Claims Jeopardy: Your Issues (in the Form of a Question)

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I. Introduction and Overview

Claims Handling for $100: Answer: Candid answers to the questions you always wanted to ask a claims professional. Question: What will you get if you attend DRI's PL Claims Jeopardy?

One of the most challenging aspects of the insurance defense business is navigation of the tripartite relationship between insurer, insured and defense counsel. The relationship arises because the insureds, through insurance policy contracts, cede to the liability insurer the authority and responsibility of managing litigation against them.

That management includes hiring and overseeing lawyers. But, the question then arises to whom the lawyer's loyalty is owed and what that means to the third person in the relationship. See, Ronald E. Mallen, *Looking to the Millennium: Will the Tripartite Relationship Survive?* 66 DEFENSE COUNSEL J. 481 (October 1999); Charles Silver and Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L. J. 255 (1995).

Successfully navigating these questions and these issues can be feel like winning the Dailey Double. But, defense attorneys often feel they are navigating these issues on their own because their loyalty to their clients preclude asking certain questions. That barrier does not exist in this crowd-sourced presentation. We frankly address some of the most awkward and sensitive topics.

II. Coverage Issues

> *Coverage for $200*: Answer: The most fundamental decision the claims handler will make in a case because all other decisions in the case depend on it. Question: What is the insurance coverage under the policy for the claim?

The insurance carrier is responsible to the insured only for claims that are covered by the insurance policy. *Jepsen, Murphy & Assocs., LLC v. Travelers Cas. Ins. Co. of Am.*, 2014 Colo. Dist. LEXIS 2295 (D. Co. 2014). The lawyer's duty, on the other hand, is somewhat broader. Lawyers cannot, because of their fiduciary duties to their clients, take action that would imperil the insured's coverage. The implications for failing to recognize this can lead to malpractice claims or discipline action for the attorney and bad faith claims for the insurance company. *See* ABA Model Rules of Professional Conduct ("MRPC") 1.6.

So, for example, a lawyer cannot disclose confidential information showing that the insured's actions were intentional (and not covered) instead of negligent (and covered). *Parsons v. Continental Nat'l Am. Group*, 550 P.2d 94, 113 Ariz. 223 (1976). Nor can the lawyer encourage the insured to adopt "no-settlement" position which improperly exposed insured to serious risk of personal liability *Betts v. Allstate Ins. Co*., 154 Cal. App. 3d 688, 201 Cal. Rptr. 528 (1984). It is also improper for defense counsel to take a deposition to establish lack of cooperation by the insured which might defeat coverage. *Fid. & Cas. Co. v. McConnaughy*, 179 A.2d 117, 228 Md. 1 (1962). Coverage issues can creep into any case, but there are some cases where the issues seem thornier. *See, San Diego Fed. Credit Union v. Cumis Ins. Soc'y*, 162 Cal. App. 3d 358, 162 Cal. App. 3d 358 (1984).

Partially Covered Cases. In these cases, some claims are covered and some are not. See, 2014 Emerging Issues 7183, *Only Partially Covered: Allocation Under Management Liability Policies*, May 12, 2014. Or the carrier is required to provide a defense, but not necessarily

indemnity. *Bovis Lend Lease LMB Inc. v. Garito Contracting, Inc.*, 65 A.D.3d 872, 885 N.Y.S.2d 59 (N.Y. App. Div. 1st Dep't 2009); *City of Jasper, Ind. v. Employers Ins. of Wausau*, 987 F.2d 453 (7th Cir. 1993); *Mount Vernon Fire Ins. Co. v. Creative Hous. Ltd.*, 797 F. Supp. 176 (E.D.N.Y. 1992). In these cases, both lawyers and carriers must consider carefully:

- Whether facts obtained in discovery that could impact coverage should be reported to the carrier, especially when the disclosure could result in limited or no coverage of the claim.
- Whether or not the facts can be reported under the Rules of Professional Conduct.
- Whether or not defense counsel can obtain consent from the insured.
- Whether special interrogatories can or should be submitted to the jury. If the carrier and the insured disagree on the answer to this, does that disqualify defense counsel from trying the case?

