

## Litigating the Insurance Coverage Case

By Michael J. Haverson

**Strengthen the attorney-client relationship by soliciting input on improvement opportunities.**

# A Carrier's Expectations of Its Counsel

The purpose of this article is to increase understanding among outside insurance coverage counsel representing carriers as to what is important to the client-carrier when litigating an insurance coverage case. Carriers often

talk about teamwork, communication and the need to focus on cost containment while obtaining best results, but what does this really mean? This article will discuss the carrier's expectations from the perspective of this writer, a former vice president responsible for managing coverage litigation for a major international carrier with over 25 years experience with insurance coverage litigation management and dispute resolution in both a law firm and insurance company setting. The article will examine:

- Responsibilities of a litigation manager;
- Considerations of in-house personnel when hiring panel coverage counsel;
- Coverage counseling tips;
- Important initial steps during the preliminary stages of coverage litigation;
- Development of a detailed litigation plan and budget;
- Opportunities for dispute resolution;
- Preparation of the case and the development of case themes; and
- Preparation for trial and post trial considerations.

This article hopefully will also provide a deeper understanding of the carrier's expectations and improve teamwork and communication with the insurer.

### Role of the Litigation Case Manager

The internal case manager supervising a coverage litigation case pending against an insurance company often has a wide array of responsibilities, most of which are quite different from those of the outside counsel litigating the case on behalf of the insurer. Although the specific responsibilities will vary from one insurer to another, the case manager may be accountable for ensuring that the carrier's case resolution goals are consistent with the insurer's business and operational goals. Moreover, when evaluating litigation strategies and tactics, a case manager must often consider such issues as positional consistency, corporate structure/history, organizational structure, records organization/maintenance, key persons with knowledge and prior experience with similar cases. Outside counsel often must



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rely on the in-house case handler to ensure such issues are fully deliberated when developing litigation strategies.

The case manager may be responsible for case reporting, both with respect to other stakeholders within the claims organization and senior management. The reporting obligations are also necessary to ensure that key internal decision makers

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have enough lead time and sufficient information to make critical decisions. Separate reporting obligations may also exist to other interested parties such as reinsurers and auditors.

The case manager typically is also accountable to ensure that the case is well managed in a cost effective fashion consistent with litigation management/budget guidelines and best practices. Counsel performance may also be measured in the aggregate over multiple cases or through comparisons with other counsel in the same jurisdictions handling similar cases.

Understanding these responsibilities will help place in context much of what follows in the remainder of this article regarding what the carrier will expect from its outside counsel during the course of litigating an insurance coverage case.

### What Carriers Look for When Retaining Coverage Counsel

There is no standard insurance company model or formula used to retain coverage counsel. Some carriers prefer a national coverage counsel ("NCC") model through which a relatively small number of law firms handle the bulk of the coverage lit-

igation cases pending against an insurer. The proponents of this approach provide a greater volume of cases to a smaller number of law firms, often in consideration of rate reductions or alternative billing arrangements. Moreover, use of a smaller number of counsel may facilitate consistency of position and transmission of corporate history, structure, etc. Conversely, some carriers believe in utilizing a large network of local counsel. Such carriers often place greater value on the knowledge such local counsel will have regarding local practice rules, the jury pool, knowledge of the local judiciary and local business and political connections. Another approach, combining elements of both prior approaches, is the use by some carriers of a select number of regional counsel who have the knowledge, experience and history of working with the carrier but who often have a greater sensitivity to local considerations. With respect to national or regional counsel, such attorneys often work with local firms or rely on local offices of the NCC or regional firm to assist with knowledge of the venue.

