GETTING THE MOST FROM YOUR DEFENSE $$$

HOW TO PROPERLY SELECT AND UTILIZE LEGAL COUNSEL

Matthew J. Smith, Esq.

SMITH, ROLFES & SKAVDAHL COMPANY LPA

CINCINNATI, OH | COLUMBUS, OH | DETROIT, MI | FT. MITCHELL, KY | ORLANDO, FL | SARASOTA, FL

www.smithrolfes.com

INTRODUCTION: THE REALITY OF TODAY'S ECONOMY

The Great Recession that began in 2008 continues to reverberate throughout the American and world economies in general and the insurance industry in specific. For many of us in this profession, the impact of the economic downturn may continue to have a dramatic impact on the insurance industry for the remainder of our professional work life careers.

There is little value in placing blame or responsibility for how we got here. All economies are cyclical and we have learned the hard way no matter how much new technology or innovation we claim, we are not immune to economic downturn.

More importantly, leaders for the future must focus on how the insurance industry can thrive and grow in the reality of a diminished fiscal climate. The insurance companies and key insurance executives who embrace this concept will be at the forefront of our industry for decades to come.

Next to indemnity dollars, most property and casualty insurers' largest expense is legal fees. Even before the economic downturn, most insurance carriers had started the process of analyzing how to trim legal expense. This has increased in the post-Great Recession era. Legal expense is a "necessary evil" of the insurance profession unless our industry is going to simply pay policy limits on every claim. How legal expense dollars are invested, and accountability for the investment of those dollars, are the keys to success. In truth, most insurance carriers have simply focused on slashing legal expenses without truly analyzing the effectiveness of those cuts, or whether their use of legal expense dollars is achieving maximum benefit for both the company and its policyholders. This trend should stop, as there is simply a better way of analyzing legal expenditures and reducing legal expense without increasing indemnity payments or sacrificing quality claims handling.

CHANGE… FOR GOOD OR BAD, IT IS THE REALITY WE FACE

The insurance industry has never been one to move quickly. Oftentimes, we are in a profession which moves in "lock step" and follows what other carriers take the lead in doing. One of the key examples is to simply look at how insurance claims were handled twenty years ago. The idea at that time was claims were best handled at the local level, and most national carriers opened small drive-in style claims offices in local communities and at multiple locations in larger metropolitan areas. Today, those offices have been shuttered and are either for lease or have been reused as doctors' offices or retail establishments. Insurance companies now are focused increasingly on centralized claims and SIU operations in large "mega centers" covering vast sections of the United States from remote locations. This has not generally been done with the thought of increased customer service, but instead in response to the greater focus on cost cutting. Close affiliations and working relationships with vendors such as auto body repair shops, IME physicians and panel counsel have now disappeared. In today's reality, most insurance claims professionals handling even litigated files have never personally met many of the attorneys to whom they are making lawsuit assignments.

While these trends have emerged within our own industry, change has been taking place in other aspects of our society in general and amongst the plaintiffs' bar of attorneys in specific. As I speak on insurance law issues throughout the United States, I am always amazed to find adjusters handling even the most complex of insurance litigation are generally "clueless" of the vast information available on the Internet concerning bad faith and the ever-increasing and aggressive attempts to set up insurance companies for large damage awards, especially on first-party claims.

Years ago, most consumers knew nothing of bad faith until becoming upset with the insurance company and seeking legal advice. Today, co-workers, parents of children's friends and social media connections all are new avenues from whom a disgruntled policyholder may learn the term "bad faith."

In today's world, when someone is unfamiliar with a term, they simply "Google" the word or phrase to find its meaning. In the case of "bad faith," they are immediately directed to a series of websites, most of which are owned by plaintiffs' attorneys, promoting anti-insurance sentiments. Plaintiffs' attorneys are also now aggressively advertising to first-party policyholders who are displeased with claim services, and promoting themselves as bad faith counsel who will "punish" the offending insurance company.

While no doubt unwittingly doing so, insurers are fanning the flames of this fire. As policy premium dollars become scarcer, and are aggressively fought over, property and casualty insurers have increasingly turned to mass media advertising campaigns promoting extremely expansive implications of what is covered under an insurance policy. At least one major insurance company now is "guaranteeing" its policyholders will be satisfied with its claims adjustment process.

Since details will be lost in the "fine print," this creates an artificial expectation of what an insurance policy covers and the claim adjustment process in the eyes of the American consumer, who ultimately sit on juries deciding bad faith cases. Plaintiffs' attorneys are aggressively using this type of information. They have learned they have the ability to secure a multi-million dollar bad faith verdict, where only a decade ago they promoted more traditional bodily injury litigation. We are in a changing world and in a profession which is moving too slowly to keep up or stay ahead.

Change has come, however, to the insurance industry in terms of legal counsel selection, but that change has not always been for the better. This certainly does not mean the way things were done previously was right either. When I began in the practice of insurance litigation in the mid-1980's, it became obvious very quickly attorneys were not always selected on quality of representation or experience, but based upon a "good old boy network," which included providing tickets to sporting events, lavish holiday parties and gifts. This practice needed to stop, and by and large has.

In its place, however, the pendulum perhaps has swung too far in the other direction. In a world governed by time metric analysis and accounting modules, we have lost the focus on quality and replaced it with quantitative analysis.

ACCOUNTABILITY AND CHANGE… IN INSURANCE LAW SERVICES

Every insurance defense attorney should be held accountable for a reasonable hourly rate, closing the file as quickly as possible and holding down litigation expense. There is, however, simply no time metric or quantitative analysis formula which will tell any insurance company whether or not that attorney can effectively deliver an impactful and believable message to a jury, can argue convincingly a motion before a judge or whether she or he has the skill or expertise to ask the key questions in a deposition or Examination Under Oath to move a claim toward prompt resolution. Instead of focusing on finding the correct and most effective counsel for a specific type of claim, the insurance industry has instead moved more in the direction of finding the "low bidder" for the providing of legal services. The question should not be whether your company should "pare down" or "ramp up" your panel counsel list, but instead whether you are effectively seeking the right counsel for the type of claim or litigation involved.