Probably the most important thing for all three of the parties in the tripartite relationship in these circumstances is to document for the insured in writing the scope and limits of the representation, together with the insured's right to retain separate counsel (perhaps at the carrier's expense). See, e.g., Ga. R. Prof. Resp. 1.4, 1.7; 1 New Appleman Insurance Bad Faith Litigation § 3.05 (2d ed.) Liability Coverages: Duty To Defend; *Insured's Rights To Independent Counsel*.

Excess Exposure. Most carriers expect and require case evaluations from their defense counsel according to claims handling guidelines. While evaluating a case is always a challenge, it is all the more so when there is a possibility that the insured's personal assets can be exposed by excess verdict. This can happen at the outset if the plaintiff's demand meets or exceeds the available limit of insurance coverage. *New Eng. Ins. Co v. Healthcare Underwriters Mut. Ins.*

Co., 295 F.3d 232 (2d Cir. 2002); *Pinto v. Allstate Ins. Co*., 221 F.3d 394 (2d Cir. 2000); *Pavia v. State Farm Mut. Auto. Ins. Co*., 82 N.Y.2d 445 (1993); *State Farm Mut. Auto. Ins. v. Floyd*, 235 Va. 136, 141 (1988); *Commercial Union Ins. Co. v. Liberty Mut. Ins. Co*., 426 Mich. 127, 136 (1986); *Centennial Ins. Co. v. Liberty Mut. Ins. Co.*, 62 Ohio St. 2d 221, 224, 16 Ohio Op. 3d 251 (1980); *Maroney v. Allstate Ins. Co*., 12 Wis. 2d 197, 201 (Sup. Ct. 1961); *Zumwalt v. Utilities Ins. Co.*, 360 Mo. 362, 370 (1950); *Boling v. New Amsterdam Cas. Co.*, 46 P.2d 916, 918–19 (Okl. 1935)).

Diminishing Limits or Expenses within Limits Policies. This can also be problematic when defense costs erode the limit of liability. See, *Illinois Union Insurance Co. v. North County Ob-Gyn Medical Group, Inc.*, 2010 U.S. Dist. LEXIS 50095, at *6 (S.D. Cal. May 18, 2010) (policy language attempting to reduce coverage limits by defense expenses could not be enforced because the insured could not have known that its policy limits would be eroded by defense costs); *National Fire & Marine Insurance Co. v. Lindemann*, 2018 U.S. Dist. LEXIS 176993, 2018 WL 4986878 (insurer estopped from asserting a "declining balance" provision in the policy at issue because the provision had not been disclosed during the course of litigation but only on the eve of trial).

The carrier and the lawyer always have to be mindful of the need to protect the insured, and the impact of the costs on the protection offered to the insured. They also need to consider how coverage issues can help move a case to resolution because coverage issues can drive settlement. Honest, timely and through evaluation is key to avoiding insolvable problems in these areas.

III. Communication Issues

Claims Handling $300: Answer: The relationship among the claims handler, attorney, and insured. Question: What can make a hard case easy and an easy case hard?

Each and every client the attorney has is the attorney's most important client and every case the client assigns to the attorney is important. Uninformed clients—whether carrier or insured--don't feel that is true and are unhappy clients. Attorneys must return clients' calls and e-mail inquiries promptly, and keep a record that they have done so. Attorneys should send routine reports, even if they are not asked to (and keep a copy in their files). See, Rule 1.4; *Brito v. Gomez Law Group, LLC*, 289 Ga. App. 625, 629 (2008). Being able to refer back to reports helps everyone stay on the same page during the course of the litigation.

