

ARTICLES

CLM ISSUES “LITIGATION GUIDELINES” IN 2010

By *Tim Lynch*



Wikipedia defines the term “project management” as the discipline of planning, organizing, and managing resources to bring about the successful completion of specific project goals and objectives. A similar definition could be applied to the Council for Litigation Management “Litigation Guidelines” which were released in February 2010. They can be found on the CLM website at <http://www.litmgmt.org/uploads/guidelines/clm-guidelines.pdf>.

Seventeen months of work by a committee of 37 representatives from the insurance industry, law firms and litigation support entities went into the development of these guidelines. The committee reviewed individual carrier guidelines and earlier efforts at standardized models. The goal was to arrive at guidelines which not only impose some fiscal discipline upon the litigation process but also add value to the overall management of the case thereby increasing the probability of reaching an outcome that meets the expectations of the insured and the insurer.

This goal has been accomplished by developing an Initial Evaluation and Litigation Plan (IELP) which is to be submitted prior to or very close in time with the preparation of a litigation budget. The deadline for the IELP is 30 days after the initial assignment. By this time the attorney should be reasonably up-to-speed on the essential facts of the case. Therefore, much of the information sought in the IELP should be available. However, it is still early enough in the litigation that most of the critical decisions that affect both cost and direction will not have been made. As a result, the claims professional will not be presented with a series of *fait accompli* where they are committed to a course of action over which they have little or no control.

Tapping into the combined experience of the committee members, the drafters deconstructed both defense and coverage litigation. They created two sets of questions and bullet-pointed outlines which are appendixes 2 and 3 to the guidelines. Having defense counsel provide the information sought in the IELP as an integral part of the budgeting process should result in a budget that is less of an “educated guess” and more of a realistic assessment of the financial requirements for the defense of the lawsuit.

For coverage cases, the drafters isolated seven “key points” regarding the underlying action and 16 with regard to the assigned coverage case. For third party defense cases, they identified 11 “key points” of background information and legal theories to be analyzed and 11 questions to be answered in order to develop a “strategy for resolution and recommended activities.”

The guidelines call for the claims professional to advise defense counsel at the outset as to the type of budget he or she will be required to prepare. Three types are identified. They are:

- **Itemized** where the fees and costs are estimated in phases chronologically following either the ABA billing code guidelines or UTBMS Guidelines and stopping the projection at the settlement phase prior to the pre-trial and trial phases;
- **General** where a broad outline is provided chronologically tracking the litigation plan; and
- **Phased Budget** which is set out in detail in Appendix 4 to the guidelines.

Appendix 4 divides the litigation into five logical phases, I. Initial; II. Discovery; III. Alternative Dispute Resolution/Mediation/Settlement; IV. Pre-Trial and Trial; and V. Appeal.

Costs that can be incurred in each phase that are frequently run together in other guidelines are broken out by phase in this model. These costs include travel, copies, expert fees, etc. In addition, attorney and paralegal time are specified as to each phase. Thus, a phased budget that is developed simultaneously with the appropriate IELP will allow the claims professional to gauge the cost and potential consequences or benefits of alternative courses of action early in the litigation.

It is true that the financial requirements for several of the sub-categories in the later phases cannot be predicted with any real degree of accuracy. For example, in phase IV items A.8 preparation of witnesses and exhibits for trial, A.11 post trial motions, and in phase V items A.2 review transcript and exhibits and A.3 legal research would be at best educated estimates. However, by imposing the discipline of examining each element of each phase of litigation, the claims professional should be able to arrive at a reasonably accurate and workable litigation budget.

About the Author: *Tim Lynch is the founder of Lynch & Associates (www.northlaw.com). Since 1973 he has represented insurers and self-insureds across the state of Alaska. He has 30-plus first chair jury trials in products liability, bad faith, general negligence, Dram Shop and arson/fraud cases. He can be reached at tlynch@northlaw.com.*