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 2: Thursday, April 10, 2014 (11:30 am – 12:30 pm)

Managing your Company's Litigation Counsel & Dealing with Your Firm's Clients

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I. Introduction

One of the important reasons why Publix is a stellar company is because of the representation it receives from its outside litigation counsel and the efforts of its in-house counsel. At its best, the relationship between inside and outside counsel is a partnership, with outside counsel advocating to the Court, juries, and opposing counsel and inside counsel guiding these efforts to the best advantage of the client. But problems do occur. There are misunderstandings, miscommunication, failed expectations and disappointments. However, if both the client and outside counsel are able to better understand the preferences and expectations of the other, these problems can be reduced or even eliminated.

This is **not** about litigation management, which is a related but separate topic. This is about how clients, like Publix, perceive the efforts and actions of their outside litigation counsel and what those perceptions mean to counsel.

II. Introduction to Publix and Publix Litigation Management

The lawyers at Publix Super Markets manage a tremendous amount of litigation. Publix is a grocery retailer based in Lakeland, Florida with over 1,077 stores located in six Southern states. Publix is privately but widely held, with over 80,000 stockholders and over $28 billion in sales; ranking it 108th in 2013 by the Fortune Magazine.

In 2013, Publix was sued over 350 times and Publix directly retains counsel to defend a majority of these lawsuits. Publix is currently represented by twenty-four law firms who specialize in civil defense. Seven of these firms are in the South Florida Tri-County area, which includes Miami-Dade, Broward and Palm Beach Counties.

Publix has two in-house attorneys who oversee litigation as well as the relationships with our outside law firms. In addition, Publix has two Paralegals working with the outside lawyers and their staff on discovery and investigation. At Publix, all of the lawsuits brought by consumers against the company, including pharmacy litigation, fleet claims, general and product liability and consumer class actions, are handled by the Legal Group within Risk Management.

But the serious heavy lifting in the Publix litigation management function is handled by the 20 associates of the Publix/Sedgwick dedicated claims unit located on site at Publix Risk Management. The Publix/Sedgwick group includes 16 adjusters and 2 managers. These adjusters average over 15 years of claims handling experience. Despite this very experienced litigation management staff which is always available to answer questions or provide guidance to Publix's outside attorneys, issues do arise.

III. Introduction to Wicker Smith O'Hara McCoy and Ford, PA

Wicker Smith is a well known litigation firm with seven offices located throughout Florida, with offices in Miami, Fort Lauderdale, West Palm Beach, Orlando, Tampa, Naples and Jacksonville. Wicker Smith lawyers handle critical and complex litigation matters filed in State and Federal Courts. Numerous major corporations have selected Wicker Smith as national and regional counsel. Wicker Smith attorneys are recognized as leaders in the defense of a wide range of litigation practice areas, including retail, products liability, medical malpractice, catastrophic aviation accidents, legal malpractice, accounting malpractice, nursing home claims, construction litigation, and commercial litigation, as well as a variety of general negligence matters. With over 140 attorneys, and an experienced support staff of legal assistants, paralegals, investigators, nurses, and a physician, Wicker Smith provides legal services for its clients throughout the entire State of Florida and beyond.

The trial lawyers at Wicker Smith enjoy long term and loyal relationships with its clients due to its longstanding presence in Florida. Wicker Smith dedicates specialized teams of lawyers for its clients to serve their needs in particular practice areas. Because of the diversity of its offices and its lawyers, Wicker Smith has been able to expand its practice areas in the defense of state, national and international clients.

IV. Cost of Litigation vs. Results

A. Client

All Clients are familiar with this type of case: it ends with a settlement, which while substantial, is far below a potential trial loss or the demand during much of the litigation. However, the legal fees are extremely high. Outside counsel feels confident of a job well done because the bottom line resolution was within the guidance given by the client, likely in a complex case. However, the client believes that based upon the significant amount of legal costs and fees expended, the result should have been exemplary and not simply within settlement authority.