Oftentimes, we learn the most by looking at other professions. While the medical profession may be fraught with its own issues, there are some similarities we can learn in the providing of legal counsel representation from our medical counterparts. For generations, Americans grew up with the concept of the family doctor. Local in the community, and handling virtually any type of medical issue, they were the "go to" medical providers absent a major medical crisis. Today, medical services are provided by a team of highly skilled specialists, whether focusing on the type of disease, portion of the body or specific surgery required.

Insurance defense legal representation has lagged behind, but is very similar in the path taken. Not too long ago, insurance carriers had panel counsel in virtually every major, moderate and even small town. In larger areas, several law firms may have been selected, but solely upon their geographic area of representation. In moderate and small markets, attorneys were selected who oftentimes were general practitioners handling a myriad of different types of cases. Legal assignments from insurance carriers were made to these attorneys based on their proximity to the local courthouse where the case was filed.

While this may have worked for many years, insurance carriers who are still using this concept are far behind the times. The idea of "one size fits all" may have worked well when most of the litigation assigned was soft tissue or other bodily injury matters of a routine nature. This system failed for two reasons. First, managing what were oftentimes hundreds of approved legal counsel attorneys in each state became an unwieldy undertaking. Second, more complex litigation, bad faith allegations, fraud investigations and the presence of multi-state questionable medical providers and fraud rings all made assignments to localized "general counsel" ineffective.

Attorneys themselves were also not without blame. Rampant overbilling, refusals to hold down litigation expense and increasing hourly rates were all in control of insurance defense counsel who failed to recognize the need to change the manner in which they were doing business.

IN-HOUSE COUNSEL – KEEPING QUALITY AND ETHICS IN CHECK

As the excesses became more prevalent, insurance carriers began to battle back predominantly through the use of house counsel programs. I am probably one of the few insurance defense attorneys who has never been critical of an insurance company using house counsel. The misguided concept that panel counsel are better lawyers than house counsel is simply wrong. There are outstanding, mediocre and poor attorneys in both law firms and house counsel programs. The quality of legal work provided is contingent, not upon the work environment, but upon the individual attorney assigned to handle the matter.

The reason I have not been critical of house counsel programs is most insurance carriers have recognized the delicate situation both they and their house counsel are in. For decades, insurance companies argued before State Bar Associations and State Supreme Courts the ethicacy of house counsel programs. They claimed regardless of who paid the attorney's salary, the attorney-client relationship existed between the house counsel attorney and the policyholder. Courts relied upon these representations by insurance carriers, and most insurers abided by this standard.

This is not to say the use of house counsel is not without its pitfalls. In recent years, and facing the economic reality of cost cutting, insurance companies have deviated from their own standards and are now using house counsel to handle first-party claims ranging from UM/UIM to

full-blown arson and theft investigations. The reality is, you simply cannot operate a house counsel program claiming the attorney-client relationship between the "firm" and its clients exists to serve the policyholders and defend their interest, and then claim you really did not mean that when counsel are being use to limit the recovery or deny coverage on a first-party claim.

The test is also not always one of whether you can ethically do something, but the price you may pay even if you are not violating an ethical standard. Coming from an attorney who has tried insurance cases for more than two decades, a jury justifiably may have good reason to feel a claim investigation was not fair and impartial and "the wagons were circled a little too close" when they hear:

- An insurance company is denying coverage to an insured (especially in today's overly aggressive television advertising market);
- The company accepted premium dollars from its insured and the insured had a claim which was investigated by the internal SIU of the company;
- An Examination Under Oath was taken by in-house counsel paid exclusively by the insurance company (and probably eligible for a company bonus based upon financial performance); and,
- The attorney in the courtroom is part of the same house counsel program.

These same arguments do not exist with third-party claims. Verdicts in recent years for bad faith litigation have skyrocketed, with some verdicts exceeding Thirty Million Dollars ($30,000,000.00). Insurers are also learning virtually any claim or litigation can also go viral with only a few keystrokes, as disgruntled policyholders use social media to vent their frustrations with insurance carriers and their internal policies and procedures.

THE KEY IS FINDING THE CORRECT COUNSEL FOR THE TYPE OF CLAIM

Whether using panel counsel or house counsel, the important thing in the new millennium for insurance companies to understand and appreciate is the value of selecting the correct attorney for the type of claim assigned. In reality, your defense counsel will accept any assignment, oftentimes for fear of losing your confidence or business if they refuse. You may have the best auto defense counsel in Dubuque, Iowa, but that does not mean she knows anything about how to handle or investigate an arson fire claim! Simply turning to a computerized list of approved counsel in a geographic territory does not mean that attorney has been vetted and possesses the skills and qualifications to handle first-party litigation or complex claim investigation and litigation matters. Insurers who do not recognize this fact and fail to take immediate steps to properly vet and select their counsel will pay the high price of either direct actions against them for bad faith and punitive damages, or potential suits brought by their insureds for negligence in the counsel selection process.

It is important to realize your insurance counsel is acting as the agent of your company. No insurance company can hide behind your legal counsel as justifying your company making the wrong or incorrect decision in how your policy was interpreted, or why a claim was not investigated in a timely manner. If your counsel is not providing timely updates and reports, and moving the claim investigation or litigation forward promptly, it is up to you to remain in charge of the claim and fulfill the fiduciary duty owed to your policyholder. Failure to do so is not going to be chargeable to the attorney, but will ultimately be chargeable to you and your company for failing to make certain your attorney acted in a proper and timely manner.

