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Striking A Balance for the Efficient Management of Claims and Litigation

I. The General Principles and Competing Dynamics

In most of our current circumstances, the defense of a claim or a lawsuit involves many people. In theory, each party to the defense side of the claims process has a role in assessing the claim, recommending and setting reserves and arriving at a value, and then managing the claim and/or lawsuit. But to ensure that we avoid a situation that "too many cooks spoil the broth," it is generally accepted that there has to be a hierarchy and predetermined responsibilities. Each involved party should be keenly aware of their role, and those roles need to be determined before the first claim arrives.

To function effectively as a team, the various groups, whether they are carriers, policy holders and/or defense counsel, must define their objectives at the start of each claim or lawsuit. The common enemy has been the skyrocketing costs of litigation and ongoing claims. This conclusion, whether accurate or not, adds tension to what would otherwise be congenial relationships among each of the stakeholders. Left undefined during the course of a claim or a lawsuit, each may have different concepts of winning that correspond with their distinct roles in the process. Consequently, unless they can articulate common goals at the start of a case, their different perspectives may interfere with the teamwork required for effective litigation management.

A key to good teamwork is collaboration. It is often found that collaboration doesn't just allow ideas to flourish; it also encourages the transfer of knowledge. Interacting with other individuals handling different aspects of the claim or litigation allows everyone to see the bigger picture. In theory, this results in more minds on the same problem, therefore increasing the chances of finding a good solution. If effective, collaboration and teamwork saves money. Just as many hands make light work, many minds solve problems faster. When time is money, collaboration cuts costs. Tangentially, the research also tells us that it results in higher employee retention through the bonding experience, which reduces training and other turnover costs.

It is arguable that the dedicated claim team (including the outside panel counsel who defends the litigation when the claim becomes a lawsuit), delivers the best claim results from its teamwork. This is especially so when the goal of risk management is not to see how many claims each adjuster can handle, but to achieve better results more economically.

Contrast the team approach with the single adjuster who carries the claim from cradle to grave with the assistance of his supervisor and/or claims manager and their outside counsel. The relationship of trust allows candid and frank communication as they bring their expertise and experience to the efficient management of the claim and lawsuit. The reality is that many minds will still influence the efficient handling of the claim and lawsuit even though the adjuster and his outside counsel may not have the assistance from an Early Case Assessment Resolution Expert or a Medicare Compliance Professional, or even a third party to audit outside counsel's bills. The team approach still applies but the team is smaller. It is arguable that in this circumstance, having more people come in contact with the claim may hinder the frank and candid communication that is required for the economic and efficient handling of the claim.

II. The Journey from the General Adjuster to the Inside Adjuster: Claims Handling from a Call Center

The past 20 years has seen the claims handling process undergo a revolution of more and more specialization. With the goal of enhancing litigation management, claims offices have divided up their adjusters into specialized teams that focus merely on one type of claim. The goal behind this development was to foster consistency in claim handling. Further, the drive towards the timely resolution of claims has resulted in increased supervision with managers taking on an active role in ensuring that goals and deadlines are met.

In fact, Triage Units are now common in claims departments resulting in a claim already being evaluated before it hits a claims adjuster's desk. Often times the triage evaluation determines the strength of the coverage position, the appropriate handling unit and the dedication of the appropriate resources. Additionally, the Triage Unit identifies the claims that may be suitable for early settlement, and at the other end of the spectrum, claims that may be likely candidates for trial. The philosophy is that the early identification of claims as settlement candidates provides for timely resolution, cost savings and appropriate expense allocation.

With the rise of the specialization of the claims process, the "general" adjuster has become rarer. There is a clear trend in the claims business for the increase in the role of "inside adjusting." Inside adjusting is when an adjuster handles a claim remotely, typically from a call center with other inside adjusters, rather than visiting with the claimant to physically inspect the loss. As a result, the communication takes place by telephone and other technology. It appears that carriers believe that inside adjusting will even cover major catastrophe response as it will be adjusted remotely, *supported* by field adjusting and technology. The clear trend in the industry is that field adjusting will be

less often handled by a general adjuster with full claim closing authority. Rather, the parts of the claim that must be inspected physically will be assigned to an In Field Specialist whose job it is to transfer their findings to the inside adjusting team handling the claim as a whole.

This is the team approach at work again. With adjusters all working in a call center together, they can operate as a unified team to handle a claim, instead of one person handling the entire process start to finish. Multiple adjusters often touch a single claim, or a specific part of the claim, before it is paid out. Essentially, the claim now moves through an almost assembly line-like process. It has a less personal feel, but the idea is that it creates a more streamlined, efficient and scalable system.

In fact, it is cost efficiencies that likely first explained the creation and existence of Third Party Claim Administrators, typically abbreviated as a "TPA." Many insurers, re-insurers, self-insured firms, organizations, or government or entities of some type elect to contract the handling of claims to an outside party. Outsourcing certain tasks has been commonplace for many years in some industries. However, the insurance industry, which tends to be somewhat conservative by nature, was for much of its history behind this curve on this issue to some extent. The outsourcing of claims has become much more prominent over the past 20 years and consequently, so has the growth of TPAs.

The theory and the reality has been that a TPA can bring to the table specialized skills and expert services, not to mention lower overhead costs, which can contribute to various benefits for the outsourcing self insured entity. These can include increased efficiencies, reduced operating expenses, and in many cases improved customer service. All of these factors can obviously help the insurer, re-insurer, or self-insured be more competitive. With greater competition, drastically reduced investment incomes, and various other market factors affecting profitability, more organizations are coming to recognize the potential benefits of outsourcing, and this increasingly includes the claim process.

