Chapter 8

Direct Your Learning

Managing Litigation

After learning the content of this chapter and completing the corresponding course guide assignment, you should be able to:

- Given a third-party lawsuit against an insured, describe the activities a claim representative would perform to manage the lawsuit.
- Given a bad-faith lawsuit against an insurer, describe the activities a claim representative would perform to manage the lawsuit.
- Explain how a claim representative can manage litigation expenses.
- Define or describe each of the Key Words and Phrases for this chapter.

OUTLINE

Develop Your Perspective

What are the main topics covered in the chapter?

Claim representatives are responsible for managing litigation brought by either a third-party against an insured or by an insured against the insurer. To do so, they must actively participate in all aspects of litigation. They are also responsible for managing the expenses associated with litigation.

Review your company's policy for managing litigation.

- What do you do when a lawsuit is received?
- What steps do you take to manage litigation expenses?

Why is it important to learn about these topics?

Claim representatives routinely handle lawsuits against their insureds and the insurer. Mishandling of these lawsuits can result in bad-faith claims. Because claim representatives may also handle bad-faith lawsuits, they must understand the specific issues inherent in such claims. In managing the costs of lawsuits, claim representatives must avoid compromising the defense that is provided.

Consider how your organization manages litigation.

- Are the procedures for a third-party lawsuit different from those for a bad-faith lawsuit?
- How does your company handle the review of legal bills?

How can you use what you will learn?

Analyze a claim that is currently in litigation.

- What efforts has the claim representative taken to manage litigation expenses?
- What efforts might the claim representative take going forward?

Chapter 8
Managing Litigation

Most claims are resolved without litigation. Claim representatives are responsible for managing those claims that do result in litigation, and to do so, they must have a solid understanding of the legal system. They must handle and coordinate two aspects of managing litigation—the lawsuit itself and the expense of the lawsuit—in order to provide the insured or the insurer with an effective defense. In the process of litigation management, claim representatives must make decisions that can affect a lawsuit's outcome, including what to investigate, what to document, and how to settle claims. An understanding of the legal process can also help claim representatives avoid the kinds of errors in handling claims that can lead to bad-faith lawsuits.

Every claim has the potential to become a lawsuit. Such lawsuits usually come to the claim representative in one of three circumstances:

- While a claim is being investigated
- Before a claim is filed
- After a claim is closed

Most lawsuits are initiated on claims that are being actively handled by the claim representative. These lawsuits may be filed because the statute of limitations is about to expire or because negotiations have been unproductive. In this situation, the claimant (either the insured or a third party) is the plaintiff, that is, the party that files the lawsuit. The defendant, the party being sued, is usually the insured or the insurer, although other parties may also be named as defendants. If the insured is the plaintiff, then the lawsuit is a first-party lawsuit. If someone other than the insured files the lawsuit, it is a third-party lawsuit. For both first-party and third-party lawsuits, the claim representative has the advantage of using the information in the entire claim file to address the allegations.

In contrast to litigation that arises regarding a claim currently being handled, a lawsuit brought by an insured before a claim has been filed is the insurer's first notice of the claim. The insurer has no prior information about the accident or event giving rise to the lawsuit. The claim representative lacks the advantage of a claim file and has only the information contained in the lawsuit. The insured might have failed to report the accident or event alleged in the lawsuit for many reasons. The claim representative is responsible not only for investigating the allegations contained in the lawsuit but for investigating the reason the claim was not reported.

Lawsuits filed after claims have been closed are often coverage suits brought by insureds whose claims have been denied. To handle these lawsuits, the claim representative usually must reopen the claim file.

A claim representative may also receive a lawsuit when the insured (and in some states a third party) sues the insurer for bad faith. These lawsuits are generally received on active or closed claim files, but can also be received as the first notice of a claim. For example, the insured may file a bad-faith lawsuit alleging that the insurer failed to handle a claim in a timely manner, and the insurer may have no record of ever having received the claim. Because bad-faith lawsuits involve different allegations than third-party lawsuits, they are discussed separately in this chapter.

The process of managing the litigation of claims against the insured or insurer in any of these situations is the same. The process involves the following four steps:

1. Receiving the summons and complaint
2. Checking the summons and complaint to identify the parties, the applicable statute of limitations, the jurisdiction and venue, and the allegations
3. Referring the lawsuit to counsel, which involves selecting an attorney to represent the insured, preparing a suit transmittal letter, and notifying the insured of the selection
4. Assisting counsel in creating a litigation plan, answering the complaint, preparing evidence, preparing for trial, and managing pre-trial and post-trial activities

An important aspect of the claim representative's role in litigation management is managing litigation expenses. Failure to manage litigation properly can lead to adverse financial consequences for both the insured and the insurer.

Some insurers assign files involving litigation only to experienced claim representatives. However, because any claim can result in a lawsuit, an understanding of the litigation process is important for all claim representatives.

Complaint, or petition
The initial document or pleading that is filed with the appropriate court to initiate a lawsuit and that specifies the grounds or allegations on which relief can be granted.

Summons
A document that directs a sheriff or another court-designated officer to notify the defendant named in the lawsuit that a lawsuit has been started and that the defendant has a specified amount of time to answer the complaint.

MANAGING A THIRD-PARTY LAWSUIT

When claimants or insureds are dissatisfied with the outcome of a claim or the way a claim is being resolved, they can file documents with the appropriate courts. A **complaint**, or **petition**, is the initial document (or pleading) that is filed with the appropriate court and that specifies the grounds or allegations on which relief in the form of a judgment can be granted. This document may have other names, such as writ, depending on the state. For the types of lawsuits claim representatives handle, relief means money damages or the enforcement of a right. The complaint is delivered to the defendant via a **summons**, a document that directs a sheriff or another court-designated officer to notify a defendant named in a lawsuit that the lawsuit has been started and that the defendant has a specified amount of time to answer the complaint.

The delivery of the summons and complaint to the defendant by an authorized person is called **service of process**. If the defendant has insurance that covers or may cover the complaint's allegations, the defendant delivers the summons and complaint to the insurer to provide the defense. The Appendix at the end of this chapter contains an example of a summons and complaint.

Service of process
The delivery of a summons and complaint to a defendant by an authorized person.

Receiving the Summons and Complaint

An insured who has been served with a summons and complaint should immediately deliver them to the insurer or the producer, either by mail, by fax, or in person. If the insured delivers the documents to the producer, the producer should immediately forward them to the insurer. Time is of the essence in getting the summons and complaint into the hands of the claim representative because the summons contains a deadline by which the defense attorney must file an answer. An **answer** is a pleading or document filed in court by a defendant responding to a plaintiff's complaint and explaining why the plaintiff should not win the case. While the deadline to file the answer can be, and often is, extended by the plaintiff, it cannot be ignored.

Answer
A pleading or document filed in court by a defendant responding to a plaintiff's complaint and explaining why the plaintiff should not win the case.

When the insurer receives the summons and complaint, they may be given directly to the claim representative handling the claim or to the claim representative's supervisor. Information about the lawsuit may be entered in a tracking system, used by most insurers to compile data on lawsuit trends. The lawsuit is then matched to the existing claim, or if the lawsuit is the first notice of claim, a new claim file is created and referred to the claim representative for further handling.

Checking the Summons and Complaint

After receiving the summons and complaint, the claim representative must identify the parties in the complaint, determine the applicable statute of limitations and whether it has expired, and verify that the jurisdiction and venue are correct. The claim representative must also determine whether the insurance policy provides a defense against the allegations and coverage for any possible damages that may result from the allegations. Claim representatives cannot assume that all claims contained in lawsuits they receive are covered by the policy and are therefore eligible to be defended.

Generally, the insurer's duty to defend is broader than its duty to pay damages. If the allegations against the insured are fraudulent or potentially outside the coverage provided, the insurer usually is still obligated to defend the insured. Under such circumstances, the insurer may issue a reservation of rights to preserve its right to provide a defense only until such time as it is proven that the allegations are outside the policy coverage. Courts generally hold that an insurer's duty to defend is triggered if the lawsuit's allegations fall within policy coverage, regardless of whether the allegations are true.