YOUR LEGAL COUNSEL IS YOUR AGENT – FOR GOOD OR BAD (FAITH)

When selecting counsel, insurance companies too often overlook the idea of the attorney acting as an agent on behalf of the company, even if the attorney is from an outside panel counsel firm. In most states, evidence of bad faith is going to be viewed very broadly and more aggressive plaintiffs' attorneys are beginning to not only utilize communications and actions by insurance counsel as evidence of bad faith, but are also taking the step of joining the individual attorney and law firm as additional defendants in bad faith litigation.

Have you considered fully the fact all communications to your insured by your insurance counsel can be viewed as evidence of bad faith? For example, all written communications to the insured, whether Examination Under Oath requests, documentary information, Reservations of Rights or coverage decision letters (even if authored by your legal counsel), may be used against the company to try and prove evidence of bad faith. Perhaps more importantly, literally every question an attorney asks at an Examination Under Oath may end up projected on a giant screen in a courtroom as evidence the company did not conduct a fair and impartial investigation of the underlying claim. Unfortunately, few insurance carriers seriously considered the implications of these actions at the time of making a claim assignment to their selected legal counsel.

The implications of these decisions can be far reaching and cost the company literally tens of millions of dollars. Most states recognize the ability of an insurance carrier to claim an Advice of Counsel defense. This type of defense is probably most effective in a motion to be heard by a judge for final summary judgment, as most juries are not going to take kindly to an insurance carrier appearing to "hide" behind the advice of its counsel as justifying its actions regarding a claim. Equally important is if you have selected the correct counsel, that should be the attorney you want representing the company in front of a jury and not testifying from the

witness stand. To use a sports analogy, you want your lead quarterback in the game if your company is being sued for bad faith and you do not want your "second string" calling all of the plays while your primary attorney is isolated to only testifying as a witness subject to full cross examination. Use of the Advice of Counsel defense also requires waiver of the attorney-client privilege and will open up a myriad of communications which will be scrutinized word-for-word to determine whether those letters, emails and even billing statements may be evidence to inflame a jury, or show where the company was not acting at all times with the utmost of good faith toward its insured.

THE LEGAL COUNSEL SELECTION AND VETTING PROCESS

There are methods available to insurance companies to properly pre-select and vet the appropriate legal counsel for the type of claim identified. Insurance carriers who recognize the necessity of the pre-approval and vetting process consider factors far beyond the years of experience or educational background of the lawyer.

Key factors to consider include:

- **Membership and active participation in professional organizations.** Is the attorney keeping up to date on new and emerging trends and recognized as a leader within their area of legal or claim expertise? Attorneys, like many other professions, can belong to associations and simply send in an annual dues check. The key is whether the lawyer is actively participating and improving their qualifications through professional affiliations.
- **Conversations with other insurance carriers.** Your best source for finding good, competent counsel may be from your competitor. Insurance companies do

not spend enough time sharing legitimate information between each other. Most people who have been in the insurance industry, however, for more than a few years have developed personal working relationships with professionals in other companies. You should utilize these relationships to find good, competent counsel for handling of specific types of claims.

- **Requesting legal work product samples.** Ask to see specific transcripts of depositions and Examinations Under Oath, as well as motions and briefs prepared by the attorney or law firm. You should not entrust your professional career and millions of dollars of your company's money on the "promise" of high quality legal work. Require the person to bring forth the evidence to show you their work product and their success history.
- **Make sure your attorney will actually try the case.** I am constantly amazed at the number of attorneys who will hold themselves out as "trial lawyers" until you ask them when was the last time they actually jury tried a case. I have seen many insurance carriers deride plaintiffs' attorneys who advertise themselves as trial litigators, but have never seen the inside of a courtroom. Those same insurance company claims people become somewhat baffled when I ask them to tell me the last time their defense counsel jury tried a case for their company or any other insurance carrier.

The vetting process is but one aspect of how the selection of legal counsel should change within the insurance industry. There are certain trends which are beginning to emerge across the United States which will in large measure define how insurance counsel is selected and utilized for decades to come. These include the rising use of national and regional counsel programs.

Carriers who are utilizing this concept are identifying specific types of claims such as fraud investigations, commercial litigation, bad faith defense and medical or class action recovery actions, and assigning those matters to law firms or individual lawyers who provide services on a regional or national level. While you will never find a lawyer or law firm admitted to practice in all fifty states, regional and national counsel programs rely upon attorneys who can handle large areas of the country or regions through strategic alliances with local counsel and admission, on a limited basis, through *pro hac vice* proceedings. Certain firms are also continuing to use fewer, but selected local counsel on a regional basis, but under the auspices of a national coordinating counsel program. Programs such as these are normally administered directly by a law firm, and the insurance carrier makes assignments to that law firm solely. It is then the responsibility of that firm to make assignments to local counsel in a given state or area. Reporting on claims and litigation is then sent from the local counsel back to the coordinating counsel, and in turn back to the carrier. Where these programs have been implemented effectively, very stringent standards are put in place to control not only budgeting and cost efficiency, but also very clearly defined duties and responsibilities of the national coordinating counsel in their role of managing the litigation or claims investigation process for the insurance carrier.

Also within this area, certain insurance companies are beginning to recognize the need to "carve out" from their house counsel programs. These companies are identifying specific types of claims which for a myriad of reasons are not appropriate for the house counsel program, and which are assigned to national, regional or even local panel counsel. Decisions to pull back from making all assignments to the house counsel program have oftentimes been caused by carriers learning the hard way the cost savings of using house counsel evaporate quickly when the underlying case is lost and a large amount of damages are paid. This is even more apparent

when millions of dollars of punitive damages are paid on a single claim, wiping out perhaps several years of house counsel program savings.

