



Civil Rights **and** Municipal Liability

Coordination between Risk Manager and Counsel

By Denise McHam-Pinto and Michael E. Saucier

Current trending among progressive risk management programs considers not only the conventional operational hazards, but intangible exposures that could impede an organization's capacity to maintain its competitive edge and its position of legitimacy in the eyes of the public. When hazards and exposures result in litigation, strategic partnering with defense counsel is needed until the matter is resolved.

Oddly, enough, the maneuvers, passes and mergence of the risk/claim professional and the attorney suggest the complex movements of a ballet duet. In classical pas de deux, this is the opening act, comprised of unfolding balanced movements. The suit's arrival is the entrée and sets the stage. The principal roles are assigned. The dance commences.

Claim Initiation *Risk/Claim Manager*

For those disputes involving a lawsuit, the following factors are imperative. The first being, an assessment of the environment the claim originated in and the implications of findings from the internal investigation. Concurrent, is the consideration of avenues of recovery, and/or contributions to mitigate adverse effects of the claim on the organization's resources.

During the claims investigation, the internal investigation is analyzed and the organizational position assessed and asserted. It is a very critical time for fact-finding and preservation of enterprise information and documentation. Policies, practices and standards of operations need to be vetted and validated.

Attorney

While outside counsel is seldom consulted

in internal affairs investigations, the results of the investigation can dictate several significant courses of action affecting the handling of the claim. If the internal affairs investigation results in a finding of violation of law or department procedure, separate counsel will likely need to be engaged to represent the differing interests. The legal spend implications can be enormous. If the internal affairs investigation finds no violation of department policies and procedures, multiple representation is possible. Informed written consent of all potential defendants must be obtained.

Insurance Coverage or Conflict *Risk/Claim Manager*

Most entities have some form of insurance, whether it is full coverage, or hybrid combination of self-insurance and excess. The scenario the risk manager wants to avoid is being at odds with their liability carrier in the process of litigation. Understandably, a

risk/claim manager seeks to get their insurance carrier on board with the defense and coverage commitment early on. In the instance of intentional acts, the risk professional treads lightly to ensure that the civil rights of any accused employee are not infringed. Public entities face an issue not found in the private sector — a resolution or ordinance by the governing authority that sets out the terms and conditions by which employees are afforded a defense of suits brought against them, as well as judgments. The notice and decision to defend and management of the outlying defense under the shadow of conflict showcases another delicate hold featuring risk management and internal stakeholders.

Attorney

Although outside counsel cannot take a role in advising on insurance issues, a general awareness of insurance limits, excess triggers and reservation of rights is essential. While the primary impact of these issues rests with the claims representative, the partnership with outside counsel requires sensitivity in reporting case subject matter assessments that may impact or trigger limits on insurance coverage issues.

Reputational Risk Risk Manager

The organization's internal environment and the public reputation held (or to be renounced), comprise the backdrop of the claim and could both affect the information yielded from the claim investigation and shape the defense. Most organizations have an internal litigation plan or response that addresses terms, conditions and consequences of employee actions. This translates into an overall consideration of the organizational internal litigation plan, the impact of intentional acts on the organization and the weighty problem of multiple defendants. Depending on the type of suit and organization, one or more of these factors can force a position or defense strategy.

A prominent example of a conflagration of environmental stressors is an incident at a

public entity where there were several casualties in a workplace shooting. The profile of the case and the victims drew intense media scrutiny and triggered reactions and commentary from all levels of internal and external communities on the topic of security. Multiple defendant employees were parties to various suits from plaintiffs and/or their estates. Internal information sharing halted as sectors positioned themselves to weather the onslaught. Further, the public image and personal sentiments of decision makers compelled immediate actions that fell outside lanes of insurance coverage. The insurance carrier's demands for information to enable their evaluative efforts were a tough sell to the parties on the ground. The risk/claim manager considers all factors and caps it with the need to sustain the organization's future ability to manage risk.

Attorney

Depending on the governmental entity and the jurisdiction, issues involving reputational risk can dominate concerns around settlement. Whether as a matter of courtesy, or as a requirement of an insurance policy with a "consent to settle" provision, early exploration and understanding of individual client and entity needs are important. The

governmental entities and their employees with no discernable record of lawsuits are understandably reluctant to settle claims. The public and political perception of settlement can be commonly understood to be an admission of wrongdoing, notwithstanding express provisions in a release to the contrary. The perception of encouraging additional lawsuits by settlement of any particular matter is a concern, whether perceived or real.

Plan for Defense

Attorney

Assuming that multiple representation is feasible, claims representative and outside counsel will develop a plan of defense that will include short-, intermediate- and long-term

action plans and goals for the case. Jurisdiction and venue serve as threshold points of assessment if a complaint that includes a federal civil rights cause of action is filed in state court.

An important point of coordination concerns the availability and pursuit of immunity defenses. Both claims representative and outside counsel need to be confident concerning the timing of any such motions. Potential intervention with the court to limit discovery may become part of a short-term action plan if such discovery is sought. Yet, an early Motion for Summary Judgment runs the risk of potential defeat based on a dispute of material facts in the case.

The general perimeters of potential jury awards in either state or federal jurisdiction impact the assessment of reserves. Defense plans that outline the typical and critical tasks in these cases should be quickly developed for reserve purposes.

Finale Risk Manager

Interpreting and balancing the organization's internal personality, the global need to preserve public position and confidence, and preserve capacity to recover all financial and technical contributions constituted a case study in crisis risk management. All elements cannot be serviced at the same level or granted immediate priority. As in the case of a misstep in ballet, you accept it and keep dancing through the movement.

Attorney

While each civil rights claim presents its own unique challenges, claims representative and outside counsel respond as a team. The relationship requires cooperation and collaboration. Case evaluation calls for planning and assessment of the continually changing aspects of lawsuits, and strategic responses to those changes. Both outside counsel and claims representative must be open to exploring creative approaches to common problems to achieve the best results in the situation. ■

Denise McCam-Pinto is the Manager of P&C Risk Operations at Fulton County in Atlanta. Michael E. Saucier is a Partner with the Portland, Maine, law firm Thompson & Bowie.