However, an insurer is permitted to deny a claim and refuse to defend a lawsuit if the defendant is not insured. The claim representative's thorough review of the summons and complaint should determine whether the defendant is covered by the policy.

Checking the Summons and Complaint for Coverage—Related Information

- Identify the parties—Who was served and are they insureds?
- Check how the service is accomplished—Was it proper?
- Determine the time to answer—What is the deadline to file an answer?
- Check the statute—Was the case filed within the statute of limitations?
- Verify the jurisdiction and venue—Is the lawsuit filed in the appropriate court and location?
- Examine the allegations—Are the allegations covered by the policy?
- Damages—Does the amount alleged as damages exceed the policy limits?

Parties

A complaint usually begins by identifying the parties in the lawsuit by name and address. It also gives the name and address of the plaintiff's attorney. The case caption "John Smith, Plaintiff v. Thomas Jones, Defendant" is used by most attorneys as an identifier in their correspondence and bills.

The claim representative must verify that the defendant is an insured under the applicable policy. Whereas verification is usually straightforward when dealing with a personal insurance policy such as auto or homeowners, it can be more complicated if the insured is a commercial entity that has various businesses insured by the same policy. When a commercial insured is involved, the claim representative may have to investigate the entities listed in the complaint to determine whether the defendant is an insured. For example, a general contractor may have an insurance policy that covers by endorsement every subcontractor the contractor has ever worked with. The claim representative must sort through all the endorsements to find the subcontractor named in the complaint. If the claim representative fails to verify the defendant is an insured on the policy, the insurer may erroneously provide a defense to an uninsured party.

Service

State and local laws specify who can be served with legal papers and how service is to be accomplished. For example, in Pennsylvania, a process server can accomplish service by handing the summons directly to the defendant or to an adult family member at the defendant's residence; to the clerk or manager of the hotel, motel, apartment house, or other place of lodging at which the defendant resides; or to the defendant's agent at the defendant's

office or place of business. The Federal Rules of Civil Procedure set out the rules for service of federal lawsuits. To determine whether the appropriate party was served and the manner of service was correct, claim representatives should be familiar with the rules that apply in the jurisdiction of the lawsuit. If it appears that service was improper, the claim representative should advise defense counsel, who may file motions with the court relating to those issues or use them as a defense in the lawsuit.

Generally, two types of service are as follows:

1. Actual service
2. Substituted or constructive service

Actual service is hand delivery of the summons and complaint to the defendant. In the case of a corporation, the articles of incorporation designate the person authorized to accept service on behalf of the corporation, and that designation is filed with the secretary of state in the state of incorporation. **Substituted service, or constructive service**, is any method of notifying the defendant other than personal delivery of the summons and complaint. Most state statutes permit service by registered mail. Service can also be made by regular mail or may be delivered to the defendant's residence and left with a person of suitable age and discretion. Service by publication, usually in a newspaper, is the primary means of service on out-of-state defendants in some types of cases. In addition, if the defendant's whereabouts are unknown and there is no location to which the summons and complaint can be delivered, service by publication is appropriate.

Actual service
Hand delivery of a summons and complaint to a defendant.

Substituted service, or constructive service
Any method of notifying a defendant of a lawsuit other than personal delivery of a summons and complaint.

Time to Answer

Determining the deadline for filing an answer to the summons and complaint is an important aspect of handling litigation. If a complaint is not answered within the time specified, the insured and the insurer may face adverse consequences, such as losing the opportunity to defend against the allegations. The deadline to file an answer varies by state and usually ranges from ten days to twenty or thirty days from the date of service. Because the deadline is based on the date of service, the claim representative must determine when and how service was accomplished.

One common problem with insurance lawsuits is the potential for delay in getting the lawsuit into the hands of the claim representative. An insured named as a defendant who is unaware of the deadline for filing an answer may not report summonses and complaints to insurers promptly. If a summons and complaint are received close to the deadline for filing an answer, most states allow the claim representative to ask the plaintiff's attorney for an extension to answer the complaint. Some states require that defense counsel rather than claim representatives make such requests. In either case, attorneys usually grant the extension, usually for thirty days. If the extension is denied, the deadline in the summons stands. If a lawsuit is the first notice of the loss, the claim representative and defense counsel will have little time to investigate

the claim before filing the answer. Formulating an answer on such short notice is difficult but not impossible.

Statute of Limitations

As previously explained, the statute of limitations defines the time limit for filing a lawsuit. The claim representative must check the complaint to determine the date the alleged offense occurred and then consult with counsel or otherwise determine the applicable statute of limitations. For example, if a summons and complaint alleges injury as a result of an auto accident, the claim representative can look up the statute of limitations for the state in which the complaint was filed. For example, the statute of limitations may be two years for a bodily injury claim. If the complaint alleges the accident occurred on May 18, 2004, and the complaint was filed on July 26, 2006, the statute of limitations has expired. If investigation reveals that a statute of limitations has expired, the claim representative should consult with counsel before taking any action.

Jurisdiction and Venue

The claim representative must next verify that the lawsuit's jurisdiction and venue comply with state or federal rules of civil procedure. An understanding of United States court systems is helpful in this analysis.

The U.S. has state and federal courts. State courts are created by each state's constitution. The single federal court system is created by the U.S. Constitution and acts of Congress. Whether a lawsuit is filed in state court or federal court depends on **jurisdiction**, a particular court's power or authority to decide a lawsuit of a certain type or within a specific territory. A court must have jurisdiction over a lawsuit to hear and decide it. Specifically, the court must have jurisdiction over the parties, the subject matter at issue, and the dollar amount at issue. The claim representative can make a preliminary review of the jurisdiction of the case and ask defense counsel to perform a more in-depth review.

Jurisdiction
A particular court's power or authority to decide a lawsuit of a certain type or within a certain territory.

In state court systems, the courts generally have jurisdiction over parties who reside or do business in that state. Most states also extend jurisdiction over anyone who operates a motor vehicle in the state. For example, a Pennsylvania resident who causes an automobile accident in New York is subject to the jurisdiction of the New York courts.

State court systems are similar to the federal court system, but the names of the courts at various levels may vary among U.S. states and territories. Every state has a trial court level at which most litigation starts. These courts of general jurisdiction have names such as court of common pleas, superior court, and district court. States may also have courts of limited jurisdiction, which hear specific types of cases. Examples are probate courts, which hear estate cases, and municipal courts, which hear cases involving limited amounts of money.

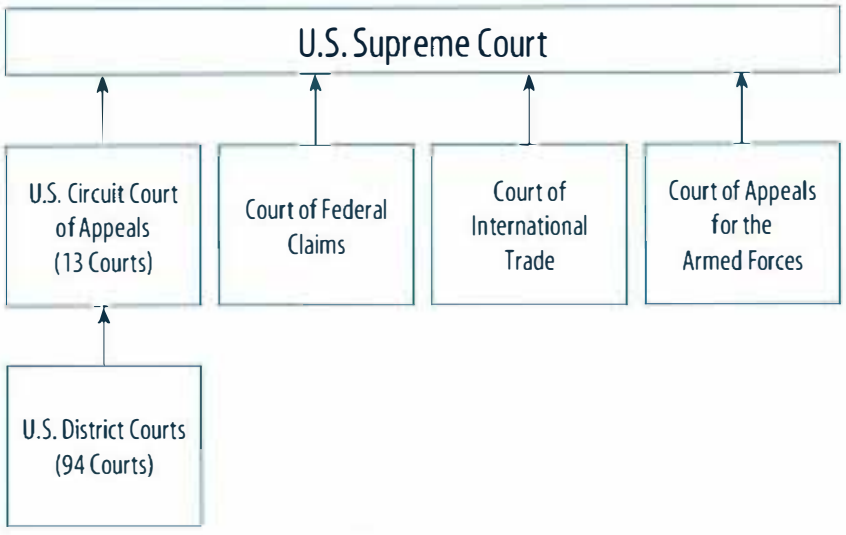
In addition to jurisdiction over the parties to a lawsuit, courts must have jurisdiction over the subject matter of the lawsuit. For example, a federal bankruptcy court lacks the subject matter jurisdiction to hear a lawsuit involving an automobile accident. Generally, state courts have subject matter jurisdiction over any legal dispute except those reserved by the U.S. Constitution for the federal courts.

