

## Managing Contingencies

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It has always been my perception that in the insurance defense world, managing litigation necessarily means providing a quality defense to insureds while effectively keeping control of the costs. Obviously, more is involved than just costs. Companies want to be on top of managing the risks presented by each case. However, it appears from a distance, that cost control, especially lawyers' fees, is a serious concern for claims people in maintaining control over defense matters in litigation.

How does the concept of litigation management change when we talk about managing subrogation files that are being handled on a contingency fee? Since I work on the attorney side of the equation, I don't want to guess about the insurer's perspective. I will leave that to other writers in this issue. Instead, I want to explore the attorneys, at least this attorney's, perspective on litigation management related to contingent fee cases.

An attorney has a duty to represent its client, which essentially means the client has ultimate authority to make key decisions on a litigated subrogation claim. Obviously, decisions about how much money to pay on experts, testing, and other costs are the client's decisions to make. Input from counsel should be a key part in making those decisions.

The more interesting issue for me is the decision to settle or try a case. We all would agree that the client has the right to make that decision and the lawyer has the duty to respect that. Let me share my perspective on factors that attorneys care about regarding that decision:

1. The attorney working on a contingency fee has tremendous risk involved in a case. All an attorney has to sell is time. When a decision is made to try a case, not only is there risk of spending a large amount of time on a case for no fee, but the expense of having to place all other matters in abeyance while the trial approaches and occurs. This means that no attorney wants a claims person to make a cavalier decision to try a case or make a decision based on emotion rather than facts. Worse yet, any decision made without the attorney feeling they have input is a great way to destroy a relationship.
2. An attorney has a duty to keep its client advised about the progress of any litigation. This is an important step in making sure the lawyer and the client are on the same page as the matter progresses. The client should not be surprised unless the lawyer is surprised by some turn of events. When the attorney and client are on the same page as the matter progresses, it is rare for there to be some disagreement at the end of the case. However, I have seen cases where the claims person and the attorney are both in alignment as to how a matter should proceed, but when the time comes to make the ultimate decision, a supervisor goes in a different direction. This can be a frustrating experience for an attorney (and, I imagine, the claims person too), particularly when the perception is that the

- supervisor has spent very little time reviewing the case or discussing it with the attorney. In such scenarios, a successful approach to avoid dissention between the attorney and client is to hold a conference in which all players (claims person, attorney and supervisor) can have a substantive discussion about the major issues in the case. This usually makes everyone more comfortable with the ultimate decision. From an attorney's perspective, I often feel as though I am in the best position, based on my legal knowledge and experience, to offer advice on how to proceed. I feel that this knowledge and experience should have formed the basis of the company's decision to hire me, and therefore, my advice should be strongly considered.
3. My law firm recently tried a case where our firm and the client absolutely agreed the case should be tried. This involved an incredible amount of work. We were ultimately successful. When the verdict came in, do you know what we celebrated? It wasn't the fee. It was the satisfaction of success, of representing our client's interests well, in a very tough forum, against a relentless competitor. The point is, lawyers care about more than money. The verdict a trial lawyer obtains is very personal to him or her. Most lawyers I know really do want to do the best job they can for the client and take great personal responsibility for the outcome.

A contingency fee attorney is really a partner with its client. Both have a lot at stake. As in any partnership, each party has responsibilities to each other. In a good healthy partnership, mutual respect is essential. Success is contingent upon it.