Irrespective of which approach is utilized by counsel, there are certain factors carriers often consider when evaluating whom to retain as counsel of a particular case. First, has the firm already been placed on a carrier's panel list? Has the firm's bona fides been fully vetted and evaluated? Second, what is the specific experience of the law firm with the type of coverage case at issue and the local jurisdiction? Does the firm have an established expertise and track record with the type of case encountered (e.g., construction defect, professional liability, property, asbestos, etc.)? Who within the firm will handle the case? Third, has the firm proven to be effective, collaborative and fiscally responsible in its prior dealings with the carrier? Lastly, does the firm have either legal or business conflicts that would preclude its involvement in the case? The existence of a business type conflict that doesn't necessarily qualify as a legal conflict may often be troublesome to a carrier. Failure to openly disclose these issues to a carrier may create distrust. It is always preferable from the carrier's standpoint to have the firm fully disclose any legal or business type conflict, leaving the decision to the client as to whether such dealings are an important consideration

when evaluating the decision on whether to retain the law firm. Even if the firm does not get the case, the carrier will often appreciate the transparency and will likely view the firm more favorably when other retention opportunities become available.

### Coverage Opinions

Outside coverage counsel may be called upon to provide a legal coverage opinion or assessment as a tool to assist the carrier on how to best respond to a request for coverage. The request for an opinion may be made prior to the existence of any coverage litigation or during the pendency of a coverage action. The request may be subject to time pressures related to the need for a timely response to a demand, compliance with claims handling procedures, or tied into litigation or regulatory related deadlines.

In evaluating and responding to a request for coverage assessment, do not assume what you don't know. Providing an opinion in the absence of important policy or claims documents can create the potential for mistakes. Try to obtain all necessary information before providing an assessment. If this is not possible, clearly identify the absence of necessary information and carefully delineate the basis for any assumptions as part of your work product. Follow up to obtain the necessary information so you can supplement the assessment if needed.

Moreover, resist any temptation to tell the client what you perceive they implicitly would want to hear (e.g., "I want your honest assessment, but I, the client, have looked at this and can't see how there would be coverage") unless it reflects your reasoned opinion and independent assessment. Certainly, all experienced counsel should be sensitive to how they characterize their opinions in writing but you are being retained to provide *your* assessment. It may be a good idea to orally discuss sensitive issues with a client and then determine what should be addressed in writing. Remember, your analysis will be a knowledge tool relied upon by others in the decision chain, not just your personal case manager/adjuster contact.

When providing coverage counsel advice to an insurer client prior to the institution of coverage litigation, be sensitive to the risk, albeit small, that you may be called upon to be a fact witness in a subsequent action

against the carrier for alleged bad faith. This circumstance might occur when the insurer elects to assert an “advice of counsel” defense to the bad faith claims or when the counsel providing pre-litigation legal advice is aware of facts that may be relevant to the claims for bad faith. Such an action would have a substantial negative impact on a counsel’s ability to represent its client. Also, be aware of the trends in certain jurisdictions that may make your coverage opinion letter discoverable based on implied waiver of privilege or otherwise. Carriers take varying approaches when deciding whether to retain the same counsel who provided coverage advice in circumstances where a subsequent action for coverage/bad faith is filed. As a counsel evaluating whether to accept such a retention, you should discuss this risk with the client and decline the representation should you believe there is a serious risk that you will be called to testify during a bad faith phase of the case. Your candor will be appreciated by the client. You certainly don’t want to brush the issue aside and then try to explain to a surprised and frustrated client why the issue had not been vetted earlier.

### Initial Steps When Assigned a Coverage Action

The carrier has now assigned you a new insurance coverage action. As outside counsel, you are likely to ask the client for claims and underwriting information while at the same time enter an appearance and take steps to ensure a response is timely filed or an extension is obtained. These are certainly important activities but what else should be considered to best service the needs of your insurer client?

Discuss with the client the roles and responsibilities of each member of the in-house carrier team working with you on the litigation. Discuss expectations of how you will work as a team, including reporting and communication expectations and compliance with the insurer’s litigation management and billing guidelines. Also, identify the key members of the outside counsel team and their roles/responsibilities within the team. Identify the primary lead law firm attorney. Who will be the trial attorney, if one is needed and how will he/she be involved with the case? Maintain consistency of roles and responsibilities

of the law firm team to the extent possible and communicate any significant changes to the client beforehand.