III. The Early Case Assessment Team and Even Separate Settlement Counsel

A recent innovation in the effective management and handling of claims is the introduction of the Early Case Assessment Team that dedicates its time and resources to settling the claim or lawsuit before litigation costs escalate. Typically, this involves the claim and/or lawsuit being transferred to a different adjuster and/or team that is dedicated to this task. Do new hands touching this file, even with specialized training, increase the chances of resolution, or dilute the efforts already undertaken? Do the "fresh eyes" of additional claims professionals result in determining the true "settlement" value of claims?

Effective litigation management programs include strategies for managing disputes that reduce legal expenses without compromising the outcome. The overall strategy value is a partnership between a lawyer and the client to meet the client's business objectives in tandem with obtaining a favorable resolution. The theory behind

Early Case Assessment is that the claims people and the lawyers will know 80% of what they will need to ever know to resolve the claim or lawsuit within 60 days. While the amount of time ECAs take might vary, the ultimate goal of an Early Case Assessment, an understanding of the case and a strategy consistent with that understanding, remains the same. However, the emphasis is always on trying to resolve cases quickly because it will involve less cost. The mantra behind Early Case Assessment programs is to avoid "all the major work" on a case if possible. The workable definition of an Early Case Assessment program is a disciplined, proactive case management approach designed to assemble, within 60 days, enough of the facts, law and other information relevant to a dispute to evaluate the matter, to develop a litigation strategy, and formulate a settlement plan if appropriate.

Not only are there dedicated claims units to handle Early Case Assessments, there is even a move to retain "settlement counsel" to assist in this process. The settlement counsel is different from the attorney who will be retained to defend the litigation and try the case if the matter cannot be settled early. The separate settlement counsel can be seen as a development out of the Collaborative Law movement. From the beginnings in the Minnesota Family Courts in the early 1990s, Collaborative Law has grown swiftly throughout the United States with some of its principals being incorporated into claims and litigation management with the use of separate settlement counsel. An essential Collaborative Law element has come to be the disqualification provision or "Participation Agreement" where the lawyers for both sides agree in writing to work toward a negotiated resolution and, if the case proceeds to court, the clients must engage other counsel. In theory, this non-adversarial approach promotes resolution that is fundamentally different from the traditional negotiation occurring in the context of a lawsuit. The principles of Collaborative Law have evolved into many different offshoots, but each technique seeks the same end: a negotiated resolution by eliminating or reducing adversarial bargaining as much as possible. The theory behind using separate settlement counsel, is that they will focus their experience upon the single goal of settlement rather than discussing the issues in the context of impending discovery or other litigation strategies.

IV. Medicare Compliance and Resolution Specialists

All parties involved in Claims and Litigation where a Medicare Beneficiary is seeking damages for bodily injuries are statutorily obligated to protect Medicare's interests. With the threat from the Government to file enforcement lawsuits against the "responsible party", we have seen the development of specialized entities that contract with our clients to ensure that the claim and litigation settlements are complying with the relevant federal statutes.

There is no doubt that these organizations provide an extremely valuable service to our industry, especially when they provide on a scale that can satisfy the needs to large claim and lawsuit inventories, however, can't a general adjuster with specialized training in these specific areas provide the same expertise to their organizations so that it is not necessary to contract with these outside vendors? Is this one area where a similar

financial investment in training can allow a Claims organization to manage and mitigate these risks internally.

V. Third Party Attorney Bill Review

In most circumstances, the claims specialists managing a claim and/or lawsuit no longer have to spend time reviewing the invoices from their retained outside counsel. Whereas reviewing outside counsel's legal bills is an important part of the efficient management of claims and litigation, the conclusion that has been reached is that the claims specialist should not be doing that task. The theory is that an effective legal bill review strategy to manage the high cost of outside counsel spend requires a more dedicated and focused approach. Many self-insureds and third party administrators have neither the time nor the resources needed to do anything beyond basic management of their legal bills. Even with legal e-billing solutions, inconsistent use of the system and competing priorities on the claim specialist's time often drops bill review to the bottom of the to do list, marginalizing any cost savings. The solution to this problem is outsourcing this traditional task of the claims specialist to third party entities.

Although the cost efficiencies of using a third-party legal bill review vendor may be obvious, there is a strong school of thought that it detracts from creating a close working relationship between outside counsel and the claims specialist. Although they can be difficult conversations to have, the call from outside counsel to the claims specialist to ask why there were deductions made on the last bill, can lead to a much better understanding about the efficient handling of the litigation and the philosophical approach of the Claims organization in general. Is this one circumstance where the right balance might be not retaining the outside vendor whose sole focus is reviewing panel counsel's invoices.

A counter-point argument to this position is that perhaps outside counsel is willing to have its bills audited by an outside vendor if it is guaranteed payment within 60 days of submitting its invoice. There is little doubt that claims specialists enjoy not having to review panel counsel's invoices.

VI. 60 Day Pre-Trial Phone Conference with Head Office

It is common-place to have a phone conference in the 30 to 60 period prior to starting trial to discuss the case not just with the claims specialist handling the matter, but also with several other people within the Claims organization that the claims specialist reports to, as well as a representative from Head Office. How many fresh pair of eyes on a case is too many? Is this when too many cooks might spoil the "theory of defense" broth?

The success of this type of pre-trial conference depends on one of the goals stated above, that the Claims team has a clear hierarchy with each member having predetermined responsibilities.

VII. Specialized Training for the Claims Professionals

Those that are in the “too many cooks spoil the broth” camp in this discussion, strongly believe that additional investment in training for the claims specialist can result in less reliance on the specialized outside vendors.

We are fortunate that we belong to an organization that emphasizes ongoing and vigorous training for both claims specialists and the outside panel counsel used in claims and litigation.

This is a complicated issue that deserves continued discussion.