Finally, the dollar amount at issue must also fall within the court's jurisdiction. Some courts can handle only lawsuits that do not exceed a stated dollar amount.

The federal court system has trial courts, called U.S. District Courts, and courts of appeal in thirteen multi-state judicial circuits. These courts handle lawsuits that deal with federal issues, such as those involving the U.S. Constitution, federal laws, and the U.S. as either a plaintiff or a defendant. In addition, there are special federal courts, such as the U.S. Customs Court, Bankruptcy Court, and the Patent Appeals Court, that have specific subject matter jurisdiction. Exhibit 8-1 shows the organization of the federal court system.

EXHIBIT 8-1

Federal Court System



U.S. District Courts also hear lawsuits involving diversity jurisdiction. Diversity jurisdiction is a federal court's authority to hear cases involving parties from different states that involve dollar amounts in controversy over a specified threshold. Claim representatives may find that some of their claims are heard in federal court because of diversity jurisdiction. This is often the case in a products liability claim when the insured is a corporation doing business in many states and when plaintiffs are from different states.

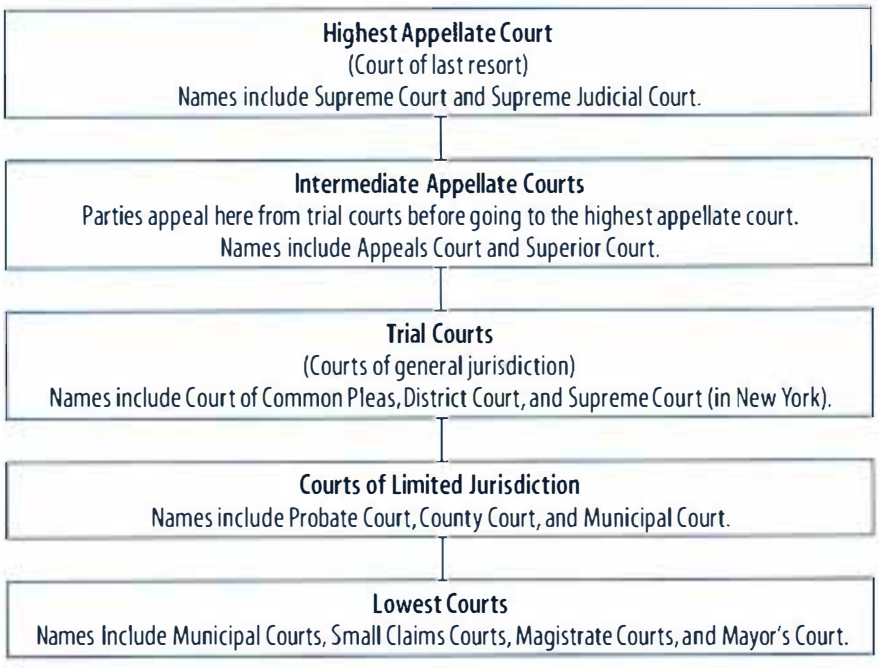
When reviewing the summons and complaint, the claim representative should note any possible jurisdictional question and bring it to the attention of counsel. Lawyers frequently seek to have a case dismissed on the grounds that a court does not have jurisdiction to hear a case.

A losing party in a lawsuit before a federal district court can appeal to the appropriate U.S. court of appeals. The losing party on a court of appeals case can appeal the case to the U.S. Supreme Court, the country's court of last resort, by filing a petition for a writ of *certiorari*, which asks the Supreme Court to consider the case. The Supreme Court grants review of a case solely within its discretion and chooses only about 100 cases to review annually.

Most states have an intermediate appellate-level court that hears appeals from trial courts. The decisions of a state's appellate-level court can be appealed to the state's highest appellate court. Many states call this court the supreme court, but other states use different terms. Claim representatives should learn the names of the courts in the states in which they handle claims. Exhibit 8-2 shows the organization of state court systems.

EXHIBIT 8-2

State Court Systems



Venue
The locale in which the lawsuit may be brought.

Having reviewed the summons for jurisdictional issues, the claim representative should check the lawsuit's venue. **Venue** refers to the locale in which the lawsuit may be brought. Statutes usually require that a lawsuit be brought in the state in which the accident or occurrence took place, or in which either the plaintiff or defendant resides or does business. While jurisdiction designates

which type of court will hear a case, venue designates the particular city, county, or state in which a court with jurisdiction will hear the case. Venue is important to the claim representative because when several different courts meet the requirements of jurisdiction and venue, the plaintiff chooses the court that is most likely to favor the plaintiff's lawsuit. This is an accepted practice; however, some plaintiffs may engage in a more questionable practice called forum shopping, manipulating the facts of a lawsuit to take advantage of a favorable venue, or forum. The claim representative should review the summons and complaint to determine whether the venue is questionable, and, if so, alert defense counsel. Defense counsel may seek to have the lawsuit removed to a more appropriate venue.

Example of Forum Shopping

Atley Corporation, incorporated and headquartered in New York City, is an international manufacturer and retailer of pesticide. The pesticide is shipped around the world in tanker ships. During a routine docking in San Francisco, the tanker runs aground and the pesticide leaks into the water, killing massive numbers of fish and game birds and contaminating miles of beaches. Atley spends billions of dollars cleaning up the spill, but Atley officials still expect to be sued by the commercial fishermen and local businesses affected by the spill. Atley Corporation is insured by Zelle Insurance Company, also headquartered in New York City. Atley submits a claim for the costs of the pesticide spill cleanup. Zelle Insurance Company denies the claim. Atley wants to sue the insurer for payment of the claim, but its attorneys do not believe it can win the case if it is heard in New York City. Research on jury verdicts in various states indicates that a Delaware jury may be more sympathetic to Atley's case. Consequently, Atley moves its corporate headquarters to Delaware and files suit against Zelle in Delaware.

Allegations

The body of the complaint contains the plaintiff's **allegations**, which are the claims the plaintiff expects to prove to obtain a judgment against the defendant. The body of the complaint serves the following four functions:

Allegations
Claims made in the complaint by the plaintiff, specifying what the plaintiff expects to prove to obtain a judgment against the defendant.

1. Gives notice
2. Reveals facts
3. Formulates legal causes of action
4. States the damages sought

The complaint gives the reader notice of who the parties are and where and why the lawsuit was filed. It lists each of the parties by name and states why the venue and jurisdiction are proper. It then presents the facts of the lawsuit and applies them to the issues of the plaintiff's cause of action (such as negligence or breach of contract). The facts must be sufficiently specific to give the reader fair notice about the basis for the lawsuit.

Claim representatives read complaints to determine whether some or all of the allegations are covered by the insurance policy. Allegations often include statements about the insured's actions or activities that may not be covered under the policy. If the policy clearly covers the allegations, then the claim representative refers the lawsuit to defense counsel to prepare an answer and defense. If the claim representative concludes that the policy does not cover the allegations, he or she should review that conclusion with a manager or supervisor. Some coverage questions may be so complex that an opinion from coverage counsel may also be sought. If the conclusion stands, the claim representative should issue a letter to the insured denying coverage and defense, stating specific reasons for the denial, and returning the lawsuit documents to the insured. If the complaint includes both covered and noncovered allegations, the insurer usually has to provide a defense for all the allegations but must indemnify only the covered allegations. In such cases, the claim representative sends the insured a reservation of rights letter reserving the insurer's right to withdraw the defense should facts clearly place the allegations of the lawsuit outside the policy coverage. Claim representatives should be aware that some states require insurers, when reserving their rights, to offer the insureds the option of choosing their own defense counsel.