And being able to refer back to good, clear, agreed upon engagement letters help everyone move in concert through the case. For example, if a lawyer is sued and later an ethics complaint is made, the ethics complaint should covered by a separate engagement, even if the defense to the grievance is provided under the same policy as the malpractice claim. Counsel should be mindful of the limitations in the original engagement and push back on attempts to expand the written engagement without a writing.

Changes in Valuation. The reporting should include regular and current evaluations and recommendations. Some attorneys are reluctant to evaluate a case until all the facts are known and discovery is completed. However, this makes handling most cases more difficult for both the insured and the carrier. Even though a lawyer may not be able to provide a dollar-certain verdict value, he or she should be able to let the carrier and the insured know on the first evaluation if the case is likely to be a $25,000 case, a $250,000 case, a $2,500,000 case, or a $25,000,000 case. That information often affects reporting obligations and reserving needs for the claims professional, so it should be shared as soon as possible. This information also is important to insureds because it enables them to make reasoned decisions about how to protect their own

interests. Whether they want or need independent counsel may vary depending on whether the exposure is in the hundreds or thousands or millions of dollars.

For their part, claims professionals generally do and should understand that cases evolve as the facts develop. It is permissible for defense counsel, and the carrier, to hone and even change valuation opinions as the case progresses. *KBS, Inc. v. Great Am. Ins. Co. of N.Y.*, 2006 U.S. Dist. LEXIS 88520, at *20 (E.D. Va. Nov. 7, 2006); *Morrell Constr., Inc. v. Home Ins. Co.*, 920 F.2d 576, 580 (9th Cir. 1990); *Ramsey v. Interstate Insurers, Inc.*, 365 S.E.2d 172, 175 (N.C. Ct. App.), rev. denied, 370 S.E.2d 248 (N.C. 1988). What is not permissible or acceptable is for these valuations not to be shared in timely fashion with the carrier **and** the insured. Defending a case aggressively only to be told on the courthouse steps that it should be settled is a problem for everyone in the case. *See, e.g., Brown v. Liberty Mut. Fire Ins. Co.*, 2006 U.S. App. LEXIS 3173 (5th Cir. 2006); *McCulloch v. Hartford Life & Acc. Ins. Co.*, 363 F. Supp. 2d 169, 178 (D. Conn. 2005); *Walbrook Ins. Co. v. Liberty Mut. Ins. Co.*, 5 Cal. App. 4th 1445, 1454 (1992); *Peckham v. Continental Cas. Co.*, 895 F.2d 830, 835 (1st Cir. 1990); *Glenn v. Fleming*, 247 Kan. 296, 306 (1990); *Thomas v. Lumbermens Mut. Cas. Co.*, 424 So. 2d 36, 38 (Fla. Dist. Ct. App. 1982); *Gov't Employees Ins. Co. v. Grounds*, 311 So. 2d 164, 167 (Fla. Dist. Ct. App. 1975). It is imperative that if defense counsel's opinion changes at any point in the litigation, that this is communicated to the claims professional and the insured immediately.

Lack of specificity. Many lawyers also hedge their valuations and assessments of liability. It is helpful to the claims professional to see the assessment in terms of both words and numbers. A 75% chance of prevailing on liability issues means a lot more than "more likely that not". However, it doesn't mean much of anything if the lawyer always evaluates cases as 51% winner or 49% loser. Assigning percentages is something of an art, but it is an art which good

defense counsel learn and which claims professionals appreciate. It also is much more meaningful if the lawyer doesn't just report facts, but provides analysis and recommendations.

Too much specificity. On the other hand, be mindful of being overly specific or wordy. Claims professionals are busy and need to be able quickly to assess the case and its value. Unless the color of the dress is important, tell the claims professional that "plaintiff crossed the street with the light" instead of "Plaintiff, wearing a light blue dress, crossed the street at Maple and Third with the light and, therefore, had the legal right of way." It feels suspiciously like overbilling when the attorney sends repetitive status reports, especially when they are lengthy.