Talk with the client to understand the insurer’s case resolution perspectives as well as client sensitivities to any business, regulatory or media related issues. With respect to media inquiries determine how the carrier would like you to respond, if at all, before talking with the media.

Take early steps to work with the carrier team to identify potentially responsive documents along with document organization and retention/destruction practices. Address document preservation and litigation hold issues at the earliest possible time. Understand the company’s protocols for case handling and make your role consistent with those protocols.

Coordinate with the client concerning the preparation of initial pleadings, disclosures and statements with respect to corporate bona fides. Also, be sensitive to the client’s portfolio preferences with respect to positional consistency on coverage issues, forum and venue issues and other matters. The importance of early communication and coordination with the client cannot be overemphasized.

### Development of Detailed Litigation Plan and Budget

As discussed earlier, the insurer case manager has a set of responsibilities that may include case reporting, as well as ensuring that the case resolution goals are consistent with the carrier’s business and operational goals and that the case is well managed in a cost-effective fashion consistent with the carrier’s best practice expectations. For many insurer clients, the litigation plan is a critical knowledge management tool used by the insurer to help manage performance against these accountabilities. The development and continuous refinement of a detailed litigation plan and budget is the measuring stick against which the case strategies and activities are evaluated. What should outside counsel consider when preparing a litigation management plan and budget?

When preparing a litigation management plan and budget, take the time to understand the insurer’s expectations as set forth in the litigation management guidelines or protocols. The substance and tim-

ing of a detailed case management plan and related budget should be undertaken consistent with those guidelines. The litigation plan should be a “living” document that is fleshed out and modified during the course of the litigation. Accordingly, the initial plan should comprehensively identify issues/activities and strategies, even if only to identify their potential relevance as the litigation progresses. The plan should review and outline procedural options, key case issues, possible discovery (offensive and defensive) and motion practice. The plan should discuss potential offensive and defensive strategies. Contribution and subrogation issues, if applicable, should also be discussed in the plan.

Counsel should also coordinate with the client to ensure that the litigation plan includes an early information development plan relating to documents, key personnel interviews and anticipated necessary outside discovery. In larger cases, joint discovery efforts may also be discussed.

As the litigation plan evolves through the development of the case, outside counsel should work with the client to develop the case theme and stories, as well as how the stories and themes will be impacted by discovery. The plan should also discuss the legal and factual proofs necessary to advance the insurer’s positions.

It is not unheard of for a carrier to also face extracontractual claims in addition to the claims relating to declaratory relief and breach of contract relating to coverage. Proactively assess the claims for extracontractual relief and how best to respond to those claims as part of the litigation plan.

Creation of a litigation budget is not an empty exercise. Counsel should carefully evaluate the resources required to implement the plan and provide the carrier with a meaningful budget that provides a detailed estimate of how personnel and other resources will be employed to accomplish reasonably foreseeable activities consistent with the plan. Budgets should be revised consistent with litigation management to reflect changed circumstances. Counsel should ensure that the litigation plan has real meaning and that the work being performed in the case is undertaken in an integrated cost-effective fashion consistent with the litigation plan and budget. Every carrier is focused on obtaining

best results in a cost-effective fashion. As counsel, proactively exercise your obligation to control costs through prudent staffing, streamlined execution, examination of early opportunities for resolution and a bottom line review of the cost-benefit of tasks and activities attendant to implementation of the litigation plan. The carrier will take notice and your prospects for a longer

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term relationship with the carrier may be significantly enhanced.

### Examine Opportunities for Early Dispute Resolution

As a general proposition, carriers are often interested in exploring early settlement of a coverage case so long as information is sufficiently developed to permit a reasoned assessment of its exposure under the policy and the settlement is otherwise consistent with the carrier's case resolution goals. As seasoned litigators and aggressive advocates, counsel often prefer an opportunity to obtain all the facts through discovery and to pursue a resolution that will advance the insurer's best arguments with the goal of winning the case, however that is defined. Carriers, however, may evaluate the risk/benefit proposition of litigating a case against a different backdrop. What are the costs associated with the litigation? What internal resource commitments will be required with respect to document production and witness testimony and what is the potential impact relating to aspects of the document production and witness testimony? Is there a potential risk for an adverse ruling(s) on a key coverage issue that might negatively impact other, similar cases?