When coverage of the allegations is an issue, the claim representative should select an attorney other than the attorney defending the insured to review the coverage issue. The defense attorney has an ethical obligation to act in the best interest of the insured. To be asked to render an opinion about coverage under the policy could present a conflict of interest for the defense attorney because the resulting opinion may be contrary to the insured's best interest.

Damages

The complaint concludes with a demand for damages. The claim representative should review this section carefully to determine whether the damages sought exceed policy limits. If so, the claim representative should advise the insured that the policy may not cover the total potential damages in the case. This information is usually contained in what is called an excess letter, and most insurers have a template for this letter that conforms to state law. The excess letter also gives the insured the option of hiring separate defense counsel to work with the insurer-appointed defense counsel in order to protect the insured's uninsured interests.

After deciding whether the insurer will defend the lawsuit, the claim representative is ready to select the defense counsel.

Referring the Lawsuit to Defense Counsel

Careful selection of defense counsel is an important factor in successful litigation and control of litigation expenses. Once the selection is made, the claim representative gives a copy of the claim file and the summons and

complaint to the defense attorney, along with a lawsuit transmittal letter or set of instructions. The claim representative also notifies the insured that defense counsel has been assigned and provides the attorney's name and contact information.

Defense Counsel Selection

How defense counsel is selected varies by insurer. Defense counsel may be selected by one or more of the following: the claim manager, in-house legal counsel, a claim representative who is a litigation specialist, or the claim representative handling the claim. Generally, defense counsel is selected from a panel of attorneys, usually compiled by the home office claim staff in conjunction with the various claim offices. Selection of an attorney from the panel is usually based on a proven record of having represented insureds' interests well in previous cases and on an agreement to a fee schedule and billing guidelines set by the insurer. Some insurers may use staff attorneys, called in-house counsel, in the defense of insureds.

When selecting defense counsel, claim representatives should try to match the attorney's experience level to the subject matter and complexity of the lawsuit. For example, an attorney who specializes in workers' compensation cases may not be the best selection to defend an insured in a products liability case involving complex engineering issues.

Claim representatives should also select defense counsel who will meet the service needs of the insured and the insurer, for example, promptly returning phone calls and responding to the insured and the claim representative and submitting reports to the insurer throughout the litigation process. Defense counsel should be willing to work as a team with the claim representative in defending the insured. Often what distinguishes one attorney from another is this type of customer service.

Transmittal Form Completion

Once counsel is selected, the claim representative prepares a set of instructions and sends them to defense counsel in the form of a letter and report, along with the summons and complaint and a copy of the claim file. The transmittal form varies by insurer but generally provides a summary of the lawsuit and the claim investigation to date and includes the claim representative's opinions and expectations about the lawsuit's outcome. If the lawsuit is the first notice of the claim, the lawsuit transmittal letter informs defense counsel of how the claim representative intends to investigate the allegations.

The instructions set out a preliminary schedule of tasks to be accomplished, such as answering the complaint and completing outstanding investigation. They may also provide work and billing guidelines to which the attorney and the insurer have agreed. Details about these guidelines are described subsequently in this chapter.

Lawsuit Transmittal Letter Contents

A lawsuit transmittal letter should contain the following information:

- Case caption
- Title of the court in which the lawsuit is filed, along with the court's location
- Claim number
- Date of loss
- Name and address of the plaintiff's attorney
- Details of service of process
- Name and address of the insured
- Identity of all defendants to be defended by the appointed attorney
- Policy number, insurer's name, and policy type
- Policy limits
- Deductible, if any
- Presence of demand in excess of policy limits
- Investigation conducted to date
- Investigation remaining
- Details of any settlement negotiations conducted
- Reporting schedule
- Billing guidelines
- Request for a liability analysis
- Request for a litigation plan

The claim representative should also prepare the claim file for transmittal. Some insurers photocopy the claim file and send it to the attorney with the summons and complaint. Others may give the attorney access to the electronic claim file via the Internet or company network/intranet. Whether the file is paper or electronic, the claim representative should ensure that it contains all documents pertinent to the claim, including copies of e-mail messages and activity notes. A copy of the insurance policy may be included. However, the transmittal should not include documents relating to any coverage issue, because such information can create a conflict of interest for the defense attorney.

Insured Notification

In addition to notifying defense counsel, the claim representative informs the insured that an attorney has been selected, providing name and contact information. The claim representative should instruct the insured to speak about the claim only to the claim representative and the designated attorney. This instruction is included to prevent the insured from making statements to others that could later be used against the insured in court.

Assisting Counsel

The claim representative's responsibilities in handling a claim do not end when the claim has been referred to defense counsel. The claim representative continues to be involved in all aspects of the defense. Even after litigation has begun, claim representatives continue to assess coverage, investigate liability and damages, evaluate the claim, and attempt to bring the claim to conclusion. Having defense counsel perform these tasks is not only too expensive but also, in many cases, inappropriate.

Claim representatives work with defense counsel to create litigation plans or plans for the insureds' defense. They may provide information that is useful to defense counsel in preparing answers to the complaints as well as certain types of evidence that can be used at trial. Claim representatives for some insurers take active roles in preparing evidence and witnesses for trial, and defense counsel may ask claim representatives to participate in the trials. In addition, claim representatives may handle negotiations, both during and after a trial, in an attempt to resolve the claim, and they may work with defense counsel on any post-trial motions or appeals. Because handling litigated claims can be complex and time-consuming, many insurers have a staff of experienced claim representatives dedicated to handling claims in litigation. Other insurers may assign only unusual or complex claims to such staff specialists so that other claim representatives can gain experience in assisting counsel with less complex claims.

Litigation Plan

After defense counsel has analyzed the information about the lawsuit provided by the claim representative, the two work together to develop a litigation plan or a plan for defense. They reach an agreement on what the ultimate outcome of the case should be and how to achieve it. This process can lay the foundation for effective communication between the claim representative and counsel throughout the trial, and the litigation plan itself can reduce the possibility of misunderstandings and disagreements with counsel. By agreeing on a goal at the outset, the claim representative and counsel can more easily work as a team to achieve the desired result. A litigation plan should also clarify the roles and expectations of the parties.

Both the claim representative and the defense counsel should view the litigation plan as a guideline rather than a rigid directive. They will probably adjust the plan several times as the litigation proceeds, and counsel should be aware that any deviations from the plan should occur only after consultation with the claim representative. Similarly, the claim representative should understand that the defense counsel owes the insured a duty of competent representation and that deviations from the plan should not jeopardize the attorney-client relationship by hindering the attorney's representation of the insured.

Generally, litigation plans outline a strategy to reach one of the following three possible objectives:

1. Defend the lawsuit
2. Settle the lawsuit
3. Obtain more information to decide whether to defend or settle the lawsuit

If the defense counsel and claim representative decide the lawsuit should be defended, they should agree on how to defend it. If they decide the lawsuit should be settled, for example, if the defendant is clearly liable, they should agree on a negotiation strategy. If, on the other hand, they decide they need more information before deciding whether to defend or settle, they must determine what additional information they need, how to obtain it, and who will obtain it.

When the litigation plan is complete, the defense counsel can draft an answer to the complaint.

Complaint Answer

The answer to the complaint contains the defendant's initial response to the complaint's allegations. A typical response is to deny the plaintiff's allegation of facts. For example, if the plaintiff alleges that the defendant negligently ran a stop sign at the corner of King Street and Main Street, on June 8, 2005, the defendant's answer may be a denial of the entire allegation or a denial only that the defendant negligently ran the stop sign.

The answer also presents affirmative defenses to the allegations, such as that the plaintiff failed to file the lawsuit within the appropriate statute of limitations, that the court in which the lawsuit was filed lacks jurisdiction, or that the venue is incorrect. Another affirmative defense is failure to state a claim for which relief can be granted (that is, the facts as alleged do not support the action). For example, in defense to a plaintiff's allegation of age-related employment discrimination, the defendant may assert that the plaintiff was not in a protected age class, was the youngest of all job applicants, and is ten years younger than the applicant who was hired for the job.