YOUR DUTY TO RETAIN CONTROL OF THE CLAIM AND LITIGATION

Regardless of what trends or changes are taking place, one constant still remains: the necessity of the claims professional retaining control of the litigation process. Regardless of how good your legal counsel may be, you simply cannot and should not walk away from direct responsibility and supervision of the claim. An insurance company has a non-delegable duty to at all times make certain every claim, whether first-or-third-party, is handled in full accordance with the policy terms and conditions and the company's standards for claims or litigation handling. If you fail to fulfill this duty, it will be made very clear to a jury and a judge in the bad faith trial to follow.

While it should never be the duty of an insurance claims professional to "babysit" your counsel, the reality is you do retain ultimate responsibility and supervision of the file throughout the entirety of the claims and litigation process.

LITIGATION MANAGEMENT – WE CAN DO BETTER!

In addition to new ways of selecting confident and qualified legal counsel, there are also new and better ways insurance carriers are effectively managing the claim and litigation process. Often, these are very simple steps, but they will improve the quality of service provided on the claim and, when effectively utilized, help control litigation expense as well.

Insurance carriers are beginning to realize the claim process itself is oftentimes the best evidence to defend a coverage decision or allegation of bad faith. Having policies and

procedures in place to effectively and efficiently manage a claim or litigation is extremely prudent in making certain a proper level of uniformity is applied fairly to all insureds. This does not mean, however, "one size fits all" works in either claim or litigation reporting. Not long ago, I observed a trial where an attorney was on the witness stand and was very uncomfortable trying to explain in a fire arson case why the insurance company required him to complete a form where more than half of the form was related to bodily injury. At points, the jury was actually laughing at "mandatory" claim reporting processes instituted by the insurance carrier defendant.

This does not mean forms and procedures in and of themselves are incorrect. Having the correct forms and procedures in place is what is crucial. One of the items developed by our firm on first-party investigation claims is the use of what we call an Examination Under Oath Action Plan (*See Appendix A*).

This is a two-part document. The first portion is to be completed by the claims professional assigning the file for an EUO. The second portion of the document is completed by the attorney to whom the file is assigned, requesting they review the claim information and confirm to the insurance carrier in advance of even requesting the EUO whether reasonable justification exists under the applicable state law for an Examination Under Oath and further claim investigation to proceed. We have utilized this document both internally for our own clients, and also for clients we represent as national coordinating counsel, requesting it to be completed by local counsel. The value of this form is it adds an additional "layer" of protection where an insurance company can clearly state they relied upon the advice of counsel in even making the decision whether to proceed forward with the investigation of the claim and taking of Examination Under Oath testimony.

THE COVERAGE DECISION PROCESS – GET ALL THE FACTS FIRST

Other more efficient ways of securing value from your defense counsel arise in the claim decision process. It is more than semantics that we do not call the communication of the final claim decision to an insured a claim "denial." Instead, we focus the entirety of the investigation process and valuation on making the claims decision.

As part of that process, we recommend carriers instruct their counsel to make no final opinion or decision, nor express any opinion on coverage, until the investigation is complete. At that time, it is then incumbent upon the legal counsel to convene a conference call with those involved in all aspects of the claim investigation. We recommend this call be convened by the attorney, as it is then subject to attorney work product protection, and as noted subsequently, ultimately it is subject to attorney-client privilege.

We say "ultimately," because at the start of the call we invite local police or fire public sector investigators to participate if they will join us. It is not their decision to pay or deny the claim, but it is important we ask them for any updated information regarding their separate and distinct investigation, and also summarize for them the information as we understand it to determine whether any new or additional information exists, or any information conveyed previously may have been altered or is no longer accurate. Once this process is complete, they are excused and disconnected from the call.

The focus of the call then turns to the outside investigators retained by the insurance carrier. These may include origin and cause investigators, forensic accountants, lab technicians and even independent medical evaluators. Each of these experts are asked to identify what they term to be the "weakest link" in their scientific or professional investigation. We specifically advise each expert we do not want to hear this is "the perfect claim," but rather what they believe

to be the weakest point which would need to be addressed should the matter proceed to litigation. Once we have identified these issues and determined their significant impact on the claim, the experts are then excused from the call.

At this point, the call becomes subject to attorney-client privilege, as those remaining include only the representatives of the insurance carrier and outside counsel. Normally, this will include claims management, the claims professionals responsible for the file and SIU investigators. At this juncture, all of the information from the public sector, private investigators and the entirety of the claim investigation are reviewed, analyzed and considered. Only when this call concludes and a final decision is made to either pay or deny coverage for the claim, is counsel then authorized to proceed with authoring a full legal opinion and coverage decision letter to go to the insured.

We encourage our clients to not engage in this process "in the dark," but to instead utilize this claim review and decision process as something to be very proud of and, if appropriate, to actually present as evidence to the jury. One of the exhibits we utilize at trial frequently is a listing of each of the persons involved from the insurance company in the investigation and their title and years of experience in the insurance industry. It is very impactful on a closing argument to show a jury an exhibit compiled by legal counsel to show a combined 150-200 years of insurance experience went into the decision on the claim. This is a very effective way to counter plaintiffs' attorneys' arguments of little consideration being given to the claim or a summary claim denial being made without justification.

