



DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

AMERICAN CORPORATE COUNSEL ASSOCIATION
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INTERNAL MARKETING OF LEGAL SERVICES FOR INSURANCE STAFF COUNSEL - GETTING TO MARKET SHARES

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Before embarking on the long journey to start a Staff Counsel program, many decisions need to be made. The first and most important decision is, what do you want from your Staff Counsel. I suggest that you require that your Staff Counsel provide **QUALITY LEGAL REPRESENTATION OF THE INSURER AND ITS INSURED IN THE MOST COST EFFECTIVE AND EFFICIENT MANNER.**

You might now say to yourself, that's a great Mission Statement. But, how am I supposed to do this. You need to determine:

- A. How much litigation do you have?
- B. What type of litigation do you have?
- C. What are the jurisdictions (states) where this litigation is located?
- D. What am I presently spending for Outside Counsel fees and costs?

A. How much litigation do I have? You should not embark on this journey unless you have and anticipate having in the future a sufficient amount of litigation.

B. What type of litigation do I have? Is the Staff Counsel arrangement conducive to the handling of the type of litigation I have or is it best handled by Outside Counsel - **QUALITY LEGAL REPRESENTATION, EFFECTIVENESS, EFFICIENCIES.**

C. What are the jurisdictions where this litigation is located? Again, you should not embark on this journey unless the litigation you have and anticipate you'll have in the future is located within a confined area.

D. What am I presently spending in Outside Counsel fees and costs? In the short run and, more importantly, in the long run, will I be saving money by switching from Outside Counsel to Staff Counsel.

The answer to each of these questions is equally important in the decision to start a Staff Counsel program.

A. As to the issue of volume of litigation, my experience has shown that the volume of litigation increases

with the establishment of a Staff Counsel program. While Staff Counsel should not be abused, it should be used by its Claims Client. Staff Counsel allows an insurer to evaluate a case without having to factor in the attorney's fees that would have to be incurred to properly defend the case. If the Claims Client does not have to factor in these fees, the business decision that "its just cheaper to settle the claim than to pay the costs of defense" becomes less of a factor. If the costs of defense are less by the use of Staff Counsel (it is never "zero"), a Claims Client can evaluate and make its decisions based on the merits of the claim.

B. You next have to examine the type of litigation you have and compare it with the type of litigation you expect your Staff Counsel to handle. Will counsel handle cases that have low to medium severity or will they also handle high exposure cases? Will counsel handle cases that are relatively simple from a legal issues perspective, or will they also handle cases that contain complex legal issues? Will counsel handle bad faith and punitive damages cases filed against the insurer? Will counsel handle subrogation cases on behalf of the insurer?

Will counsel handle cases in which there is a potential verdict or award greater than the insured's policy limits? Will counsel provide opinions of law on issues not in suit, conduct EUOs and subpoena records for matters not in suit.

The answers to the first two issues, volume of litigation and type of litigation, will help you to decide how large a Staff Counsel office should be and the experience and expertise of the people you want to hire to staff that office. As an example, you might want to hire Attorneys and Trial Attorneys to handle the low to moderate exposure and complexity cases, Senior Trial Attorneys and Master Attorneys to handle the heavier and more complex cases. You will also need someone to perform the administrative functions for the running of the office. If the office will be rather small, the Master Attorney could also be charged with these administrative responsibilities. However, if the office will be large in size and staff, it would be advisable to have a Managing Attorney whose principal responsibility would pertain to the running of the office. These attorneys will need a support staff which could be made up of one or more of the following types of individuals - secretaries, paralegals, calendar individuals, receptionist, mail-file person and office manager. As with the attorneys, the volume of litigation and the type of litigation will help you to decide what type and size support staff you need.

C. Next, you need to determine what is the geographic location of your litigation - is it centrally located or is it spread out within a state or region. Usually, for a Staff Counsel operation to be EFFECTIVE and EFFICIENT the matters handled need to be centrally confined to a reasonably small geographic area. This is usually an urban area and its surrounding counties. You have to realize that these are attorneys handling matters in litigation. Thus, they will be out of the office appearing in court, at depositions, arbitrations, etc. Too much windshield time will lower the efficiencies thereby adversely affecting the QUALITY OF LEGAL REPRESENTATION.

D. You may have a sufficient volume and type of litigation that is centrally located which would seem to justify the start of a Staff Counsel program within a particular state. But, your final decision cannot be made until you compare the cost effectiveness and efficiencies of Staff Counsel vs continuing to use Outside Counsel to handle your matters in litigation.

II. Cost Effectiveness and Efficiency Models

This last factor, a comparison of the cost effectiveness and efficiencies of a Staff Counsel operation vs the continued use of Outside Counsel can be very difficult to measure. You first have to accept the fact that in the short run, one-two years, the cost effectiveness and efficiencies of Staff Counsel may be lower than using Outside Counsel. There will be many start-up and front end costs that will be incurred in the planning and opening of a Staff Counsel office. These are usually one-time expenses which will not continue to be incurred. You, therefore, have to look beyond these short-term expenses to measure the long-term benefits of

establishing a Staff Counsel program.

Some of the long-term expenses that will be incurred by a Staff Counsel operation are salary and benefits, support unit charge-backs (Human Resources Department, Systems, Accounting), rent, computers, books and periodicals, travel, air and train transportation, equipment (photocopy machine, fax machine), association dues, postage. In short, all of the expenses incurred in the operation of the Staff Counsel office need to be compared with the legal fees that are paid by the insurer to Outside Counsel to handle a comparable volume and type of litigation. Caviat - such costs as filing fees, deposition costs, costs of subpoenaing records, independent medical examinations that are incurred in the handling of each case should not be factored into the cost effectiveness and efficiency equations used to compare the benefits of Staff Counsel vs Outside Counsel. These costs are incurred by both Staff Counsel and Outside Counsel and should be considered "Claims Expenses". In short, only the ULE (Unallocated Legal Expenses which are not charged to any particular case or file) of Staff Counsel should be compared with Outside Counsel's legal fees.

This comparison, however, is like trying to grab Jello in your hand. It is not an easy comparison to make. Staff Counsel's costs are fixed regardless of the number of cases being handled at any particular time, while Outside Counsel fees are based on billing. While Staff Counsel will incur costs on a regular monthly, quarterly and yearly basis, Outside Counsel billings are sporadic and the amount fluctuates from billing to billing. While not foolproof, some possible cost effectiveness and efficiency formulas that might be used are:

ULE incurred in a month/quarter/year

Number of cases opened/closed/pending in a month/quarter/year

In a rudimentary way, this formula may indicate what it costs the insurer to have its Staff Counsel handle one case. The problem arises, however, when you try to compare this amount with what it costs the insurer to have Outside Counsel handle a comparable case. In order to wind up with a comparison of apples to apples rather than apples to oranges, I recommend the following formula be used.

Staff Counsel ULE incurred in a year (or longer)

Number of cases closed in a year (or longer)

vs.

Outside Counsel Legal fees incurred in a year (or longer)

Number of cases closed in a year (or longer)

An alternate to using these formulas is to have your Staff Counsel bill each of the files it handles in a similar way to how Outside Counsel bills each of the files it handles. The possible problems with having your Staff Counsel bill these files are a loss of efficiencies (your attorneys will be spending time in the performance of a billing function rather than in a QUALITY OF LEGAL REPRESENTATION function) and a reluctance on the part of your Staff Counsel attorneys to perform billing functions. Many of the attorneys who make the decision to join a Staff Counsel do so because they want to get away from the billing function and creative billing they were doing at Outside Counsel. Last, and probably most important, I am not convinced that the comparisons of Staff Counsel "fees" vs Outside Counsel fees per file will be anymore accurate than using the formulas referred to above.

When making these comparisons, you must be sure you are comparing similar types of cases being handled in the same geographic location. Furthermore, how Claims works with its Staff Counsel and Outside Counsel has a significant impact on how accurate the cost effectiveness and efficiency findings will be.

Some Claims Organizations give their counsel carte blanche to handle a case and incur costs the way counsel determines is necessary in order to provide quality legal representation. It would be naive on the part of the Claims Organization not to realize that Outside Counsel's fee is based upon the amount of work generated in