IV. Managing the Client

> *Litigating $400*: Answer: Lawyers who do not get repeat assignments from insurance carriers Question: Who are lawyers who think they only need to consider the legal issues in a case?

Reporting in a way that is helpful and meaningful to the carrier and the insured is one aspect of the lawyer's job of "managing" the client. Insureds often are traversing unfamiliar landscape and the claims professionals, while experienced, have specific metrics and obligations that they must meet to satisfy their own job requirements. The attorney should guide them both.

Effectively communicate the insurers' position to the insure. Advocating on behalf of the insured client does not mean that the lawyer cannot communicate the insurer's position on any given issue and aid in the evaluation of the matter. The insured has the right to know and understand what the carrier is—and is not—doing to protect the insured's interests.

Manage the insureds expectations. Honestly and fairly communicating the evolution of the litigation can go a long way in making the process less traumatic for all parties involved. Counsel who overhype the victories and losses often create false expectations or overreaction to particular outcomes. And, while losses and bad verdicts are manageable, surprise verdicts are

much more so. *See, Berg v. Nationwide Mut. Ins. Co*., 235 A.3d 1223 (Pa. 2020).

Use engagement letters. Like any other client engagement, a well-crafted engagement letter can often be a good guidepost for the representation in managing the expectations of all three parties to the tripartite relationship. Particularly important is the scope of services and the reporting relationship between the lawyer and the carrier. The MRPC state that the scope of the representation and the fees to be charged shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. MRPC 1.5(b). But *cf.,* Ct. Rule 1.5(b) (engagement agreement **shall** be in writing) and Ga. Rule 1.5(c) (contingency fee agreements **shall** be in writing).

As noted in the rule, the scope of the representation can and should be included in a representation agreement. These agreements can and should be used in any professional relationship: architect, engineer, doctor, lawyer, etc. They will provide guidance and protection for all three parties to the tripartite relationship as dispute resolution proceeds.

In *Attallah v. Milbank, Tweed, Hadley & McCloy, LLP*, 168 A.D.3d 1026, 93 N.Y.S.3d 353 (2019), the Supreme Court of New York found that a law firm's written engagement agreement precluded the client's later malpractice suit because it specified what the law firm agreed to do. The Court looked carefully at the terms of the Agreement and determined that the conclusively established the parameters of the relationship, precluding the later malpractice claims. *Attallah* at 1029. Similarly, in *Jones v. Bresset*, 47 Pa. D. & C. 4th 60 (2000), the court found that a Pennsylvania attorney successfully limited his potential liability to a client by limiting, in the engagement letter, the scope of his employment. See also, *Joint Formal Opinion 2011-100*, PA Bar Assoc. Legal Ethics and Prof. Resp. Comm. and the Philadelphia Bar Assoc. Prof. Guid. Comm.

In contrast, a Nevada plaintiff sued her attorney for failing to file a personal injury action after she attended a consultation about that personal injury. The lawyer said she agreed to evaluate the case, but told the client that she would not bring the action. Since the attorney did not have a written agreement limiting her representation, the Court found a jury issue on the scope of her obligation to her client. See *Allyn v. McDonald*, 910 P.2d 263, 265 (Nv. 1996). The outcome may have been different, even without an engagement agreement, if the lawyer had written a declination or disengagement letter.

In Ohio, the medical informed consent statute requires that a written consent form set forth in general terms the nature and purpose of the procedure, what it is expected to accomplish, any reasonably known risks, and the names of the physicians who will perform the procedure. The person giving the consent must acknowledge that such disclosure of information has been made and that all questions asked about the procedure have been satisfactorily answered and must sign the consent. *Joiner v. Simon*, 2007-Ohio-425, 2007 Ohio App. LEXIS 372 (2007). The scope of the engagement, what can reasonably be expected from the engagement, and the agreement of the patient to the engagement are in this way established by written document that can later remind or inform either party what the original agreement was. See, also, *Rosen v. Bureau of Prof'l & Occupational Affairs*, 763 A.2d 962, 2000 Pa. Commw. LEXIS 685 (2000). (Pennsylvania architecture or engineering obligations).

