

DRI Construction 2022
How to Win Clients and Influence Partners
Moderator – John Hays | Speakers – Timothy Donnelly and Stephanie Petras
January 26, 2022



Topic: What defines excellent client service? Nothing is more important to the long-term success of a young attorney than learning how to provide clients with what they need, when they need it. Hear from two experienced insurance professionals about what they expect from their outside counsel, what makes their lives easier, and what simply wastes their time.

1. Understanding Expectations for Outside Counsel

a. Early Coordination and Reporting

i. Initial Handling and Coordination

1. Any new assignment or referral should be promptly acknowledged and initial handling instructions confirmed.
 - a. In situations where counsel engagement has yet not been confirmed, review the claim materials, pleadings and/or docket to ensure that there are no time sensitive issues to be addressed, such as a response deadline, timed limited demand or statutory notice that needs to be addressed. Make sure that the claims professional is aware of any time sensitive issues and provide courtesy updates or reminders to avoid any adverse developments.
 - b. Discuss topics and issues that may be important to the insured / new client. The claims professional most likely has already spoken to the insured and may have information that is helpful or insightful.
 - c. Ensure that the type of claim involved is appropriately matched with counsel's expertise. Let the claims professional / TPA know if there is another attorney in the firm whose expertise, qualifications and/or geographic location are a better fit!
 - i. Get to know the claim professional handler and the insured's background. Doing so can provide insight as to the most important factors and focus for each of them. It may also provide valuable information, such as: Is this an account that the claim professional has handled for years and thus is familiar with his / her personnel, applicable contracts and/or vendors?

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- ii. The claim professional may have contacts within the company that can assist in the event of communication issues; if other expertise is needed relative to the insured's business; and/or to assist with witness preparation/depositions.
- iii. In some situations, a first notice lawsuit or new lawsuit requires a quick response. Defense counsel may contact the insured before the claim professional. It could be productive to include the claim professional in the initial teleconference/interview with the insured to avoid duplication of efforts and ensure that all parties are familiar with the facts and circumstances giving rise to the tender of the claim.

ii. Litigation Guidelines versus Best Practices

1. Most insurers have Litigation Guidelines or Best Practices that should be reviewed and followed unless otherwise discussed and agreed in the initial instructions. Ask questions and address any guidelines that may present an issue or challenge up front.
 - a. Insurers may require an initial conference within a certain timeframe following a new assignment or referral to develop a mutually agreed litigation plan between defense counsel and the claim professional through Best Practices (i.e. - "Within the first 60 days following case assignment, counsel must consult with the claims professional to develop an agreed upon strategy and/or direction of counsel's engagement.")
 - b. Litigation Guidelines may require a more formal approach that requires an initial comprehensive report and litigation budget to provide a summary of the case; an analysis of the potential liability exposure and claimed damages; recommendations for defense strategy, expert retention, and early resolution; as well as a budget for the estimated cost of defense through phases of the litigation through trial.
 - c. While it may be acceptable to have limited formal reporting with established clients / insurers in some cases, confirming the client's and/or insurer's expectations for reporting frequency and content at the outset of any new matter will likely improve communication and build on partnerships going forward. Keep in mind that an agreement to forego a formal litigation report or regular litigation status reports could result in extended periods without (or gaps in) updates on litigation developments that could impact the insurer's view and/or analysis of the claim.
 - d. In addition to preparing a litigation plan and generally discussing the strategies to be implemented, take the time to ask the client or claim professional for the key information to be addressed in a report immediately, as well as the checkpoints during the litigation for required reporting and/or litigation updates, such as:

