CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

ADVANCING ETHICS, COOPERATION AND EDUCATION

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)

Bringing Experts Into the Fold of Litigation Management: Can It Be Done?

I. The "Big Picture" Problems

Experts- they are more than just vendors

Experts are often a critical component of litigation, and represent a necessary but significant cost component of a litigation budget. They are also part of the "face" of the litigation- presenting evidence and playing a role in the burden of proof. From a litigation cost perspective, however, they often categorized as a cost item along with other vendors such as court reporters and process servers. Treating experts more as attorneys from a litigation management perspective than vendors will better serve the interests of attorneys, clients, and the experts themselves by providing objective expectations regarding the scope of services, timing of services, and budgeting and cost management.

Typical litigation guidelines do little to address experts

Although litigation guidelines and billing guidelines for counsel are now common, the majority say little to nothing about the retention and handling of experts other than to require advance approval, and to dictate whether expert bills are submitted direct to the client for payment or as a cost item on the firm's legal bills. This "gap" in current guidelines can result in a lack of proper communication between counsel and the experts, which in turn, can result in unnecessary costs, billing disputes, delay in payments, and budget inaccuracies.

Rendering services to the lawyers for the benefit of clients and to be paid by clients

Experts are not part of the tri-partite relationship between counsel, carrier, and insured. However, their role in the litigation often mirrors that of counsel. Experts typically render services directly to the law firm for the benefit of the insured/carrier, but to be paid by the carrier-client. However, the expert

typically communicates solely with the attorney and rarely (if ever) with the client. Because the expert falls into this "pseudo-attorney" role vis-à-vis the client, but without the structure of any litigation guidelines, they again fall into a gap which can be better addressed by all parties involved.

II. The Drill Down- Specific Problems Encountered

The Attorney Perspective

Attorneys often do a poor job taking the lead in overseeing and managing expert service, despite having retained the expert and being the primary point of contact. Specific problems experienced include (a) multiple individuals staffing the file; (b) inadequate or complete lack of billing descriptions; (c) costs which for the firm would be considered by the client to be non-reimburseable overhead costs (secretarial time, file organization, photo indexing, etc.); and (d) unnecessary services rendered. On the other hand, attorneys realize that they must take care in over-controlling their expert due to concerns that everything from retainer agreements to communications regarding the scope of the engagement will be discoverable and could affect the perceived neutrality of a testifying expert.

Attorneys also find that they often spend a lot of time (non-billable) dealing with ministerial tasks of overdue expert invoices, invoices lacking in detail and requiring resubmission, differences of opinion with expert as to whether they will await payment from the carrier, expect law firm's to advance payment, and the like. A lot of these problems arise because there is nothing concrete for either the expert or the law firm to refer to and rely upon to resolve these issues.

The Client Perspective

When the expert is retained by the attorney during the course of litigation or anticipated litigation, the client relies upon the attorney to oversee that relationship and manage the costs of the expert in conjunction with management of fees and overall file costs. But the expert relationship is very different than that of the law firm- carriers cannot be expected to have approved "panel experts" like they do for law firms, with stringent litigation guidelines and billing requirements.

The Expert Perspective

Experts are most often retained by a law firm rather than directly by the law firm's client. The expert may never know the adjuster's name or contact information. When payment is overdue, the expert's point of contact is only the law firm, but most law firms do not front such payments. Billing delays are therefore common, and can get very frustrating for the expert who is unable to really get to the source of the problem and solution. Retention is also often informal and via phone and exchange of a fee schedule and conflict check. If retainer/retention agreements are more formalized it is usually coming from the expert and provides only that information which the expert requires to secure timely payment of invoices. That is not to say that experts are not open to additional terms of engagement, but that raises concerns over whether broader terms impinge on the expert's ability to perform its job, affect admissibility of the expert opinion, or create grounds of attack against the expert's impartiality.

III. Why the Expert Relationship Is Different than Lawyers

Professional Services Agreements- for whom

Whether the engagement is memorialized by phone, a series of emails, or a written engagement and retainer agreement, an expert's involvement is a professional services contract. When the law firm engages the expert, privity of contract is between the expert and the law firm (not the carrier). However, industry standards and norms often dictate that payment for the services is made by the carrier (not the law firm). Without an express agreement or understanding with the expert, payment may be expected by

an expert sooner than the client is reasonably expected to issue payment to the law firm. In the worst case scenario of an outstanding bill or other billing dispute, an expert may legally demand payment from the law firm, requiring the law firm to "front" payment. As one can imagine, have a lack of clarity regarding the terms and conditions of the service agreement with an expert can result in unnecessary and inconvenient disputes, budget problems, and payment delays.

