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File Closing Strategies in Times of Tension and Distrust

Introduction

The current social climate is tense. We are seeing increased difficulty in getting necessary information, reasonable demands, and case closures due to the rise in social tension and distrust. This session is designed to discuss current topics and issues we are seeing with getting claims settled and closed and the growing resistance that may be encountered from plaintiffs' attorneys. This roundtable discussion will address ways to build trust with the plaintiffs' counsel; ways to gather the documents and information necessary to secure the appropriate authority needed to settle the claim; ways to defuse hostile plaintiffs' counsel; and some useful tools to help you close files.

What do we mean by "times of tension and distrust?"

Today, there are numerous external and internal factors which affect the way claims are being resolved. As for the elephant in the room, COVID-19 has significantly changed the way claims will be handled for the foreseeable future. Numerous businesses, including some insurance companies and SIR entities, have seen their bottom lines drop, their hours reduced, their customers disappear, and sometimes, their doors close. Many plaintiffs have been laid off or had their pay or hours reduced by their employers, and sometimes find themselves fighting off creditors – often trying to collect on their medical bills – and find themselves facing the reality that it could be years before they get their day in court. Courts in many jurisdictions are still prohibited from jury trial operations, and no one knows just how long it will take courts to catch up from the current backlog.

Timing is Everything.

It is important that claims professionals and defense counsel understand which strategies work best when trying to close a file at different points on the claim's timeline:

Pre-Suit Considerations and Strategies

There is often a push to settle a claim by one or both sides before suit is filed. This usually includes a pre-suit, time-limited demand. In some jurisdictions, serious consequences can attach to a rejection of said demand. This can include the imposition of pre-judgment interest, the imposition of attorneys' fees, or possible exposure to an excess verdict or a future bad faith claim. When you receive one of these demands, there are numerous important things to quickly evaluate when considering whether to accept such a demand:

- Did the claimant fail to provide any supporting documents or information necessary to properly evaluate the claim?
- Are you being given enough time to properly evaluate the documents and information provided, or should you request an extension?
- Does the demand comply with all requirements of local law? Is it valid?

Considerations and Strategies After Suit is Filed

Sometimes settlement is not feasible prior to litigation, or a procrastinating plaintiff files suit right at the end of the statute of limitations. Now lawyers are involved. To be in the best position to settle a claim and close a file once litigation commences, it is important to always be *proactive*, not *reactive* (i.e., the best defense is a good offense). You may decide that the case is uniquely suited to try early (prior to most discovery) mediation. You may want to deliver an abusive litigation warning (or similar vehicle in your jurisdiction) to eliminate frivolous claims and narrow the issues being discussed and litigated. Sometimes it helps to be honest and forthright about the propriety of the claims and defenses from the start of the case; ***and*** it builds trust on both sides. Did the Plaintiff file in the wrong venue, or do you have a legal right to change venue? Sometimes, a change in *venue* can mean a significant change in *value*. Are there facts to investigate that could immediately give you leverage for a quick settlement? These strategies continue throughout the discovery and motion practices phases of litigation.

Strategies and Considerations for Mediation/ADR (Alternative Dispute Resolution)

Usually, mediation – whether court-ordered or voluntary – is beneficial in getting claims settled and files closed. Alternatively, is there a binding arbitration clause that can be enforced? Would arbitration be beneficial? What is the client's/insurer's goals? Would a high/low agreement be beneficial to one or both parties? Should you file a motion or serve discovery prior to mediation to gain leverage? Does this sow distrust?

Post-Litigation Strategies and Considerations

If the case does not settle, often the "loser" at trial (or, to a far lesser extent, arbitration) will file an appeal. This often serves two purposes for the losing party: (1) it buys them time by dragging out the finality of the case; and (2) it is given them some leverage to try to mitigate the loss at trial with a more favorable settlement. How should you handle this? Does this sow distrust?

What if there is no appeal, and your client/insurer wants to pay the Judgment, but there are valid liens and Plaintiff's counsel refuses to indemnify you or satisfy any liens through the Judgment proceeds? Should you notify all lien claimants and timely pay all judgment proceeds into the Registry of the Court?

Finally, what if the case settles, but Plaintiff's counsel wants to modify the language in the release agreement? What if they will only accept limited indemnity or no indemnity language at all? What if they include a short-fuse payment schedule (i.e., "or else" language)? How should you respond? Does this build distrust, uncertainty, and tension?

Ethical and Risk Management Concerns

No matter what stage the claim or litigation is in, there are always concerns related to ethics, professionalism, and risk management. The primary way to handle a claim ethically at all stages is by timely, transparent, and total communication.

Communication with the Adjuster/Claims Professional

Keeping open lines of communication with the adjuster or SIR client's claim handler means timely forwarding all demands and settlement offers to maximize their evaluation and response time. As a lawyer, it is important to not just forward the demand itself, but also to

include your professional analysis, which includes: (1) claim strengths/weaknesses; (2) analysis of issues; (3) valuation (including any verdict and settlement research); and (4) settlement recommendations. And to ensure the adjuster can properly evaluate claims and is not playing catchup, it is likewise important to stay up to date on all litigation update reports, pre-mediation reports, pre-trial reports, deposition summaries, mediation summaries, etc. Finally, always timely let the adjuster know when important pleadings or motions have been filed or deadlines are approaching.

Communication with the Client/Insured

Just because the bills are all being paid by an insurer does not mean that communication with the actual insured client can be neglected. It is important to also timely forward demand letters or offers of settlement to the client and/or the client's personal coverage counsel, family lawyer, or criminal defense counsel. And likewise, make sure the client is kept abreast of all important case events and deadlines when the client *needs to know*.

Communication *After* the File is Closed

Hooray! The claim is closed! Job done? Not necessarily. It is important to do the following:

- Notify the insured/client of the settlement, judgment, dismissal, or other case closure.
- Advise the client of the possibility that the case could be re-filed within a certain time, if dismissed *without prejudice*.
- Advise client of their possible exposure to a subrogation (UM) claim.
- Send disengagement letters; and
- Notify client and adjuster of your firm's retention policy for litigation and claim file materials, as well as materials provided by the client (originals?).