Counterclaim
A lawsuit brought by the defendant against the plaintiff that arises out of the same occurrence that is the subject matter of the plaintiff's lawsuit.

The answer also provides defense counsel with the opportunity to file a counterclaim, if the defendant has been wronged. A **counterclaim** is a lawsuit brought by the defendant against the plaintiff that arises out of the same occurrence that is the subject matter of the plaintiff's lawsuit. For judicial economy, courts usually hear both the original claim and the counterclaim simultaneously. For example, if the plaintiff claims the defendant negligently damaged the plaintiff's car, the defendant can counterclaim that the plaintiff negligently damaged the defendant's car and that the defendant's actions were in response to the plaintiff's negligent driving.

Defendants can also file lawsuits, called cross-claims, against other defendants in a case. A defendant's cross-claim alleges that another defendant should be at least partially responsible for any liability that may be imposed on the

cross-claiming defendant. For example, in an indemnity contract with a general contractor, a subcontractor assumes responsibility for any damage that occurs while the subcontractor is working on the project. A plaintiff sues for damages and names both the general contractor and the subcontractor as defendants in the suit. The general contractor can cross-claim against the subcontractor for any award against the general contractor.

In a similar manner, a defendant can bring a third party into a lawsuit by filing a third-party complaint. The defendant alleges that the third party should bear some or all of the responsibility for the occurrence. For example, Driver B swerves into oncoming traffic and strikes Driver A. Driver A sues Driver B for negligence. Driver B files a third-party complaint against Driver C, alleging that Driver C stopped suddenly in front of Driver B, causing Driver B to strike Driver A.

Courts usually hear cross-claims and third-party complaints simultaneously with the original lawsuit.

Deciding when to use a counterclaim, cross-claim, or third-party complaint should be left to defense counsel. However, the claim representative should be alert for facts in the claim that may lead to any of these types of legal actions.

As previously discussed, promptness in answering the summons and complaint is important in order to avoid a default judgment. A **default judgment** is a judgment awarded to a plaintiff because the defendant has failed to respond to the summons and complaint by the deadline. Default judgments should be avoided because they automatically give the plaintiff all the damages asked for in the complaint.

Default judgment
Judgment awarded to a plaintiff because the defendant has failed to respond to the summons and complaint by the deadline.

A default judgment may occasionally be the insurer's first notice that a lawsuit had been filed. This is usually because an insured was served a summons and complaint and did not report it to the insurer. Although it is possible to have a default judgment vacated (withdrawn), such an outcome is not assured.

Discovery

Litigation plans outline the activities needed to accomplish the goals the claim representative and defense counsel have agreed on. For activities that are investigative in nature, the claim representative most likely can perform them more cost-effectively than the attorney can. If an activity can be performed only by the defense counsel, it is usually part of the discovery process.

Discovery is the process used to reveal facts and preserve testimony in a lawsuit. Discovery can also be used to narrow the issues of the lawsuit, which can lead to an early resolution. Both the plaintiff and the defendant use discovery to learn more about the case. Court rules generally permit attorneys to seek information in discovery that would not be admissible at trial; however, they must reasonably believe, and be able to show if asked by the court, that the information sought will lead to admissible evidence. A party may generally seek in discovery any evidence that is relevant to the subject matter

Discovery
The process used to reveal facts and preserve testimony in a lawsuit.

of the lawsuit as long as it is not privileged. Privileged evidence includes statements made by persons within a protected relationship, such as husband-wife, attorney-client, and doctor-patient. Examples of privileged evidence also include government records, grand jury proceedings, identity of informers, and attorney's work product. State statutes define the evidence and relationships that are privileged.

The following are the five most commonly used methods of discovery:

1. Request for production of documents
2. Interrogatories
3. Depositions
4. Physical or mental examinations
5. Admissions of facts not in dispute

Attorneys have the discretion to use discovery methods in any order. However, they generally use them in order listed because information gathered in one method is used in the next method. They may also use some discovery methods simultaneously, for example, sending a request for production of documents along with interrogatories.

A court's rules of civil procedure govern discovery methods, define each method of discovery, and set deadlines for exchange of discovery information and penalties for noncompliance with the rules. A court may also set a deadline for the completion of discovery in a specific lawsuit.

Request for production of documents
A request made by either the plaintiff or defendant in a lawsuit to the opposing side to provide all the documents and other tangible evidence it has in its possession relating to the facts of the case.

The discovery process usually begins with a **request for production of documents,** made by either the plaintiff or defendant to the opposing side to provide all the documents and other tangible evidence it has in its possession relating to the facts of the case. Other tangible evidence includes videotapes, diagrams, photographs, electronic records, and any other media used to transmit or preserve information. Any of the requested documents that the party possesses or can obtain without unreasonable effort must be produced, unless the party believes the document is privileged. To withhold a document as privileged, the party must identify the document, the parties communicating in it, and the basis for exercising the privilege. Lawyers may contest which types of documents are subject to privilege.

Interrogatories
Specific written questions or requests submitted by one party in a lawsuit requiring the opposing party to answer in writing.

After receiving and reviewing the requested documents, the attorney creates interrogatories. **Interrogatories** are specific written questions or requests submitted by one party in a lawsuit requiring the opposing party to answer in writing. Their primary purpose is to allow each side to discover the other side's position about the facts of the case and the applicable law. Because the answers are in writing, providing no opportunity for follow-up or clarifying questions, interrogatories are best used to identify specific facts and sources of information.

For example, an issue in a lawsuit is whether the lawsuit was filed within the appropriate statute of limitations. The defendant alleges in Paragraph #12 of its answer to the plaintiff's complaint that the driver was a permissive user of

the plaintiff's vehicle. The plaintiff's interrogatory may state the following: "Please identify all the facts on which the defendant relies regarding Paragraph #12 of defendant's answer to plaintiff's complaint." This interrogatory seeks the information the plaintiff needs to determine the basis of the defendant's assertion of permissive use. The defendant must provide all the facts that support the allegation. Failure to respond completely to all questions in an interrogatory precludes the party from subsequently relying on information that was not disclosed. In this example, if the defendant withheld one of its reasons for believing the driver to be a permissive user of the vehicle, the defense would be unable to use that fact at trial.

Defense lawyers may call on claim representatives to assist in answering interrogatories, particularly when the plaintiff raises issues about the claim process. The claim representative should respond promptly because deadlines for answering interrogatories are usually short. Failure to meet filing requirements can result in sanctions, such as fines, or a finding in favor of the interrogating party. Exhibit 8-3 is an example of a simplified interrogatory.

Attorneys often use the answers to interrogatories as the basis for depositions. A **deposition** is an oral examination of a witness about his or her activities or knowledge of the subject matter of a lawsuit. This testimony is typed by a court reporter or videotaped. Depositions can be used at trials as evidence of what a person saw, heard, or did in relation to the dispute between the parties. Depositions are generally conducted at the office of the lawyer who requested the deposition.

Deposition
An oral examination of a witness about his or her activities or knowledge of the subject matter of a lawsuit.

Depositions have two purposes. First, they allow each party to the lawsuit to discover what the other party's witnesses know about the facts of the matter. Second, because the testimony is transcribed, it can be used to challenge any conflicting testimony given by the same witness at trial. Such a challenge can discredit the witness, and in some cases, expose the witness to a perjury charge.

Two types of witnesses can be deposed: party witnesses and nonparty witnesses. Party witnesses are parties to the suit, such as the plaintiff or the defendant or, in the case of a party that is a corporation, one of its representatives or employees. Nonparty witnesses include all other persons who have knowledge of the case. Nonparty witnesses may be eyewitnesses to an accident, claim representatives who investigated the loss, expert witnesses, or recordkeepers.

