

From the Top  
National Committee

What is Litigation Management?

By Ron del Pino and Jim Foster

Is it possible to separate litigation management from claims management? Which is which? Are they two distinctly different things or are they co-joined processes that run concurrently in the life cycle of a claim. To answer this, one must understand that a claim can exist without too much in the way of litigation management. However, a litigated matter cannot exist without both claims and litigation management in play.

### **Better Litigation Management**

Sound claims management practices require that claims handlers can visualize and understand the life cycle of the claim before them. Handlers must anticipate, act and aggressively pursue what is needed to resolve a claim. These three things go a long way to facilitate successful resolution of claims *with or without minimal litigation activity*. This is proactive claim handling. The opposite is passive handling and is the death knell for a successful result.

Claim supervisors are the key to ensuring passive handling does not happen. Generally, file notes will quickly reveal those who do not pursue, but simply wait for information to magically appear in files. Telltale signs are the specifically stated "waiting" for something over and over or the lack of creativity in pursuing information from alternative sources that are sure to have it, often via the Internet. But, this means that supervisors must be in the files with sufficient frequency to keep the staff on their toes.

If a claim is handled proactively, the odds that it will go into suit are greatly reduced. Claimants and their advocates are less inclined to litigate if the claim progresses in a timely and professional manner. However, when a claim that has been proactively handled does migrate to litigation, we can approach the lawsuit from an informed position and enable counsel to be far more effective from the outset by focusing on key issues, thus reducing the legal spend.

Conventional wisdom is that no two claims are alike. However, in the drudgery of a day, it is easy for claim handlers to fall prey to the management of diaries and other checklist items by which they are often measured. This will result in a task orientation and the claim handlers lose sight of the uniqueness of the claim before them. A well-balanced performance measurement process that includes a healthy measurement of results helps to mitigate this issue.

### **Clearly Defined Expectations**

The first step to successful litigation management is to have well-crafted litigation guidelines that unambiguously set forth the expectations of counsel throughout the life of a matter. This is the operational handbook for counsel. Essentially, it outlines what is expected, how often and to whom it will be sent. Well-documented guidelines will clear up any ownership concerns and

should be drafted with the participation of the appropriate parties. This collaboration in and of itself establishes ownership of the entire process as well. It is critical that it is clear who is accountable for ensuring that the case progresses in a satisfactory manner. This is not to say that the result must be satisfactory, but the handling must be.

One of the most frequent stumbling blocks to effective litigation management is ownership. From the outset we must answer the question: Whose role is it anyway? As a claims or risk manager, nothing is more galling than to see counsel billing for time spent on investigative and other work that should have been done by the claims handler. Often these activities are the result of passive handling by the claim handler, so counsel takes the bull by the horns to get the job done.

Claim handlers should work with counsel to craft an agreed-to litigation plan from which a meaningful budget can be prepared. In this process, all issues of ownership for who does what are addressed. This is where recognition of the “no two cases are alike” axiom really can be profound depending on status of settlement negotiations, jurisdiction, extent of pleadings, named parties, discovery requirements and so on.

Finally, claims personnel should never abdicate their responsibilities to counsel. That diminishes both the adjusters’ role as well as counsel’s ability to focus on legal and jurisdictional issues, motion practice and more. Accountability becomes murky and the results will slip.

As with any team, one crafted with highly skilled professionals who plan and work closely together to achieve favorable outcomes will have a winning record.

### **Working as a Team**

Defense attorneys are their eyes and ears to assess party and witness credibility. In addition, defense attorneys can provide valuable insight on state law issues such as comparative fault and joint and several liability. Defense attorneys assess both settlement and verdict values for a particular venue. Further, they shed light on the plaintiff’s counsel’s capabilities, the judge and the likelihood of certain evidence being either admitted or excluded.

Communication between defense counsel and the claims professionals is crucial for a successful outcome of the case. This collaborative effort will ensure that everyone is on the same page, and that there are clearly defined goals and expectations. Defense attorneys need to understand what the claims professionals deem to be a win, as it can be as varied as a scorched earth defense to gear the case up for a trial, to settle early or to file a motion for summary judgment.

The budget is another form of communication, which should track the plan of attack. It allows everyone to analyze what expert and non-expert discovery needs to be completed for the exit strategy to be a success, and provides a cost projection to accomplish this goal.

The case evaluation or litigation plan should be a collaborative effort to provide the roadmap to case resolution. Every case must have an exit strategy or plan of attack. This team effort allows

for clearly defined goals, expectations and communication for a successful exit strategy. This process is a “win-win” in claims and litigation management.

*Ron del Pino is a National Claims Manager with Verizon. Jim Foster is a Partner-Cassiday Schade, LLP.*