Litigation has rapidly changed over the past several years. Nearly all potential exposure faced by a company is insurable, including PLI, EPL, CGL, D&O, professional liability, etc. More than ever, it is vital for litigators to understand that a successful relationship with insurers involves providing cost-effective resolution of claims. To that end, insurers refer claims made under a policy to their panel counsel, who go through a vetting process before they are approved for referrals. But, how does a firm become an approve panel counsel? What can you expect when you do become a panel counsel? What does it take to maintain that relationship with the insurer? This panel will discuss the ABCs of becoming an insurance panel counsel.

Program Chair & Moderator:
Peter C. Kim, Senior Associate, Adler Murphy & McQuillen LLP

Speakers:
Linda Lu, Chief Litigation Officer, Nationwide
Kyun Yi, Managing Partner, De Martini & Yi, LLP
Daniel Sakaguchi, Partner, Armstrong Teasdale LLP
AGENDA

9:15-9:25  Introductions and purpose of program

Moderator:  Peter C. Kim, Adler Murphy & McQuillen LLP
Speaker:  Linda Lu, Nationwide
          Kyun Yi, De Martini & Yi, LLP
          Daniel Sakaguchi, Armstrong Teasdale LLP

9:25-9:40  What is a panel counsel, what are its pros and cons and what is the vetting process like?

Perspective from practitioners
Perspective from insurer

9:40-10:00  What does the insurer expect from panel counsel and how does counsel meet the insurer’s requirements?

Budget Reports – UTBMS Codes
Insurer Status Reports

10:00-10:10  Non-traditional ways to obtain insurance defense work – Peppers counsel and insured’s right to choose counsel

Coverage dispute – Defense counsel chosen by insured, but paid by insurer
Accommodation – Defense counsel chosen by insured

10:10-10:20  What are the different types of insurance defense work?

Panel will discuss different areas of insured risks, including, PLI, EPL, CGL, D&O, auto, professional liability, etc.

10:20-10:30  Questions
The ABCs of Insurance Panel Counsel
Insurance Panel Counsel?

- An attorney chosen by an insurance company to represent its policyholders in defending liability claims.
- Attorneys typically have relationships with several insurers.
- Opportunity to represent wide range of clients.
**Pros**
- Stable workload
- Meet several potential clients
- Cross-market

**Cons**
- Insurer sets rates
- Adhere to insurer’s guidelines
- Must be efficient
REQUIREMENTS

**BUDGETS**
- UTBMS codes
- Electronic billing
- Blended rates

**REPORTS**
- Initial analysis
- Adhere to insurer’s guidelines
- Must be efficient
NON-TRADITIONAL ROUTES

CONFLICT COUNSEL
- Coverage dispute
- Conflict of interest
- Insured’s personal counsel paid by insurer

Accommodation
- Prior agreement
- Special knowledge
CONFLICT COUNSEL

When Is There a Conflict?

Maryland Casualty Company v. Peppers, 64 Ill. 2d 187 (Ill. 1976)

• If “the insurer’s interests would be furthered by providing a less than vigorous defense.”

• If “factual issues will be resolved in the underlying suit that would allow insurer-retained counsel to ‘lay the groundwork’ for a later denial of coverage.”

INTRO

PROS & CONS

REQUIREMENTS

NON-TRADITIONAL ROUTES

MATTERS
**CONFLICT COUNSEL**

**Insurer’s Rights**
- Insured entitled to choose attorney
- Attorney’s fees must be reasonable
- Insurer entitled to retain counsel to monitor
No shortage of practice areas

- Employment practices
- Product liability
- Construction
- Toxic torts
- Medical malpractice
- Legal malpractice
Uniform Task-Based Management System

Litigation Code Set
- Overview
- Litigation Code Set
- Litigation Code Set: Sample Budget Format
- Litigation Code Definitions
- Background, Definitions, Principles, and Assumptions
- Participants and Liaisons
- Disclaimer & Copyright

Counseling Code Set, Project Code Set, Bankruptcy Code Set
- Overview
- Counseling Code Set
- Project Code Set
- Bankruptcy Code Set
- Activity Codes
- Expense Codes
- Participants and Liaisons
- Disclaimer & Copyright

Disclaimer & Copyright
The authors hereby grant permission to use the codes and related definitions, in whole or in part, on a non-exclusive, royalty-free basis. In addition, this document may be freely reproduced and distributed in any electronic or hardcopy medium, on a nonexclusive, royalty-free basis, provided that this reproduction and distribution are not for profit, and that this title page is included in its entirety.

This document has not been approved by either the Council of the Section of Litigation, or the ABA House of Delegates, and therefore, does not constitute official Section or ABA policy.
Overview

The Uniform Task-Based Management System is a budgeting and billing system designed to provide clients and law firms with meaningful cost information on legal services. The first major area of legal work addressed by the System is litigation. This document presents the Litigation Code Set and definitions developed by a tripartite effort of the American Bar Association Section of Litigation, the American Corporate Counsel Association, and a group of major corporate clients and law firms coordinated and supported by Price Waterhouse LLP. The System enables lawyers to budget and bill by litigation task, aiding client and counsel in understanding, managing and conducting litigations. It is intended to cover all contested matters, including judicial litigation, binding arbitration and regulatory/administrative proceedings.

The goals of the Litigation Code Set are to:

1. Enable client and counsel to plan and maintain an efficient and effective litigation.
2. Facilitate effective communication of the tasks and costs of litigation and any variations from the expected or the norm.
3. Provide each client and law firm with a means to individually understand and compare the cost of litigation, for greater efficiency and as a foundation for use of alternative billing arrangements.
4. Harmonize the various task-based efforts to ease widespread adoption of a simple, concise and flexible task-based management approach.

The Litigation Code Set is grouped into five basic phases or aspects of a litigation, plus expenses:

- Case Assessment, Development and Administration
- Pre-Trial Pleadings and Motions
- Discovery
- Trial Preparation and Trial
- Appeal

Each phase consists of a number of tasks, such as Written Discovery, Document Production and Depositions. In total, 29 tasks comprise the Litigation Code Set.

All work associated with a task should be included in that category. For example, Depositions (L330) encompasses all time spent on depositions including deposition notices and subpoenas, deposition scheduling and logistics, planning for and preparing to take the depositions and any deposition summaries. The intent is to provide a true picture of the labor cost of each task. (Out-of-pocket expenses, such as witness fees and transcripts, are treated under Expenses.)

For each billing period, the time charges by attorney or other professional are recorded by task. The System also allows for accumulation of the time charges, providing a comparison at a glance of the cost of each phase and each task for the month, for a specified budget period, and cumulatively for the litigation. Expenses can also be reported on a period and cumulative basis on request.

For those desiring, a budget can be prepared for each phase, and within that, each task for the whole case and/or by quarter (or other time period). The monthly bills would then compare that month’s bill and the cumulative total with the budget.
The System also provides a long form for those wishing to capture the task-based work by specific activity. The activity identifies how the work is being performed (e.g., communicating in firm, researching, drafting, and reviewing). For this purpose, any or all of eleven activities can be used with any or all of the tasks of the System.

The intention of the Litigation Code Set is to minimize multiple interpretation and options for coding time. It is recognized that not all litigation work will fit neatly in a particular category. Work can overlap tasks, categories may be imprecise, or time may be expended on the truly unusual. Users should categorize the work to its primary purpose. Definitions are provided for guidance. Where uncertainty envelops substantial or repeating work, it is best for client and counsel to agree in advance on the category to be used.

It is important to understand the considerations that went into the development of consensus around a single standard. Therefore, following the definitions is a discussion of the background of this initiative, and the guiding principles and assumptions that informed the development of the Litigation Code Set.
Litigation Code Set

L100 Case Assessment, Development and Administration
   L110 Fact Investigation/Development
   L120 Analysis/Strategy
   L130 Experts/Consultants
   L140 Document/File Management
   L150 Budgeting
   L160 Settlement/Non-Binding ADR
   L190 Other Case Assessment, Development and Administration

L200 Pre-Trial Pleadings and Motions
   L210 Pleadings
   L220 Preliminary Injunctions/Provisional Remedies
   L230 Court Mandated Conferences
   L240 Dispositive Motions
   L250 Other Written Motions and Submissions
   L260 Class Action Certification and Notice

L300 Discovery
   L310 Written Discovery
   L320 Document Production
   L330 Depositions
   L340 Expert Discovery
   L350 Discovery Motions
   L390 Other Discovery

L400 Trial Preparation and Trial
   L410 Fact Witnesses
   L420 Expert Witnesses
   L430 Written Motions and Submissions
   L440 Other Trial Preparation and Support
   L450 Trial and Hearing Attendance
   L460 Post-Trial Motions and Submissions
   L470 Enforcement

L500 Appeal
   L510 Appellate Motions and Submissions
   L520 Appellate Briefs
   L530 Oral Argument

A100 Activities
   A101 Plan and prepare for
   A102 Research
   A103 Draft/revise
   A104 Review/analyze
   A105 Communicate (in firm)
   A106 Communicate (with client)
A107 Communicate (other outside counsel)
A108 Communicate (other external)
A109 Appear for/attend
A110 Manage data/files
A111 Other

E100 Expenses
E101 Copying
E102 Outside printing
E103 Word processing
E104 Facsimile
E105 Telephone
E106 Online research
E107 Delivery services/messengers
E108 Postage
E109 Local travel
E110 Out-of-town travel
E111 Meals
E112 Court fees
E113 Subpoena fees
E114 Witness fees
E115 Deposition transcripts
E116 Trial transcripts
E117 Trial exhibits
E118 Litigation support vendors
E119 Experts
E120 Private investigators
E121 Arbitrators/mediators
E122 Local counsel
E123 Other professionals
E124 Other
## Sample Budget Format

**Case:** ___________________________________________

**Month From Inception:** ______________________________

**Budget Period:** _____________________________________

**Month into Budget Period:** _____________________________

<table>
<thead>
<tr>
<th>For Budget</th>
<th>Period From Inception</th>
</tr>
</thead>
<tbody>
<tr>
<td>Current Billings</td>
<td>Bills to Budget Date</td>
</tr>
</tbody>
</table>

### L100 Case Assessment, Development and Administration

- L110 Fact Investigation/Development
- L120 Analysis/Strategy
- L130 Experts/Consultants
- L140 Document/File Management
- L150 Budgeting
- L160 Settlement/Non-Binding ADR
- L190 Other Case Assessment, Development and Administration

### L200 Pre-Trial Pleadings and Motions

- L210 Pleadings
- L220 Preliminary Injunctions/Provisional Remedies
- L230 Court Mandated Conferences
- L240 Dispositive Motions
- L250 Other Written Motions and Submissions
- L260 Class Action Certification and Notice

### L300 Discovery

- L310 Written Discovery
- L320 Document Production
- L330 Depositions
- L340 Expert Discovery
- L350 Discovery Motions
- L390 Other Discovery

### L400 Trial Preparation and Trial

- L410 Fact Witnesses
- L420 Expert Witnesses
- L430 Written Motions and Submissions
- L440 Other Trial Preparation and Support
- L450 Trial and Hearing Attendance
- L460 Post-Trial Motions and Submissions
- L470 Enforcement
L500 Appeal
   L510 Appellate Motions and Submissions
   L520 Appellate Briefs
   L530 Oral Argument

E100 Expenses (Itemize)
   TOTAL
Litigation Code Definitions
The Litigation Code Set is intended for use in all adversarial matters including litigation, binding arbitrations, and regulatory/administrative proceedings. The following definitions elaborate on the intended scope of each phase and task and should guide attorneys in coding time.

**L100 Case Assessment, Development and Administration.** Focuses on the case as a whole, the "forest" rather than the "trees".

- **L110 Fact Investigation/Development.** All actions to investigate and understand the facts of a matter. Covers interviews of client personnel and potential witnesses, review of documents to learn the facts of the case (but not for document production, L320), work with an investigator, and all related communications and correspondence.

- **L120 Analysis/Strategy.** The thinking, strategizing, and planning for a case, including discussions, writing, and meetings on case strategy. Also includes initial legal research for case assessment purposes and legal research for developing a basic case strategy. Most legal research will be under the primary task for which the research is conducted, such as research for a summary judgment motion (L240). Once concrete trial preparation begins, use L440 for trial strategy and planning.

- **L130 Experts/Consultants.** Identifying and interviewing experts and consultants (testifying or non-testifying), working with them, and developing expert reports. Does not include preparing for expert depositions (L340) or trial (L420).

- **L140 Document/File Management.** A narrowly defined task that comprises only the processes of creating and populating document and other databases or filing systems. Includes the planning, design, and overall management of this process. Work of outside vendors in building litigation support databases should be an Expense.

- **L150 Budgeting.** Covers developing, negotiating, and revising the budget for a matter.

- **L160 Settlement/Non-Binding ADR.** All activities directed specifically to settlement. Encompasses planning for and participating in settlement discussions, conferences, and hearings and implementing a settlement. Covers pursuing and participating in mediation and other non-binding Alternative Dispute Resolution (ADR) procedures. Also includes pre-litigation demand letters and ensuing discussions.

- **L190 Other Case Assessment, Development and Administration.** Time not attributable to any other overall task. Specific use in a given matter often may be pre-determined jointly by the client and law firm.

**L200 Pre-Trial Pleadings and Motions.** Covers all pleadings and all pretrial motions and procedures other than discovery.

- **L210 Pleadings.** Developing (researching, drafting, editing, filing) and reviewing complaints,
answers, counter-claims and third party complaints. Also embraces motions directed at pleadings such as motions to dismiss, motions to strike, and jurisdictional motions.

**L220 Preliminary Injunctions/Provisional Remedies.** Developing and discussing strategy for these remedies, preparing motions, affidavits and briefs, reviewing opponent's papers, preparing for and attending court hearing, preparing witnesses for the hearing, and effectuating the remedy.

**L230 Court Mandated Conferences.** Preparing for and attending hearings and conferences required by court order or procedural rules (including Rule 16 sessions) other than settlement conferences (L160).

**L240 Dispositive Motions.** Developing and discussing strategy for or opposing motions for judgment on the pleadings and motions for complete or partial summary judgment, preparing papers, reviewing opponent's papers, defensive motions (e.g., motion to strike affidavit testimony, Rule 56(f) motion), and preparing for and attending the hearing.

**L250 Other Written Motions/Submissions.** Developing, responding to, and arguing all motions other than dispositive (L240), pleadings (L210), and discovery (L350), such as motions to consolidate, to bifurcate, to remand, to stay, to compel arbitration, for MDL treatment and for change of venue.

**L260 Class Action Certification and Notice.** Proceedings unique to class action litigation and derivative suits such as class certification and notice.

**L300 Discovery.** Includes all work pertaining to discovery according to court or agency rules.

**L310 Written Discovery.** Developing, responding to, objecting to, and negotiating interrogatories and requests to admit. Includes mandatory meet-and-confer sessions. Also covers mandatory written disclosures as under Rule 26(a).

**L320 Document Production.** Developing, responding to, objecting to, and negotiating document requests, including the mandatory meet-and-confer sessions to resolve objections. Includes identifying documents for production, reviewing documents for privilege, effecting production, and preparing requested privilege lists. (While a general review of documents produced by other parties falls under this task, coding and entering produced documents into a data base is Task L140 and reviewing documents primarily to understand the facts is Task L110.)

**L330 Depositions.** All work concerning depositions, including determining the deponents and the timing and sequence of depositions, preparing deposition notices and subpoenas, communicating with opposing or other party's counsel on scheduling and logistics, planning for and preparing to take the depositions, discussing deposition strategy, preparing witnesses, reviewing documents for deposition preparation, attending depositions, and drafting any deposition summaries.

**L340 Expert Discovery.** Same as L330, but for expert witnesses.

**L350 Discovery Motions.** Developing, responding to, and arguing all motions that arise out of the discovery process. Includes the protective order process.

**L390 Other Discovery.** Less frequently used forms of discovery, such as medical examinations and on-site inspections.
L400 Trial Preparation and Trial. Commences when lawyer and client determine that trial is sufficiently likely and imminent so that the process of actually preparing for trial begins. It continues through the trial and post-trial proceedings in the trial court. Once trial begins, lawyers who appear in court presumptively should bill their court time to L450 Trial and Hearing Attendance. Litigation work outside the courtroom during this phase (e.g., evenings, weekends and the time of other attorneys and support personnel), should continue to be classified using other L400 Tasks.

L410 Fact Witnesses. Preparing for examination and cross-examination of non-expert witnesses.

L420 Expert Witnesses. Preparing for examination and cross-examination of expert witnesses.

L430 Written Motions/Submissions. Developing, responding to and arguing written motions during preparation for trial and trial, such as motions in limine and motions to strike proposed evidence. Also includes developing other written pre-trial and trial filings, such as jury instructions, witness lists, proposed findings of fact and conclusions of law, and trial briefs.

L440 Other Trial Preparation and Support. All other time spent in preparing for and supporting a trial, including developing overall trial strategy, preparing opening and closing arguments, establishing an off-site support office, identifying documents for use at trial, preparing demonstrative materials, etc.

L450 Trial and Hearing Attendance. Appearing at trial, at hearings and at court-mandated conferences, including the pre-trial conferences to prepare for trial. For scheduling conferences that are denominated as "Pre-Trial Conferences", but not directed toward conduct of the trial, use Task L230.

L460 Post-Trial Motions and Submissions. Developing, responding to and arguing all post-verdict matters in the trial court, such as motions for new trial or j.n.o.v., for stay pending appeal, bills of costs, and requests for attorney’s fees.

L470 Enforcement. All work performed in enforcing and collecting judgments and asserting or addressing defenses thereto.

L500 Appeal. Covers all work on appeal or before a reviewing body.

L510 Appellate Motions and Submissions. Developing, responding to and arguing motions and other filings before a reviewing body, such as motions and other filings for stay pending appeal.

L520 Appellate Briefs. Preparing and reviewing appellate briefs.

L530 Oral Argument. Preparing for and arguing an appeal before a reviewing body.
Litigation Code Set

Overview | Litigation Code Set | Sample Budget Format | Definitions | Background, Definitions, Principles, and Assumptions | Participants & Liaisons | Disclaimer & Copyright

Background, Definitions, Principles, and Assumptions

A. Background: The Need

Until the past decade, law firm billing was relatively straightforward. Firms billed their clients in greater or lesser detail, typically providing in-depth narrative descriptions of the tasks and processes underlying their hourly charges. In issuing bills and providing the underlying detail, each firm followed its own approach. In recent years, however, clients have become more focused in requesting additional billing information of their outside law firms, or asking that billing data be presented in specific formats. In some instances companies have wanted to analyze their costs along various dimensions to provide benchmarks for the more systematic evaluation of legal costs. In others, there has been a desire to develop a database of costs on discrete legal activities. Most of these efforts have been part of an overriding effort to manage corporate legal expenses more effectively by considering inside/outside mix, comparative performance by attorneys and firms of discrete activities, and other aspects of cost.

As a consequence of these trends, many law firms' administrative organizations are faced with the challenge of complying with a broad range of specialized billing requirements - each unique to one client. This situation already poses a substantial burden to a number of firms. As law departments expand their use of "task-based billing" and broaden their efforts to manage outside legal costs more effectively, firms face the prospect of overwhelming complexity as they strive to comply with the various requests of dozens of clients. Ultimately, law departments will be burdened by different law firm coding structures and billing systems.

Aside from "need" narrowly defined, there are significant benefits to both law firms and law departments in terms of administrative simplicity and cost reduction to be gained from standardization. In addition, the development of standard billing categories will permit introduction of billing based on Electronic Data Interchange (EDI). This technology is already widely employed in other areas of commercial activity. By linking the suppliers and consumers of legal services, EDI offers the prospect of "paperless billing" and a new level of administrative and cost efficiency.

The need, therefore, is for a uniform set of billing and task categories - detailed describers of legal work that would be acceptable to both law departments and firms, and that could prevail across American industry, financial services, and commerce. Analogous to the role of standards in other industries and functions, standard billing categories would make it possible for law firms to standardize their billing systems and for corporate law departments to work with their law firms in a far more efficient manner than prevails today.

B. Definitions

Following is a glossary of terms that will be helpful in understanding the Litigation Code Set.

1. **Coding set/coding scheme.** A list of alphanumeric codes and corresponding terms and definitions that describe the universe of legal work in a given area.

2. **Field.** A specific, defined category of information that is entered into an information management system or database.

3. **Area of law.** A label describing a discrete area of legal practice or specialization. Examples include real estate, intellectual property, and environmental. The group envisions that each department and firm would define these as appropriate.
4. **Matter type.** This designation describes or categorizes a specific legal services project for purposes of analysis and reporting. In most cases, matter types are more detailed than areas of law though for some specialized areas of law there may not be a more detailed listing of matter types. For example, a litigation case might be categorized as an antitrust, environmental, international trade, etc. matter.

5. **Phase.** This is the highest level category in the coding hierarchy. For litigation, examples are Pre-Trial Pleadings and Motions, and Discovery. Phases represent collections of tasks and activities that occur largely in a sequence during the course of a case or matter. Typically, timekeepers will enter time at the task level, but phase-level time entry will also be permitted. This might be useful in smaller cases in which task-level detail is not needed.

6. **Task.** This represents more detail under the phase level in the coding hierarchy. All tasks roll up to a phase. Tasks are intended to capture tangible work product produced or business results achieved. Tasks (or phases) are one of two fields to be recorded by timekeepers.

7. **Activity.** This is a code intended to describe how work is accomplished (e.g., communicating, drafting). Activities represent the second field to be recorded (optionally) by timekeepers.

C. **Principles**

The following list of guiding principles has informed the development of the Litigation Code Set. These principles emerged throughout a number of meetings held during 1994 and early 1995 and discussions of the various options under consideration.

1. **Support of business objectives and processes.** A primary, recurring consideration has been to focus on the purposes and uses of standardized coding. A number of business objectives and administrative processes that should be supported by the coding scheme were identified. These include planning and budgeting, time entry, status monitoring and reporting, bill preparation, electronic transmission of bills and payments, bill review and analysis, development of alternative financial arrangements, and practice and profitability analysis. Consistently, the group returned to the question: How are we going to use the data to be tracked?

2. **Simplicity.** The Litigation Code Set must be simple and straightforward to ensure widespread use. This includes limiting the total number of codes to a manageable level. The team consistently returned to this fundamental principle as it explored a wide range of alternatives, which frequently suggested more detailed coding schemes than we developed.

3. **Ease of use.** In practice, the Litigation Code Set should be easy for attorneys and other staff to use. The codes should be intuitive and capture an attorney’s logical work processes.

4. **Suitability for all size offices.** Currently-available technology will be an important asset in the efficient implementation of the coding scheme. Still, the group has assumed that not all law offices will have advanced technology solutions at their disposal to facilitate the capture and analysis of time. For the coding scheme to be used widely, law offices and attorneys must be able to use the codes in a manual fashion.

5. **Avoidance of multiple interpretation.** A primary concern with some existing code sets is the multitude of ways in which a single time entry can be coded, depending on individual interpretation. The codes should minimize opportunity for multiple interpretation.

6. **Flexibility to track both tasks and activities.** Some team members value the ability to analyze work according to categories of activity (e.g., communication, drafting) in addition to task (e.g., deposition). Others emphasize the importance of tracking and analyzing the level of effort expended to complete tangible work product, segments of a case, or defined business objectives. For this group, simply
using task codes is sufficient. As an option for those seeking activity detail, the System permits firms and departments to code activities separately from tasks.

D. Assumptions
Following is a list of assumptions that guided the development of the Litigation Code Set. These assumptions were drawn from discussions during initiative meetings.

1. **The fundamental coding structure has two fields: tasks (embedded within phases) and activities.** Whereas task codes track time associated with tangible work product accomplished (e.g., motion, deposition), activity codes describe how the work was performed (e.g., communicating, drafting). Not every law office will wish to use activity codes, but the coding scheme is flexible to accommodate those who value activity analysis. The team discussed the desirability of coding at a lower level below task. In the interest of simplicity, though, this additional detail may be captured using narrative rather than adding more levels. This experience was borne out by those team members with direct experience coding time.

2. **Narrative time entries will be retained.** The Litigation Code Set does not envision the elimination of narrative descriptions of time entries. However, the need for this level of detail may be educed in smaller, less complex cases with successful adoption and implementation of the coding scheme.

3. **For purposes of tracking and analysis, a matter type code distinguishes among various types of matters.** A matter type designation can be used to distinguish among various types of litigation and to identify alternative dispute resolution matters.

4. **The Litigation Code Set focuses on meeting the requirements of most matters.** The Litigation Code Set has been designed to be suitable for use with most matters. However, there may exist cases of such size, complexity, or other unique characteristics that the codes are not sufficiently detailed. The objective was to develop a code set for the vast majority of cases and to provide a framework in which more detailed codes can be developed for extraordinary cases.
Litigation Code Set

Disclaimer & Copyright
This document contains the Litigation Code Set and related definitions developed by a tripartite initiative of the American Bar Association Section of Litigation, the American Corporate Counsel Association, and a sponsoring group of major corporate law departments and law firms coordinated and supported by Price Waterhouse LLP.

The authors hereby grant permission to use the codes and related definitions, in whole or in part, on a non-exclusive, royalty-free basis. In addition, this document may be freely reproduced and distributed in any electronic or hardcopy medium, on a nonexclusive, royalty-free basis, provided that this reproduction and distribution are not for profit, and that this title page is included in its entirety.

May 1995

A copy of this document can be received by calling the ABA Member Services Department at (312) 988-5522 and asking for Product Code #: 5310129 or using the online order form. A $10.00 fee ($12.50 for non-members of ABA) will be charged to cover copying, shipping, postage and handling costs.

This document has not been approved by either the Council of the Section of Litigation, or the ABA House of Delegates, and therefore, does not constitute official Section or ABA policy.

American Bar Association Chicago, IL 60611
ISBN #: 157073-203-5
SES Legal Education Blog

Wednesday, February 26, 2014

The Ten Commandments of Practicing Insurance Defense Law

by Jennifer Pickett, Esq.

I'm sure you have heard the phrase, "it's so easy, I can do it in my sleep." That may apply to some things, but not to the practice of insurance defense law.

Although not an exhaustive list, below are my top ten rules or commandments for the civil litigation attorney.

1. Remember Who Is #1

When retained by an insurance company to represent an insured, it may seem like you have two clients; however, the insured's interests always come first. Also keep in mind that although you typically report to an insurance company about what is going on in the case, don't forget to keep the insured in the loop as well. That will hopefully ensure a cooperative defendant throughout the pendency of the lawsuit and will
also give your #1 client peace of mind that you are taking care of him/her.

Remember, we do this every day; they do not.

2. Remember your Reservation of Rights Responsibilities

There is a heightened duty on the part of an insurance defense attorney when a Reservation of Rights letter has been issued. A good practice is to copy the insured on all letters, reports, correspondence, etc. that is generated throughout the pendency of the lawsuit.

It is also important to explain to the insured the right to retain independent, personal counsel.

3. Do Unto Others

We all make mistakes, and holding another attorney's feet to the fire will garner you no favor in the future. Trust me, if you have not already, you will make a mistake, more likely, many mistakes, over the course of your practice of law.

If you have not been willing to work with the attorney on the other side in the past, he is probably not going to let you get away this time. We have enough to worry about in our daily practice, don't make it harder on yourself by refusing to continue a hearing or extend a deadline. As long as the request is within reason, my advice is to err on the side of cooperation.

4. Obey Deadlines

Along the same vein, do everything you can not to miss deadlines. Whether it be a hearing date or a report that is due, mark it on your calendar with good reminders. No one is perfect, and we have all missed a deadline or two, but it is better to be safe than sorry.

5. Obey CMS

By now, everyone should know about the reporting and reimbursement requirements applicable to Medicare beneficiaries. Because the reporting law is relatively new, there continue to be changes made, I suppose, in an attempt to simplify the process.

Some things to be on the lookout for: there is in the works some clarification regarding future medicals that should be published in 2014; due to federal budgetary constraints, approximately 50% of CMS employees have been furloughed, which will draw out the process even longer; and the next step may be to include Medicaid in the reporting process.

6. Work Your Case
It is easy to get into the daily grind of answering complaints, issuing discovery, taking depositions, etc. Sometimes, however, it is the minor details that are the most important. Don't forget to take the time to meet with witnesses, interview police officers, photograph the scene. Just a little extra work could end up saving a lot of time and money down the road.

In handling your files, it is also important to be vigilant in objecting to discovery and deposition requests. Follow up on outstanding subpoenas and updated medical records. Perform background checks on all parties and witnesses. Also, check to see whether there is a standing pretrial order in the county where your case is pending. Not every judge enters a case-specific pretrial order, and you don't want to miss pre-trial deadlines.

7. Work Product

Don't cheat on your work product. Take pride in everything you do, from researching an issue, to writing a report, to deposing a plaintiff, to interviewing a witness, to ultimately trying a case. Work can become monotonous, but give every file, no matter how seemingly insignificant, your best.

8. Treat Each Case as its Own

It can be tempting to borrow from another case and move on. Why reinvent the wheel, right? That's not always the best policy. Some things may be standard, e.g., a discovery motion; however, remember that the law is always changing, and what works for one case may not work for the next.

Also, when "borrowing" from a prior case, read and re-read what you have written, because the most obvious sign of boilerplate language is when someone else's name is accidentally left in the document. With critical documents, like an appellate brief, I always have someone else read it after me because I find I get too close to my writing and can't always see what may be blatantly obvious to another set of eyes.


From my experience, it is unusual for the majority of insurance companies to be in the same city, much less state, as the attorneys they have retained to represent their insureds. That makes reporting a very necessary, and sometimes very hated, part of the practice of insurance defense law.

Again, we may think we have everything under control, but there is usually an adjustor on the other end who needs to be reassured. When possible, communicate in some form or fashion every 30 days. Pay close attention to trial settings, and prepare your pre-trial report well in advance so that the insurer has the information he needs within a reasonable time to do something with it.

10. Liens
Always check for medical liens, and especially hospital liens. Once you have the lien, do not assume that it is correct. Very often, insurers will unknowingly lump in charges that are unrelated. Identifying those and bringing them to the attention of plaintiff's counsel can shave off a substantial amount from the total damages. Believe me, it happens more often than you might think.

Again, this list is not intended to be all-encompassing, but it does highlight some of the more important day-to-day considerations when practicing insurance defense law. Hopefully, it will, however, inspire you to be a better attorney. We need all the help we can get!

**About the Author:**

**Jennifer W. Pickett**, of Smith, Spires & Peddy, P.C. in Birmingham, AL, practices in general personal injury defense, premises liability, workers' compensation, and products liability litigation. Ms. Pickett is a member of the Birmingham and the Alabama Bar Associations and serves on the Bar Directory Committee for the Alabama State Bar. She also writes for the Birmingham Bar Bulletin.

Ms. Pickett will be presenting at the [Practical Guide to Workers' Compensation seminar in Birmingham](http://www.sterlingeducation.com).
An Insurance Defense Attorney's Dual Client Problem

By Deanna S. Brocker

What has been called the "eternal triangle" in insurance defense practice is more aptly termed the "eternal conundrum." Under certain circumstances, an insurer is obligated under a liability insurance policy to designate and compensate an attorney for defense of its insured. Unless otherwise specified by contract or agreement, a North Carolina insurance defense attorney has two clients, the insured and the insurer. To avoid any favoritism possibly engendered by the insurer's long term relationship with the attorney or by the insurer paying the attorney's bills, the insured is deemed the "primary" client, whose "best interest must be served at all times." RPC 92

What does "primary" client mean in terms of a lawyer's conduct? It appears the attorney at least owes the insured a heightened duty of communication and loyalty. See RPCs 92 and 118. The crux of dual client representation, however, is uncompromising allegiance to two clients. That is, absent a waiver, the attorney may advocate and pursue only courses of action that make both clients better off. Therefore, despite the insured's "primary" designation, where the interests of the insured and insurer diverge, the attorney may not subordinate the interests of the insurer in favor of the insured.

Conflicts of interest in this dual client relationship can place an attorney in a particularly thorny situation. If the attorney's representation of one client is either directly adverse to or will be materially limited by responsibilities to another client, there is a conflict under Rule 5.1. The question then becomes whether the clients can consent to representation despite the conflict, and if not, whether the attorney must withdraw from representation of one or both clients. This article is the first of several treating conflicts of interest in insurance defense practice. Its focus is appropriate attorney conduct when the insured reveals confidential information which would defeat his or her coverage under a standard liability policy. Consider the following hypothetical:

Suppose an insured is sued for damages based upon a negligence theory. The complaint only alleges occurrences covered by the insured's policy. The insurer appoints defense counsel, in accordance with the policy, to defend in the name of the insured. During the course of the attorney-client relationship, the insured reveals that he and the claimant set up the whole incident to obtain insurance money under the policy. What should the attorney do?

In the first instance, the attorney is bound by Rule 4 of the Rules of Professional Conduct not to disclose confidential communications of the insured. 1 In addition, Rule 7.2 prohibits an attorney from assisting the client in conduct the attorney knows to be fraudulent. Most authorities agree that representation of the insured under these circumstances would violate an attorney's duty not to assist client fraud. In light of these prohibitions, the attorney must counsel the insured to rectify the fraud, and upon the insured's refusal, withdraw from representation pursuant to Rule 2.8.

Other authorities suggest that continued representation of the insurer, where the attorney has knowledge of the insured's fraud, violates Rule 7.2 inasmuch as the attorney is acquiescing in such conduct. Even if we assume that representation of the insurer does not violate any ethical duty not to assist client fraud, the attorney is still faced with a conflict of interest under Rule 5.1. The attorney's duty of confidentiality owed to the insured conflicts with the insurer's interest in limiting its expenditures to those covered by the policy. Furthermore, the insurer cannot consent to representation because the confidentiality rules preclude the attorney from fully disclosing the reason for withdrawal. See Rule 5.1.

Many practitioners of insurance defense maintain that no conflict exists because the insurer has an absolute obligation to defend the insured so long as the complaint alleges facts which, if proven at trial, would be covered by the policy, whether or not such claims are baseless or fraudulent. Although recent case law indicates that under certain liability policies, the insurer's duty to defend is governed by the four corners of the claimant's complaint, 2 North Carolina has not acknowledged a similar duty to defend on the part of insurance defense attorneys when faced with a conflict of interest or client fraud. See Rules 5.1 and 7.2, CPR 255 and RPC 103. Moreover, the insurer's contractual duty to defend irrespective of the merits of the complaint, does not eliminate the conflict for an attorney with knowledge of collusion between the insured and the claimant because the attorney cannot act in the insurer's best interest. If the attorney could divulge the insured's fraudulent behavior, the insurer could choose either to defend under reservation of right, thereby preserving its right to contest coverage later, or to decline to defend, relying upon proof of fraud or collusion to absolve it from any subsequent breach of contract or bad faith claim by the insured. Because the attorney's duty of confidentiality to the insured materially hinders representation of the
insurer, the attorney must also advise the insurer to seek separate counsel. The theory is, where a fundamental conflict of interest exists, both the insured and insurer would be better off with separate counsel whose loyalty is not divided.

The preceding section discusses an insurance defense attorney’s professional duties under our Rules of Professional Conduct. Compliance with the letter and spirit of the rules, however, does not alleviate problems the rules were intended to address. First, some authorities point out that withdrawal from representation of the insured in the above situation, merely waives a red flag and is tantamount to revealing the essence, if not the substance, of the insured’s confidential communications. While it is true that even a purely non-communicative withdrawal is a signal to a savvy insurer to inquire about the circumstances of withdrawal, the rules nonetheless permit withdrawal under the above circumstances so long as the attorney reveals no confidential communications.

Second, the practical result of the attorney’s withdrawal from representation of the insured and the insurer is that another attorney may be faced with the same dilemma or conflict situation. In all likelihood, however, no conflict will exist because, upon recommendation of the withdrawing attorney, the insured will retain separate, independent counsel for his defense. 3 Unless the insurer, by reason of attorney withdrawal, received a heads up as to a potential coverage dispute, however, it may be no better off than it was in the first instance.

Third, the confidentiality rules may actually facilitate client fraud. Having revealed the fraud to the first attorney, who has withdrawn, the insured now knows not to reveal the fraud to a second attorney, who will zealously represent the insured’s interests in defense of the claim.

Unfortunately, these inconsistencies plague insurance defense practitioners who strive to uphold the ethical requirements placed upon them. What’s more, the recently published Proposed Revised Rules of Professional Conduct do not appear to free attorneys from the ethical quagmire rooted in the "eternal triangle" of insurance defense. For discussions of other conflicts of interest dilemmas in insurance defense practice, look for the Ethics Page in subsequent issues of the State Bar Journal.

Endnotes

1. Although RPC 153 appears to hold that where clients consent to joint representation by an attorney, communications are ordinarily not confidential as impliedly authorized under Rule 4, insurance defense cases have been universally distinguished because the joint representation is not undertaken by mutual consent, but by contractual obligation.


3. Depending upon the circumstances of withdrawal and the terms of the policy, the insurer may be obligated to pay for the insured’s counsel.
INSURANCE DEFENSE LAWYERS AREN'T DEVILS

Dean R. Brett
I’m tired of hearing insurance defense lawyers described as devils: unethical, uncaring, evil, dedicated to destruction of valid claims and to refusing appropriate compensation for real injuries. I’ve been representing claimants in personal injury actions for more than forty years, and people who see insurance defense lawyers as devils just don’t understand the pressures they are under in the insurance claims process.

Unlike plaintiff attorneys, insurance defense attorneys don’t get to choose their clients. Our firm, which represents only plaintiffs, agrees to represent about one of every ten potential clients. These are cases of honest people who are seriously injured through no fault of their own. They are cases we can believe in. They are claimants we like. We get immense psychological rewards for helping out people who really need our help, putting their lives back together after an injury. Insurance defense lawyers don’t have that luxury. Most of them either work for an insurance company or for a law firm that is economically dependent on an insurance company. They don’t get to choose which people they represent.

Defense lawyers can get some joy, if you want to call it joy, from squashing the invalid claims of people who’ve convinced an inexperienced personal injury lawyer to take their case. However, most of those cases are handled by young insurance defense lawyers. Experienced insurance defense lawyers generally get stuck with cases involving significant damages where there is either clear liability or at least a well-founded liability dispute. They are stuck in a perpetual game of prevent defense, where success is preventing a runaway verdict or a settlement for more than the case is worth. When the verdict is in or the case is settled, the plaintiff lawyer, who is generally working on a contingency fee, has a payday and celebrates the victory with his vindicated client. The insurance defense lawyer just opens another file -- Sisyphus constantly re-rolling the rock up the hill.

And insurance defense lawyers aren’t all that well paid. They’re wage slaves. They work with an accountant from the insurance company constantly looking over their shoulder, arguing they should be charging less per hour and putting fewer hours into each case. When you’re billing by the hour, there is only so much income you can generate, because there are only so many hours in the day. It’s relatively easy for an insurance defense lawyer to earn an annual income in the low six digits. It’s very difficult to make much more unless he owns an insurance defense firm and hires lots of young associates to work for him, paying each of them slightly less than they are worth and billing the insurance company for slightly more than they are worth, collecting the difference in a massive pyramid. Although many young, inexperienced or part time plaintiffs’ lawyers make less than insurance defense counsel, most experienced plaintiffs lawyers make more -- and insurance defense lawyers tend to resent it.

So if insurance defense lawyers are over worked, under paid and stuck representing people they don’t like and wouldn’t ordinarily choose -- why do they do it? One answer is that not everybody gets their first choice. Many insurance defense lawyers, after gaining experience, change sides and become plaintiffs’ lawyers; others can’t make that switch. They don’t have the entrepreneurial skill to build a personal injury practice, which requires the lawyer at the end of every successful case to find a new client. Finding a new client means meeting people, connecting with them on a human level, instilling a level of trust and confidence, and winning their loyalty through the long process of building a personal injury claim. Many of the people who do insurance defense work lack either the ability or the willingness to make those personal connections, the foundation for a thriving plaintiffs’ practice.

What insurance defense lawyers get instead is security. They work in a firm they don’t have to
manage, and they’re given a constant supply of negligent clients to defend. They are not evil; they’re just stuck in a system that gives them security in exchange for avoiding the stresses, particularly those stresses dealing with obtaining new clients that plaintiff lawyers have to face. Many of them accept their lot, willingly and happily, focusing their lives outside the law, on their families and friends.

Over time, the best of them understand the system they are in, and accept their role by working in a symbiotic relationship with plaintiffs’ lawyers to fairly resolve the claims they’ve been assigned to defend. In short, they are not devils; they have just opted to play defense in an adversarial process that forces injured parties to hire plaintiff lawyers to obtain their goal: prompt, fair compensation for injuries they have suffered at the hands of a negligent stranger.

How then should a plaintiff lawyer approach an insurance defense lawyer?

I usually begin by trying to distinguish myself from plaintiff’s lawyers who see insurance defense lawyers as evil. I try to avoid fights about the tort system, the relative merits of plaintiff’s claims in general, or which side of that fight lawyers should take. I want the lawyer to know that I am cooperative, easy to work with, and a problem solver, that together we will resolve the claim in a reasonable way, taking into account the horrible injuries my client has suffered. I explain, in a jocular way, “It is not my job to make your life miserable -- I’m just here for the money!” I don’t want this to be a fight to determine who is the best lawyer, who has the biggest spleen, or who is the most dominant. I accept the fact that the insurance defense lawyer is just doing his job, and encourage him to do that job well by providing him all the information he needs to fully evaluate the claim and make a recommendation to his superior based on the serious risk the insurer faces at trial. I want to do everything I can to make the insurance defense lawyer look good to his superiors when he settles the case for a considerable sum, more than most similar cases, but less than could have happened had the case proceeded to trial based on the facts I have so helpfully provided.

If, as I argue, the insurance defense lawyer is underpaid, overworked, stuck defending random claims he does not choose and in whose merits he has no personal stake, and if he is focused on maintaining his secure position within the insurance claims hierarchy, why should I pick a personal fight? Why not instead defuse the animosity that sometimes occurs between the plaintiff and defense bar, and instead concentrate on presenting the facts that will distinguish my client’s valid claim from the others on his desk, helping him avoid the embarrassment that would occur should he risk proceeding to trial on such a well-documented, compelling claim against a honest straightforward lawyer with an excellent track record at trial.

Who is going to get the best settlement from an insurance defense lawyer? The lawyer who treats him as an evil, uncaring devil trying to deny every plaintiff the recovery he deserves, or the lawyer who accepts him as a hard-working, fair lawyer trying to hold back payment to invalid claims while resolving valid claims (like my client’s) in a reasonable way?

Source: Brett Murphy Legal News (http://www.washingtoninjury.com/content/insurance-defense-lawyers-are%E2%80%99t-devils-attorney-dean-brett)

View Profile: Dean R. Brett (/lawyers/dean-r-brett/158376/)