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- i. Summary of discovery - What discovery should be summarized versus providing copies of the underlying documents/information? What is preferred approach to litigation of and reporting on discovery motion practice and/or production issues?
 - ii. Claim / Settlement Valuation – What discovery and information is needed and/or should be considered in preparing an analysis of the claim and/or settlement valuation? When should this analysis be provided (before / after discovery completed)? Does the insurer consider the future cost of defense in the claim / settlement valuation?
 - iii. Settlement Demands – Time Limited and/or Policy Limit Demands may require specific and immediate action by the insurer. Be prepared to respond to requests for an updated analysis of the claim and the settlement demand.
 - iv. Reporting prior to Mediation, Arbitration, Settlement Conferences and/or Trial – What are the insurer’s reporting requirements and deadlines prior to ADR and/or Trial?
 - e. Insurance defense tends to be a volume business. Claim professionals and/or TPAs will likely work with the same legal partners for a variety of reasons, such as multiple claims, accounts, or lawsuits within the same programs or jurisdictions; claim types that require specific legal expertise or qualifications; or required use of panel counsel list. That said, continued referrals and/or business volume is not guaranteed. One of the best ways to ensure continued referrals and client satisfaction is to make certain that expectations are clearly communicated and deliverables met.
 - f. Understand billing procedures and preferences and make sure that the Accounting Department is fully aware of same. Confirm whether the insured / client has a Self-Insured Retention or Deductible and how it should be handled to avoid any misunderstandings or confusion.
- iii. ***Defense Counsel Early Investigation***
 1. Develop approach to early investigation with initial litigation report and/or agreed litigation plan in mind
 - a. Gather and conduct thorough review of all claim related documents and records from client, claim professional, plaintiff, other parties. Conduct initial interviews and discussions with client and other counsel.
 - b. Prior Investigation - Did the claim professional undertake a liability/damages investigation prior to your retention? What documents were generated? Where did the investigation leave off?
 - c. Motion Practice / Initial Pleadings – After reviewing all relevant documentation and pleadings, if applicable, consider if there is a basis for

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dispositive motions, such as a Motion to Dismiss; Demurrer; Motion for Summary Judgment. Is there a basis for Cross-Complaints or need to file a Third-Party Complaint or Non-Party Action?

- d. Social Media/Internet Investigation – who will conduct online and/or social media research? Are background checks and/or surveillance needed and does the insurer prefer that a vendor be used to provide these services?
- e. Expert Consultation – Will experts be needed to properly assess the claimed damages and the insured’s potential liability exposure?
- f. Consider and provide assessment / early impressions of plaintiff(s); plaintiff(s) counsel and other defendant(s) and/or their counsel. Is there any specific information about the other parties and/or their counsel that could impact the analysis of the insured’s potential exposure or the case (i.e. – well-known or highly regarded reputation in court or publicly; difficult; sympathetic, etc.)? Similar consideration should be given the judge or jurisdiction in which the claim will be adjudicated. Including these impressions or opinions to the claim professional can have a significant impact on the overall valuation of a claim.
- g. Focus on early evaluation / resolution through ADR if appropriate for the case.
- h. Statutory Settlement Offers – Are statutory settlement offers an option in the jurisdiction and is there any benefit or leverage provided in utilizing such an offer?

b. **Continued Handling and Reporting**

i. Analysis and Reporting on Liability and Damages

- a. Provide detailed summaries of discovery, depositions, and expert reports that impact the analysis of the insured’s potential liability as well as the claimed damages.
 - i. Report any change in the facts and/or evidence that impact the current analysis of liability and damages as soon as possible. If either liability or damages head in an unexpected direction, it can never be too early to alert the claim professional or client. Immediate notice and an updated analysis of new information to the claim professional that could significantly impact the claim valuation is strongly recommended.
 - ii. The liability analysis should be provided in terms of a likely percentage range of best to worst case scenario. The estimated allocation of fault should be supported by facts and/or evidence that has been verified. The strength and/or weakness of the facts, evidence or affirmative defenses to the claim / allegations should be discussed in the supporting analysis of the liability percentage allocation. The likelihood of a defense verdict

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(stated as a percentage) should also be provided. It is also helpful if the estimated liability allocation to any other defendants is provided.