Consider using an engagement letter with every professional relationship. They permit the parties to define the beginning point, objectives, scope of work, payment terms, and end point. This written agreement can be the touchstone for all three parties to the relationship as the case progresses, especially when there is an unwanted development.

Manage Billing Effectively. The natural follow on to a good engagement letter is good, clear, regular billing. First, lawyers need to read, understand, and follow the carrier's billing guidelines. Thy are not suggestions. They are rules to which carriers expect adherence. All the time.

Most guidelines require a budget. Do not use cookie cutter budgets. Budgets are important components of the claims professional's job. They are tasked with handling their cases with the amount of money budgeted or reserved by the company for them, so they need to know for how much to ask. Help the claims professional by providing timely and realistic cost estimates for cases, both defense and indemnity. One way to do this is pay attention to one's own billing and develop understanding of "normal" costs for particular activities.

Claims professionals understand that unexpected developments may cause revisions in the budget. However, they need and expect reasonable estimates and reasonable explanations for deviations from those budgets.

Attorneys should also bill frequently and routinely. This avoids the surprise bill and the eye-popping fees. *See, generally, Schonberger v. Serchuk*, 1991 U.S. Dist. LEXIS 11607 (SD NY 1991) (a tangled mess related to past due fees and claimed malpractice). It also avoids a violation of the professional obligation to keep the client reasonably informed about the matter and its progress. MPRC 1.4(a)(3) ("keep the client reasonably informed…). Bills are a monthly opportunity to showcase to clients the value the lawyer has provided to the clients.

Communicate Frequently. Routine and frequent billing is one way that the attorney can regularly communicate with the insured and the carrier. Communication during litigation should be frequent. The attorney should follow carrier guidelines about reporting, meet case deadlines, and timely respond to questions from the claims professional. In turn, the claims professional

should stay on top of the case and involve the attorneys who are handling the litigation in communications.

In these communications, none of the parties should tell the others what they think the others want to hear. That leads to unrealistic expectations and disappointment. See, *Goldberg v. Hirschberg*, 10 Misc. 3d 292, 806 N.Y.S.2d 333 (2005); *Smith v. O'Donnell*, 288 S.W.3d 417 (Tx. 2009). Communication should be clear, honest and frank.

This is especially true if a mistake has been made. Errors can usually be fixed, but not when they are not acknowledged and addressed. And they should be addressed, as a team by the lawyer, the carrier, and the insured. Any other "solution" leaves open the possibility of later ethics, malpractice, or bad faith claims.

And know when to make a call and when to put things in writing. Some things are harsh in print, but need to be documented. Others need a more personal and gentle touch. Use good judgment and common sense to decide what is called for in the particular situation—whether it be the communication of bad news or sensitive information or something else.

Develop expertise. Judgment is developed over time, as is expertise. It is developed by trying cases when they need to be tried. Not every plaintiff or plaintiff's lawyer is reasonable and not every case can be resolved for a reasonable sum. The triumvirate should make decisions about when and how cases will be resolved (dismissal, settlement, or trial) based on the frequent communication, realistic budgeting, frank analysis, and fair billing that has occurred in the case. The client, the carrier, and the attorney can reasonably assess the risks and benefits of any particular course of action and neither flip flop at crunch time nor overpay.

V. Conclusion

Double Jeopardy: Answer: What every claims handler and defense attorney loves. Question: What is going to DRI PL in New York in December?

The tripartite relationship is complex and multifaceted. It is both complicated and interesting. Navigating it successfully is both a challenge and a reward of a litigation defense profession. We look forward to discussing it with you at the conference.