



2019 Annual Conference

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## **A Success Story: Driving a Litigation Risk Management Culture and Strategy**

### **I. Establishing the desired litigation management objective**

The key to any effective strategy and partnership between an insurer or TPA and the insured/corporate customer is to establish and maintain a collaborative approach in addressing the customer's litigation needs pre and post suit. The litigation management strategy should include multiple components, including monitoring and measuring firm performance and outcomes, discussion of emerging practices and trends that may enhance oversight, making changes in legal providers when necessary, and sharing quantitative and qualitative results, internally and externally, to inform decisions.

This collaborative approach starts with understanding the current litigation/risk management strategy and vision. Defining the strategy is in many instances difficult. There may be different approaches depending on the line of business, or whether varying groups handle the claim within the company. It is important to slow down, and reflect on the varying strategies and quality of the litigation management program. Other factors to consider include loss history and expected claim and litigation volume. By reviewing the current strategy, holistically, allows one to form a vision (which could be status quo) and shape expectations from a claims and litigation management perspective.

Achieving "success" or quality outcomes on litigated files begins with the initial assessment of the case, setting a defined strategy and choice of firm. As each case brings a different set of facts, which can drive legal complexity or potential

exposure, numerous factors must be considered and weighed when choosing the appropriate strategy and defense counsel.

A. Venue concerns:

We are all aware that certain states (and venues within states) have reputations for being conservative, liberal, or for/or against businesses, and a history of large or small jury awards. The state and county in which a case is filed should be carefully reviewed as it may play directly into the strategy of how a case is litigated.

B. Choosing the appropriate law firms – considerations:

1. Prior use and experience: What experiences have you or others at the company had with this firm? Has the firm handled a variety of cases of differing complexity? In general, did the attorneys provide good analysis, recommendations? Did the attorneys provide timely and impact status reporting, including a budget?
2. Specialty work versus general work: Is this the type of case which requires a firm who practices in a niche area or within a specific specialty?
3. Request for proposals (RFPs): When forming a national, regional or specialty panel, detailed and formal requests and the firm's responses can help to compare and benchmark firms' strengths and weaknesses.
4. Staffing models/philosophy: How does the firm staff cases? Are there multiple partners, associates and paralegals on files? Does the firm discuss the addition of timekeepers on a file prior to the work being completed and invoiced? Do they push work down to the lowest, but most capable timekeeping level?
5. Bench strength: Does the firm have other attorneys who could step in and try the case should the handling partner leave the firm, fall ill? Are there other attorneys who have similar specialty experience who could take over the case if needed?
6. Rates/Alternative Fee Arrangements: Does the firm use partners, of counsel, associates, paralegals, law clerks? What are the rates for each level? Is the firm willing to consider or perform work under a flat fee or other alternative arrangement?
7. Appropriate venue coverage and resources: Can the firm or panel of firms cover the geographic footprint of the state? Is there a

firm located directly within the potentially problematic counties of the state?

8. Audit history: What has review of the firm's invoices revealed about their billing practices? Has the insurer/TPA audited the firm on-site and what were the results?
9. Guideline compliance/billing issues: Does the firm comply with the corporate/carrier/TPA guidelines? How does the firm respond to reductions in invoices due to non-compliance?
10. Metrics analyses (Work in Process, Closed Case Outcomes, Billing and Guideline Compliance, Cycle Time, Trending)
11. Alternative Legal Service Providers and technology resources to boost efficiency and output. Firms and companies must leverage emerging technology and alternative work processes in managing litigation. Those companies/firms which are already utilizing these resources will gain a competitive advantage in the market from a resource, quality and efficiency standpoint.

## **II. Litigation management oversight (Objective and Subjective review)**

Once the desired litigation management objectives are set, and a firm chosen, there are a variety of mechanisms and tools that can be employed to ensure that strategies, handling and desired outcome are aligned and achieved. The insurer/TPA and insured/customer must be in a position to best manage case handling and costs. In doing so, they should consider alternative rates and fee agreements (considerations include lines of business, jurisdictions, firms, tiers and phases by types of cases and/or statuses within a case, shadow billing, collars, reconciliations, etc.). The partnership is only strengthened by also increasing the interface between customer, firm and insurer/TPA on billing practices and compliance and qualitative handling (enhancing bill review, audit practices, communications and reporting before there are critical issues). Finally, using metrics (litigation costs, indemnity, medical payments, outcomes, cycle time) at the insured and firm levels to assess performance and effectuate change are critical to a well-developed strategy and litigation management program.

- A. Utilizing claim reviews: Such reviews present an opportunity for Risk Managers, Claims and the handling attorney to meet and level set on the procedural posture, strategy and going forward plan.
- B. Ongoing review of actionable metrics at the insured and firm levels:

1. Operational and actionable dashboards and KPIs
  2. Monitoring spend on open inventory: Analysis of firm's average spend per case, year to date, as well as monthly spend, broken out by complex and non-complex cases, allows one to track trending and, if available, compare to closed case metrics.
  3. High dollar claims: Identifying, both at a firm and company level, new claims with either high potential exposure or pending matters which incurred significant expense; such reports allows for proactive monitoring and heightened engagement.
  4. Firm fees and expenses as compared to budgets: Review of "burn rate" which indicates a firm's actual legal spend versus budgeted plan. This oversight requires firms to update budgets, leads to better claim reserve practices and company cash flow forecasting.
  5. Firm labor rate/staffing: Monitoring average labor rates is one means of determining that firms are moving work to the most appropriate timekeeper level.
  6. Resolution metrics: Ability to report on the case disposition, which can then be used for analysis of firm performance, and to monitor whether the litigation strategies and corporate philosophy have been followed.
  7. Benchmarking data: Essential to compare firm and corporate experience across lines of business (WC/Auto), venues and complexity.
  8. Task code reporting: Analyzing billing at the task and activity code levels allows one to assess staffing and activity distribution.
  9. Communicating metrics to counsel, insurer/TPA and others.
  10. Other types of possible metric reporting.
- C. Corporate/Claims feedback – surveys
- D. Predictive modeling (artificial intelligence) as a litigation management tool
- E. Guidelines compliance, Errant Rate and Best Billing Practices: Monitoring a firm's guideline compliance and errant rate, while benchmarking against firms performing the same type of work, allows one to plan appropriate follow-up and to ensure that the Company, firm and Claims are all synchronized with expectations and best billing practices.

- F. Audits: What has review of the firm's invoices revealed about their billing practices? Has the insurer/TPA audited the firm on-site and what were the results?
- G. Reassessing Panel strength and improvements given key states and trends.

### **III. The importance of communication**

The success of identifying and implementing a litigation management program will be dependent on how well the strategy is communicated internally within the organization and externally to firm/vendor partners.

Maintaining an on-going and open dialogue, and sharing information, should enhance the collaborative litigation management process for the customer, firms and insurer/TPA. Each party should be able to identify effective practices, as well as any areas needing improvement, and freely exchange this information. These discussions can take place through informal reporting (emails/calls) or more formal meetings. Teamwork is the key to success.