- iii. The claimed damages should be properly verified and evaluated, irrespective of any liability considerations. The damage analysis should specifically address the likelihood that the claimed damages are recoverable at law and based on the evidence and expert opinion, if applicable. Once the gross amount of recoverable, verified damages can be determined, the estimated liability exposure should be factored into the claim settlement valuation.
- iv. Separately, the damage analysis should include the estimated verdict range based on similar cases in the same venue. The verdict analysis should also include factors that can influence a verdict, such as a bench vs. jury trial; the jury pool demographics; and credibility, likeability, or sympathetic appeal of witnesses. The verdict range should be factored into the overall analysis of the potential damage exposure.
- v. Concluding a litigation report without itemizing or providing a breakdown of the estimated settlement valuation or verdict range will likely lead to more questions. It is better to provide a comprehensive, well-supported analysis of the liability and damages based on the available information. Early analysis may have very little “evidence” to support an estimated valuation; however, a “ball park” estimate of potential exposure could be provided based on prior experience with similar claims. Clients and claim professionals seeking financial authority will be expected to justify the amount in detail. As such, providing a complete and detailed analysis is very helpful and important.
- vi. If a particular component of the claimed damages has a potentially wide range (i.e.- general damages), it may be necessary to breakout the different types of damages and the amounts associated with each type, stated as a range. It is also helpful to confirm the most likely amount of damages (by type / category) that may be awarded by a jury. Again, providing a detailed breakdown of the liability and claimed damage analysis, with associated ranges and likelihood of recovery, will be instrumental and assist the client and/or claim professional in undertaking their own analysis.
- vii. Providing copies of the supporting documentation obtained in discovery when possible allows the client or claim professional the opportunity to examine the evidence; formulate and/or answer questions they may have; and may reduce any back and forth that may occur based upon review of a litigation report alone. It could also result in further discussions about the case analysis, defense and/or negotiation strategy.

2. What Makes Life Easier for Claims Professionals?

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a. **A Single Litigation Report**

- i. Some claim professionals prefer one consistently updated litigation report, which strikes out irrelevant information and **bolds** new information. It can also be one of the easiest ways to track developments in litigation or across multiple files. It assists the professional in answering the all-important question “what has changed?” It also reduces the time that can be spent on preparing separate litigation status reports. Not all claim professionals or insurers prefer this method of reporting so confirming the preferred format for reporting during the initial discussions is strongly recommended.

b. **Executive Reporting on Liability**

- i. In some cases, where the circumstances giving rise to a claim are relatively straightforward, a brief explanation of the elements of a cause of action is all that is necessary to set up your reporting on the facts supporting liability.
- ii. The bulk of the liability section should be dedicated to the facts that will support either side’s argument, as well as some insight into what the jury will be asked to decide.
- iii. A percentage assessment of liability identifying the key factual disputes that influence it is more effective than a general assessment.

c. **Expert Retention – Budget and Plan**

- i. Expert retention and reporting are primarily handled through counsel and can result in surprises if the client / claim professional and defense counsel are not on the same page.
- ii. When expert retention is recommended, be prepared to provide a copy of the expert’s CV and a budget, scope and plan detailing how the expert will be used and what favorable testimony he/she is expected to provide.
- iii. Advise as to whether the expert will be used for a currently known set of documents, or as a set of eyes across all future discovery.
- iv. Work with the professional and expert to simplify billing to avoid any payment issues.
- v. Invite the professional to participate in key teleconferences with the expert. Having the opportunity to ask direct questions and view the work firsthand can make a significant difference later on.

d. **Be Innovative and Collaborative!**

- i. Take a creative approach to developing defense strategies and discovery. “Checking boxes” in completing discovery or providing defense strategy recommendations to the client or claim professional may follow the normal course of the litigation process, but going down the list does not guarantee a better outcome. Utilizing motion practice to reduce the scope of claims;

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considering early mediation before discovery; participating in joint defense agreements or sharing experts (where appropriate) can help to reduce costs and potential exposure if an early assessment and resolution can be reached.

