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NATURAL SELECTION

Find the Strongest Legal Counsel and Weed Out the Weak

By Matthew J. Smith, Esq.

The Great Recession continues to reverberate throughout America and the insurance world. Leaders for the future must focus on how the insurance industry will thrive in the reality of a recovering but diminished fiscal climate. Company executives embracing this concept will move to the forefront of our profession.

For most insurers, one of the largest expenses is legal fees—a “necessary evil” unless we are going to simply pay demands on every claim. Investing legal expense dollars wisely and demanding accountability for those dollars are keys to success.

In truth, most insurance carriers focus on slashing legal expenses without truly analyzing the effectiveness of those cuts or whether their legal expenses are achieving maximum benefits for both the company and its policyholders. This trend should stop because there is a better way of analyzing and reducing legal expenses without increasing indemnity payments or sacrificing quality litigation handling.

Change Is the Reality

Change has come to the insurance legal counsel selection process, but change has not always been for the better. This certainly does not mean the way things were done previously is superior. In the

mid-1980s, insurance attorneys often were not selected on quality or experience but rather through a good ol’ boy network that relied heavily upon sports tickets, lavish holiday parties, and gifts.

Today, the pendulum perhaps has swung too far back in the other direction. In a world governed by time, metric analyses, and accounting modules, have we lost our focus on quality and replaced it with a quantitative scrutiny?

Every insurance defense attorney should be accountable for a reasonable rate structure, closing a file quickly, and controlling litigation expenses. There is, however, no time metric or quantitative analysis that will tell any insurance company whether an attorney can effectively deliver an impactful and believable message to a jury and argue convincingly a motion before a judge. Nor can such quantitative solutions tell if he has the skill and 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, our industry has moved in the direction of finding the lowest bidder for providing legal services. The question should not be whether to “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.

While the medical profession has its issues, there are some lessons we can learn from physicians. For generations, Americans grew up with the concept of the family doctor who handled virtually any type of medical issue. Today, medical services are provided by a team of highly skilled specialists, focusing on the type of disease, portion of the body, or specific surgery required.

Insurance legal representation is following a very similar path. Not long ago, insurance carriers had panel counsel in every major, moderate, and even small town. Legal assignments were made based on proximity to the local courthouse in which the case was filed.

This system failed for two reasons. First, managing what could be hundreds of approved counsel in each state became unwieldy. Second, more complex litigation, bad-faith allegations, claims investigations, and the presence of multistate questionable medical providers and fraud rings made assignments to local general counsel ineffective.

Attorneys also were not without blame. Rampant overbilling, refusal to hold down litigation expenses, and increasing hourly rates were acts by counsel who failed to recognize the need to change their manner of doing business.



In-House Counsel Quandry

As excesses became more prevalent, insurance carriers battled back predominantly through house counsel programs. The concept that panel counsel lawyers are better than house counsel is simply wrong. Outstanding, mediocre, and poor attorneys exist in both law firms and house counsel programs. The quality of legal work rests solely upon the individual attorney assigned to handle the matter.

Most house counsel and insurance carriers recognize the delicate situation both are in. For decades, insurance companies argued before state bar associations and supreme courts about the ethics of house counsel programs by claiming that, regardless of who pays the attorney's salary, the attorney-client relationship exists between house counsel and policyholder. Courts relied on these representations, and most insurers abided by this standard—until recently.

Facing the economic reality of cost-cutting, insurers have deviated from their own standards and now use house counsel to handle first-party claims ranging from UM/UIM to insurance fraud investigations. The reality is that you simply cannot operate a house counsel program claiming the attorney-client relationship exists to serve and defend your policyholders' interests and then use that same counsel to limit recovery or deny coverage to policyholders on a first-party claim.

The test is not always what you can do ethically, but what price you may pay even if you're not directly violating an ethical standard. A reasonable jury may have good cause to find a claims investigation was not fair and impartial when shown the insurance company is denying coverage to an insured from whom the company accepted premium dollars; the claim was investigated by internal claims and SIU personnel; the EUO was taken by in-house counsel who is paid by the insurance company (and probably eligible for a company bonus based on financial performance); and the attorney in the courtroom is part of the same house counsel program.

All savings from using house counsel on first-party claims may be lost with one bad-faith verdict. The question is whether or not it is worth taking the risk.

Finding Correct Counsel

Whether panel or house counsel, selecting the correct attorney for the type of claim is crucial. Most defense counsel will accept any assignment, oftentimes for fear of losing confidence or business if they refuse. You may have the best auto defense counsel in Topeka, but that does not mean she knows anything about investigating an arson loss. Having access to a computerized list of approved counsel does not mean that an attorney has been vetted or possesses the skills or qualifications necessary to handle complex claims investigations or litigation matters. Insurers failing to recognize and take action to properly select counsel will pay the high price of either direct actions for bad faith or suits brought by those who they have the duty to defend for negligence in the defense counsel selection process.

Remember, defense counsel acts as an agent of your company. No insurance company may hide behind legal counsel to justify making an incorrect decision on how a policy was interpreted or why a claim was not investigated in a more timely manner. If counsel is not providing reports and moving the assigned matter forward promptly, you must remain in charge and fulfill the fiduciary duty owed to your policyholder. Failure to do so will not be chargeable to the attorney but, ultimately, rests on the company for failing to make certain the attorney acted in a proper and timely manner.

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

Counsel Selection Process

Methods are available to select the appropriate legal counsel for the type of claim identified. Insurance carriers that recognize the necessity of the pre-approval process consider factors far beyond the years of experience or educational background of the lawyer. Key factors to consider include:

- **Active participation in professional organizations.** Is the attorney up to

date on new and emerging trends and recognized as a leader within his area of insurance law expertise? This goes far beyond simply paying dues to join an organization. Is he teaching classes, leading seminars, and showing that he is at the forefront of his areas of expertise?

- **Conversations with other insurance carriers.** Your best source for finding outstanding counsel may be your competitor. Insurance companies spend too little time sharing legitimate information. Most insurance professionals have working relationships with counterparts in other companies. Utilize these relationships to find good, competent counsel for specific types of claims.
- **Request legal work product samples.** Review transcripts of depositions and EUOs, as well as motions and briefs prepared by the specific attorney. Do not entrust your professional career and your company's money and reputation to the promise of high-quality legal work. Require evidence to show excellent work product and success history.
- **Get a "real" trial attorney.** Many attorneys, both plaintiff and defense, hold themselves out as trial lawyers until you ask them when they last tried a case before a jury. Ask for and require proof of results.

The vetting process is but one aspect of how legal counsel selection is changing within the insurance industry. Trends are emerging that will define how insurance counsel is selected and utilized for decades to come. These include the rising use of national and regional counsel programs for specific types of claims such as fraud investigations, commercial litigation, bad-faith defense, and medical recovery actions. Complex matters are assigned to law firms or individual lawyers who provide services on a regional or national level. These programs rely upon attorneys to handle large geographic areas through strategic alliances with local counsel and *pro hac vice* admission on a limited basis. When implemented effectively, stringent standards are put in place to control not



only cost efficiency, but also to define clearly the responsibilities of the coordinating counsel in managing the litigation process for the insurance carrier.

Hold Your Counsel Accountable

All legal counsel should be held accountable to any client for whom they have the privilege of representing, 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, insurance companies should be equally cautious in whatever they write about defense counsel, including audits or other evaluations that a company conducts of attorneys or law firms, since those may be subject to discovery and used as evidence of bad faith.

For example, in one case, a very large bad-faith verdict was rendered against an insurance company in which one of the most compelling pieces of evidence was supplied by a plaintiff's attorney. He subpoenaed the audited billing records from the insurance carrier for a law firm and highlighted deductions for "unnecessary" and "duplicative" work that the insurance company refused to pay as evidence that the claim investigation was done in bad faith and the attorney violated the insurance carrier's own standards for a high-quality investigation.

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 not specifically skilled in these areas are not on the cutting edge of the practice of law and may not be your best investment either today or in the future.

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. If we handle matters properly, 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 should improve the manner in which we select those providing legal services. When legal representation is required, the insurer owes both the company and policyholder the highest quality legal representation, while doing so in a cost-efficient environment. This can be done, and we must all commit ourselves to achieve this goal while at the same time realizing

that there are new, innovative, and better ways to conduct our business activities as we move into the future. **CM**

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