There *are* results for which clients are prepared to pay a premium: trial victories, dismissals, protecting critical policies/practices and defending truly fraudulent cases. However, a client is rarely pleased to pay seven or eight times of the average cost and fees of a particular area of litigation, only to resolve a case for the amount the client believed the case could have been resolved for at the initiation of the litigation. Although all clients understand that litigation against very difficult opponents in bad jurisdictions costs more, there comes a point at which premium costs must be justified with exemplary results.

B. Attorney

Can lawyers make miracles happen? Not typically, but there are certainly ways to streamline a case and get to the finish line without expending exorbitant amounts of expense/time. The challenge lies when lawyers are tasked with unearthing wrinkles in a case to minimize exposure and unfortunately, ultimately come up empty. Often times mountains of documents (medical records/otherwise) are reviewed, depositions are taken, and motions are prepared and argued in an effort to defend a case. Additionally, experts are retained to create/defend causation issues. Many times these efforts pay off, but it is when these efforts fail to prove fruitful that clients take notice. A primary source of frustration for clients stems from incurring large expenses which appear to have little practical impact on the value of a case. To minimize this frustration, it is important for lawyers to always be creative in preparing a defense plan with clear communication with the client at the start of the relationship (and then again before each case) to discuss goals and expectations and, most importantly, the price the client is willing to pay to achieve success to avoid sticker shock.

It is also important to keep the client updated regarding your progress (or lack thereof) and in addition, to continue to provide updated budgets which include fees/costs incurred to date. That way, the client is making informed decisions as to future handling of the case.

V. Day-to-Day Expectations of Clients

A. Client

Make no mistake, promptly responding to emails, returning phone calls and following litigation and billing guidelines are minimum requirements of continuing to represent your clients. Responsiveness is a prerequisite. Clients understand that their attorneys are busy, but acknowledging receipt of an email

or phone call is the least a client expects. Also, this level of responsiveness must apply to your client's entire litigation management chain, from the least experienced claims adjuster to the General Counsel.

Similarly, it is astounding how outside counsel often views due dates on internal reports and updates as "flexible". Although most clients are willing to be flexible (as long as this is discussed before a report is due), continually being weeks late on initial and update reports, case assessments, pre-mediation reports and especially pre-trial reports, is ruinous to relationships.

Finally, these day to day expectations are requirements. Even if outside counsel immediately returns each phone call and meets every internal deadline, this is at the best, "satisfactory", but that is better than the alternative.

B. Attorney

Clearly, responsiveness by attorneys is just a ticket into the ball game; it does little to assure that your team will win the game. To win, you need to be responsive and effective, all while being collaborative. Keep in mind that clients are not "in the trenches" and are not as attuned to what is taking place on their cases day to day unless you tell them. If you elicit some useful testimony at a deposition, turn the Court around on a challenging issue, etc., but you don't keep the client informed in a timely manner it's as if this case "victory" never happened. I've always found it helpful to gain the client's prospective on a problem or a challenge, and to give the client an opportunity to propose a solution or plan of action before conveying my own. Clients want to know what you propose to do and why you feel it is necessary and/or will provide marginal value to the case. Some clients are less instructive than others and defer to outside counsels' litigation plan. However, if your client does have ideas, you will find yourself much more successful if you can weave those ideas into a jointly conceived solution.

Every lawyer has a client who sends multiple emails asking for the same information already provided. Lawyers work hard to keep their clients updated throughout a case and it is very common for emails from lawyers to their clients to be ignored. Relationships are a two way street, and lawyers are rightfully annoyed when the very client who complains about lack of updates on a case appears to be unresponsive when lawyers seek approval or guidance for certain important tasks. It is equally frustrating (and apparent) to lawyers when certain clients are more concerned about checking boxes for completed tasks without regard or concern for the underlying purpose of such task and the results thereof once accomplished.