Retention/Retainer Agreements (or not)

In this discussion, retainer agreements and litigation guidelines are treated distinctly. Some (but not all) experts require the carrier or law firm to execute a Retention or Retainer Agreement. These typically address the limited issues of hourly fee, billing cycle of the expert, and when payment is due- but nothing else. Surprisingly, many expert services are never reduced to writing at all. As with law firm related guidelines, it is recommended that the best starting point to provide structure and clarity between an expert and the law firm/client is a written service agreement which incorporates certain billing and file management guidelines.

Expert Neutrality

The neutrality of a testifying expert is paramount in litigation. Experts and lawyers alike know that experts are "paid for their services, not for their opinions." As such, written agreements and guidelines with experts must be crafted to ensure that they do not appear to impinge upon the expert's obligation to render opinions free from persuasion or influence of attorneys. It should be carefully crafted to capture the goal of increasing communication and provided parameters for accurate billing and cost management.

Discoverability of Services Agreements

Attorneys often try to limit any written communications with experts because most, if not all, such communications may be subject to discovery by the opposing party. Although some jurisdictions provide for the work product privilege to be asserted over limited forms of communications, it is unlikely that any written agreements or other writings related to an expert retention would be privileged. As such, any written billing guidelines governing the expert relationship have to be created with the backdrop of litigation in mind and the assumption that such a document will likely be subject to scrutiny by an opposing lawyer.

IV. Goals in Applying Litigation Management to Experts

Improved communication and results

Litigation guidelines dictate key communication milestones such as preliminary reports, quarterly reports, and reporting on minimal key milestones in a case. These reporting requirements cannot be blindly applied to an expert in the same way. But the spirit of such guidelines (that improved communication results in better, faster, and more results-oriented handling of a file) can be achieved and modified for the expert role.

Manage costs

Litigation guidelines almost always dictate the permissible number of lawyers to work on a particular file, hourly rate for each tier, and description of permissible and impermissible billable tasks (versus firm overhead costs). Consideration should be given to provide such structure to experts, particularly expert firms that utilize more than one person on a particular file, or other technical support people.

Cost predictability and budget accuracy

The litigation budget originates with the law firm, but a huge cost component of any budget are expert costs. Because an expert is not rendering a unit priced product (like a court reporter or process server), the law firm really cannot expect to accurately budget expert costs without the expert providing a budget. We submit that cost management will rarely if ever really be achieved without an accurate budget and an expert's input into same.

Requiring budgets should also be seen as an additional tool to promoting more effective communication regarding the scope of the retention and work requested, because they go hand in hand.

V. Litigation Management Tools to Consider- Positives & Negatives

Billing Guidelines- staffing, billing increments, and billing formats

Issues that should be considered and discussed include:

- Staffing- number and levels of experience to avoid overstaffing and potential duplication of work. For experts, staffing numbers should be/can be more flexible dependent on the nature of the work and scope of services.
- Hourly rates for each
- What is reimburseable- unlike law firms, many experts typically bill for what a carrier may consider "overhead" such as calls, faxes, file opening, indexing, organization, scheduling, and preparation of evidence and video/discs.
- Billing increments and billing cycles- experts should be requested to submit bills generally in the same overall format and on the same cycles as legal bills (or advised of any differences). Billing problems can arise from things as simple as quarterly billing cycles for a client, but monthly billing and payment expectations from an expert.
- Billing descriptions- obviously expert bills are usually not subjected to billing review programs, but they should still contain sufficient detail to permit the attorney to review the bill and determine if it is reasonable, necessary, and compliance with the services agreement. Law firms and their clients must also have a clear understanding as to whether this review process is a billable task or not.

Retainers v. hourly billing

Experts may require a retainer in advance of commencing work and law firms/carriers should remain flexible. Many experts may require retainers in response to consistent problems obtaining timely payment of bills. Be specific with the expert regarding whether the retainer is held until the end of the case or if all invoices will be deducted from that retainer until exhausted. It should also be clear whether the retainer is required to be replenished, and whether the law firm or carrier must first approve the bill prior to it being paid via the retainer.

Specifying scope of services

Consideration should be given, as appropriate, to:

- "Staging" the expert work- (1) preliminary evaluation stage to identify key issues/defenses requiring expert opinion and consultation; (2) discovery stage to identify expert need to contribute to crafting of written discovery, deposition questions for key witnesses, and ensure all non-party documents obtained that are necessary to base future expert testimony; (3) expert stage- crafting of reports for disclosure, attendance at depositions and deposition preparation; and (4) trial participation.

- Timing issues- the attorney and expert should communicate regarding what stages of work are necessary at various stages of the case.

Budgeting and staged work

Issues that should be considered:

- Staged budgeting or “full case” budget through trial
- How itemized the budget should be for the expert
- Billing limitations on budget preparation