In like manner, insurance carriers should seek the advice and direction of counsel in conveying the coverage decision to their insured. Coverage decision letters should be sent on the letterhead from the insurance carrier, but frequently drafted by legal counsel. Experienced and

properly selected legal counsel will include information in the coverage decision letters such as an offer to review any new or additional evidence within a set time period (normally 14 days). With insurance carrier approval, we often recommend advising the insured if they disagree with the coverage decision, the insurance carrier, at its own expense, will file an action for declaratory judgment to request a court to review the coverage decision to ensure it is in full compliance with the policy and applicable state law. While very few insureds may actually elect to have the declaratory judgment action filed, the mere offer in writing to file such an action at the expense of the insurance carrier is tremendous evidence to present to a court on a motion for final summary judgment on any bad faith claim to show the insurance carrier was not arbitrary, and even extended to the insured prior to suit being filed the opportunity to have a court review the carrier's coverage decision.

HOLDING YOUR LEGAL COUNSEL ACCOUNTABLE

Before leaving the area of attorney-client relationships, it is also important to discuss accountability. All legal counsel should be held accountable to any client we have the privilege to represent, whether individually or corporately. Insurance companies have every right to demand the highest quality of legal work and full compliance with company guidelines from their legal counsel.

Having said that, however, be equally cautious whatever you write about your defense counsel, or whatever audits or other information an insurance company conducts of attorneys or law firms as those may well be subject to discovery and can once again be used as evidence of bad faith. While I have not been able to document the accuracy of the information, I have been told a story of a very large bad faith verdict rendered against an insurance company where one of

the most compelling pieces of evidence was a plaintiffs' attorney who subpoenaed the audited billing records from the insurance carrier for a law firm. He used deductions for "unnecessary" and "duplicative" work which the insurance company refused to pay for as evidence the claim investigation was done in bad faith and the attorney violated the insurance carrier's own standards for a high quality investigation.

In short, be careful what you write and what comments you make concerning your own legal counsel. One of the things we repeatedly tell our attorneys is to view anything you place in writing as if you are looking though a welder's mask. View your computer screen or whatever you are writing through the "screen" of *"would you be proud to see this statement enlarged and presented to a jury if this claim ultimately goes to litigation?"*

Finally, make certain your legal counsel knows how to litigate in the new millennium. Services exist to assist insurance carriers and their counsel in areas ranging from social network monitoring to conducting specific investigations of potential jurors and their Internet postings. Legal counsel also should be acquainted with the emerging use of electronics in the courtroom. Attorneys who are not specifically skilled in these areas and are not at the cutting edge of the practice of law in this new electronic era may not be your best investment either today or in the future.

CONTROLLING LITIGATION EXPENSE – ARE WE OUR OWN WORST ENEMY?

In terms of controlling litigation expense, insurance carriers also are often their own worst enemy. We are now in an age where litigation reporting, multi-phase budget forms and email communications are actually the biggest culprits in increasing litigation expenses. An example I frequently use is that when I began the practice of insurance law in the mid-1980's,

"standard" litigation reporting was a 3-4 page status report every 90 days and interim reports only for major developments such as the plaintiff's deposition or a significant court ruling. It was not unusual for all reporting on a file for that 90 day period to not exceed 3-5 hours of attorney time.

In contrast, today carriers insist upon multiple forms being completed and multi-phase budgets being submitted. We have one carrier that prior to a pre-trial requires 17 different reporting or budget forms to be executed for any litigation approvals. While many of these forms may be well-intentioned, when combined with responding to 3-10 email streams from adjusters and opposing counsel on a daily basis, there is an explosion in litigation expense. The question becomes: *"how do we do a better job?"*

THE 99.2% FACTOR – A NEW WAY TO VIEW LITIGATION

The key is deciding which cases to take to trial. National statistics have shown only 0.8% of all civil lawsuits filed in America ever proceed to even the first day of jury selection, let alone a jury verdict. The remaining 99.2% of all lawsuits filed in this country end in settlements. Those of us in the insurance profession know these statistics are true. In contrast, however, virtually every insurance company's litigation management plans are designed as if 100% of the cases are going to trial. This expends both staff and attorney resources to map out a strategy and corresponding budget on a case that has about the same chance of seeing a jury trial as you do being struck by lightning. This should cause us to ask the question: *"why are we managing litigation for the .08% of cases and not the 99.2% of reality?"*

KNOW YOUR EXIT STRATEGY

If you are truly committed to efficient use of your legal resources, there is a better way. We recommend to our clients from the immediate assignment of the case to legal counsel, it is crucial to develop an "exit strategy." Exit strategies for insurance litigation in almost every case will consist of one of the following:

- Immediate reopening of settlement negotiations after suit is filed to "close the gap" and settle the case promptly.
- Conducting of limited discovery and placing the case into mediation, arbitration or some other form of ADR.
- Conducting targeted and sufficient discovery for a well-defined and agreed dispositive motion in whole or in part, and filing the motion promptly.
- Jury trial, if the facts, jurisdiction and circumstances so warrant.

There is simply no reason why a well-experienced insurance attorney should not provide her or his client with a defined exit strategy within 14 days of receipt of the litigation assignment. We recommend using an Initial Case Evaluation Report (*see Appendix B*), which requires the attorney to identify and budget for the initial phase of the case to confirm the proposed exit strategy is a viable option for ultimate resolution of the case.

Once approved by the insurance carrier, we then recommend not more than 90 days later a Case Management Report (*see Appendix C*) be completed by the attorney and submitted for final review and approval by the insurance carrier. This document, and the corresponding budget, then become the "road map" to lead to the agreed exit strategy for the litigation to occur as promptly as possible.

Based upon our experience in implementing this program for a number of insurance carriers, we have found these two reports lay out all strategic planning and financial accountability information required to effectively manage litigation in a streamlined and much more efficient manner. When implemented by insurance carriers and followed correctly by legal counsel, these two forms often replace 10 to 20 other duplicative reports, budget and summary reporting thereby saving literally thousands if not tens of thousands of dollars of legal expense for each file assignment.