As to dealing with your clients' expectations, listen to your clients' complaints and actually take action to rectify/resolve those issues. Be careful not to react until you have a complete understanding of what your clients' complaints really are. By demonstrating that you are willing to listen and that you actually care, your clients will appreciate your patience and feel more comfortable with you on any particular task/file. Plus, clients will be more willing to problem solve with you in the future.

VI. Lack of Aggressive Tactics/Risk Adverse Lawyering/Lack of Creativity

A. Client

Busy lawyers sometime fall into the same pattern in defending similar cases over the years. This includes how they manage discovery, present their case at mediation and even during trial proceedings. These lawyers follow the "path of least resistance" and frankly, the adjusters know that their attorneys are not putting forth their best efforts. Many cases are similar, but no two are identical. Outside counsel must identify the issues on which the particular case revolves and zealously attack (or defend) the specific points. In the best situations, the gravamen of the case involves liability, but it could be causation,

damages or medical costs. Each case has its own story to tell; your job is to determine what the story of your case (and is going to be) and figure out how to use discovery to advance that story.

Clients love to see creative and aggressive solutions to litigation problems. For example, the first bio-mechanical simulations used in defending slip and fall lawsuits were game changers. Other examples include tactics such as expedited mediations, noticing cases early for trial, creative use of expert witnesses, extensive investigations and early Offers of Judgment. In trial, nothing is as effective as a good demonstrative exhibit or deconstructing the video deposition of the Plaintiff.

Clients understand that only a very small percentage of cases go to trial. Despite this, clients want their outside counsel to use every opportunity to advocate their position. The best litigators have no shame in advancing their clients' position at every interaction with opposing counsel. And, it goes without saying, that this advocacy must be zealous.

B. Attorney

Claims are settled pre-suit for a reason. Litigation is expensive and drawn out. While no two cases are the same, due to the constant pressure placed on attorneys to keep litigation costs down, some cookie cutter steps are a necessary evil. It is common for outside lawyers to attempt to think outside the box and come up with creative ways to advance the case/defend the clients' interests. Unfortunately, it is also commonplace for counsel to receive phone calls from the client questioning the particular task or strategy as the client is not accustomed to different ways of defending a case. Unfortunately, some claims adjusters are concerned about justifying their approval of counsels' stepping outside the box to accomplish certain goals. Simply put, some claims adjusters prefer to avoid being under a microscope while in unfamiliar surroundings.

Clients have carefully selected their attorneys of choice. Once the litigation process has begun, it is critical for clients to allow their attorneys to be creative in performing their job. However, it is up to the lawyer to make sure the client understands the recommended strategy, especially if unorthodox. Clients also need to realistically adjust their expectations and recognize that there is direct correlation between aggressiveness in the defense of a lawsuit and increased litigation expenses.

Often times a lawyer's recommendation to settle might provide the appearance that the lawyer is risk adverse. However, it is the lawyer that is entrenched in the case and has participated in the hearings, depositions, etc. Clients sometimes become emotionally charged in a case, i.e. growing disdain for certain Plaintiff's lawyers, Plaintiff's treating physicians and Plaintiff's themselves. Also, it is important to rely upon outside counsel's ability to provide guidance as to jury verdict and court rulings in their jurisdictions.

VII. Dealing with Mistakes by Your Clients

A. Client

Clients are going to make mistakes. If clients did not make mistakes, they would not need counsel nearly as much or rely on outside counsel to the extent they do. The variety of these mistakes is extraordinary. But dealing with these mistakes and minimizing their impact on the case is a characteristic of the very best advocate. Attorneys, your clients expect you to deal with these mistakes!

Wholesale mitigation of these mistakes is a very different task than defending a single mistake in a single case. For a sizable company with hundreds, if not thousands of locations, the implementation of any new policy is a lengthy process which involves multiple stakeholders and perhaps competing

business goals. Even if both inside and outside counsel decide that change is necessary, inside counsel must still convince operational business units, finance, human resources, risk management, etc., of the value of the change. Finally, merely implementing a new policy or changing a policy is rarely enough. Clients have to find ways to ensure that the policies are being communicated and followed or these actions just create more mistakes.

