

## **Perfecting Your Panel Position: Advice for the New and for the Experienced**

*By Michelle Lore*

Every insurance carrier is different and has its own methods for finding and keeping counsel on its defense panel roster. In fact, it can take years of perseverance before a lawyer or a firm finally makes it into this apparently coveted position. But it isn't enough just to get on the panel. Lawyers and law firms that want to keep their spot on the roster need to avoid becoming complacent and should consciously work to nurture and solidify their relationship with the carrier. As discussed below, much of that involves good work and communication. But part of it also includes succession planning – training new lawyers within the firm to work as panel counsel as well, introducing them to insurance claims personnel and giving them opportunities to work on files. The idea is for these younger lawyers to be ready to slide into the panel spots that longtime defense panel members leave when they quit practicing.

Within some insurance companies, particularly smaller ones like Minnesota Lawyers Mutual, the claim handlers (most are attorneys themselves) are given carte blanche to choose the lawyer they want to defend an insured when a malpractice claim is asserted against an insured lawyer. The defense attorney must be a member of the insurer's established defense panel roster, but as long as that is the case, the claim handler makes the choice.

So what do claim handlers look for in defense counsel? What attributes and actions cause them to hire one defense lawyer over another? What can lawyers do to ensure that they are the one that is at the top of the claim handler's mind when he or she needs counsel for an insured in their jurisdiction? And what can younger, associate attorneys working with defense panel do to endear themselves to claim handlers?

The most important thing is to know the insurer you are working with. Ask the claim handlers what they want in terms of the level of communication and involvement in the file. What follows are the thoughts of one legal malpractice claim handler. It is likely that many of the tips provided are universal, such as keeping the claim handler up to date on facts that may change the liability or damages analysis on the claim. But others may vary from insurer to insurer, so communicate with the claim handler early on after receiving the file.

First, and this should go without saying, promptly return phone calls and emails from claim handlers. If you are in trial or on vacation, have someone in your office contact the claim handler and let him or her know you are out of the office but will be in touch as soon as you are able. Most claim handlers understand that they are not the only person you are working with.

Communicate regularly regarding the status of the claim. If information comes to light during discovery that changes the outlook for the insured's liability -- for better or for worse -- or greatly increases or decreases the potential damages at issue, let the claim handler know immediately. Don't ever be in the position of having relayed to the claim handler all throughout discovery that a claim is defensible, and then suddenly, on the eve of trial, report that it should be settled for hundreds of thousands of dollars.

Similarly, keep the claim handler in the loop as to what activity is occurring in the file. The first time the claim handler learns of something -- for example, that you brought or defended a motion to compel -- should never be when he or she is reviewing the related entries on your invoice. And at least occasionally, rather than send an email, pick up the phone and call the claim handler when something comes up on a file.

Be sure your regular status reports are well thought-out and organized. If the claim is stayed or otherwise "on hold" and there is nothing new to report, let the claim handler know.

This is much preferred to sending a report that simply repeats what was reported previously, and then billing the insurer for it.

Most claim handlers want their file to closely resemble yours, so send them copies of pleadings, briefs and memos filed in the matter without being requested to do so. In fact, many claim handlers would like to see drafts of briefs and motion papers before filing. The claimant handler may not have the time or inclination to review all of them – for example, they may not feel the need to review a motion to compel before it's filed – but most still appreciate being given the opportunity to do so. Many claim handlers do want to review other, bigger filings, like summary judgment memos or appellate briefs, prior to filing. Often the claim handler may have insight that you did not consider. Plus, even a cursory review of the brief gives the claim handler a better feel for the claim and the arguments being asserted. Moreover, some are very good editors who can help you avoid embarrassing grammatical and typographical errors.

Similarly, run settlement releases by the claim handler before sending them to opposing counsel. While most experienced defense counsel have drafted numerous releases in malpractice cases and think they have it down to a science, it's an important document, so it can never hurt to have one more set of eyes review it before it goes out.

With regard to claim handling, have a plan and be proactive. When you get a new assignment from an insurer, immediately take a look at the big picture. Is it a case that can be settled for a nominal amount quickly? Is it a situation that can be “repaired”? Is it a defensible claim with an unreasonable claimant that will have to go to trial? Consider what would be the best resolution of the problem and work towards that goal. Don't just dive in by answering the Complaint and sending out discovery requests. Similarly, be conscious of how much time and money the claim is worth. Don't spend \$20,000 in your time analyzing a claim that came win

with a settlement demand of \$15,000. Some claims can be settled early on without incurring a lot of time or cost, which is undoubtedly better for your client and for the insurer. Plus, the more claims you handle in a quick, cost-effective manner, the more files the claims handlers are likely to send you.