KNOW WHICH CASES SHOULD GO TO TRIAL AND WHICH TO AVOID

Make certain as well the legal counsel you select has the sufficient skill, knowledge and experience to know which cases should be taken to trial and not which cases simply may be taken to trial. Over many years, I have seen insurance companies waste thousands of dollars on cases they may "legally" have an argument to take to trial, but which are unwinnable when ultimately presented to a jury. Equal blame falls oftentimes on insurance carriers and their legal counsel for becoming so focused on the concepts and ideas of insurance coverage and law, we fail to see the proverbial "forest for the trees."

If you want to effectively use your litigation expenditures, make certain to have frank conversations with your legal counsel about whether the facts, circumstances and overall scope of the evidence in the case present issues which are truly "winnable" before a jury.

ALTERNATIVE FEE AGREEMENTS – MOVING BEYOND LIP SERVICE

No discussion of effective use of legal expenditure dollars by insurance companies can conclude without also addressing the concept of alternative fee agreements. Insurance carriers

have talked about alternative fee agreements for decades, but other than very simple flat fee agreements, the talk has been cheap and no meaningful change has occurred. This trend as well should stop.

Seek out innovative attorneys and law firms who are truly willing to discuss alternative fee arrangements. Before you do so, however, make certain your company is truly committed to such agreements and not simply giving them "lip service."

Flat fee agreements have existed for a long enough time period, they are generally understood. Newer and more innovative programs you may wish to consider include:

- **Staged flat fee programs.** Under this concept, the law firm is paid a flat fee for completion of each stage of the approved litigation plan. The flat fee should be tied to specific events and activities to occur within the litigation stages, but also should equally be tied to holding the law firm accountable for completing those tasks within the time period agreed to under the staged flat fee program.
- **Tiered hourly rates.** Under this concept, the law firm is paid a base hourly rate for all work performed on the file, but at a substantially discounted rate from the "normal" hourly rate charged. In exchange for charging the lower base hourly rate, the law firm agrees to accept the remaining "balance" of the hourly rate at the conclusion of the case. This would be directly tied to the results secured for the insurance carrier. For example, a reduced hourly rate may be Seventy Five Dollars ($75.00) per hour, and if all motion rulings or verdict go against the insurance carrier, that would be all the law firm is entitled to. If, however, a verdict or settlement is secured within an agreed range, the hourly rate may then increase to One Hundred Dollars ($100.00) per hour. If an entire defense verdict

is secured, the hourly rate may increase to One Hundred Fifty Dollars ($150.00) per hour. The insurance company agrees to accept the additional hourly rate payment between the base rate and the additional rate at the end of the case tied to the success of the firm's results. The additional hourly rate is then paid as a "lump sum" at the conclusion of the case.

- **Deferred compensation.** Under this model, the law firm may agree to either a flat fee or hourly rate form of compensation with the agreement the law firm will only be paid a minimal base rate for all work performed on the file until the conclusion of the case. At that time, a set flat fee or hourly rate structure will be paid to the law firm, depending upon the successful result and outcome of the litigation. Under this system, it is important, if an hourly rate structure is being utilized, for the law firm to continue to track all work and to submit billing, even if payment is not due, so issues do not arise at the end of the case concerning what was "approved" action for which the insurance carrier is willing to pay.
- **Reverse contingent fee agreements.** This is perhaps the most innovative form of compensation, and plaintiffs' attorneys have worked for decades on contingent fee agreements based upon the percent of recovery secured for their client. Insurance carriers have been reluctant to broach similar agreements with defense counsel, but times are slowly changing. Especially on defined claims such as property losses and fraud investigations, a reverse contingent fee agreement may be appropriate. These agreements work best where there is a defined amount of money at stake (*i.e.* policy limits or a clearly defined amount of damage), and the issue is whether or not coverage is owed under the policy for that amount of

damage or loss. Under a reverse contingent fee agreement, if the law firm tells the insurance carrier no coverage is due and owing, but ultimately it is determined full coverage must be paid, the firm may well be entitled to no compensation other than out-of-pocket expenses. If, however, the law firm succeeds in motion practice or at trial with a full defense verdict affirming its position no coverage was due and owing was correct, then the law firm is paid one-third or even perhaps one-half of the amount, as the law firm's efforts saved the insurance carrier by not paying the uncovered claim. There are certain perils associated with this type of program. It requires the utmost of ethics and a clear understanding of the fiduciary duties owed by the insurance company to its insured, and the ethical standards and duties of the law firm in providing the services. Like contingent fee agreements utilized by plaintiffs' attorneys, it is also imperative reverse contingent fee agreements spell out clearly in writing the details of the agreement.

DON'T BE AFRAID TO CHANGE COURSE IF NECESSARY

Finally, throughout the litigation process with your legal counsel, do not ever hesitate to change course or direction if the evidence and the facts so warrant. Even with an agreed litigation strategy plan, it is important to build in "key stop points." These are points built into the litigation plan at which time the lawyer and the insurance professionals will either meet personally or conduct a telephone/video conference to evaluate the current status of the litigation and whether the course of action approved is still appropriate. These key stop points are crucial in making certain the insurance company is at all times handling the litigation in both an

appropriate and effective manner. We should never be at any point in the litigation process where we believe we are so above reproach to not consider new evidence, re-evaluate our position and make appropriate changes if so warranted and necessary.

CONCLUSION: SEIZE THE NEW ERA AND BUILD ON QUALITY

We are in a new era where budgeting and cost control will remain the watch words for most of our professional careers. This is not entirely negative, as if we handle matters correctly it causes us to be more thoughtful, and to more effectively and efficiently utilize the financial resources available throughout the litigation process. There are, however, ways we can improve the manner in which we select, supervise and compensate those involved in the providing of legal defense representation services. No matter what we do, however, the most important factor to always remember is every insurance company which has the privilege to conduct business and issue policies to a policyholder owes that policyholder the absolute duty to do their best and provide all applicable coverages under the policy. When legal representation is required, the insurer further owes that policyholder the highest quality of legal representation, while doing so in a cost efficient environment. This can be done, and we must all commit ourselves to achieving this goal while at the same time realizing there are new, innovative and better ways to conduct our business activities as we move forward into the future.

