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Private Firm

'Pick Me, Pick Me!' Insurance Insiders Tell How They Hire Lawyers

BY MELISSA M. LESSELL

To thrive at a large legal malpractice defense firm, lawyers need to do more than simply be good advocates—they need to develop their own books of business. And that means developing good relationships with insurance claims adjusters. This was the discussion topic for a panel comprised that two insurance executives, Scott Barabash, vice president of professional liability claims at Aspen Insurance, and Matt Borrillo, senior claims attorney for the Oregon State Bar Professional Liability Fund, and rain-maker defense attorney, Meredith Kaplan Stoma, a partner at Morgan Melhuish Abrutyn.

The panel, moderated Ashley Eiler, consulting counsel at Wiley Rein, was presented at the Fall 2017 National Legal Malpractice Conference in Colorado Springs.

Appointing Counsel

Speaking to an audience largely of defense counsel of various ages and experience, Barabash explained how

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the different insurance policy terms dictate the selection of counsel. There are four variants: "insured select," "mutual select," "panel counsel," and "independent counsel."

Insured select means exactly that: the insured gets to pick the attorney. Insured select provisions usually are contained in insurance policies written for larger law firms and are accompanied by substantial premiums. This type of policy will either contain specific language giving the insured the right to select counsel, or, on occasion, will contain an endorsement that specifies the name of the lawyer or firm who will defend the insured against any claim or lawsuit. Barabash remarked that usually the more control an insured has, the higher the premiums.

As the name suggests, mutual select provisions give both the insurance company and the insured control over the select of counsel. This type of provision gives the insured some control, but gives the insurance company the ability to participate in the decision as to counsel.

The insured has the least amount of control when the policy states that he or she will be defended by panel counsel. This is typically found in a duty to defend policy, which provides that the carrier has the right and the duty to defend the insured. When a policy calls for the appointment of panel counsel, the carrier often will select counsel without any input from the insured lawyer or firm. However, oftentimes insurance companies may allow their insured to select from a list of panel counsel, if the insurance company has more than one option in the state. In situations like this, Stoma recommends that counsel volunteer to be interviewed by the insured, rather than leaving him or her to blindly select a name from a list.

The fourth type of counsel appointment is when the insurance company has to provide the insured with independent counsel. This situation is usually triggered when there are coverage issues, but the requirement to appoint independent counsel varies by state. The independent counsel typically is charged with doing whatever is "reasonable and necessary" on behalf of the insured and sometimes does not have to comply with all

of the insurance company's litigation or billing guidelines.

How to Set Yourself Apart From Other Lawyers

The presenters made it clear that there is no quick and easy way to get on an insurer's panel. Rather, it seems to require a mix of hard work, doing a good job, and knowing the right people through developing your network and reputation.

Borrillo, whose company is smaller than some of the larger public insurance companies, stated that the panel process is very informal. His company stresses having a diverse panel of subject matter experts, but he noted that adding new counsel to its panel is almost "junior high-like." To fill openings they first ask around internally, then with other people they know in the insurance industry. Because of this process, an attorney's reputation is paramount, he said.

The panelists agreed that word of mouth and professional reputation is often the way to get new business. Barabash cautioned that word of mouth can always work to the disadvantage of an attorney who has developed a bad reputation in the profession. Stoma agreed, saying that a lawyer should never bad-mouth other attorneys.

Stoma, the sole partner on the panel, shared some experiences that have helped her develop her book of business over time. She encouraged young lawyers to develop connections when they first start practicing and continue to nurture those connections as they move jobs or insurance companies. "Build your network and make sure people know what you do," Stoma said. Attorneys should carry business cards and hand them out. She also encouraged written marketing plans to help hold lawyers accountable, as they can develop goals and revisit different strategies.

"The work a lawyer performs is the best way to get new cases," she said. She stressed that developing a personal relationship with a carrier is important, and that picking up the telephone is much better than sending a "generic email." Along the same lines, she encourages attorneys to take claims professionals out to lunch or dinner, to get to know them on a personal level. Barabash said that while some adjusters like to do these things, others do not and may not even like small talk.