B. Attorney

Any lawyer can obtain a favorable resolution of a slip and fall claim on a clean floor with a solid five minute last inspection time and two witnesses who inspected the floor on their hands and knees immediately after the incident. But litigators are faced with, amongst other issues:

- bad witnesses;
- failure to preserve video;
- poor record keeping;
- bad practices;
- bad internal documents (emails) and
- violations of polices.

While clients are going to make mistakes, clients far too often have difficulty acknowledging their mistakes. Frequently, clients blame their attorneys for mistakes which are beyond the control of or otherwise wholly unattributable to their attorneys. For example, a good pre-deposition conference can go a long way, but sometimes there is simply no cure for a bad witness. Other times, critical evidence is spoliated due to a lack of diligence by the client and simply incurable by the attorney once the issue comes to light. Whether the client accepts responsibility for its mistakes or not, there is only one method in dealing with this problem by the attorney – by bringing said issues to light with all candor to your client as soon as the problem rears its ugly head. Like it or not, a client's mistakes will frequently have a negative impact on the value of a case. However, it serves no good to ignore/avoid the mistake or to try to hide it from the client once the issue has been exposed by opposing counsel. Attorneys need to remain mindful not to confuse a good argument for minimizing the impact of a client's mistake with a true and objective assessment of the impact of a client's mistake. Lastly, if such client mistakes occur, be prepared to recommend several possible solutions to rectify the problem or at a minimum, mitigate the impact. Attorneys should also be comfortable with suggesting possible institutional changes which may prevent the occurrence of future mistakes, appreciating that any change in policy could require the buy in of a variety of decision makers.

VIII. Delegation of Legal Work

A. Client

One of the most common mistakes made by insurance defense law firms is to assign as much pre-trial work as possible to associates or young partners. In these cases, the experienced partner reviews the details of the case only if it looks like it is headed to trial. For most cases, this works as the younger defense lawyers are less expensive and frequently less distracted than their more experienced bosses. Also, younger lawyers can bring enthusiasm to the most routine slip and fall cases involving minor injuries.

However, if not adequately supervised, problems can arise quickly. For example, younger lawyers typically do not have sufficient experience or confidence to recommend significant settlements to clients early in the litigation. In some cases, the experienced partners do not know enough details about the case until it is too late to affect the outcome. This can lead to missed opportunities to accept Offers of Judgments before the plaintiff incurs additional medical costs, additional legal fees and other adverse developments. Also, younger lawyers tend to be more careful and risk adverse than their older, more confident partners.

However, the biggest problem is that sometimes younger lawyers, no matter how smart, responsive or knowledgeable, lack the "feel" for anticipating when a case is going to dramatically increase in value. In one example, a young associate failed to recognize the signs of an impending RSD diagnosis and did not recommend early resolution or a certified medical exam with an RSD expert, until after the diagnosis was made.

A related issue to the over-utilization of associates is inappropriate delegation of discovery efforts to paralegals and legal assistants. Although your clients may provide draft answers to discovery, the lawyer is ultimately responsible for what is actually served upon the opposing party. Lawyers must review information from the client to ensure that it makes sense and all responses are defensible. When discovery disputes arise, it will be your outside counsel, and not a paralegal or legal assistant, who will be making the arguments to the Judge.

B. Attorney

Some clients are concerned about delegation, especially to younger lawyers/associates in your Firm. First ask, why are they concerned? This should be seen as a compliment, as the client has built some level of trust for YOU, and not necessarily others in your Firm. Many clients do not know how law firms and their hierarchy work, but clients want to make sure that your personal touch, intelligence and skill set are being channeled in the client's best interests.

Some clients want certain tasks delegated while other clients seem to believe that the rainmaker or senior partner should be involved in every decision no matter how mundane. By learning exactly what your client's expectations are, and making sure you reveal the realities of your practice, you reduce the exposure for future problems, i.e. billing entries and updates. Regardless, and you must be realistic with yourself, your client should understand that you are taking full/complete personal responsibility for the work performed and the client's ultimate fulfillment. Your client needs to be aware that you will know how your cases are unfolding at all times and will step in at any phase of the litigation as appropriate.

