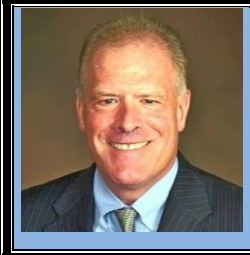

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STRATEGIES FOR THE EFFICIENT MANAGEMENT OF TRANSPORTATION LITIGATION

Today trucking and truck brokerage companies are burdened with the exposure and expense of defending a wide variety of litigated claims, including truck accident cases, large exposure workers compensation cases, cargo claims, contract claims, business dispute claims (commercial litigation), patent litigation and other claims. Depending on the type of claim and the structure of the company's insurance program, one of the most important roles for a general counsel in a smaller transportation company, or a senior in-house litigation attorney or risk director in a larger transportation company, is the management of litigated claims which have been assigned to outside counsel. This article is intended to be a primer for those managing litigation for trucking or truck brokerage companies.

Proactive in-house litigation mangers seek control over such litigation by first defining clear-cut goals or objectives, and then by closely managing outside counsel in order to efficiently achieve these goals. This article will present general techniques that can be followed by in-house transportation litigation managers who seek to take and maintain control over the direction of litigated claims and in the process reduce the company's litigation costs, while achieving superior results. General principles applicable to all types of cases defended by transportation companies will be discussed, with the nuances involved in particular types of transportation litigation left for future articles.

GOAL SETTING

An ancient philosopher once said:

"In every enterprise, consider where you would come out."

This is a point that should be well taken by in-house litigation mangers. When first analyzing a new claim or lawsuit that has been filed against the company, one must first determine where the company "would come out" upon resolution of the claim. This assists in setting the goals to be achieved in defending a litigated claim, and enhances the ability to manage the claim with a results-oriented outlook. Too often companies either cede the initiative to plaintiff's attorneys while in a reactive mode, or let outside counsel determine the course of litigation. Such approaches do not serve the corporate employer. These passive approaches can only lead to high defense costs and increased exposure.

As an in-house manager of litigation, one must first set the goals or objectives to be achieved in defending litigated claims, communicate them to outside defense counsel, and then monitor compliance. This serves to focus the defense counsel's energies, and provides for a better return on the company's investment in his or her billable time. The nature of the goals to be attained will vary with the individual claim. Factors unique to individual claims such as potential exposure, complexity,

jurisdiction, particular subject matter, potential for adverse publicity, and other intangible factors will influence the objectives to be set. However, ninety percent of the goals that should usually be sought in the defense of litigated claims can be summarized by the following list:

- the limitation of attorney fees incurred;
- the limitation of other litigation costs;
- achieving early resolution of the case or claim;
- a settlement or a verdict at the minimum equitable level; and
- the limitation on the encouragement of similar suits.

Once the goals to be achieved in the particular litigated claim are set, then the next step is to formulate a plan for achieving these goals. A good in-house litigation manager needs to apply some basic time and battle-tested methods to achieve the types of goals discussed above. These goals can be achieved by consistent application of these methods. A generalized list of these methods is as follows:

- the careful selection of an outside defense trial attorney, not a "litigator";
- the negotiation of discounted hourly billing rates, and the careful review of future billings;
- the communication of detailed instructions for claim handling, and careful monitoring for compliance;
- focusing discovery on relevant issues;
- the use of alternative dispute resolution proceedings; and
- the taking pro-active steps to limit adverse publicity.

Let us now consider the use of each of these methods in the management of litigated claims.

OUTSIDE COUNSEL SELECTION PROCESS

The key to selecting a defense attorney capable of assisting in achieving goals is to focus on hiring an individual attorney, not a law firm, and to make sure that that individual is an experienced trial attorney who is willing and able to take the matter to trial if necessary. The company should avoid hiring a "litigator" who is capable of taking the case only through the discovery stages, but who is unable to effectively support a decision to try a case. Most litigated claims never go to trial. However, sometimes the best settlements arise from a Plaintiff's attorney's perception of a defense counsel's ability and willingness to try a case. The assignment of a good trial attorney also gives comfort to a corporate defendant making a decision to try a case, unless acceptable settlement terms can be achieved.