A party witness's lawyer usually reviews anticipated questions with that witness before the deposition. Such preparations may be time consuming if the witness has extensive knowledge that is important to the lawsuit. However, the review can help refresh the witness's memory and familiarize him or her with the types of questions that are likely to be asked. Claim representatives are frequently required to give depositions about claims they have investigated. In preparation for being deposed, a claim representative should refer to the claim's activity log to review the facts.

EXHIBIT 8-3

Sample Interrogatory

SUPERIOR COURT OF
DAWSON COUNTY
COMMONWEALTH OF PENNSYLVANIA

CIVIL ACTION NO. 1-77804

James A. Dermont
Plaintiff

v.

INTERROGATORIES

Hamilton W. Grind
Defendant

TO: HAMILTON W. GRIND

Please take notice that the plaintiff, James A. Dermont, demands answers to the following interrogatories under oath within 30 days from the time service is made upon you.

Question No. 1: Was the defendant legally intoxicated at the time of the accident?

Question No. 2: Did the defendant fail to stop at a stop sign?

Question No. 3: What physical evidence will the defendant present?

Question No. 4: State the names and addresses of all the witnesses that the defendant will use to testify on behalf of the defendant in the trial of the case.

s/s Jerry R. Fleetwood
Jerry R. Fleetwood
Attorney for Plaintiff
1200 Audubon Street
New Haven, Pennsylvania

Date: 10/15/200X

Attorneys preparing for depositions may not always have the name of the person who has the information they are seeking, particularly if the plaintiff or the defendant is a corporation, partnership, association, or government agency. In such cases, an attorney may request a deposition from the "person with most knowledge" about the allegations in the complaint and answer. For example, the lawyer of a plaintiff suing a large corporation may not know specifically which manager was responsible for developing and implementing a particular policy. Asking to depose the person with most knowledge eliminates the need to identify the specific individual.

During a deposition, the opposing lawyer is required to follow basic rules of professional courtesy. However, lawyers can ask questions out of order, repeat questions after rephrasing them, and engage in other tactics designed to catch the deposed party off guard to reveal contradictions in the testimony. Observing witnesses in the deposition setting also helps lawyers evaluate how they will testify in court.

Information obtained in a deposition or produced by another discovery method may lead defense counsel to request an examination of the opposing party's physical and/or mental condition. Requests for independent medical examinations (IMEs) are most common in bodily injury claims or claims for emotional or psychological injury and are usually initiated by the defendant in order to assess the physical or mental injuries claimed by the plaintiff. Generally, the rules of civil procedure require the injured party to submit to an examination. The claim representative and the defense attorney decide when an IME is needed, and the claim representative usually makes the necessary arrangements. After the need is determined, the claim representative should promptly contact the insured or claimant to request the IME and should follow the insurer's standards for selecting medical practitioners to conduct the IME.

With the information compiled from all other methods of discovery, one or both parties to the lawsuit may decide to request admissions. **Admissions** are factual statements that, unless denied, bind the party at trial. The purpose of this discovery device is to narrow the factual issues to those in contention and to reduce the number of facts the court or jury has to determine at trial. Facts that are usually admitted by the parties before trial include the names and addresses of the parties, dates of certain incidents, and other facts that are not in dispute but would otherwise need to be proven at trial.

Admissions
Factual statements that, unless denied, bind the party at trial.

The attorney representing each party must decide whether to admit certain facts. When the defense receives a request for admissions, the attorney may send it to the claim representative for review.

Attorneys are sometimes tempted to refuse to admit any facts, even those they know are true, on the premise that it is safer to deny everything. Such an approach can unnecessarily prolong litigation because it forces the opposing side to prove trivial details. For example, a complaint may allege that the insured owns a 2002 Toyota Camry. If there is no dispute over this fact, defense counsel could admit to it in the answer. Generally, facts that are indisputable should be admitted.

Once all methods of discovery have been completed, the claim representative and defense counsel should review the litigation plan to determine whether the information produced in discovery requires a change in the plan. If their initial assessment was that insufficient information was available to decide whether to defend or settle, discovery should have produced the needed information. If they initially considered the case to be defensible, they should review that decision in light of information obtained during discovery.

If the claim representative and defense counsel determine that the lawsuit is still defensible, then trial preparation begins.

Trial Preparation

Throughout discovery, the defense attorney and claim representative have gathered information leading to the decision to try the case. This information must be incorporated into the trial strategy. The trial strategy is created by defense counsel and communicated to the claim representative, usually in the form of a pre-trial report that outlines the strengths and weaknesses of both the defendant's case and the plaintiff's case. The report may include a synopsis of applicable law and a range for possible settlement and/or jury awards.

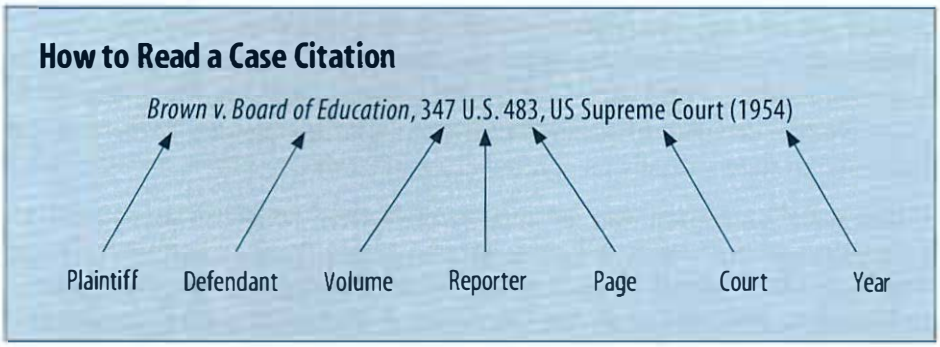
Stare decisis
The principle that lower courts must follow precedents set by higher courts.

In preparing the trial strategy, the defense attorney may research court decisions in similar cases to find a precedent for the defense position in the current case. The practice of using precedent is based on ***stare decisis*** (pronounced STAHR-ee di-SI-sis or STAIR-ee, meaning to stand by things decided), the principle that lower courts must follow precedents set by higher courts. Cases decided by a state's highest court become the common law of that state and set a precedent for later decisions in lower courts. Attorneys seek to distinguish their cases from unfavorable precedents in order to persuade judges that the precedents do not apply. Lawyers use favorable precedents to support their cases and may seek to have a precedent applied more broadly so that it applies to their case. For example, if a precedent-setting case involved an interpretation of a doctor's duties to a patient, an attorney might seek to use this precedent for a case involving a veterinarian's duty to an animal's owner even though, under the current common law, no such duty is required.

A higher court can overturn a lower court's precedent. Such decisions are often made when a precedent becomes obsolete because of changes in statutory law, technology, or society.

Defense counsel often include case citations to precedent cases in their pre-trial reports or case analyses. Court opinions are chronicled in books called reporters or online in various legal databases. Case citations provide the following information:

- Name of the case
- Volume number, name of the reporter, and page number where the case can be found
- Court that decided the case
- Year the case was decided



Courts publish their written opinions in official case reporters. Each state and each level of court may have its own reporter, the names of which are abbreviated in the case citation. The reporters have tables listing the abbreviations and the full names of the volumes. Commercial entities such as Westlaw or LexisNexis also publish compiled cases, and case law is available on the Internet at many different commercial, educational, and judicial Web sites.

Published court decisions usually start with a short case synopsis and a summary of the court's decision, or holding. They show the names of the attorneys involved and give a recitation of the facts. The court's decision is then set out in its entirety, followed by any concurring and dissenting opinions if it is a multi-judge court. Claim representatives may find it helpful to read court opinions not just in relation to a particular claim in litigation, but to stay abreast of changes in laws that may affect claims they will handle in the future.

After reviewing the trial strategy and case analysis with defense counsel, the claim representative and defense counsel should agree on any pretrial motions to be made. During litigation, the court must rule on disputes that arise relating to the case or the trial process. Some common issues are whether certain evidence can be admitted at trial, whether certain persons can be called as witnesses, and whether the lawsuit can be settled without further action by the parties. To bring these matters to a court's attention, lawyers file motions with the court. A motion is a written proposal for how a dispute should be resolved. Motions are governed by the rules of civil procedure, which designate when a motion can be brought, why a motion can be brought, what must be included in a motion, and when opposing attorneys must respond to a motion.