Often, from the carrier's perspective, there is little downside in examining

early opportunities for dispute resolution through processes such as mediation. Information sharing in the context of mediation may be a cost-effective opportunity to obtain factual information to meaningfully assess exposure and to assess the prospects for early resolution. Mediation can also assist to understand the positions, interests and motivations of the parties. Moreover, in contrast to litigation, a mediation can help the parties maintain control of the resolution process.

Insurance coverage mediation disputes have unique characteristics that add complexity to the process, including complexity of issues and grouping of parties based on standing or issues of interest.

When evaluating insurance coverage mediation, consider such factors as:

- *Timing*—What is the right time to mediate? What is the status of related litigation? What is the court's role with respect to mediation? Is information sufficiently developed?
- *Choosing a mediator*—Does the mediator understand insurance coverage and have the time and patience to work through the details of the dispute? Will the mediator engage the parties with respect to the relative merits of their positions and their respective interests? What mediation style is the mediator likely to employ?
- *Mediation goals, process, structure*—What are the mediation goals? What are the critical matters to be addressed? How will information be shared? How will the process for dialog and follow up be structured?

Work closely with your insurer during the mediation process. It is likely that the carrier representative will need to become involved as a decision maker with authority. That involvement will likely be easier and more productive if the insurer representative is fully engaged in the mediation. Be prepared to know what key provisions of a settlement agreement need to be stated in the written memorandum of settlement handwritten at the end of the mediation, such as confidentiality, indemnity and scope of release.

### Documents and Witnesses

Earlier in this article, we discussed the importance of coordinating an early infor-

mation development plan relating to documents, key personnel interviews and anticipated discovery. Pay attention to the client's expectations and concerns when developing the discovery plan. Client sensitivities with respect to the production of certain categories of documents or the possible testimony of certain insurer witnesses might impact not only what is voluntarily made available in response to a document request or deposition notice/subpoena, but may also impact decisions with respect to the scope of affirmative discovery. Experienced case managers may also have discovery preferences to satisfy certain information needs for evaluation of the risks of exposure under the policies. Discuss the potential outcomes and consequences of discovery choices with the client before implementing the discovery plan.

It is also important to have early interviews of key insurer deponents and witnesses. Such interviews will help to develop your case and provide an opportunity to address any surprises. Moreover, interviews will help direct future witness preparation and identify whether specialized witness preparation assistance might be needed, such as with outside litigation consultants. Partnering with the client to provide background on the deponents/witnesses and to assist in determining preparation needs will help to avoid future questioning regarding whether the witness was properly prepared by counsel.

### Development of Litigation Themes and Stories

The insurer case manager, who often will be focused on the "big picture" when evaluating coverage litigation, will want to work with counsel to identify, develop and implement the litigation theme and story(ies). The litigation theme is the recurrent primary idea you will want to get across to the jury. The litigation story(ies) will be the facts you want to demonstrate to support or amplify the litigation theme. Insurers are sometimes critical of counsel who have detailed knowledge of the facts and law but do not know how to effectively package the case for presentation in a manner that will be easily understood by a jury. Counsel should collaborate with the client to develop the themes and stories to be advanced at trial, with a continuous assess-

ment of how the themes and stories are impacted by discovery, case rulings and other developments.

Consider whether you want to employ jury consultants who can utilize focus groups or mock juries comprising the same demographics as your jury pool to test and develop your case theme and how to best package stories to support the theme. Focus groups provide an early window as to how jurors might view the case and the themes you might want to advance at trial, providing vital feedback necessary to frame future strategic planning. Early use of a focus group based on available information can also assist in the identification of additional discovery needs that will be necessary to support the theme and to evaluate how presently available evidence (including witness testimony) is likely to be perceived by the fact-finder. Moreover, refinement of the theme and story based upon mock juror feedback can impact how the witnesses are prepared for deposition and trial. Early use of such consultants in the right case can greatly assist development of the litigation plan, witness presentation and help to minimize the risk that the jury simply did not understand the case.

