



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)

“Penny Wise and Pound Foolish – Breaking the Insurance Defense Model of Case Development by Frontloading Defense Costs to Resolve Claims Earlier”

I. The First Steps in Resolving Claims Earlier

Assume that as a claims handler, you have reviewed the applicable insurance policy and coverage is found to exist. Assume also, that from a risk management perspective you have put your carrier on notice in accordance with the requirements of the applicable policy. Delays in either regard can be disastrous with regard to protecting your rights from as a carrier perspective or insured.

Understand three things as soon as possible:

- a. What is the theory of liability?**
- b. What are the damages?**
- c. What is the settlement value of this case?**

If you can determine the answers to those three questions pre-suit or prior to appointing counsel and think the case can and should be settled, take steps to settle the case. Otherwise, appoint experienced counsel to defend the claim.

II. Choosing the Right Counsel

Counsel should not be chosen because they are the least expensive, because they are large or small, or because they send good holiday gifts. Counsel should be chosen because they are right for the case. Generally speaking, quality is not cheap. However, quality is also not defined by the highest billable rate. Factors that should be considered are:

- a. Proven track record
- b. Expertise in a given area
- c. Prior experience in adhering to litigation guidelines
- d. Ability to understand the client’s objective
- e. Firm resources
- f. Communication skills
- g. Rates

Choosing counsel is similar to choosing an expert. Interview him or her about their experience, their track record, and their results. Get a sense of whether you can work with this individual. Explain your objectives and ask counsel how they believe they can achieve your goals. Ask yourself does this individual communicate well. Will a judge find them persuasive and effective? If it comes to it, will a jury like them? What are their rates? Do their rates reflect the type of expertise and experience they profess to have? Are they too high or too low? Ask them about their billing practices. Determine how they utilize their staff and find out where they think they spend the most time when working on a file. How do they see their value added? Finally, ask yourself, if you personally would want this individual representing you.

The right counsel will assist you in more efficient and effective handling of the file. While the rate may be higher than others, the expertise of the attorney may shorten the amount of time spent per task and achieve more value from the time spent. Further, the right counsel is knowledgeable in the subject matter of the litigation, which reduces potential expert costs.

Spending the time and effort on the front end, by investigating the right counsel can save time, energy and expenses throughout the life of the claim. Further, changing counsel during litigation is expensive, leads to possible lack of preparation for new counsel, and signals to the opponent that you believe there is room for concern, which can drive up settlement value and double the cost of litigation.

III. Be Proactive not Reactive

Now that you have chosen counsel, make sure that you are focused on achieving answers to the critical three questions as soon as possible. If you are not in the driver's seat you are a passenger on someone else's ride. In that case, you are letting someone else control the flow and development of information on the path they determine. A passenger general only reacts to a course taken by the driver. In litigation, you need to ensure that defense counsel is driving towards achieving answers to the three critical questions above and towards building a defense centered on those answers. Sometimes, driving means consciously deciding to keep a low profile. These decisions are made after careful consideration and discussion with knowledgeable counsel.

Generally, litigation that is slow to develop costs more and involves surprise endings. Suddenly, after years of litigation, counsel says the claim is worth significantly more than previously evaluated. Seemingly out of nowhere, factors come to light that completely change the landscape. Now, years of litigation expenses have been incurred and the "true" value of the claim is only now coming to light. The purpose of this presentation is to demonstrate that dedicating the time, effort and expense in the beginning stages of litigation saves countless expenses and helps achieve better settlements in shorter time frames.

Everyone is familiar with the standard course of litigation, which varies slightly from state to state:

- a. File assignment
- b. Review of claim materials/complaint
- c. Draft responsive pleadings
- d. Draft dispositive motions
- e. Serve written discovery
- f. Collect documents
- g. Review discovery materials
- h. Schedule depositions
- i. Close discovery
- j. Prepare settlement conference materials
- k. Discuss settlement options

- l. Attend settlement conference
- m. Prepare pre-trial statement
- n. Attend pre-trial conference
- o. Prepare for trial

Critical to this presentation is when and how experts are utilized in both the claims file handling and the litigation file handling process. The purpose of this presentation is to demonstrate that utilizing the right experts at the right time can be critical to shortening the life of a claim, reducing overall defense costs and achieving a better settlement.

IV. Choosing the Right Expert

A common approach to expert selection is to wait until all the facts are known and then determine that an expert is needed to defend the Plaintiff's version of events or damages. Often, experts are used only for rebuttal, and often a decision is made to hold off on expert retention until we "see where this is going". In other words, we push the expert expenses to the back of the file hoping that we can either get dismissed or get the case settled before those expenses are incurred. The net result, in most cases where this approach is employed, is that defense costs are higher and settlements are more expensive.

This presentation promotes utilizing experts earlier, and differently than norm. An hour spent with a consulting expert at the outset of a case, can save hours and hours of research and discovery on non-relevant issues. Also, an hour of expert consultation at the outset can instantly focus the defense on the right issues ensuring that retained experts have all the necessary information.

Whether a consulting expert or a retained defense expert, vetting should be done to ensure that the expert has the required level of expertise, sufficient background, geographic region (if appropriate), and will withstand challenges for bias and qualifications at trial. Often cases are won or lost at trial based on experts. The most knowledgeable expert may not make the best presentation to the jury. Meeting an expert in person and talking to an expert on the phone is extremely important to a decision to utilize an expert for defense in a case. Vetting an expert can make the difference in a win or loss at trial, and ultimately cost the defense millions of dollars in an adverse decision. Choosing to save the cost of a flight to meet an expert in person, or several hours of a pre-retention meeting can be a penny wise decision that results devastating losses later.

When to Retain an Expert

Experts should be retained as soon as it is understood that **any** assistance is needed in developing, refuting or understanding liability or damages. During the initial stages of vetting possible experts, you can gather sufficient data to understand the direction that you need to go in order to develop a defense on liability or the general universe of documents to gather to defend on damages, but the best value an expert offers you, is critical review of the issues and assistance in developing the facts in the manner most favorable for your defense. Many claims handlers and risk managers cringe when outside counsel suggests utilizing two experts on the same subject matter: a consultant and a defense trial expert. However the money spent on a consulting expert, who is never intended to testify at trial, and whose identity and review is never discoverable accomplish several critical goals essential to reducing overall costs and achieving earlier resolutions: insulates the development of negative information from your expert from discovery; allows you to develop the positives; helps you negotiate settlements earlier or recommend mediation prior to the development of facts in discovery which would ultimately harm the defense.

In a consulting context, you and your expert can communicate freely and honestly allowing you to focus on ways to reduce the impact of the negatives in your case, develop key and critical facts to assist the positive, and direct you regarding specifics of tailoring your discovery. This allows you to obtain the

information your testifying expert will need to rely upon and to assist in framing the testifying expert's opinions without helping your opponent on cross-examination at trial. A few hours of fees associated with utilizing a consulting expert can go a long way in protecting the interests of the defense.

V. Mistakes in Deferring Expenses Upon Notice of a Potential Claim

One of the most devastating things a claims handler or insured can do is to ignore notice of facts which *could* give rise to a claim. Seasoned risk managers and claims handlers can identify facts which are likely to result in litigation. In hopes that the potential litigant will not sue, decisions are often made to do nothing until suit is filed. During this waiting period, or the period of time from the date of incident until suit is filed, evidence which is necessary and valuable to the defense may be forever lost. Memories are not preserved, witnesses have become unavailable, physical evidence is destroyed or repaired, and the defense is prejudiced.

VI. Defense Strategy

Decisions regarding control of litigation are important and should be addressed from the beginning. Policy language, self-insured retentions, the right to independent counsel, and assignment of panel counsel all impact the litigation strategy and whether you can achieve better results in shorter time frames. In any of these situations, the aid of early investigation, early defense counsel retention, and early retention of experts can be critical to developing sufficient information to establish a claim value and earlier resolution.

VII. Irreversible Damage from Late Expert Retention

You don't know what you do not know. Often times you also do not know what you need to know. This is more than just a philosophical dilemma but a very common problem for claims handlers, risk managers and outside counsel. To avoid irreversible damages and case posturing that puts you, your defense and client in an untenable defense posture, you must retain experts early in litigation. To conduct the most relevant discovery one should work with experts from day one of discovery. Experts know exactly what materials are germane to their opinion and more importantly they are focused only on their expert analysis so by engaging experts earlier they will guide you through the world of relevant and irrelevant discovery they will ensure that your discovery requests are focused and lead to relevant materials which will ultimately assist with his/her analysis. If you pinch a penny in discovery you might have to pay a pound or more in settlement or at trial because saving a penny in discovery only ensures you will not know what you need to know.

VIII. Value Added from Retaining Damages Experts

The value adjusters, risk managers and outside counsel gain from retaining experts early, is knowing what the true value of the case is in an early enough stage that allows the defense team to make the educated decision of early resolution or vigorous defense. Through early discussions with your damages experts, the defense team will learn which damages assumptions made by plaintiff are meritorious or pure conjecture. By assessing the economic damages at an early stage of litigation the defense team will have the valuable information it needs to better assess its global defense strategy (through a risk matrix). Additionally, with preliminary conversations with your economist the defense team will learn at a preliminary stage what other damages experts they might need to retain to defend on damages (Vocational, Life Care Planner, Life Expectancy Expert).