

By Larry A. Reback

The choice of defense counsel can be one of the most important decisions your company makes upon being sued. The attorney representing you can determine not only the ultimate outcome of the litigation, but also can affect your reputation and ability to retain client/customer relationships. For this reason, many insureds prefer to select their own counsel, in whom they have confidence because of past experience or reputation.

As a policyholder, however, your ability to select counsel to defend an insured claim is strictly limited under the terms and conditions of the standard Commercial General Liability (CGL) policy. Standard terms include the "right and duty to defend," which essentially allows the insurer to unilaterally choose counsel. Disputes can arise when the carrier insists on a particular defense counsel while the insured prefers its own attorney.

To avoid disagreements, it is important that you understand your rights and responsibilities under the policy, and that you develop pre- and post-loss strategies to strengthen your ability to choose your defense counsel.

The Right and Duty to Defend

The carrier's "right and duty" to defend is found in the standard insuring clauses of the CGL policy, which states:

"We will have the right and duty to defend the insured against any suit seeking those damages...We may, at our discretion, investigate any offense and settle any claim or suit that may result." (ISO CG 0 001 10 01)

The "right" to defend empowers the carrier to select the attorney to defend the insured. Due to the large portfolios of litigation they manage, carriers typically can negotiate discounted rates and enforce litigation protocols with select attorneys. Underwriters perceive that in giving up the right to choose counsel they compromise their ability to control litigation costs.

The Carrier's Choice: Panel Counsel

When selecting a defense attorney for a claim, a carrier typically chooses "panel counsel," e.g., either an attorney on the insurance company's payroll (so-called "captive counsel") or one with whom they have pre-arranged formal agreements. Unlike the captive counsel, the non-captive counsel may also have similar agreements with other carriers wherein, in return for a volume of cases, they agree to discounted rates and to abide by the carrier's litigation guidelines.

While few insureds object to panel counsel for “routine” litigation, many prefer to choose their own attorney when faced with catastrophic loss or other high profile litigation. Corporate counsel is often unwilling to relinquish control in these instances, given the magnitude of the potential impact of both insured and uninsured risks on the company.

Strategies for Approval of Insured’s Preferred Counsel

The following strategies can resolve seemingly non-aligned interests of the policyholder and the carrier in selection of counsel:

- **Obtain Pre-Approval of Preferred Counsel:** The most effective way to avoid disputes is to deal with the issue pre-loss, during the underwriting process, when as a policyholder you are in your strongest bargaining position. Armed with a list of preferred counsel from your law department, you can seek to have these firms specifically endorsed to the policy as pre-approved counsel. The carrier may require agreement on rates and adherence to certain guidelines (bill format, staffing, etc.) before agreeing to add the firms to the policy.
- **Modify Policy Terms to Allow Insured to Choose Counsel:** Alternatively, you can seek an endorsement to the policy modifying the standard “right and duty to defend” terms to give you the right to select counsel. If the carrier seeks to add terms to the endorsement that require its consent to counsel, a clause stating that such consent “will not be unreasonably withheld” should also be inserted.
- **Increase Policy Retention:** To the extent that your company can retain more risk, you should enjoy a corresponding increase in your control over claims and litigation. The policy should be endorsed to give you the unilateral right to incur costs, including attorney fees, and to resolve claims if the combined costs and settlements do not exceed the retention. Again, if carrier consent is required, a clause stating such consent “will not be unreasonably withheld” should be inserted.
- **Determine if Conflict of Interest Exists:** Since panel counsel is paid directly by the carrier, conflicts of interest may arise when the carrier disputes coverage. If panel counsel’s defense of the litigation can influence the insurer’s coverage determination, most states require the insurer to pay for independent counsel chosen by the insured. (See, e.g., California Civil Code § 2860). If independent counsel is required, the carrier may still be allowed to cap rates and impose certain other criteria, such as level of experience, on the selection of independent counsel.

- **Emphasize Expertise of Preferred Counsel:** While many panel counsel are experienced litigators, there is value in retaining counsel with specific expertise and historical success in defending a particular insured. While such counsel may charge higher hourly rates, the overall defense fees may be less than panel counsel's fees due to efficiencies established from prior representation. If cost savings can be demonstrated, the carrier may be more willing to agree to your preferred counsel.
- **Ensure that preferred counsel will abide by insurer's litigation guidelines:** Beyond cost motivations, a carrier will prefer panel counsel because these firms agree to abide by the insurer's litigation guidelines, which can include utilizing an approved billing format (e.g. no "block" billing), regular status updates, and pre-approval for "extraordinary" expenses such as retention of experts and jury consultants. Law firms that do not regularly work with insurance companies often resist complying with insurer litigation guidelines, which may be perceived as burdensome and invasive. Negotiating your counsel's commitment to do so, however, will help you obtain carrier approval of preferred counsel.
- **Negotiate lower rate with preferred counsel:** Panel counsel's rates are almost always less than preferred counsel's rates. However, rates are subject to negotiation and often vary by the type of litigation as well as the history of the law firm/company relationship. To obtain lower rates, many insureds are leveraging their business and personal relationships with select counsel as well as exploring alternative billing arrangements, such as flat fees and "blended" fees (one lower fee for all attorneys working on the case). If the preferred counsel's rates can be negotiated down to panel counsel rates, your chances of obtaining carrier consent are improved.
- **Offer to pay the difference in rates between panel counsel and preferred counsel:** If, after negotiation, there still is a significant difference between panel and preferred counsel's rates, you may decide to offer to pay the difference. Combined with an agreement to adhere to carrier litigation guidelines, you will have removed the two of the most stringent of the insurers' objections.

Conclusion

The “right and duty” to defend under standard CGL policies allows the insurer to choose the counsel to defend its insured. Disputes can arise when the insured prefers to retain its own counsel for certain litigation but the carrier will not relinquish its right to select counsel. Pre-loss and post-loss negotiation, however, can often achieve agreement on selection of counsel that is satisfactory to both the policyholder and the insurer.

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