Stoma cautioned attendees to keep firm politics in mind when marketing and developing contacts. Younger attorneys should talk to their senior partners and be open, rather than create an environment of competition within the firm. Stoma also stated that there is strength to being at a good defense firm, reminding the group that "you are marketing the firm, not you." Lawyers should "use 'we' or 'the firm'" when developing clients, as carriers want to know that there is an established firm behind each lawyer handling their cases.

What to Do Once You Have a Case

The panel turned to what that lawyer can do to really make herself shine, once she lands a case. Borrillo explained that the relationship between a carrier and panel counsel is unique, in that the litigation guidelines provide a detailed list of what the carrier expects from its counsel. This lets lawyers know what the insurance carrier wants before even speaking to the adjuster for the first time.

Borrillo said that the purpose of the guidelines "is not to micromanage, but rather to develop continuity to allow the carrier to track cases." Knowing and following the litigation guidelines is the best thing a lawyer can do, since no one can get mad at a lawyer for following the carrier's rules.

Barabash agreed, saying that the guidelines are the minimum baseline the carrier wants and expects but encouraged lawyers to find ways to exceed them. Acknowledging that many lawyers find guidelines to be cumbersome, he admitted that many claims handlers may not like the guidelines either, but that the guidelines are required.

Barabash likened guidelines to a law school exam where a student would get a lower grade, even if he got the correct answer if he failed to provide proper analysis in reaching it. "Even a great result won't get you more cases if you aren't following the guidelines," Barabash warned.

The panel agreed that it's a good idea to check in with the adjuster during the pendency of a case. Borrillo said that when a lawyer asks him for feedback, he sees it as a demonstration of that lawyer's strong interest in the work and as a sign that they will work well together in the future.

Insight into a Claims Handler's Mind

Barabash and Borrillo also provided insight into what exactly they are looking for from counsel when handling a case, since "doing a good job, in the right way, will pay dividends."

Accuracy and promptness were two key factors for Borrillo, who said that when something happens in his case, he wants to know. By accuracy, Borrillo said he means that a lawyer knows what she is talking about, not necessarily that she believes they are going to win. He also likes counsel to be straightforward—it's ok to say "I don't know" if there is not sufficient information developed in a case yet.

Borrillo said he needs attorneys to be accurate and prompt in their reporting, so that he can analyze the risk associated with the case at any given point. Insurance companies seek to manage risk. His work gets rolled up into a general forecast on the risk, which then gets passed on to the reinsurers, the board of directors, and the board of governors. He told the panel to err on the side of over-reporting and to avoid having the carrier ask for an update.

Barabash further echoed the importance of reporting promptly when situations change, explaining that "[we] expect bad news, we just don't like to get bad news on the eve of trial when the information has been out there for a while." Barabash further explained that he does not mind when a lawyer changes his mind in terms of an evaluation of the file, as long as it is based on something substantive.

Barabash and Borrillo disagreed as to how they want their individual cases to be evaluated. Barabash likes his lawyers to provide him with percentages and estimates for verdict and settlement value, but acknowledged that the numbers given to him by a lawyer aren't definitive, since he does his own analysis. Borrillo, on the other hand, stated that he does not like it when lawyers provide percentages of success or decision tree analyses and is fine with generalities. The differences in opinion between these two insurance professionals highlighted one theme from the panel: the need for law-

yers to really get to know the carriers with whom they work in order to learn and know their respective preferences.

Stoma said that from her perspective, it is important to make the adjuster's workload easier. Always provide timely updates and follow up a report with a call.

Barabash added that the adjuster is a lawyer's connection to the company. The lawyer should strive to make the adjuster look good, should never throw them

under the bus and avoid going over the adjuster's head except in the most extreme of circumstances.

Stoma said it's important, in the insurance defense context, to manage the tri-partite relationship. She stressed that it is important to know when to step aside and focus on the defense of the case and let the carrier and client work out any coverage issues amongst themselves.