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BRIDGING THE GAP – A LITIGATION MANAGEMENT PROPOSAL

I. The Relationship

The Insurance Professional

For the Insurance Professional (“IP”), receiving notice of a claim triggers several obligations. First, the IP must take steps to protect the interests of the Insured. This process includes reviewing the policy for both coverage and exclusions and, often, the retention of defense counsel. Second, the IP must also be vigilant regarding the interests of the carrier through diligent coverage assessment and ensuring compliance with best practices. Third, although it seems obvious, it should be pointed out that the IP should constantly be working towards the efficient resolution of the matter. The IP should be diligent in their approach to these three items because it ultimately leads to an increased performance rating.

Defense Counsel

When defense counsel (“DC”) is assigned to handle a matter on behalf of the carrier, a complex tripartite relationship ensues between DC, the IP/carrier and the Insured. First and foremost, DC must be working towards the resolution of the matter that has been assigned. While doing so, DC must also be following litigation guidelines, including providing updates to the carrier on a regular basis. At the same time, DC has duties to the Insured that are specific to the claim at hand, and those should not come at the expense of the broader relationship with the carrier. Avoiding conflict situations and maintaining a balance among these three parties is paramount in developing an ongoing relationship.

The Claim

Whether a claim consists of notice of occurrence, a demand letter or a filed pleading will impact both the short- and long-term actions of both IP and DC. It is imperative for the IP to understand the parameters of the policy and how this impacts the scope of the representation by DC. Additionally, if there is a self-insured retention, this is key information for managing the early stages of the tripartite relationship. Also, IP needs to have an awareness of policy provisions (including whether they are eroding, the existence of multiple claims, consent to settle clause, etc.) and to relay that to DC without venturing into the realm of coverage discussion that is outside the scope of the representation. Similarly, it is also important that both IP and DC are aware of what is a covered and uncovered allegation within the claim in order for the Insured and the carrier to best represented.

II. Hurdles Faced

Conveying Expectations

Most, if not all, of the issues that arise between IP and DC arise from a failure to properly – and clearly – relate the expectations. Before exploring specifics below, it is important to address this topic generally. Like any other relationship, dissatisfaction arises when expectations are not met. Also, like any other relationship, expectations can only be met if they are communicated. Neither IP nor DC should assume that they know what the other side wants. Each carrier and each IP have their nuances, just like each DC has their preferred method for conducting legal business. Therefore, if IP and DC have not worked together before, it is well worth the time to invest in understanding each other's methodology and work personality.

Poor Communication

Closely connected to conveying expectations is poor communication. The IP is looking for DC's best legal ability, including regular communication and efficient billing. DC is – ideally – providing those but must be able to relay to IP the challenges in doing so. DC should convey clear, accurate budgeting, which includes being proactive if costs will exceed their anticipated marks. DC must also recognize and relay deadlines. Lastly, DC should not assume the IP is aware of jurisdictional differences. Different areas of the country have very different methods of operation. Part of open communication is ensuring that everyone involved with a claim recognizes what may be unique about a plaintiff's lawyer, judge or jurisdiction generally.

Litigation Costs

One of, if not the largest, points of contention that can arise between IP and DC are over litigation costs. Once again, these issues are best addressed through early and open communication. Retention amounts should be clearly outlined by the IP and records maintained by both IP and DC as the retention amount is eroded. This piece is especially important if there are legal fees or portions of hourly billing that do not impact the retention. Specifically within litigation costs, it is usually discovery that proves to be the most costly and most contentious. DC should be up front about the number of depositions and experts that may be necessary and the potential costs. In the growing world of e-discovery, there are vendors that now can perform discovery tasks significantly cheaper than a law firm. IP should not hesitate to engage this approach and DC must remain receptive to working with third-party vendors to perform litigation tasks.

Panel versus Non-Panel Firm Assignment

A situation that may arise that impacts the tripartite relationship is when DC has been retained as panel counsel versus as a non-panel assignment. In a non-panel situation, DC may be handling a matter in an unfamiliar practice area; may need to make a "quick study" of litigation guidelines of which they are unfamiliar; and may be in unfamiliar territory with a demanding client (who insisted on having their "favorite son" attorney handle the matter) who wants vindication, while the best overall strategy for the insured and the insurer may be early resolution. For the IP, a non-panel assignment can provide additional challenges because DC may not be familiar with a carrier's litigation guidelines, reporting requirements or receiving the appropriate approvals before acting. For DC, it is important to focus on

the big picture, rather than the “annoyances” of complying with the carrier, while for the IP, patience and additional communication of expectations is imperative.

III. Proposed Litigation Management Framework

What Analysts Needs to Know

IP cannot assume their expectations from DC are known unless it is a DC they have personally worked with before and have an established working relationship. Expectations are best relayed by clarifying when and how the IP will be involved with defense counsel. IP must also have the patience to recognize that the handling of a claim for DC is not formulaic and, therefore, adjustments during the life of the claim that impact approach and cost will nearly always occur. Flexibility, while working within allotted parameters, should be exercised.

What Counsel Needs to Know

DC must recognize that working for a carrier is not like working for other clients. You are answering to both the Insured and the carrier. There is reporting that takes place and relaying of information that often exceeds other representations. Therefore, more transparency is required in the expected defense costs. Most importantly, DC must recognize that a carrier’s litigation guidelines are not recommendations, they are requirements.

Early Resolutions May Be Mutually Beneficial

A tension may exist in the desire to quickly resolve a claim, especially for DC who must also protect the Insured’s interests. IP must have a willingness to begin working towards a resolution immediately, even before an initial report from DC. Conversely, DC must begin an open dialogue regarding assessing the claim from initial inception as well. In both working towards a resolution and building a long-term working relationship, there is no room for sugar-coating the road DC, IP and Insured will face. When an Insured does not want to settle a matter, it is on both DC and IP to relay from their respective perspectives the benefits and drawbacks of pursuing a protracted claim process. Front-end resolution tactics can be useful and both IP and DC should not hesitate to pursue dialogue on options. Ultimately, IP and DC (as well as the Insured!) are best served through long-term, on-going relationships that can be achieved through recognizing each side’s needs, working to realize each other’s expectations and diligent communication.