Beyond the Looking Glass

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A looking glass is a somewhat lost term for a mirror. I was a trial attorney for 15 years and have worked in the insurance industry for 25 years, and I have been managing attorneys and litigation most of that time. Trial attorneys are generally not without egos. When they look into the mirror, they often see themselves and like what they see. They also expect that everyone else does too. Over the years, I have also managed a number of claim operations. What outside counsel often misses is that the looking glass is a one-way mirror. Behind it stands an in-house attorney such as me and, more importantly, the claims people, all of whom are watching the attorneys through the mirror. Too often, however, we do not like what we see.

Insurers all operate differently. In my many years of insurance experience, however, there have been a few consistencies around the selection and management of panel counsel. The first is the primary one upon which all attorneys focus: being appointed to the panel. The process varies, but it always involves vetting and decision-making by either a claims attorney or a senior claims officer. Unless the need is critical, the process at many insurers can take some time and frustrate claim personnel, as confirming an attorney and completing the engagement process may require a number of steps and multiple approvals before completion. Add to that the need to add a firm and timekeepers to bill review systems and Freudian avoidance behavior can take over. When an attorney and firm make it through that process, they issue a sigh of relief and wait for the flood of new business to appear.

What too many attorneys do not seem to realize is that in most insurers, the people who control the floodgates are not the same people who made the decision to add the firm to the panel. In my experience, once I confirm a firm to the panel, I am finished with the firm unless timekeepers or rates need to change, I am personally managing litigation, someone has an issue with the firm, or someone wants the firm removed from the panel. Front-line claim adjusters and supervisors make the actual case assignments. The criteria they use in making the assignment decisions, however, are very different from the characteristics that drove the decision to add the firm to the panel.

Firms make it onto insurer panels usually because they attorneys selected are good, effective, and efficient trial attorneys and are competitive from a market cost perspective. Insurers may evaluate those factors from very different bases of information and perspectives, but they generally are the drivers. When claim people then turn to the panel to assign a case, they assume that the attorneys can deliver on those expectations. What drives the assignment decisions is which of the attorneys on the panel make the claim person's job easier. That should seem obvious, but it is astonishing how many attorneys either do not grasp that vital point or make the mistake of thinking that what they see in the mirror as the way they do business is also good for the claim personnel. It is for this reason that although the primary concern for most attorneys is <u>getting</u> on a panel, their primary concern should be <u>staying</u> on the panel.

Unfortunately, the ways that attorneys make life difficult for claim personnel in my experience are legion. I will highlight a few of the major ones. The overarching one is attorneys do not comply with the insurer's litigation management program. It is overarching because the litigation management program defines all of the ways the insurer expects the attorneys to service the litigation and the claim personnel managing it. Meet all of the standards set forth in the program and you generally will have no problem, and get a steady stream of new assignments.

To be blunt, litigation management programs are a pain in the neck. Every insurer has a different one with varied and sometimes directly contradictory expectations. I have written several and maintained even more. Nevertheless, they are necessary. Importantly for counsel, practically all insurers hold the claim personnel managing the claims accountable for assuring that the attorneys handling the cases comply with the program. So when you do not comply with the litigation management program, you can make that claim person's life difficult.

Moreover, outside counsel may not be aware that they are not complying with their client's litigation management program. This is because most claim people do not want confrontation with their attorneys. Indeed, they often like you personally and avoid pushing you because they know you are busy. They will write you with gentle status requests or reminders, but will often not mention how you are not following the litigation management program. Compliance failures, therefore, often fester under the radar until they become major problems. At first, you may not notice the slowdown in assignments. Over time, however, the insurer's business shifts to another firm until you look at a year-end production report and notice that revenue from the insurer is way down. Even then, you may not make the connection because no one ever told you that doing business with you is too difficult. The end of the line on rare occasions is a notice from someone like me that we are moving your open cases to another firm. Those may be because of poor performance, but most often they are because a firm has just become too high-maintenance for us.

The first step toward effective compliance is simple. Read the litigation management program documents. I am amazed at how often attorneys do not read the instructions we send them. When the attorney cannot follow our instructions, I wonder whether the attorney can read and follow court rules and the law. I know that sounds harsh, but it is the impression left by such experiences.

The second step is also simple. Assure that everyone working on the insurer's cases read and follow the requirements. That includes paralegals, administrative and clerical personnel, and billing employees. You have no idea how much time a claim person wastes because law firm administrative personnel have never seen, and therefore cannot follow, the insurer requirements. It does not take too many of those exchanges before the claim people begin to conclude that you are a high-maintenance firm.

Another very significant way that you can make the life of a claim person easier is by communicating regularly and in the manner specified by the insurer. Claim people manage their claims usually on 30-45 day diaries. That means that every 30 days they open the claim file to check on the progress of the litigation. If the insurer requires litigation plans, that review will include a check to see if the attorney has accomplished what he or she said would be done. When they open the file and find status updates from counsel, they can easily check the progress and, if everything is going according to plan, set a new diary date and move on to the next claim.

When the claim personnel review the file and have nothing from the attorneys, they document the file with something like, "Nothing from counsel. Checking on status." That note permits one of only two inferences: (1) the attorney is doing nothing on the case, or (2) the attorney is not communicating with us. Neither of those inferences is good. Moreover, now the claim person has to set a shorter diary for follow up, which increases the adjuster's workload by adding unnecessary work to the file. Too many notes such as that and you garner the perception of being a high-maintenance firm.

Any time you receive a status request from a claim person you should recognize that as a failure in communication and make sure you communicate more regularly. Again, the solution is simple, though I have never discussed this with an attorney who has adopted it. The simple solution is to set a rolling diary date of 30 days after every communication. Ideally, the next communication triggers a new diary date that eliminates the prior date before it arrives. If you reach that date, however, either you or your staff should send a brief update or cancel the diary date if it is not necessary. If nothing has happened, state that and explain why. That will assure that there is always a status communication in the claim file when the claim adjuster reaches his or her diary.

The final point may be unique to Catalina, but only because we have attempted to address a problem that exists in many insurers but is not often raised. We want practically all communications from our counsel to be in emails. We prohibit attorneys from sending us a letter, in any format, attached to an email. We ban letter attachments because they add a number of unnecessary steps to the claim review process. First, the transmission email rarely indicates what is in the letter, so the adjuster has to open and read the attachment to triage and prioritize communications. That effectively forces the adjuster to address the email immediately, as there is no way otherwise to determine urgency. In addition, an email is usually easily attached to the claim file in a single step. The document attached to the email, however, often has to be opened, saved in a drive, moved to a document management system, and associated with the claim. Those steps add to the adjuster's workload, and adjusters frequently forget in the haste to move to the next item or claim. When the adjuster does not detach the document, however, it becomes far more difficult to find in the claim file. When it has to be found and retrieved, the added work time becomes significant.

Unfortunately for attorneys, those who fail to comply with this Catalina requirement stick out as sore thumbs. The non-compliance is obvious the moment we open the email. Failing to meet this requirement can have you perceived as high-maintenance very quickly at Catalina. Even if your other insurers do not have this requirement, I will wager that if you adopt this practice without violating the guidelines of those insurers, the front-line claim personnel will appreciate the difference. It is just another easy thing to do that will encourage claim people to send you new assignments.

The final point also is an easy one. Occasionally, call your claim adjusters and ask them if there is anything you could do to make their lives easier. They may not tell you as criticism, but if you invite the discussion, you may learn something that has gone unspoken. You can call the claim lawyers such as me, but we are usually not engaged in the claims sufficiently to provide good feedback. The bottom line, though, is in everything you do, ask if it is client-friendly or something you do for you and not your clients. Your clients will appreciate the difference in perspective. And they will look through the looking glass and like what they see.