In interviewing a proposed defense attorney for a particular case, one should elicit information from that attorney from which to decide whether that attorney is a "litigator" or a "trial attorney". Such information should include:

- years of trial experience for the proposed defense attorney;
- the number of his or her jury trials in recent years;
- the proposed attorney's jury trials involving similar claims and similar companies;
- whether the attorney subscribes to a proactive or to a reactive approach; and
- whether the attorney presently has time to personally handle the case.

If an attorney with acceptable credentials is found, then negotiation needs to be made with that attorney as to the billing rate, firm staffing, communication with the company, and other "practices and procedures". Once these matters are agreed upon, they should be set forth clearly in writing.

BILLING RATES AND STAFFING

Most law firms and most attorneys have several different hourly billing rates that they follow, depending on the client and the nature of the work. Most attorneys have a standard rate they will quote when asked, but a company potentially offering a significant volume of future business should be able to negotiate hourly rates significantly below the standard rate. The company may be able to achieve a promised volume to a particular trusted attorney by assigning cases from an entire region to the attorney, rather than making piecemeal assignments for each locale.

The negotiation of discounted fees is a straight forward cost saving measure, but one should not "lose the forest for the trees". Negotiations must also include restrictions on delegation of assigned work within a particular defense firm. If an attorney offering the fee discount then assigns most of the work to other firm attorneys or paralegals, or is inefficient on how he or she handles the claim, the savings from the discounted rate can quickly disappear. Significant savings may result from firm personnel with lower hourly rates handling particular tasks, but if those persons are inefficient, it could end up being more costly in the long run to have lower level firm personnel handle certain matters. The hired partner is generally more efficient in the time he or she spends on a given task. What good is an associate's 25% lower hourly rate if that associate spends 2-3 times as many hours as the partner on the same task? By the same token, even if minimal delegation takes place, the efficiency of the hired partner must also be considered in reviewing future billings.

The careful review of bills submitted by defense attorneys is also an important aspect of controlling defense costs. Not only does reducing excessive individual billings save money, but future billings are also limited because of the defense attorney's awareness of a company's active billing review process. For substantial exposure claims, it is difficult to effectively utilize billing auditing services, and such services risk antagonizing outside defense attorneys. These services utilize computer driven billing review processes which fail to take into account the particular factual, legal and procedural issues present in a given case. What is really needed is the application of professional judgment on whether the time spent on a particular billable task is reasonable. However, some generalized rules are helpful in the billing review process. These rules include:

- actual hours should be reflected on bills, not minimum billing increments;
- no two professionals should bill for the same service ("double billing") unless there is some justification for using two attorneys or other professionals in the same firm for that task;
- large amounts of time spent on "research" should be pre-authorized and be backed up by file copies of the actual research from which its reasonableness can be judged;
- administrative or overhead items should not be billed as professional services (i.e.---word processing, filing, staff overtime, etc.); and
- overall billings should not be out of line with probable exposure.

The negotiation of flat fees for the defense of the entire case has been proposed as a solution to the problem of containing excessive defense costs. While this may be a viable alternative for repetitive "cookie cutter", small exposure cases, it is not really a viable alternative for large claim litigation. A limited flat fee agreement in larger exposure claims has some utility if the defense assignment is limited

to the filing of responsive pleadings, preliminary disclosures and discovery and an initial case evaluation. If, as a matter of course, the corporate client then reviews the case evaluation and seeks an early resolution, or at that point authorizes a specific plan for preparation of the case for trial, then the limited flat fee arrangement is a valuable cost containment tool. Future case billings would then be on an hourly basis. If possible, early resolution of the case through mediation, arbitration or effective negotiation will drastically reduce defense costs by avoiding a full-blown defense preparation.

COMMUNICATION AND IN-HOUSE CONTROL OF LITIGATION

A "hands on" approach by in-house counsel to the management of litigation is an indispensable component of litigation cost control, and a vital element of a quality control plan to achieve superior results. The results achieved are ultimately judged on how closely the resolution of the case meets the goals set at the outset of the litigation. Aside from defense cost reduction factors, superior results may be reflected in achieving a settlement or verdict at the lowest equitable level. Superior results may also be achieved through the minimization of adverse publicity and the reduction of exposure for similar claims in the future.

Good communication between the in-house case managers, and the outside defense counsel, is vital to achieving effective in-house control of litigation. The process of communication should be initiated by providing the defense attorney written guidelines, commonly referred to as "practices and procedures" guidelines. Each company should have its own pre-printed guidelines to be forwarded to defense counsel along with the initial engagement letter. A corporation's defense counsel "practices and procedures" guidelines should be tailored for the type of litigation involved (i.e. --- personal injury, employment practices, commercial litigation, etc.) They should provide clear guidance to defense counsel on how the company wants its defense assignments handled. At a minimum, the following subjects should be covered:

- How the case will be staffed by the firm (allocation of work between hired partner, associates and paralegals).
- Initial case assignment considerations, such as:
    - the possible removal from state court to federal;
    - consideration of motions to transfer to different venues within the same court system; and
    - how authorization for jury trial demands is made.
- Billing procedures:
    - hourly rates;
    - frequency of billings;
    - detail to be provided on hourly fees and expenses; and
    - pre-authorization procedures for extensive research.
- Communications to the Company:
    - information or documents to be regularly forwarded to company;
    - company contact or contacts to be kept informed;
    - contacts for particular types of case decisions;
    - requirement of and components of defense costs budget;
    - communication of critical case progression dates or deadlines; and
    - the timetable for initial and follow-up case evaluations.
- Components of required case evaluations, including:
    - liability analysis;

- possible defenses;
- claimed compensatory damages;
- punitive damages claimed;
- testimony of critical fact witnesses;
- expert witness summaries;
- summary of settlement negotiations to date;
- feasibility of ADR;
- potential verdict range; and
- probable verdict range.

MANAGEMENT OF THE DISCOVERY AND DISCLOSURE PROCESSES

Discovery and Disclosure Procedures may be responsible for the lion's share of defense costs for a corporation and represent a significant element of increasing liability exposure because of the potential for court sanctions for failure to preserve and disclose evidence relevant to the litigated issues. So, this part of the process must be managed with two somewhat divergent goals in mind:

- the limitation of the burden of excessive discovery demands by the Plaintiff and
- the limitation for exposure to discovery sanctions for failure to preserve and produce relevant evidence.

These two goals will be discussed below.

Limitation on the Burden of Discovery

In Federal Courts and in many state courts, the "discovery process" amounts to the duty to make initial disclosures to the other party of basic relevant documents and the identity of key witnesses[i], followed by responding to actual discovery requests made by the adverse party in the form of written interrogatories, requests for production of documents and deposition notices. This section of the article concentrates on steps to be taken to limit the burden of responding to the actual discovery requests made by the Plaintiff after the initial disclosures are made.

The cost of responding to unlimited Plaintiffs' discovery arise not only from billable attorney time, but also from the time spent by company employees hunting down and compiling manual and electronic documents responsive to Plaintiff's document production requests, and then producing company witnesses to answer questions regarding the information disclosed in these documents. These costs are largely unaccounted for, but their significance cannot be ignored. The costs can be effectively contained by seeking to enforce the definition of allowable discovery provided by the law. In some cases, Plaintiffs submit discovery requests which are gauged to discover facts relevant to legitimate issues. In such situations, the internal and external costs of responding to such discovery requests are simply a cost of doing business. However, in a large percentage of these cases, the discovery requests, including document production requests, are nothing more than unmerited fishing expeditions, which exceed the bounds of the properly defined scope of discovery. It is therefore important to make a concentrated effort to try to restrict discovery responses to discovery questions or requests which are relevant to legitimate issues in the case.

In determining the proper scope of discovery in a given case, one must consider the Plaintiff's Complaint, as well as Federal Rules 11 and 26, and similar state code rules. Rule 26(b) (1) provides in pertinent part:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.

The proper "scope of discovery" is a complex issue that is beyond the reach of this article. Suffice it to say that although the courts are liberal is ordering discovery, not everything asked for by the Plaintiff's counsel is discoverable and there are definite limits to discovery. The limits of allowable discovery in a given case should be disused with outside counsel and responses to Plaintiff's discovery should be governed accordingly.

The relevance of an item sought in discovery "to the subject matter" of a litigated case is largely defined by the pleadings. Defense counsel should be instructed on the company's position on discovery generally. Discovery questions which go beyond the proper scope of discovery should be met by timely objections. If necessary, defense counsel should seek protective orders from the Court to restrict Plaintiff's discovery.

It also goes without saying that good claims management practice dictates that discovery responses also be restricted to "non-privileged" information or documents. The in-house litigator should always take into account the possible application of the attorney/client privilege, the work-product doctrine and the self-investigative privilege.

Limitation on Exposure to Discovery Sanctions

The modern court system has evolved to the point that much is expected of companies who are sued, or potentially could be sued, to preserve relevant evidence for future production, even if no formal lawsuit of claim has been filed. Not taking measures to preserve relevant paper and electronic documents for future potential production increases the overall cost of defense and exposure to judgments. This exposure arises from sanctions that are later imposed by a court under Federal Rule 37 or their state court rule counterparts. Rule 37(b) of the Federal Rules of Civil Procedure provides that a district court may impose sanctions for a party's failure to comply with discovery orders. This exposure usually arises from actions or inaction taking place BEFORE outside counsel has been retained and for which in-house litigation managers are responsible.

Sanctions for the failure to adequately preserve evidence (otherwise called evidence "spoliation") can range from pure monetary sanctions, such as the reimbursement of additional costs incurred by the Plaintiff in discovery or otherwise proving the case, to the most severe, which are findings determining liability, either by striking a party's responsive pleadings or by entering findings instructing a jury that if the evidence had been found and produced, it would have been against the party failing to produce it[ii].

The extent of the responsibility to anticipate future claims and the documents which might someday be relevant to these claims is determined by applicable court rules and caselaw of the local jurisdiction. However, the trend of late has been to impose a heavy burden on in-house managers of litigation to take affirmative steps to preserve evidence. These steps include the circulation of internal document

destruction “hold orders” and the taking of certain steps to ascertain the location of and secure the preservation of documents.

Within the last couple of years, two large trucking companies have been severely sanctioned at that trial court level in Georgia and Texas for, in the courts’ view, failure to properly secure and preserve post-accident documents and data. In these cases, the trial courts faulted the companies for failure to timely preserve and produce basic post-accident vehicle and driver documents. Those cases, taken together, stand as warnings to trucking companies that they need to preserve and timely produce such basic post-accident documents or information as the condition of the truck itself (not repairing truck before the Plaintiff has a chance to inspect), black box evidence (speeds and braking data right before the accident), QUALCOMM data and driver logs. The in-house litigation manager must be prepared to anticipate the need to preserve such evidence and to take affirmative steps to prevent its destruction and prompt production in discovery, even if the accident does not seem to be the fault of the truck driver. At its worst, without taking the needed preservation steps, a no-liability claim can become a liability claim because a court can “deem” liability as a sanction for spoliation of evidence. At a minimum, litigation costs can be driven up by costly court hearings and monetary sanctions.

EARLY SETTLEMENT ALTERNATE DISPUTE RESOLUTION

It goes without saying that an acceptable settlement achieved in the early stages of litigation is far better than incurring the costs and risks associated with a full blown defense preparation and a trial. Some court systems require mediation at early stages of the case, which is useful in only a limited number of cases. If the parties are willing and able, a voluntary agreement to mediate a claim at the appropriate time, before or after the actual filing of the lawsuit, can be a "win-win" situation for both sides.

Once sufficient discovery has been performed, or available information is otherwise sufficient to enable an accurate assessment of liability and damages exposure, then the in-house litigator should explore the feasibility of approaching Plaintiff on conducting a mediation, or less formal settlement discussions, if appropriate. Sometimes one must rely on the local defense attorney’s assessment of the feasibility of successful settlement negotiations or a mediation, because the local defense attorney has a better feel for the personalities of the Plaintiff and the Plaintiff’s attorney. If settlement discussions are to take place within a mediation, the outside defense attorney must also give guidance on the selection of a mediator. Whether or not a skilled mediator is involved is a major factor in a mediation’s success.

LIMITING ADVERSE PUBLICITY

Lawyers receive minimal training on the public relations aspects of claims management. Unfortunately, public relations have become a factor needing the increasing attention of lawyers managing a corporation’s litigated claims. Big lawsuits, or publicized pre-suit claims, make big news. If not handled properly, a company might lose the public relations battle, even if the claims litigation is resolved satisfactorily. Also, one cannot ignore the fact that Plaintiff’s attorneys may be attempting to "poison" the jury pool long before voir dire and opening statements.

When Plaintiff’s bar takes a litigated claim filing to the press, the in-house litigator needs to be prepared to act. This does not mean that the in-house litigator should handle the situation by himself or herself. A litigator, or professional claims handler, is a professional in the field of litigation, but not in the field of public relations. The matter should be forwarded to the corporation’s public relations contact or

communications department, followed by close work with that department to bring about a proper response. The in-house litigator's role in limiting adverse publicity and discouraging the making of similar claims becomes more direct when a case is settled. At this stage, the in-house litigator needs to insist on the inclusion of strict confidentiality clauses in settlement agreements. One of the most important reasons for the use of such clauses is to prevent a Plaintiff's attorney from using his or her settlement of the present claim as a marketing tool to dredge up future claims.

CONCLUSION

An in-house counsel's pro-active role in managing litigated transportation claims assigned to outside counsel is absolutely vital for a corporation to efficiently achieve superior results. The bottom line is that the in-house litigator must have clearly defined goals or objectives to be attained in the defense of a particular litigated claim, a plan to achieve these goals, and then a diligent follow through with outside defense counsel to make sure the plan is carried out. There are some well-recognized techniques for carrying out these duties. This article has hopefully conveyed these to you.

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WALT METZ BIO

Walt's employment profile shows a transportation, warehousing and supply chain executive in-house legal counsel with an established track record of accomplishments achieved for large and medium sized public and private company employers in the trucking, warehousing, logistics and retail industries. Walt was Vice President, General Counsel and Secretary of Americold Realty Trust/Americold Logistics in Atlanta for five years from 2005 to 2010, and has several years of experience working as in-house counsel for major trucking companies. At Americold he directed the legal affairs for North America's largest provider of temperature controlled food distribution and logistics services, Americold Logistics, LLC, including a small trucking operation. Before taking his position at Americold, Walt served in the legal departments of Sears, Roebuck and Company in the Chicago area and Werner Enterprises of Omaha. During Walt's seven plus years at Werner Enterprises he supervised the nationwide defense of high exposure trucking and transportation litigation for the large transportation carrier, and provided advice on claims, litigation and risk management issues, including the structure of self-insured liability and workers compensation programs and the associated layers of excess insurance policies. At Sears he continued to manage litigation, including high exposure commercial litigation and class actions. Walt also completed a short tenure in the Legal Department of Old Dominion Freight Lines in 2011. Since January 1, 2012, Walt has sought a permanent, full time position as a house lawyer for a major transportation/supply chain company and during that time period has published several timely transportation law journal articles, has made himself available for consultation on related issues and has been remotely employed on a short term assignment for a substantial full truckload transportation company. Prior to going in-house, Walt was a member of two Omaha law firms, where he practiced primarily in Commercial Litigation and General Practice. He graduated from the University of Nebraska-Lincoln with High Distinction and was elected to membership in Phi Beta Kappa. He also earned his JD at Nebraska. Walt continues to be a huge Big Red fan!

Walt is available for a new in-house legal opportunity. Walt's complete professional profile can be accessed at: http://www.linkedin.com/in/waltmetz.

ENDNOTES:

[i] FRCP Rule 26 (a)(1) provides as follows:

(1) *Initial Disclosure.*

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

[ii] Permissible sanctions under FRCP Rule 37 (b)(2) are:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.