### Motion Practice

Motion practice is an important tool that can expedite case resolution, narrow issues before trial, narrow the scope of potential exposure, or better position a matter for settlement discussions. A good litigation plan should address the timing, substance and scope of possible motion filings and how such motions will be used to help implement the case resolution strategy to achieve the desired goals. Client coordination is important when evaluating the decisions regarding whether and what to file. The client may be able to provide input and oversight to avoid the risk of inconsistent positions or inaccurate information with respect to both procedural motions and substantive motion practice relating to policy application. Moreover, the in-house case manager will bring a broader perspective to the question of whether the filing of a motion in a given case makes sense, based upon a variety of factors, including cost, likelihood of success, historical experience and positional consistency based on the facts and law.

### Crunch Time before Trial

As trial approaches, information should be significantly developed to permit meaningful assessment of the prospects for litigation success and the risks of exposure. Regular communication and consultation between outside counsel and the client during the course of the case regarding implementation and adjustment of the litigation plan, status updates, etc., should help facilitate a meaningful dialog with the client concerning potential exposure assessment and case outcome. From the client's perspective, the assessment potentially serves multiple purposes, including assistance in the process of evaluating exposure and resolution opportunities, management reporting so key decision makers are adequately informed, and external reporting obligations to reinsurers.

The vehicle for the assessment may vary depending upon the specific circumstances and preferences of the parties, *i.e.*, written report, telephone conference, face to face meeting, or some combination thereof. Depending upon the specifics, it might make sense to have an oral discussion first with the carrier followed by a written report, if needed. This helps to avoid misunderstandings and provides the carrier with an opportunity to ask meaningful questions that might impact the scope and contents of any report.

Carriers expect their attorneys to be direct, clear and concise when providing their assessment of the case and the potential for exposure. Lengthy overviews of case law with no clear opinion or direction are sure to frustrate the client and potentially impact the confidence and trust the insurer has with its counsel. In a collaborative partnership, the insurer should understand that the attorney has no crystal ball and provides no assurances on the future turn of events. That being said, counsel's opinion is an important piece of information that the carrier needs in order to assess its potential risks, outcomes and resolution choices. Also, make sure there is a common understanding surrounding the language you use in any assessment. Does saying there is a "reasonable chance for success" mean a substantial likelihood of winning, or that there is a colorable argument? Does it mean 70 percent chance for success or 30 percent?

Often, when evaluating resolution choices before trial, consideration is given to settlement prospects. When evaluating settlement opportunities or engaging in dialog with the insured/other insurers regarding the prospects for settlement, be sure that the client is fully apprised at all stages. Moreover, be responsive to the client's needs in terms of information, documentation and other evaluative materials in order to make settlement decisions. Work with the client to obtain an understanding of the evaluation process and relative time frame needed to both obtain monetary authority and to make settlement decisions. Be clear on what authority, if any, you have with the client relating to any discussions with opposing parties. Clarify significant provisions of any prospective agreement with the client before reaching a settlement in principle. Are there specific terms (*e.g.* release, confidentiality provisions, reporting provisions, payment terms) that are especially important to the client and need to be incorporated into the settlement dialog? Conversely, be sure to keep the client apprised of significant non-monetary provisions being advanced by the opposing party as part of the settlement dialog. Don't run the risk of having a settlement backfire because you as the attorney failed to keep the client posted on key provisions you might regard as inconsequential but are very important to the client.