APPENDIX A

EUO ATTORNEY ACTION PLAN

Part One: To Be Completed by Insurer on Claim Assignment

Claim Information

Claim Number:

Type of Claim:

Automobile Damage	☐	Theft	☐	Other	☐
Personal Injury	☐	Fire Loss	☐		
General Liability	☐	Water Loss	☐		

If "Other" please specify:

Insured(s) Contact Information

Name(s):

Address:

Temporary Address (if applicable):

Home Telephone Number:

Work Telephone Number:

Cellular Telephone Number:

Email Address:

Prior Claim History

Policy Information

Policy Number:

Policy Coverage Period:

Renewal? (yes/no):

Number of Years Insured:

Loss Information

Brief Facts of the Loss:

Key Factors Identified in the Investigation to Date:

Part Two: To Be Completed by Independent Counsel

Examination Under Oath Review

Is an EUO Warranted? (yes/no):

Why or Why Not? (please provide a succinct and factual explanation):

If an EUO is to Proceed:

- **What additional investigation should be completed by the insurer prior to the Examination Under Oath?**

- **What documentation/evidence should be secured by the insurer prior to the Examination Under Oath?**

- **What documentation do you propose requesting from the insured(s) prior to the Examination Under Oath?**

- **What are the specific facts, information and goals to be achieved at the Examination Under Oath?**

- **Advise of any specific laws, rules or other information in the jurisdiction which the insurer should be aware of concerning this claim or taking of EUO testimony.**

Anticipated Budget

Review of Claim/Investigation Documents: **$**

Examination Under Oath:

Legal Fees: **$**
Travel (per guidelines): **$**
Court Reporter Fees: **$**
Other (explain): **$**

Reporting (including final opinion report): **$**

Other (explain) **$**

TOTAL: **$**

Other Comments or Key Information

_____

Signature of Reviewing Attorney

Contact Information:
Telephone: ( )
Email:

This form is to be completed and returned via email to the Case Manager and SIU Investigator within 5 days of receipt of the claim documents.

APPENDIX B

Initial Case Evaluation Report

Part One: General Information: *(Completed by Claims)*

Assignment & Reporting Instructions:

Report to:
Name:
Address:
E-mail:
Telephone:
Facsimile:

Additional Copy to:
Name:
Address:
E-mail:
Telephone:
Facsimile:

Case Information:

Caption:

Jurisdiction (State/Court/Case Number):

Party(ies) to Represent:

Summons Received: ☐ **Yes Date: / ☐ No / ☐ Unsure**

Claim Information:

Insured:

Claim Number:

Date of Loss:

Type of Claim:

Automobile Damage	☐	Property	☐	Other	☐
Personal Injury	☐	Dec Action	☐		
General Liability	☐	Work Comp	☐		

If "Other" please specify:

Insured or Client Contact Information:

Name(s):

Address:

Temporary Address (if applicable):

Home Telephone Number:

Work Telephone Number:

Cellular Telephone Number:

Email Address:

Policy Information

Policy Number:

Policy Coverage Period:

Renewal? (yes/no):

Number of Years Insured:

Loss & Case Information

Brief Facts of the Loss:

Brief Summary of Complaint Allegations:

Part Two: INITIAL CASE ANALYSIS REPORT

(Must be completed by attorney and returned within 14 days of assignment).

Attorney Responsible for case:
- **Name:**
- **Address:**
- **E-mail:**
- **Telephone:**
- **Facsimile:**

Alternative contact attorney/paralegal:
- **Name:**
- **Address:**
- **E-mail:**
- **Telephone:**
- **Facsimile:**

Summary of work performed to date on this case:

Overall evaluation of case and liability:

Analysis of Liability: (provide a succinct and factual explanation):

Analysis of Damages: (provide a succinct and factual explanation):

Analysis of Venue and Assigned Judge:

Analysis of ability and experience of opposing counsel:

Analysis of additional defendants/third parties, indemnification/contribution or potential subrogation claims or issues:

Recommended Case "Exit Strategy":

Settlement: ☐	**Recommended range: $**
Mediation: ☐	**To be completed by:**
Dispositive Motion: ☐	**To be filed by:**
Trial: ☐	**Anticipated Trial Date:**

Why is this the best "Exit Strategy" for this case:

What additional investigation or documentation is required from Claims to achieve this conclusion? (be specific)

What discovery (if any) must be secured prior to achievement of this conclusion? (be specific)

Detail specific actions to be completed within the next 90 days to achieve, or advance the case to this conclusion and include specific deadline dates:

Anticipated use of Expert Witnesses: (explain type of expert, rationale for use and if possible specific recommendation of expert)

Case Budget through recommended conclusion of case:

Budget for Initial Stage			
Activity	***Description***	***Estimated Hours***	***Projected Fees***
Opening File	Initial study of the file; subsequent study of the file if the case is reassigned to others in the firm.		
Pleadings	Work on initial pleadings and amended pleadings, preparing responses and motions. Include cross-claims, third party practice, etc., if appropriate.		
Investigation	Correspondence and reports to and from company, all conferences and related matters.		
Witness Interviews	Preparing for a meeting with witnesses in anticipation of depositions or trial.		
Communications and Meetings with Client	Conferences, telephone calls, meetings with client.		
Correspondence with Client	Letters and reports to client.		
Communications with Others	All communication with others, including counsel for plaintiff and co-defendants, witnesses, experts and court.		
Sub-Total			

Discovery			
Activity	***Description***	***Estimated Hours***	***Projected Fees***
Written Discovery	Drafting or responding to interrogatories, requests to produce/admissions and responding to objections.		
Expert Witnesses	Include all time for conferences, correspondence and preparation for depositions, etc. This includes both plaintiff and defense experts, list separately.		