It should also be mentioned that all lawyers were once young and inexperienced. Clients must recognize that there will never be the next generation of great lawyers without the exposure of young lawyers to real life tasks. These developmental techniques are not unique to the practice of law and clients probably utilize similar methods within their respective businesses. Notwithstanding, outside counsel must be careful and selective with the tasks assigned to younger partners/associates. Lastly, clients have to be realistic with the resources of partner's limited time in a day, week, month, etc. The design of a law firm is to allow for direct supervision by the partner as long as the partner takes full responsibility for the outcome.

IX. Resolution of Cases – Lawyers Who Do Not Go to Trial

A. Client

If you are a litigator defending cases involving premises liability, auto liability or other personal injury cases, every now and then you actually have to go to trial. Clients understand that trials are risky and expensive propositions, but you were likely retained because you are supposed to be a good trial lawyer. At some point, clients need to see their trial lawyers in trial. Clients need to see if their lawyers can develop the intimacy with the jury that is going to give them an advantage at trial.

Lawyers who almost never go to trial may be exceptionally fine litigators. Corporate law firms have these fine litigators by the dozens. But at some point, litigators who represent retailers must go to trial. It of course helps if the case is won or at least not too bad a loss, but in many places in the United States, there are lawyers who spend years practicing and never get to trial.

B. Attorney

A fair settlement is one where both sides walk away feeling unhappy, with the plaintiff feeling too little was accepted and the defendant feeling too much was paid. The key to a successful litigation practice is balance. When appropriate, you need to convince your client that the risk associated with trial is worth going the distance. Even if you get stung once in a while, the long term benefits will prove worthwhile. Trials will sharpen your legal skills and yield better pre-trial settlements as opposing counsel will know that you and your client aren't afraid to aggressively defend a case through a jury trial. In turn, better pre-trial settlements will more easily reveal those cases where trial is appropriate. In the end, it's a win-win for the Defense on a macro level.

There are also times when the outside lawyer recommends to their client to take a case to trial and the client disagrees. While this is inevitable (and acknowledging that the client makes the ultimate decision in that regard), clients have settled cases with opposing counsel without outside counsel's awareness. This creates a level of frustration on behalf of the outside counsel and provides the perception to opposing counsel that the defense lawyer has little influence on the outcome of the case.

X. Lawyers/Clients Relations – Don't Forget Who Your Client Is

A. Client

It is great that the outside lawyer wants to get along and be liked by everyone in their client's claims handling chain, from the claims clerks to the paralegals, adjusters, claims managers, risk managers and GC, but this can and does, present problems of accountability. That is why lawyers have to constantly remind themselves who their clients are.

The clients are not the Third Party Claims Administrator (even though it may appear to pay your bill), it is not the adjuster or the Risk Manager, or even the GC of your client. Your client is the company. The duty to zealously represent your client does not mean to overlook failures of the adjusters to respond to requests or assume that the Risk Manager wanted the internal paralegals not to produce records. Sometime associates make mistakes and have to be held accountable.

In too many situations, lawyers are unwilling to discuss a troubling situation with their client, which may involve the performance of a claims associate with whom the attorney has frequently worked

in the past and may again in the future. The result for the law firm and the client may be disastrous if the situation is not remedied.

B. Attorney

Your client is the company no doubt, and truth may be the best policy, but lawyers have to be very delicate in pointing out the failures of claims clerks, paralegals, adjusters, claims managers, risk managers and especially the general counsel.

Indeed, lawyers should appreciate the relationships they maintain with their clients. And a true attorney/client relationship requires the lawyer to adopt the culture of its client. Once both the lawyer and client have an understanding of each other and have real expectations, and are able to communicate effectively, then there is great potential for a long-standing relationship.