### Trial

Although most cases never go to trial, preparation for trial is a seminal part of the larger litigation plan, and counsel should work with the insurer client to ensure that the client's interests will be protected well before a trial date is set. Possible trial themes and stories should be in development along with the primary legal arguments and outline of proofs. As the case moves closer to trial, the carrier will likely want to be presented with a detailed trial plan that will identify all of the above in detail, along with pretrial motions and anticipated motions *in limine*. This plan should also include discussion as to possible bifurcation/trial phases relating to coverage, damages and extra-contractual claims (assuming that such issues had not been resolved through motion practice). Phasing with respect to apportionment and allocation among multiple in-

urers on the risk should also be addressed, as should the relative roles and responsibilities of those insurers with similar coverage defenses. Consideration might also be given to whether a jury consultant should be retained to assist in jury selection or to sit quietly in the back of the courtroom to observe the trial and provide feedback. The carrier will be looking to ensure that its interests are being aggressively advanced in the most cost effective means possible.

The trial plan should also identify the witnesses on behalf of the insurer, as well as who will be the “face” of the insurer (insurer representative) sitting at counsel’s table during the trial. Early notice and discussion with the insurer representative on these topics are critical to avoid last minute surprises and achieve adequate preparation well before trial. You do not want to learn on the eve of trial that an anticipated witness is unavailable or uncomfortable.

Be clear on the roles and responsibilities of the trial team and that the insurer is on board with the selection of trial counsel.

Discuss with the client beforehand his/her preferences with respect to communicating trial developments. All significant trial developments need to be immediately reported. The insurer case manager needs to ensure that his/her stakeholders are adequately and timely informed and counsel cannot afford to be viewed as unresponsive in this regard. Also, be sensitive to issues of potential media coverage and discuss with the client representative how media inquiries should be addressed consistent with company protocol.

Lastly, it is important to provide the insurer with a detailed realistic trial budget that reflects foreseeable activities con-

sistent with the trial plan. This is needed by the case manager for both planning and reporting.

### Post Trial/Appeal

The insurer will want to know the trial verdict as quickly as possible whether the results are favorable or unfavorable. The case manager needs to be apprised so he/she can quickly communicate and report the results to key stakeholders. For certain large exposure cases or cases that have the potential for publicity, immediate communication between counsel and client may be needed to address key questions or to coordinate responses in the event of media inquiry.

In the event of a victory, be prepared to discuss with the client issues relating to the opponent’s likely post-trial actions. In the event a verdict is returned that is unfavorable to the carrier, be prepared to immediately address key time frames and activities attendant to post trial motions, bonding activities and appeal. Depending upon the form of verdict, what additional information concerning coverage determinations and damages can be obtained which will help the insurer make intelligent decisions regarding its post-trial alternatives? Be prepared to discuss your post-trial recommendations that will best position the case for appeal, if the carrier decides to appeal.

Successful appeals are often an uphill battle. Be candid in your assessment regarding chances for success on appeal. Work closely with the carrier to assist their evaluation of whether to file an appeal taking into consideration the potential legal, business and media implications.

For certain matters on appeal, especially if the case involves significant exposure or

a ruling could have important precedential value, the carrier may want to consider whether to retain an appellate specialist or a former appellate judge who may have insights on how an appellate panel may react to certain issues and arguments. Your cooperation working with the insurer to assess appellate counsel needs will reflect well on your ability to be a team player whose primary concern is the interest of the client.

### Conclusion of the Case

From an internal standpoint, carriers often use the conclusion of a case as an opportunity to evaluate counsel performance. To further strengthen your relationship with the client, initiate a dialog to obtain feedback on your performance. Use the conversation as a vehicle to explore areas of improvement relating to teamwork, communication, cost-containment, strategy design and implementation. Take the feedback as a constructive opportunity to internally address performance issues that might be regarded as a “weak link” by the client. The client will likely be impressed that you are soliciting his/her input on improvement opportunities. Through open listening, you may be given an opportunity to address issues that will help strengthen and build a long term relationship with the client.

The insurer is looking to retain skilled counsel who understand the importance of communication, collaboration and planning to obtain best results in a fiscally responsible manner. Counsel who proactively meet the carrier’s performance, reporting and cost-containment drivers enhance their opportunity to establish a mutually beneficial partnership. 