



2020 Annual Conference  
March 18-20, 2020  
Dallas, TX

**Relationships and Expectations in the Litigation Process — Counsel, Carrier (TPA) and General Counsel/ Risk Manager**

I. Defining and Crafting the Proper Team:

In an era of increasing deductibles and SIRs, there has been a corresponding increasing in complexity when defining and carrying out communications with the Team of individuals who may have input into the strategy and goals in defending a lawsuit – or an insurance program. In fact, these same complexities are now ever more apparent in devising strategies in a pre-suit context. They may include how aggressively to pursue pre-suit investigation, whether to expend resources gathering all relevant documents and meeting witnesses or, perhaps directing those resources toward resolving a claim pre-suit.

The answers to these and other critical issues are not always easily rectified, and the objectives, considerations and ultimate desire in each situation, is largely impacted by the “seat” one occupies in the decision chain. The communication levels / channels which may be required to formulate a plan often no longer involves communication with one “contact person” but may now require interfacing with a number of key decision-makers whose interests may not be aligned, and whom may view a “successful result” in very different, if not competing, terms. Thus, navigating this dynamic is often as complex and stressful as dealing with the plaintiff’s attorneys seeking compensation for their clients.

Formulating the defense “Team” therefore usually entails a coordination of varying points of view by those members of the Team whose allegiance and objectives are not always aligned. And yet, the Team must still work with each other to achieve the best agreed upon outcome for the situation presented. Today, it is ever more common for the litigation Team/ decision-makers to be composed of business people on behalf of the Insured (such as owners/ operators), insureds’ risk managers, and TPAs (either retained by the insured or the carrier), as well as defense counsel, who must report to and interface with all these individuals. Understanding the goals and objective of all these Team members is central to achieving the “optimal” outcome.

What is certainly helpful in achieving a favorable result is understanding the roles and goals of each of the members of the Team who will be working together. That means, of course, that there needs to be proper communication amongst all as to what they define as a successful outcome. By understanding the roles and goals of each, any differences in the strategic approach can be addressed early on in an effort to assure that all of the Team members can try to “row in the same direction” toward a positive outcome and effectively understand, as well, the potential pitfalls or challenges that may be faced along the way – in order to effectively plan for all contingencies.

Of course, one of the main methods of communicating the “goals” of the Carrier or Client is often framed by the “Litigation Guidelines.” These guidelines generally provide a mechanical or templated framework as to how the Carrier desires defense counsel to report/ communicate and contain costs, but often does not generally discuss the intricacies or provide a roadmap so to speak as to what will be done (or not done) along the way – whether in the short or long-term – in order to achieve the best practicable/cost-effective result.

So, beyond Defense Counsel’s understanding and implementing the Carrier Guidelines which is certainly one positive step in the communication dynamic, it nonetheless is imperative that all the players have an understanding as to the level of expected communication, decision-making input and how the investigation, strategy and plan will be implemented. For example, quite often the Insured has no knowledge or understanding of the Litigation Guidelines and it can be helpful if they understand the manner by which those Guidelines will be implemented to report on developments and strategies and can help frame how the matter will be defended going forward.

## II. Managing Expectations/ Communicating to Accomplish Goals

Quite often, the desire a Defense Counsel might hear when first being engaged to represent a client/ Insured is that the client wants an “aggressive defense.” The issue however is defining exactly what that entails in each context. Does the client/ Insured understand the associated costs, and is the client willing to make the necessary sacrifices of time/ manpower resources to assist counsel to achieve the outcome desired? And, from a pragmatic standpoint, is that always feasible or the best plan? That said, it is critical to understand the client’s viewpoint as to how they desire the litigation to be defended. Similarly, the Insurer/ TPA must be a participant in the discussion wherein everyone’s ultimate objectives are voiced and considered. Indeed, it is best to understand the cost or how much resources decision-makers believe ought to be devoted to the defense of a given matter. Again, those desires do not always meld and need to be considered and determined as early as practicable. This often entails discussions focused on “expectation management”—namely what can be accomplished, how to accomplish goals/ tasks in an effective, efficient manner, what is expected in terms of the roles of each member of the Defense Team and how we envision the endpoint of the litigation to look like. In short, from the outset, the client needs to be educated on the importance of working closely with counsel, the time commitment that may be involved and that a well-crafted plan of action early on wherein everyone understands their respective roles and responsibilities typically pays dividends in the end.

That said, achieving the optimal outcome does not necessarily mean looking under every rock along the way. The Team needs to coordinate what is necessary to achieve the stated goals in an efficient, cost effective and meaningful manner. Dealing with experienced claims professional and counsel is helpful to guide the Insured as to the steps that are likely to have the most impact to determine when/ how the suit is best resolved. The defense investigation should be focused from the outset on addressing the key issues that will drive the outcome and all Team members should have a clear and agreed upon understanding of the plan of action necessary to achieve the best outcome in a given situation.

### III. Trust and Relationships

In an email laden era, the use of telephonic communication often provides the most expeditious and clear path to agreement amongst the Team players and helps further establish trust in the working relationship. It is recommended to arrange conference calls with the decision-makers early on, which often cuts through the clutter of numerous emails and can then be followed with a concise, confirmatory email of the plan. This will also help obviate any “surprise” that may occur along the way and in particular, that a key person was somehow “not kept in the loop.” It also helps to establish the proper chain of command that all those involved understand and accept. Though it is often helpful to have an established relationship and build on that relationship with time and experience, the bonds of trust can also be formed early on by devoting the time at the outset to reach out and identify key individuals with whom to communicate to foster a strong Team approach to build upon.

Importantly, this seminar will focus on how to define what is truly a “win” under the circumstances presented and managing the expectations and roles of all those individuals who have a critical voice in achieving the outcome. This means that there needs to be parameters to define what all view as a potentially successful result as early as practicable which will also help to define the plan of action going forward, as well as the costs that may (or may not) be necessary to achieve the optimal result in a given circumstance.

The panel will discuss real-world considerations and the dynamics and interplay of all the key decision-makers as well as strategies to resolve potential conflict to manage expectations and attempt to avoid disappointment or surprise in the outcome achieved. Ultimately, there is no substitute for proactive and meaningful communication with all those who may have an interest in the outcome so they have a voice opportunity to meaningfully contribute their viewpoints, ideas and objectives to achieve the best result in a given matter, recognizing the competing objectives that may present.