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STAFF, PANEL OR ALTERNATIVE FEE ARRANGEMENTS

How to Answer this Critical Question in Litigation Management and Cost Containment

There are many tools to consider when implementing a litigation management plan for your company especially if the focus is effective cost containment. One of the most significant issues is who are you going to hire to handle the case and how are you going to control legal costs and indemnity? The main options in this regard are the use of Staff Counsel versus Panel Counsel as well as the use of Alternative Fee Arrangements versus Hourly Fees. Depending on the circumstances, one option may be better than another. Indeed, each has its advantages and perhaps disadvantages. The panel will discuss the pros and cons of each tool and the decision making process that should be reviewed before reaching a conclusion. The panel has broad experience on both sides of the fence as private practitioners and industry professionals and significant successes and experiences related to the use of Staff Counsel, AFAs and Panel Counsel/billable.

I. Objectives

The objectives if this presentation are threefold. First, we need to know our options. In effect, to assess these options, you of course have to have them. Of course, not all carriers have staff counsel. So, some basic questions need to be resolved concerning the viability of staff counsel from financial considerations to legal considerations. Indeed, in certain circumstances, the existence of staff counsel may not be prudent and the panel wants to provide some takeaways in this context. Second, the panel wants to discuss the advantages and disadvantages of both panel counsel and staff counsel. While there may be shades of gray in many instances, there are several factors that should be considered in weighing the appropriate selection of counsel in each circumstance. Third, we want to discuss AFAs which one may argue could work as a hybrid between staff counsel arrangement and a panel counsel arrangement.

II. When Staff Counsel Makes Sense

Historically, carriers created staff counsel offices in an effort to control legal costs. The concept was really adopted in the Personal Lines and, immediately came under attack on ethical issues. The argument was that the employment of Staff Counsel was essentially insurers engaging in the unauthorized practice of law. Another attack was that defense counsel employed by insurers created an inherent conflict with such lawyers representing insureds. Clearly, the former argument was put to bed years ago that carriers which implemented Staff Counsel offices were not illegally practicing law. As for the latter argument, the panel will discuss when conflict issues may creep into the decision-making process. So, the key issue regarding the use of Staff Counsel focuses on the economics. What lines of business and types of exposures fit in the wheel house of Staff Counsel so that services can be provided more economically/efficiently than using Panel Counsel? Of course, much depends on the quality of Staff Counsel (and the quality of Panel Counsel) in delivering results as dictated by the carrier's metrics.

Beyond financial considerations, there are scenarios where the use of Panel Counsel over Staff Counsel should be closely reviewed. These circumstances include cases with potential bad faith exposures, matters with real coverage or ROR concerns, mishandling of the claim by the carrier's claims team, etc.

III. AFAs as a Bridge Between Panel Counsel and Staff Counsel Choice

As outlined above, the focus on the Staff Counsel v. Panel Counsel inquiry has a heavy financial element to the decision-maker. The former requires a large investment to create a Staff Counsel team. Further, for a wide array of reasons, Staff Panel simply is not the right answer for many carriers and/or many lines of insurance risks. Meanwhile, the latter sometimes requires significant claims handling and micro managing to control legal spend. Even then, the legal spend cannot be appropriately controlled. In turn, Alternative Fee Agreements (AFAs) have become a go to anti-dote to control legal spend with Panel Counsel for many in the legal industry. AFAs come in many forms from Contingent/Success Fees to Task/Unit Based Fees to Pure Flat/Fixed Fees. AFAs, if done properly, align the interests Panel Counsel with the interests of the carrier—excellence delivered in an economic and efficient fashion.