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Inside

A 2020 Survival Guide for Outside Counsel: Getting Ready for 20/20 Vision (or How to Effectively Work with In-House Counsel and Claims Adjusters)

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(Please note that the views expressed in this article are written as my own views to provide guidance for defense counsel, and do not in any way, reflect those views of Western World Insurance Company, Validus Specialty, or AIG.)

Michael Young, a partner at the law firm Hepler Broom in St. Louis, recently posed a question on LinkedIn:

"For all insurance adjusters, supervisors and in-house counsel out there, what are the things that drive you crazy about outside counsel? Things that we don't do that we should or things that we do that we shouldn't?"

Excellent question. And I can spend many pages writing about what outside counsel does wrong or how they continually succeed in driving me crazy.

But I won't. First, I have to say that outside counsel has a difficult job. They may work for a number of insurance and non-insurance related companies and each company may have its own billing and reporting guidelines.

Even worse, in dealing with one insurance company you could be dealing with 50 different adjusters, and each adjuster has its own peculiar preference. One adjuster likes short reports. The other likes long reports. One adjuster wants to talk on the phone a lot. The other communicates solely by email. Face it. You just can't win.

But you can. And it is very simple. The first question you need to get the answer to is: "How can I make the claims adjuster's or in-house counsel's life a little bit easier with respect to the case I am handling?" If you cannot answer that question, the first thing you need to do is get the answer.

Think about it. Just by asking the question, you are creating a relationship. The person on the other end will want that relationship because it creates trust which helps your business and bottom line. The relationship is not with the file, but the person on the other end of the phone, and with the client. The client has been sued. I have a dispute with an insured that I want to figure out how we can resolve. So, you have troubled people and you will be the person to show them the way out of their troubles.

We want our hand held sometimes. Ok, most of the time. And I want to be able to do this too. I am on the insurer side, and because of the volume of the business, I have seen this claim before and I can walk the insured through the process. I always like to say; "I have read the book and I know the ending." I say that to the person who has not read the book. I like to hear this from defense counsel as well.

And they do. However, if you talk the talk, you have to walk the walk. Outside counsel wants to be put on my company's panel counsel list and they tout their experience in handling the kind of claims I see. They have read the book.

And then they get on the panel counsel list, and they offer to come into the office to give a seminar on handling the type of claims we see. The offer is accepted. We like the CE credits and it may be helpful for the claims staff. They have read the book, and they will come in and read the book to us.

But, just imagine the disappointment the claims adjuster will feel that after hearing about how outside counsel has read the book, how outside counsel even came in to read the book to them, the outside counsel gets assigned the very claim that the book is based on, and they do not know the book. In fact, outside counsel tells the claim adjuster, "Thank you for sending me this very interesting new book!"

The claims adjuster gets further evidence when the adjuster is provided with the semi-annual litigation report. It is a form, and many attorneys fill it out like they are filling out a form at the doctor's office. The report summarizes the lawsuit that, hopefully, the claims adjuster summarized on his or her own for their own understanding, and the rest of the report just goes on to say that things are premature and there are no answers. This kind of report adds no value.

Does that report make the claim adjuster's life easier with respect to that particular claim. The answer is "no." We are unable to figure out what reserve to place on the

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file. We are unable to determine how we want to resolve the claim. We are stuck. If outside counsel wants to make the claims adjuster happy, make sure that the claims adjuster is not stuck.

The claims adjuster does not expect outside counsel to have all the answers. However, qualified answers are fine enough. Based upon my meeting with the client, my review of the documents I have, my experience with similar cases, this is how I see this case playing out. That is all we need, and the claims adjuster and the outside counsel can then further their relationship by discussing what direction would be best for the case.

I like to tell outside counsel to follow three rules.

First: "If the report does not help make you a better lawyer or your handling of the case, it will not help me."

In other words, write the report for yourself first.

The second rule is to always be mindful of the "Red Zone." Think about litigation management a bit like football. Good teams are not only efficient once they are in the Red Zone, but they are also efficient getting to the Red Zone. Bad teams never seem to get there, and once they do, they go backwards or fumble the ball away.

Here's a tip: Sometimes, you can be standing right in the Red Zone. That is the point when the case will never get any better for the client.

The third rule is to always have a realistic settlement value. While a realistic value may be perceived to be incredibly low based on perceived defenses in the case and could be a valid number, you have to stop for a second and think whether, in your capabilities as a negotiator, what is the percentage likelihood that you can negotiate a settlement at the value you have assigned? If there is a zero chance that you are able to settle the case at the settlement value you have assigned, you will need to qualify this opinion to state that the settlement value is a number that the case will never settle at.

Here is an illustration. It is not in dispute that the plaintiff is out of pocket $500,000, but it is in dispute whether the defendant is responsible, and there are solid defenses. Plaintiff's counsel has incurred $80,000 in legal fees to date. Defense counsel has opined that, based on defenses, the settlement value is $50,000. However, given the $500,000 loss and $80,000 investment, defense counsel gives zero chance that the case can actually settle at $50,000.

So, there is a second question. What is the number that defense counsel believes the case can actually settle at.

Another tip that will always have outside counsel succeed in their relationship with the claims adjuster or in-house counsel is to always evaluate the case with the four pillars of any case. These four pillars, which I will explain, come from my experience as a trial lawyer and my trial working on some big claims doing mock trials. Trials and mock trials.

A trial has the opening statement and the closing argument. The opening statement has the jury hearing what you believe what the evidence will show. I like to think of this as the promises we can keep. I am not the finder of fact. The folks on the jury are. "If I keep my promises, you should find for my client, but if I don't, I want you to find for the other side. Where will you get a fairer deal than that?"

So, the promises are the first pillar. If we can make lots of promises that are helpful to the case, it has a lower value. If the other side has lots of promises, it may have a higher value.

The next pillar comes from the closing argument piece. "This is my favorite case to try. My favorite case! It is not because of sexy issues or fancy experts. It is because this is the case I can rely on the common sense of the jury. Whenever I can rely on the common sense of the jury, juries always do the right thing."

So, does our story have the better common sense appeal? That is the second pillar.

I want to stop here and make another comment about looking at a case from this perspective. Too often, we tell people that they have a right to their opinion. But, in truth, we want them to accept our set of facts. Of course, if you accept our set of facts, you would come to the same opinion that I have.

Or, in other words, you have no right to your own opinion.

But, what we would love to tell a jury is that the trial court is the only place that they have both the right to their set of facts, and to their opinion.

What we are really saying is, "I trust you." Think about this. If you convey a sense of trust to the jury, they will trust you as well. If you show you do not trust them, chances are that they may not trust you either.

With trust, you gain credibility. Credibility is a lawyer's greatest currency.

Another ancillary point that I like to make when I talk about promises and common sense is to always have the ability to look at a case from a "micro" and "macro" perspective.

The "micro" approach focuses squarely on the facts of the case. This always works to the plaintiff's advantage. Because if one side has one version of the facts, the other side will have a different version.

However, the "macro" approach looks at a much bigger universe. Let's say that a professional is sued for falling below the standard of care in a transaction. How was

this transaction handled differently from similar transactions the defendant handled. If it is identical to thousands of other transactions, is it possible that the professional fell below the standard of care in thousands of transactions, but this is the first time the professional got caught?

If we use a "wrongful termination" example, from both the employee and employer perspective, was this an "incident, pattern, or lifestyle"? How the employee performed in a job overall as opposed to one infraction is the "lifestyle." How the employer handles employee termination and discipline is the employer's "lifestyle."

The last "ancillary" point is that if you are successful in getting your arms around the "promises" and "common sense" aspects of the case, and you look at the world from both a "micro" and "macro" perspective, you will learn that you will not have to rely as much on "arguing" your case and be more effective.

What do I mean by this? Lawyers love to argue! We would not be lawyers if we could not argue. But, arguments, in fact, take away your power. If you are arguing X, and the other side argues Y, it is a back and forth "ping-pong" type match.

But think of the world in this way: "When I have X, I do Y." In other words, when I have these facts, this is the world I live in. I am not arguing what my position is. I place my position firmly in the ground. I have lived this case a thousand times, and this is where I end up. It has this value. Arguments do not give you authority, but your experience does. And, we all love when counsel uses his or her "authority."

The third and fourth pillars come from two questions they ask mock juries. The first one is, "Do you have a strong desire to compensate this particular plaintiff?" Studies show that if the plaintiff is a widow or orphan, juries tend not to care so much about the facts. They just want to give away the money. The third pillar is the sympathy question.

The second question is, "Do you have a strong desire to see this particular defendant lose?" Not only do we have to think about the sleazy low life that the defendant may be, but also the defenses raised. A particular defense may get you points on the law school exam, but you can turn off a jury by raising them.

You think about those four pillars. Evaluate based on those four pillars. Negotiate based on those four pillars. Try your case on those four pillars. You will have a happy client regardless of the result.

The last thing to be concerned about is surprise. Guess what? Claim adjusters, in-house counsel, and your parents all do not like surprises. So, picture this scenario. You have been writing to everyone how the case is defensible, and you get to the courthouse steps. All of a sudden, everything falls apart. Bad judge. Bad jury instructions. Bad jurors. Bad witnesses.

And bad news. We now have to come up with lots of money to settle the case.

So, I tell my Batman and Robin story. The Adam West and Burt Ward one. Batman and Robin find the bad guys in the warehouse by the river. They beat up the bad guys. But, at the end of the episode, the net falls down on them, and next thing you know they are tied up and about to be tossed in a vat of boiling oil.

Batman has a utility belt. Robin does not. Go online and check out the pictures and you will see that I am right. How can you have a teenager go out as a crime fighter and not give him a utility belt. (Batgirl had one!)

So Robin freaks out. "Holy deathtrap, Batman!!" Batman then proceeds to go into his utility belt, take some tool or transistor thingy out, and saves them from a certain death.

The interesting thing is that it happened with every villain. The Joker. Catwoman. King Tut. The Riddler. You think that at some point, Batman and Robin would know about the net. Look up and see if there is a net!

So, the claims adjuster and in-house counsel do not want to be Batman to your Robin. We do not want to go into our utility belt and take out lots of money to save outside counsel from a certain death. The problem with that is that after we save outside counsel from certain death, there could be adverse health consequences for the claims adjuster or in-house counsel as well.

See!! It is easy. And you know what? Not only will following the instructions above ensure that you will have a very happy client. Happiness is contagious. You will find happiness as well!