Medical Records Discovery	All efforts to obtain records; analysis and summarization of records.		
Depositions or Examinations Under Oath	List separately the names of person expected testify and itemize the time to be spent on each. Include travel, preparation, attendance and reporting.		
Motion Practice & Hearings	Include all anticipated motions, pre-trial or status reports or other filings or appearances.		
Sub-Total			

Settlement			
Activity	***Description***	***Estimated Hours***	***Projected Fees***
Settlement Discussions	Time anticipated dedicated to resolution. Include all briefing, preparation and the like.		
ADR	Time anticipated dedicated to mediation, arbitration, etc. Include all briefing, preparation and the like.		
Sub-Total			

Trial Preparation and Trial			
Activity	***Description***	***Estimated Hours***	***Projected Fees***
Pretrial Conferences and Motions	Attend final pretrial conferences and drafting pretrial motions and jury instructions.		
Legal Research	Legal research for substantive issues, discovery questions, evidentiary issues not otherwise related to other categories in this budget.		
Trial Preparation	All trial preparation activities.		

Trial	Time spent in trial and daily preparation after trial commences.		
Sub-Total			

Expense Analysis	
Expense Item	***Projected Cost***
Court Reporter	
Expert Witnesses	
Investigative Services	
Trial Exhibits	
Court Fees	
Copy Services	
Travel	
Total Expense	

BUDGET TOTALS

Projected Fees		
Stage	***Estimated Hours/Total Case***	***Projected Fees/Total Case***
Initial Stage		
Discovery		
Settlement		

Trial Preparation And Trial		
Expense Analysis		
TOTAL		

Other Comments or Key Information:

_____

Signature of Attorney

Contact Information:
Telephone: ( )
Email:

This form is to be completed and returned via email to the personnel noted within 14 days of receipt of the claim documents.

APPENDIX C

90-Day Case Management Report

This report must be completed within 90 days of file assignment, and should be completed fully and returned electronically to the responsible Claims personnel.

Part One: General Information

Case Information:

Caption:

Jurisdiction (State/Court/Case Number):

Party(ies) Represented:

Claim Information:

Insured:

Claim Number:

Date of Loss:

Policy Number:

Part Two: Initial Case Analysis Report Update

Has counsel's opinion regarding the correct "exit strategy" for this case changed in any regard?
☐ Yes / ☐ No

If yes, please explain the reason why and the recommended new "exit strategy":

Have all actions and recommendations set forth by counsel in the Initial Case Analysis Report been completed? ☐ Yes / ☐ No

If no, state specifically what actions have not been completed, and give a full explanation as to why and the anticipated date of completion, or if your recommendation has changed explain why:

Part Three: 90-Day Case Analysis Report

Provide any necessary update regarding your analysis of either liability or damages from your initial report:

List any additional specific recommendations or actions not approved previously which are required to achieve the recommended "exit strategy":

Provide updated information concerning settlement negotiations, ADR and counsel settlement recommendations:

Provide an update on any key rulings or actions taken by the Court, including all dates for discovery cutoff, pretrial and trial:

Part Four: Updated Case Budget

Are any changes required to the case budget originally submitted? ☐ Yes / ☐ No

If yes, provide the following updated budget information:

Discovery				
Activity	***Description***	***Estimated Hours***	***Projected Fees***	***Reason for Budgetary Change***
Written Discovery	Drafting or responding to interrogatories, requests to produce/admissions and responding to objections.			
Expert Witnesses	Include all time for conferences, correspondence and preparation for depositions, etc. This includes both plaintiff and defense experts, list separately.			
Medical Records Discovery	All efforts to obtain records; analysis and summarization of records.			
Depositions or Examinations Under Oath	List separately the names of person expected testify and itemize the time to be spent on each. Include travel, preparation, attendance and reporting.			
Motion Practice & Hearings	Include all anticipated motions, pre-trial or status reports or other filings or appearances.			
Sub-Total				

Settlement				
Activity	***Description***	***Estimated Hours***	***Projected Fees***	***Reason for Budgetary Change***
Settlement Discussions	Time anticipated dedicated to resolution. Include all briefing, preparation and the like.			
ADR	Time anticipated dedicated to mediation, arbitration, etc. Include all briefing, preparation and the like.			
Sub-Total				

Trial Preparation and Trial				
Activity	***Description***	***Estimated Hours***	***Projected Fees***	***Reason for Budgetary Change***
Pretrial Conferences and Motions	Attend final pretrial conferences and drafting pretrial motions and jury instructions.			
Legal Research	Legal research for substantive issues, discovery questions, evidentiary issues not otherwise related to other categories in this budget.			
Trial Preparation	All trial preparation activities.			
Trial	Time spent in trial and daily preparation after trial commences.			
Sub-Total				

Expense Analysis		
Expense Item	***Projected Cost***	***Reason for Budgetary Change***
Court Reporter		
Expert Witnesses		
Investigative Services		
Trial Exhibits		
Court Fees		
Copy Services		
Travel		
Total Expense		

BUDGET TOTALS

Projected Fees			
Stage	***Estimated Hours/Total Case***	***Projected Fees/Total Case***	***Reason for Budgetary Change***
Initial Stage			
Discovery			
Settlement			
Trial Preparation And Trial			
Expense Analysis			
TOTAL			

Other Comments or Key Information:

_____

Signature of Attorney

Contact Information:
Telephone: ( )
Email: