

CLIENT ADVISORY

Dealing With Insurer Litigation Guidelines: Best Practices

If the insurance industry was a resident of Wisteria Lane (the fictional setting of ABC's hit series "Desperate Housewives"), one of its dark secrets might be Insurer Litigation Guidelines.

That may be a bit of an exaggeration, but the analogy isn't too far off. The point is this: Many insureds don't know what Insurer Litigation Guidelines are; in fact, many don't even know that they exist. Until, that is, the insured is forced to defend a claim, at which time Insurer Litigation Guidelines become all too familiar.

In a nutshell, Insurer Litigation Guidelines are the rules and procedures that a carrier expects its insured and their defense counsel to follow in order to receive coverage for defense costs. These guidelines can sometimes be very detailed, going so far as to dictate such things as how much can be billed per page for a faxed document. Most Insurer Litigation Guidelines will address these major issues at a minimum:

- Hourly billing rates allowed for various professionals involved in the defense of a matter (e.g. law firm partners, associates and paralegals);
- Allowable expenses and limits on each (e.g. no first-class air travel);
- Staffing issues (e.g. no more than two attorneys at a deposition, no more than two partners working on a particular matter);
- The nature and timing of reports (e.g. carrier wants a status update every 90 days, including projected litigation budget, witnesses to be deposed and overall defense strategy); and
- The specific requirements and timing of bills (e.g. each charge must contain a specific description of the service provided and bills may only be submitted quarterly or at some other interval.)

So where does an insurer get off requiring an insured and its counsel to abide by these guidelines?

Very few, if any, professional lines insurance policies specifically refer to Insurer Litigation Guidelines. Thus, it's not surprising that most insureds aren't aware of their existence. Carriers usually cite as the basis of their authority to impose these guidelines the near-universal policy language that defines "Defense Costs" as solely those amounts that are "reasonable." Thus, carriers contend that only by following their Insurer Litigation Guidelines can an insured incur "reasonable" defense costs which will be covered.

There are, however, differing thoughts on whether, strictly speaking, an insured is legally obligated to adhere to Insurer Litigation Guidelines. Lawyers generally have an ethical obligation to provide the best defense possible for their clients – within practical constraints, of course. Thus, if an Insurer's Litigation Guidelines impose restrictions which an attorney believes prevent him from providing his ethically-required level of legal services, the attorney would, theoretically, be obligated to ignore such limiting guidelines. One California court had this to say on the issue:

Under no circumstances can such guidelines be permitted to impede the attorney's own professional judgment about how best to competently represent the insureds. If the attorney's representation is to be limited in any way that unreasonably interferes with the defense, it is the insured, not the insurer, who should make that decision. Dynamic Concepts, Inc. v. Truck Insurance Exchange, 61 Cal App. 4th 999, 1009 n.9 (1998)

Nonetheless, it's generally a good idea to operate within the framework of an Insurer's Litigation Guidelines and avoid an adversarial relationship with the carrier whose responsibility it is to fund your defense.

One sure way to avoid unpleasant surprises regarding Insurer Litigation Guidelines is to have your

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broker request a copy from your carrier before you bind your policy. Then, sit down with your broker and review the guidelines carefully to determine whether you can live with them. You may also want to include your general counsel, if you have one, or your outside counsel to get a lawyer's perspective on the issues. Your broker should also be able to tell you what, if anything, other clients have found objectionable in those particular guidelines.

It should be emphasized that the insurer, by imposing its own Litigation Guidelines, is merely trying to align its interests with those of the insured in prudently conserving the insurance policy's proceeds so that they'll be available for as long as possible to fund a defense and, if necessary, a settlement or judgment.

"Litigation management guidelines enable the insurer and the insured to work together on effectively managing the defense of a claim and preserving limits for potential indemnity," says Joel Townsend, Senior Vice President and Worldwide Directors & Officers and Financial Institutions Errors & Omissions Claim Manager at Chubb & Son.

"Communication, especially early communication, is the key to an effective partnership," Mr. Townsend says. *"Ideally, insurers and their customers would discuss litigation management guidelines and expectations in the placement process, before a claim is 'in the door,' and defense counsel is retained. At the very least, though, they should have that conversation at the outset of a claim, to address the defense needs and clarify how the guidelines apply in the context of those needs. Resolving these issues at the outset is critical to managing the expectations of all involved, including defense counsel, and reduces the likelihood of friction as the claim progresses."*

Steve Carabases, Vice President of Claims at ACE USA, concurs with Mr. Townsend.

"Insurance company Claims Departments hate surprises," Mr. Carabases says. *"Insureds should work with their carrier early on to create a unified 'same page' approach."*

A short outline of "Best Practices" in dealing with an Insurer's Litigation Guidelines might look like this:

- Familiarize yourself with the Insurer Litigation Guidelines before you bind your coverage or, at the very least, before a claim is filed against you;
- Negotiate an acceptable compromise on any points which you find objectionable. Mr. Townsend says, *"It is important to remember that litigation management guidelines are guidelines. Most insurers are willing to be flexible in the application of their guidelines when warranted by a particular claim;"*
- Communicate with your carrier as soon as possible after a claim is made to ensure that all parties (insured, outside counsel and carrier) are working together harmoniously. **Remember:** The carrier is on your side and wants to help you resolve your claim as quickly and inexpensively as possible, although, at times, it's easy to lose sight of that fact; and
- Make sure to take advantage of your carrier's expertise and knowledge. ACE USA's Mr. Carabases points out that, *"Insurance company Claims Departments may have valuable knowledge relative to alternative fee arrangements, selection of electronic discovery vendors, special firm rates and insights to jurisdictions, judges and mediators. Also, your carrier may have developed a list of comparable case settlement values that can be quite helpful."*

The key to avoiding problems when dealing with Insurer Litigation Guidelines, as with many things in the business world, is maintaining open and honest communications with all interested parties.

So, upon closer inspection, it's probably unfair to look at Insurer Litigation Guidelines as a dark secret on Wisteria Lane. If properly understood and utilized, they can prove to be a significant asset in the defense of a claim.

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