

The Dirty Secrets of Insurance Defense

After 15 years as a lawyer in private practice, I thought I had a pretty good idea about how the insurance defense business worked. I had no idea how little I actually understood until I took an in-house counsel position for an insurance company. From my new perspective I found things that seemed obvious to me as defense counsel were nearly invisible from the viewpoint of the insurer. I also came to learn that as outside counsel I had very little understanding of the business processes that drove decisions for my clients.

The relationship between claims professionals and their outside lawyers is a key part of providing a successful defense for policyholders. But that relationship will always fall short of the ideal when half the people do not fully understand what motivates the other half.

Here are my top five “dirty secrets” of the insurance defense practice. Are they really dirty secrets? Maybe not (although it makes for a good title!). At the very least, though, these are things your outside lawyer would prefer that you not think too much about.

1. Litigation Management is not outside counsel’s job

Lawyers (this writer included) tend to think fairly highly of themselves. Successful insurance defense lawyers consider themselves to be experts in their field. But their field isn’t litigation management—that is the claims professional’s job.

Defending a lawsuit as outside counsel is vastly different from managing the litigation for an insurance company, or even managing the many cases for which an individual claims professional is responsible. The defense lawyer is fighting an individual battle in each case; the claims professional is fighting a war consisting of many individual battles. A lawyer without in-house experience will likely view the battle as the war.

This is not to say that you should discount your lawyer’s advice. You are paying for strategies to win the battle. However, always remember that you know more than outside counsel about whether winning that battle will contribute to winning the war.

Your lawyer was hired (presumably!) because she is an excellent litigator. But outside counsel’s primary focus is on doing the best job possible on one file at a time. The claims professional’s decisions must also take into account a dozen other business realities. So when your lawyer is talking you into taking that extra deposition that will make an already good case into a slam dunk, remember that your lawyer’s only job is to worry about that battle. Your job is to worry about the war.

2. Law firms need you more than you need them.

According to my very unscientific internet search, there are over a million lawyers in the United States, compared to a few thousand insurance companies. Even though all of those lawyers are not competing

for insurance defense referrals, enough of them are to make the arithmetic work out very favorably for insurers. Except in few isolated geographic areas (the Mojave Desert and the Bermuda Triangle come to mind) insurance carriers have plenty of choice in finding lawyers.

Lawyers understand this even if their clients sometimes fail to realize it. I have often worked with claims professionals who complain that the work they are getting from their law firm in a particular area is substandard, or that a lawyer's office practices are not a good match for the client's needs. Yet they stay with these firms as if they have no choice. News flash: there is almost always a choice!

You don't have to move all of your files to try out a new firm. Just send one file over and see how it works. If you like the result, send more. If not, try someone else.

But always remember: Choice equals leverage, and in the insurance defense business all of the leverage lies with the client.

3. Good defense lawyers have more files than they can handle.

No lawyer will say no to a referral. Just as our ancestors on the savanna ate whatever they could find because they never knew when they would next find food, an insurance defense lawyer is going to treat every referral as if there might not be another one.

The question for the claims professional, then, is this: Do I use the lawyer who appears to be too busy, or the one who has a more manageable caseload? That question is answered by another simple question—why is one lawyer busier than another? We both know the answer to that one.

A big part of an insurance defense lawyer's job is to manage a large caseload. She will find a way to do a good job on your file.

Bottom line: trial lawyers are not all equal. You want the busy ones, because they are busy for a reason.

4. Your lawyer has not memorized your litigation guidelines.

The defense attorney you have hired wants you to think of him as "your" lawyer. Unless you are into open relationships, that is not the case. Insurance defense is a volume business, and a successful defense lawyer likely has dozens of cases from many different clients, all demanding a portion of the lawyer's time and attention.

When I was in private practice my file count was often in the neighborhood of 300 pending files, from as many as 25 different clients. That means I was expected to follow 25 different sets of litigation guidelines, and 25 different sets of billing guidelines. Most lawyers deal with this by developing habits that fit the guidelines of (or, more accurately, do not generate complaints from) their current clients. For example, when I received a new referral I always made a point to get my opening analysis letter out within 30 days. This strategy worked for most clients, but I did not research all of my client's litigation

guidelines to come up with that—it was just a common sense figure that happened to work. If I had a client that required an opening letter within 20 days, I would have missed that deadline.

Is it too much to expect lawyers to keep track of all those different guidelines? Of course not. But especially if your guidelines are outside the norm, it can be a good idea to remind your lawyer of your expectations at the outset of each engagement, and shoot out a reminder for key deadlines. If your normally dependable lawyer misses a deadline for an important assessment letter or pre-trial report, reason might well be nothing more than a mix-up between the deadlines required by various clients.

5. “Free Advice” isn’t free.

I can’t count the number of times I have heard a claims professional say they want to call a lawyer about something other than a pending matter, but they are hesitant because they don’t want to bother him with a call that won’t be billable. When that happens to you, please remember these two words: call anyway.

Any good lawyer welcomes those calls. At my law firm we tracked the number of calls and the time they took so they could be part of the compensation picture.

There are many reasons your lawyer will be happy to take your call, not the least of which is that many calls that are not billable today relate to matters that will become referrals in the future. The lawyer you call in the pre-litigation phase has a good chance of being the lawyer assigned to the case later. It is really no different than your local sub shop offering a price discount—the goal is not to give you a free meal, it is to get you in the door.

More importantly, relationships are built on this kind of call. In the insurance defense business, relationships matter. Even the best lawyer is going to lose a case every now and then—sometimes the facts just aren’t on our side. When that happens, human nature dictates there is going to be some assignation of blame. Clients who like their lawyer tend to blame the judge or jury for a bad result; that blame is more likely to fall on the shoulders of a lawyer who is less known or liked.

The reality is that a lawyer is in a more comfortable position--and the stream of new files that translate into income is safer-- when clients not only respect the lawyers work, but like the lawyer personally. It is easy to fire a lawyer, but much harder to fire a person.

Paul D. Larimore