Attorneys can make many motions. Claim representatives should be familiar with the following three common pretrial motions:

1. Motion to dismiss
2. Motion *in limine*
3. Motion for summary judgment

Motion to dismiss
A request that a court terminate an action because of settlement, voluntary withdrawal, or procedural defect.

A **motion to dismiss** is a request that a court terminate an action because of settlement, voluntary withdrawal, or procedural defect. Among reasons for a motion to dismiss filed early in the proceedings are that the complaint is defective, the defendant has failed to respond to the summons, or the plaintiff has failed to state a legally recognized cause of action.

Motion *in limine*
A pretrial request that certain evidence be excluded from the trial.

Either party can request that information gathered during discovery be excluded from the trial by filing a **motion *in limine*** (pronounced LIM-e-nee). Attorneys typically seek to exclude evidence that is harmful to their cases. For example, if the plaintiff offers photographs showing vehicle damage and bloodstains as evidence, defense attorneys may attempt to exclude the photos because they could unduly influence the jury's decision. Although the photographs may be admissible under the rules of evidence, attorneys may still seek to persuade the court to exclude them for the following reasons:

- They are highly prejudicial (bloodstains tend to influence jurors regardless of their importance in determining fault).
- They are cumulative (other photographs are available to show damage to the vehicle that do not show bloodstains).
- The fact is not in controversy (the defendant admits that the car was damaged).

Motion for summary judgment
A pretrial request asking the court to enter a judgment when no material facts are in dispute.

At the close of discovery but before trial, the plaintiff or the defendant can file a **motion for summary judgment** asking the court to enter a judgment that no material facts are in dispute. The moving party submits a memorandum of applicable law that supports the motion. Supporting material can also include affidavits, answers to interrogatories, and replies to requests for admissions. In most cases, the nonmoving party responds to the motion for summary judgment and can file its own motion for summary judgment using the same facts but arguing for a different interpretation of the law.

After the motions and responses are filed, the court usually holds a hearing. The judge questions the attorneys about the bases for their respective motions or their opposition. In considering a motion, the judge assumes that all the pleadings of the party opposing the motion are true. For example, if defense attorneys bring a motion for summary judgment, the judge considers the motion in light of the allegations the plaintiff has presented in its complaint and other pleadings and from the standpoint that those allegations are correct. Courts apply strict standards when reviewing a motion for summary judgment because granting the motion deprives the nonmoving party (the party who has not made the motion) of a jury trial. To grant a summary judgment motion, the court must find that no genuine issues of material fact are in dispute and that the moving party (the party who made the motion) is entitled to judgment as a matter of law, and judgment is entered without a trial. If a motion for summary judgment is granted that covers the entire matter at issue, litigation is ended and a judgment for the moving party is entered. If the motion is denied or covers only some of the issues, the parties proceed to trial.

Defense counsel and the claim representative should agree in advance on pretrial motions. The claim representative should have a clear understanding of why defense counsel is proposing a motion and the likely outcome. This understanding is necessary because motion practice, as filing these motions is called, increases defense costs.

In addition to pretrial motions, there are pretrial conferences, called at the judge's discretion in an effort to settle the case. The judge and the parties' attorneys meet in the judge's chamber two or three weeks before the trial. In some cases, the judge simply inquires about the status of the case and whether any possibility of settlement exists. In other cases, the judge may use a pretrial conference to limit the issues to be heard at trial, much like a motion *in limine*. Exhibit 8-4 is an example of a pretrial order that might be issued at the conclusion of the pretrial conference to limit the issues in the case.

EXHIBIT 8-4

Sample Pretrial Order

SUPERIOR COURT OF

DAWSON COUNTY

COMMONWEALTH OF PENNSYLVANIA

CIVIL ACTION NO.1-77804

James A. Dermont

Plaintiff

v.

Hamilton W. Grind

Defendant

PRETRIAL ORDER

A pretrial conference was held on January 15, 200Y, before me, with Jerry R. Fleetwood appearing as attorney for the plaintiff and William C. Havenship appearing as attorney for the defendant. The following proceedings were had:

1. Plaintiff and defendant were involved in an automobile accident on June 1, 200X.
2. Defendant was legally intoxicated at the time of the accident.
3. The issue remaining in the action is whether the defendant's brakes failed unexpectedly at the time of the accident.

s/s Anita S. Raimondi

Anita S. Raimondi

Judge, Superior Court

Dawson County

Date: 1/20/200Y

Claim representatives may be asked to attend the pretrial conference, either by the court or by the defense attorney. Before the conference, the claim representative and defense counsel should agree on the conference's expected outcome and the claim representative's role, if any, in the conference. The judge may attempt to settle the case by persuading the claim representative to make an offer or increase an offer, even though the claim representative and defense counsel have agreed that the case should be defended rather than settled.

As part of trial preparation, defense counsel may ask the claim representative to gather additional information, such as more photos of the accident scene or medical records. When they possess evidence, claim representatives may be involved in maintaining a chain of evidence (a record showing who has possession of or access to the evidence and when). In a claim against a potentially responsible third party, an insurer can be denied recovery if evidence has been intentionally or negligently lost or destroyed. Similarly, an insurer defending a first-party coverage lawsuit can be found liable if evidence is intentionally or negligently lost or destroyed. The claim representative shares responsibility for preserving evidence with the property owner, the defense attorney, and any expert given access to the evidence.

Trial Assistance

Depending on local practices, claim representatives may be asked to drive witnesses to court, participate in conferences between the parties, and observe the entire trial. They must be ready to assist as needed, and to hire others to assist, if necessary.

Most insurers use a litigation reporting process that requires the claim representative to file periodic status reports on the trial. These litigation reports inform the various interested parties (such as the underwriter and the home office claim department) and the insurer about the case's progress and outcome. In order to file accurate trial status reports, the claim representative should be familiar with the trial process.

A trial can be a jury trial or a nonjury trial. A jury is a group of people who hear and consider the evidence in a case and decide what facts are true. In a jury trial, the jury decides all questions of fact and the judge decides all questions of law. In a nonjury trial, the judge decides all questions of both fact and law. The right to trial by jury may depend on the amount in controversy or on the particular area of law that applies to the facts of a case. For example, in some states, questions about the actions of an insurer investigating a claim are heard not by a jury but by a judge. In a civil trial, the plaintiff and defendant may agree to have a case heard by a judge alone. A bench trial, also called a trial by court or judge, is a trial heard by a judge without a jury.

Depending on the amount in controversy and the jurisdiction, a jury may have six to twelve members. Alternate jurors hear the evidence but do not deliberate unless another juror is unable to serve throughout the trial. By

using alternate jurors, the court ensures that after the trial starts, it continues to a verdict even if one or more jurors must leave the jury because of illness or undue hardship.

Jurors are selected from a jury pool. Potential jurors from the pool are questioned by the judge or lawyers about their knowledge or opinion of the parties to the litigation and the issues to be decided in the case. **Voir dire** (pronounced vwahr-deer) is the process of examining potential jurors about their possible interest in the matters presented at trial, their ability to decide the case fairly, and their competence to serve as jurors. During this process, attorneys attempt to determine the potential jurors that would most likely be favorable to their clients. Depending on the statute or a court rule, lawyers for each party are given a set number of peremptory challenges, which allow them to exclude a potential juror without stating a reason. After using the allotted peremptory challenges, lawyers may still exclude jurors but must state their reason for doing so.

Voir dire
The process of examining potential jurors about their possible interest in the matters presented at trial, their ability to decide the case fairly and without prejudice, and their overall competence to serve as jurors.

In some jurisdictions, people in certain occupations are automatically excluded from hearing a particular case. For example, attorneys and claim representatives may be excluded from hearing civil trials. Friends, relatives, and acquaintances of the parties to the lawsuit are also typically excluded.