Likewise, get results. Good results generate more work. Claim handlers understand that you are not miracle workers, that some files generate a lot of fees because of the claimant's action or unreasonableness, and that some claims just have to be tried. However, if you see a legitimate opportunity to resolve a claim early, either through a motion to dismiss or summary judgement or even settlement, talk with the claim handler about this.

When it comes to billing, send invoices regularly, preferably monthly. Most claim handlers are under pressure to maintain proper expense reserves. Failing to bill for six months and then suddenly mailing out an invoice for \$30,000 not only gives the claim handlers "sticker shock," it makes it difficult for them to properly monitor and evaluate the expense reserve on the file.

Check with your claim handler before engaging in large research projects. It may be that the insurer has a research bank it can delve into to get an answer to your research question, which will save you time and the insurer money. Moreover, it is best to let the claim handler know the reason for the project and provide an estimate of the time it will take. Contrary to the old adage, it is not better to ask for forgiveness rather than permission, at least not if the insurer is one you want to continue to work with.

Moreover, if you provide your claim handler with an e-mail update of something that happened on a matter and the claim handler responds with "Thanks for the update," consider not billing for reading the four-word, non-substantive response. Having that show up on an invoice

may cause the claim handler to stop responding to your e-mails, which in turn can leave you wondering if he or she is receiving them. If the claim handler provided substantive information or generated additional questions with her response, it is perfectly appropriate to bill for that.

Be conscious of expert costs as well. Most claim handlers want to know an expert's hourly rate and if possible, an idea of how much time the expert will need to spend on a project or report. Unfortunately, some experts see insurance companies as cash cows. Claim handlers must rely on defense counsel to find reputable, cost-effective experts. They expect you to work with experts when possible to control costs, and be willing to support them in the event there is a legitimate dispute over an expert's invoice or time spent on a matter.

Keep in mind that claim handlers have to answer to their supervisors as to the legitimacy of the fees and costs incurred in defending a claim. If you are clear with them and are able to articulate the necessity of the fees and costs incurred – yours and an expert's – they in turn are able to justify those amounts to their supervisors.

If you are an associate and work with partners who serve as insurance defense counsel, there are things you can do to cement your spot on the roster as well. In fact, much is being written and spoken these days on the topic of succession planning, in part because of our rapidly aging lawyer population and the attendant issues this raises for clients and law firms. Many of these aging attorneys have served in the capacity of insurance defense panel counsel for years, and have developed solid relationships with the carriers they work for. It's imperative -- for the firm and for the insurers -- that panel counsel take the time and make the effort to ensure there are other, younger lawyers within the firm that are ready and able to take over for them when they either expectedly, through retirement, or unexpectedly, in the case of illness or death, are no longer able to practice law.

Perhaps the best thing younger lawyers can do to make their own name with the carrier is to do good work. Take the time to learn and understand the law in the malpractice area, both the procedural aspects and the substantive law. Excel at the projects you are assigned, and request that your senior attorney include you in the signature line of memos and briefs so claim handlers become familiar with your name and your work. In addition, if you see a legitimate way to resolve a claim or come up with a valid argument or defense that the senior partner on the file has not thought of, don't be afraid to talk with him or her about it. Be respectful but confident.

In addition, take as many opportunities as possible to meet and talk to the claim handlers you work with. Be assertive. Request permission from the senior partners that you be allowed to attend events where claim handlers will be present. Attend the carrier's defense panel seminar if it has one. As noted above, most insurance defense panel attorneys who want the firm's relationship with the carrier to continue indefinitely realize the importance of succession planning. It's imperative that the claims people they work with regularly get to know others in the firm, particularly the younger lawyers who will take over for them when they leave the practice. And if the senior lawyers have not been thinking about it, they need to be, so younger lawyers should not be afraid to point this out.

In the end, it's quite simple, and likely universal among claim handlers and insurers. Doing quality work, being responsive, and developing a good rapport with the people you work with makes it far more likely that they will continue to hire you in the future. This holds true for established panel counsel, as well as the up and coming professional liability lawyers.

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