- ii. Establishing collaborative partnerships that are based on trust; consistent performance; taking an innovative approach to the litigation; and understanding expectations well enough to be intuitively proactive and responsive can make all the difference in a client's or claim professional's experience.

3. Eliminate Activities with Adverse or Low Value-Added Impact

a. Incomplete / Inconsistent Reporting on Litigation Developments

- i. Timely reporting and updates on litigation developments are crucial to the proper assessment and handling of the claim. Incomplete, inconsistent and/or late reporting can create unnecessary "emergencies" that require immediate attention; delayed communication of developments to all interested parties; and added stress for the claim professional.

b. Late Reporting of Pre-Trial/Trial Dates

- i. All trial conferences and trial dates should be reported as soon as they are scheduled.
- ii. Reporting should be supported with detail on the judge in question and how they handle their trial calendar. Will a date certain be set? Is there readiness calendar?
- iii. Professionals will have to make their own decisions regarding internal procedures on trials. Providing short notice of a pre-trial conference can set a number of procedures into motion and create considerably more work for the claim professional. As much lead time as possible should be provided at all times.

c. Lack of Coordination on Mediation Strategy

- i. Most professionals today assume that a mediation will be scheduled during the life of a claim file.
- ii. There are a number of resources, mediation partners, and strategies to employ leading up to and during mediation.
- iii. Reporting back to the claim professional that "Plaintiff would like to mediate, and their choice of mediator is available on X date" can be a significant waste of time. Advising the claim professional that there is interest in mediating, starts the conversation about who, when, where and how it will proceed.
- iv. Preparing for a mediation is a collaborative process that starts before the pre-mediation report is written. Discuss with the claim professional where the parties

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are believed to be in terms of settlement expectations. Discuss the strengths and weaknesses for the defendants and the plaintiffs. Agree on a negotiation strategy that considers where the parties will likely start out, how the negotiations might proceed, and where a settlement might be reached. Make sure that the plaintiff's counsel provides everything that will be needed to evaluate the claim well ahead of the mediation so that it can be considered in the claim evaluation.

- v. Negotiations and posturing can begin before the mediation. Mediating with the wrong neutral can be a waste of time and resources. Mediation is about more than exchanging numbers, it is about positioning the case for resolution.
- vi. The client and claim professional should be included in the selection of the mediator / neutral; the timing and location of the mediation; as well as the logistics of the mediation. Most of the time, opening statements provide little to no value, other than to educate the claimant / plaintiff. If opening statements must be given, propose a time limit and no exhibits.

d. Retroactive Approval of Staffing or Motion Practice

- i. Claim professionals are working more and more with outside auditing firms and have less influence over the application of the litigation guidelines.
- ii. Retroactively approving additional staffing to a file or necessary motion practice can require the involvement of multiple individuals at the company, as well as contact with the outside vendor.
- iii. Experienced claim professionals understand the volatile nature of litigation and the necessity of quick action to defend insureds. A quick email advising of the change in staffing and/or litigation plan to ensure that billing is handled properly is all that is needed, which can save significant amounts of time later.
- iv. If you do not receive an immediate approval email from the professional, follow up to obtain one prior to submitting your bill. If it is clear from the start of litigation that the file is complex and will run into hurdles in the standard litigation guidelines, work towards an approval of an overall strategy that can avoid these issues proactively.

e. Overly Aggressive A/R Collection Activities

- i. Although most insurers have separate legal vendor management and bill audit departments or external vendors, some insurers and businesses use TPAs. TPAs are responsible for reviewing, approval and payment processing of invoices; however, in some cases, funding must be sent from the insurer to the TPA before the invoices can be paid. Monthly reminder invoices and calls requesting payment status on invoices that are less than 60 to 90 days old, (particularly if the Litigation Guidelines state that the invoice and payment funding process will take up to 90 days) require research and a response. Ensuring that the Accounting Department has a clear understanding of the funding / payment process and timelines would limit the volume and frequency of such requests that the claim professional must address.

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