they would prefer to have some say in the drafting through this process rather than leaving it up to the legislature who could do as they please. In Alabama, the legislative committee referred the effort to a confidential mediation process involving all interested parties. The result was that the bill was negotiated in a cooperative effort by all as opposed to being subject to legislative tactics or amendments.

c. Beware of unintended consequences

After countless drafts of a bill it is easy to get bogged down in the specific language and forget the overall purpose behind the legislation. Be sure the language addresses all necessary components the law is intended to address; one misstatement could result in years of lost money for your clients. For example, the 2005 amendments to the Missouri Workers' Compensation Act failed to mention repetitive trauma injuries in the exclusive remedy provision, thus employers have been faced with civil litigation and additional liability for the past eight years because of this simple oversight in drafting. In the context of Alabama, the unforeseen objector was an association of counties that were concerned there would be a greater risk of exposure for county engineers if road contractor liability was diminished or extinguished.

V. Tips and Advice (15 minutes)

- a. Build relationships with legislators and be in tune with the political climate
- b. Be prepared to educate legislators about your proposed changes and why it is important
- c. Find one or two people in the legislature who can communicate your goals
- d. Be specific about what you want
- e. Engage the opposition and make them part of the process.
- f. After writing proposed changes, read it for unintended consequences
- g. Caution: New law, but old judges – it will take a while for the law to be applied correctly and you will have to wait for cases to go through the appellate system to determine how the amendments will be interpreted. Be patient.
- h. Research the tendencies of justices prior to filing an amicus brief – if you cannot win the appeal due to beliefs and prior rulings of the justices, you may waste your only opportunity.

- i. Organize your objective information- “The law just isn’t fair!” is not persuasive to judges that must write opinions, legislators that must answer to constituents or governors who must deal with political ramifications.
- j. Have testimonials ready- use local business owners to put a face and identity with a political request. Have a narrative that they can tell.
- k. Be realistic- rarely is it possible to get everything a group wants in a statute and you do not want to write a law that will be rewritten in the next political cycle.
- l. Do not overreach- just because one party has the political power to write the law as they wish does not mean they can. Do not create law that will not stand up to judicial scrutiny or constitutional review.
- m. Don’t drop the ball- you may not get another chance to get another bill out of committee or to argue to an appellate court.