

Navigating your Carrier's Litigation Management Guidelines

What You Don't Know May Cost You

Shareholders have sued your company and your executives. Your first thought: *hire a law firm; mount a defense*. Your second thought: *notify my D&O insurer*.

If this is your first serious Directors & Officers (D&O) claim, this may be your first encounter with litigation management guidelines. You may, therefore, be in for a few surprises. You may discover that your insurance carriers may wish to be intimately involved with your company's defense and settlement. In this *Alert*, we take you through some of the steps that may occur. Do you get to select defense counsel of your choosing? Will you always be fully reimbursed for your defense fees? Being able to anticipate what will be covered can be a distinct advantage when venturing into the unknown.

In fact, you may, in the future, decide to reverse the sequence above, calling your insurer *before* you call your lawyer.

Detailed litigation management guidelines are not unusual in today's Executive Liability world. You can, however, take steps to avoid surprises and maximize your defense costs coverage under your D&O, Employment Practices Liability (EPL), Errors & Omissions (E&O) and Fiduciary Liability insurance policies.

What No One Ever Told You about Litigation Guidelines

Litigation management guidelines are procedures and rules created by insurers addressing the interaction between the insurer and the insured's defense counsel, from the standpoint of what would be covered under an insurance policy. Guidelines are common in Management and Professional Liability insurance as well as General Liability coverage, regardless of whether the insurer has the duty to

defend or the policy is an indemnity policy. While they often address similar matters, guidelines are unique to each carrier and specific to each policy.

Oddly enough, insurance policies typically do not specifically refer to litigation management guidelines. Instead, almost all insurance policies state that they will only pay for "reasonable" defense costs and expenses, and it is this "reasonableness" requirement that insurers rely upon when seeking compliance with their guidelines. As long as the guidelines do not interfere in the zealous defense of a claim and do not prejudice the defense of the covered suit, insurers contend that they can legally impose such guidelines.

Never Assume

Most often, guidelines contain requirements regarding law firm reporting, billing and staffing to which counsel must adhere or risk losing all or part of the insurance coverage for their services. In many cases, guidelines are imposed along with panel counsel requirements (discussed below). While one would expect panel counsel law firms to be familiar with the relevant guidelines, this is not always the case.

Tips for Dealing with Your Insurer and with Your Law Firm

What to Do and When to Do It

Before retaining a law firm, review your policy or consult with your broker to see if your policy has a panel counsel requirement. If so, your first move should be to notify the insurer of the lawsuit, select a counsel from the list, and advise the insurer as to the firm you'd like to retain. The insurer typically must consent to the insured's choice of counsel, though consent is presumed when the counsel is on the panel counsel list.

Panel counsel is a list of pre-approved firms that specialize in certain areas of litigation (e.g., securities claims, employment practices claims, etc.).

You may, however, want to retain a law firm that is not on the panel counsel list. Perhaps you have used an unlisted firm many times before in other matters, and the firm knows your company well. In this case, you must present a written request to your insurer for their approval to use non-panel counsel. This request will be most effective if made immediately with an explanation as to why none of the panel firms are suitable (e.g., conflicts, unfamiliarity, lack of expertise in your business, etc.) and an exposition of the virtues of the proposed firm. Also, you should submit the law firm's résumé, summary of experience and bios of the attorneys proposed for the case, a full listing of the billing rates for all the proposed attorneys, and a statement of counsel's affirmation that they are familiar with the insurer's litigation management guidelines and agree to abide by them. This supporting documentation will expedite the insurer's review of your request and may improve your chances for approval. Sometimes your claims examiner will lack the authority to approve the request and will need to submit it up the ladder to a separate litigation management department.

On occasion it will be difficult or impossible to obtain the insurer's consent in time to serve an answer to a complaint in a lawsuit. We recommend retaining counsel to obtain an extension. If that is impossible, you may have to serve an answer while you negotiate with the insurer. Remember that the insurer often will not cover any expenses that were incurred prior to being notified of the suit or claim and usually will not cover any expenses to which they have not consented. With open communication between you and your insurer, you should be able to eliminate or minimize the amount of potentially uncovered fees.

NOTE: If the insurer agrees to your firm but refuses to pay the firm's full rates, you may elect to pay the difference yourself, bearing in mind that the difference will not count towards your retention or be paid out of your policy's limits.

Billing Guidelines

Almost all guidelines state that defense counsel must consult with the insurer and jointly agree to a litigation plan and budget for the material activities (such as motion practice, depositions and conferences) that counsel contemplates will be necessary in

defending the case. Guidelines also usually specify the timing and nature of counsel's reporting to the insurer. For example, an initial assessment followed by 90-day status updates is a typical provision. Guidelines also require counsel to provide a liability and damages exposure assessment (i.e., strengths and weakness analysis), deposition summaries, pretrial reports and significant court dates.

Expenses and billing are in many ways controlled, as counsel rates and staffing must be pre-approved. Substantial legal research must be pre-approved. Certain other items may be addressed separately, such as overhead/secretarial charges, multiple attorney "file reassignment catch-up," and interoffice conferences. Travel must generally be pre-approved and moderately priced (i.e., no first class travel or accommodations) and meals and entertainment must be fully itemized and supported by receipts.

The Glass Half Full

While these requirements may seem onerous, it is important to remember that such rules are fairly commonplace and that any law firm that is regularly involved with an insurance company will be familiar with these protocols and will usually find a way to accommodate them. More importantly, the procedures are designed to provide the information that is crucial for insurers to adequately evaluate a claim, and, in an accurate and timely fashion, set defense costs and loss reserves. These steps improve insurers' ability to pay claims.

Despite all the burdens of the guidelines, complying with them and requiring your counsel to comply with them can be the best way to maximize your insurance recovery. Furthermore, while they were written to benefit the carriers, they may help save you money on legal fees. You may want to make an insurance carrier's guidelines an important part of your criteria when selecting an insurer.

Any concerns over **attorney-client privilege** may be addressed by holding regular status conference calls among defense counsel, the claims handler, and the insurer's counsel (if the insurer has retained counsel).

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