In lawsuits against insureds, jurors and judges are not informed of insurer involvement in the case. That an insurer will pay the judgment or is providing the defense (unless, of course, an insured is suing an insurer directly) should not affect the judge's or jury's decision about liability. The trial should be conducted as though no insurers are involved, even when it is obvious that they are. For example, the parties involved in an automobile accident are likely to have insurance; therefore, it is likely that insurers are involved in civil trials related to such accidents. Nevertheless, any mention by a party that an insurer is involved is grounds for a mistrial.

The parties' respective burdens of proof have a bearing on why, how, and in what order evidence is presented at trial. **Burden of proof** is the duty of a party to prove that the facts it claims are true. To satisfy their burden of proof, plaintiffs must generally prove all the essential elements of their case by a **preponderance of evidence**; that is, the evidence supporting the jury's decision must be of greater weight than the evidence against it. For a judge or jury to determine preponderance of evidence, the basis and extent of witnesses' knowledge, the type and quality of information they possess, and their manner of testifying are more important than the number of witnesses. Determining preponderance of evidence is a subjective judgment.

Burden of proof
In a trial, the duty of a party to prove that the facts it claims are true.

Preponderance of evidence
Evidence supporting the jury's decision that is of greater weight than the evidence against it.

Once the jury is assembled, the trial begins with attorneys' opening statements. An opening statement is not evidence but a summary of the case and of the proof the attorney intends to present. Because the plaintiff has the burden of proof, the plaintiff's attorneys go first. They use this opportunity to summarize the facts of the case and the issues the jury will decide. The jury is usually told which witnesses will testify, how this testimony relates to the issues the jury is to

decide, and why the jury should decide the case in the plaintiff's favor. After the plaintiff's opening statement, attorneys for the defendant can make an opening statement or reserve the opening statement until after the close of the plaintiff's case. Whether the defendant's attorneys reserve the opening statement is a matter of strategic planning and personal preference.

Following the opening statements, the plaintiff's attorneys introduce evidence by calling and questioning witnesses to establish the plaintiff's case. The defendant's attorney is entitled to cross-examine the plaintiff's witnesses. Cross-examination is an essential element of the trial. It allows opposing attorneys to test the truth of a witness's testimony, to further develop the testimony, or to question a witness for other purposes. Successful cross-examination may discredit testimony or reduce the weight a jury may give to the evidence.

After the plaintiff's attorneys have presented their case, the defense follows the same procedure, presenting an opening statement if it did not do so previously and then calling defense witnesses to testify. The plaintiff's attorney may cross-examine defense witnesses.

Witnesses may be lay witnesses or expert witnesses. Lay witnesses have no special expertise in the matters about which they testify but have first-hand knowledge of the matters, based on observation. For example, a witness to an automobile accident would be a lay witness. An expert witness has specialized knowledge in a particular field. The judge determines whether an expert witness is qualified. Often both parties produce expert witnesses in the same field who testify with different opinions about the same facts. Expert witnesses can include doctors, engineers, accountants, psychologists, and economists. Occasionally, an expert is required in an unusual field of expertise, such as an expert in identifying artistic forgeries.

During a trial, issues about the conduct of the trial arise that must be decided by the judge. These matters may include whether a particular piece of evidence should be presented to the jury, the scheduling of the proceedings, and the estimated duration of the trial. Because such issues do not concern the jury, and in some cases must be withheld from the jury, the judge and lawyers hold a bench conference, that is, a conference outside the hearing of the jury. For example, if an attorney wants to introduce specific evidence and opposing attorneys object, the judge hears arguments from both parties' attorneys about why the evidence should be admitted or excluded. The jury is barred from hearing these arguments to prevent prejudice if the judge decides to exclude the evidence. Bench conferences may be recorded by a court reporter so that a transcript is available if either party appeals the judge's decision. However, these conferences are not necessarily made part of the trial's written record.

Similar to pre-trial motions, the parties can make motions at other points during the trial. When the plaintiff's case has been presented, defense attorneys can move for a directed verdict, asking the court to dismiss the case because the plaintiff has failed to prove its allegations. The defense attorneys

argue that the evidence is so clear and convincing that no reasonable trier of fact could find for the plaintiff. If the motion is granted, the verdict favors the defendant and the trial is concluded. Directed verdicts are rarely granted because a plaintiff's evidence is rarely so defective that it warrants such a ruling. Directed verdicts are often appealed.

After all evidence has been presented, attorneys for each side are given an opportunity to address the jury through closing arguments during which they typically summarize the facts presented in a light most favorable to their client. Like opening statements, closing arguments are not evidence. Because closing arguments promote a particular position, attorneys may attempt to influence the jury's decision by characterizing evidence adverse to their client's position as being "without weight."

Following the closing arguments, the judge instructs the jury about the law to apply in deciding the case. For example, in an automobile accident trial, the judge instructs the jury in the principles of negligence and fault and explains which party has the burden of proof. Attorneys usually submit written proposals for instructions, and the judge decides whether to incorporate them in the jury instructions. A losing party may appeal a case on the grounds that the judge instructed the jury incorrectly.

After receiving the judge's instructions, the jury retires to the jury room to decide the case. Jury members select a foreperson who acts as the leader. The jury's deliberations have no time limit; they continue until a unanimous verdict is reached. The jury returns to the courtroom, and the judge asks for their verdict. The verdict is read in open court, usually by a court officer or the jury spokesperson.

Post-Trial Activities

The court usually accepts the jury's verdict and enters a judgment to that effect. On rare occasions, the court can act on its own initiative or on a motion of the losing party and enter a judgment notwithstanding the verdict (judgment n.o.v.). This is a judgment in favor of one party even though the jury's verdict favored the other party. For example, if a jury finds a defendant liable for the plaintiff's injuries without evidence to support that verdict, the court can enter a judgment for the defendant, notwithstanding the verdict. Sometimes the losing party must file a motion for a directed verdict before a judge can grant a judgment n.o.v.

The court can grant a new trial on its own initiative or on the losing party's motion. Typical grounds for a new trial include insufficient evidence, erroneous rulings on instructions, newly discovered evidence, and a verdict contrary to the judge's instructions. However, trial judges seldom grant new trials.

The court can adjust the damages awarded by the jury. A judge who considers the jury award excessive or insufficient may decrease or raise it. This typically happens when a jury awards an extraordinarily high judgment that is disproportionate to the damages.

Either party can appeal a court verdict to a higher court, although it is commonly the losing party that appeals. Appeals courts hear no new evidence from witnesses and do not consider whether the finder of fact (the judge or the jury) in the lower court was correct in determining the facts. Rather, appeals courts usually limit their opinions to a review of the application of law to the facts decided by the jury or the judge. The distinction between the facts and the law can be subtle. For example, if the trial court found a motorist to have driven thirty-five miles per hour in a twenty-five-mile-per-hour zone, an appeals court could not dispute that finding if it was reasonable. However, the appeals court could determine whether the judge gave correct instructions to the jury on the law of negligence as it applied to the fact that the motorist was speeding.

Appeals are most commonly based on evidentiary matters. During a trial, a judge rules on many matters concerning the admissibility of evidence. A party may appeal on the grounds that the judge's decision to admit or exclude certain evidence altered the outcome of the trial. For example, defense attorneys may argue that excluded evidence about the plaintiff's reputation should have been allowed in order to show that the plaintiff is not a truthful person.

An appeal may be based on the judge's instructions to the jury. A judge's error in stating the law is grounds for an appeal because the jury uses these instructions to apply the law to the facts. For example, if a judge misstated the law of negligence, lawyers may have grounds for a successful appeal.

Another common ground for appeal is that the verdict is "against the weight of the evidence" and that, therefore, some influence from outside the trial must have caused the jurors to reach their verdict. Because jurors are entrusted to make all findings of fact, such an appeal requires a heavy burden of proof: that no reasonable trier of fact could have reached the verdict at issue.

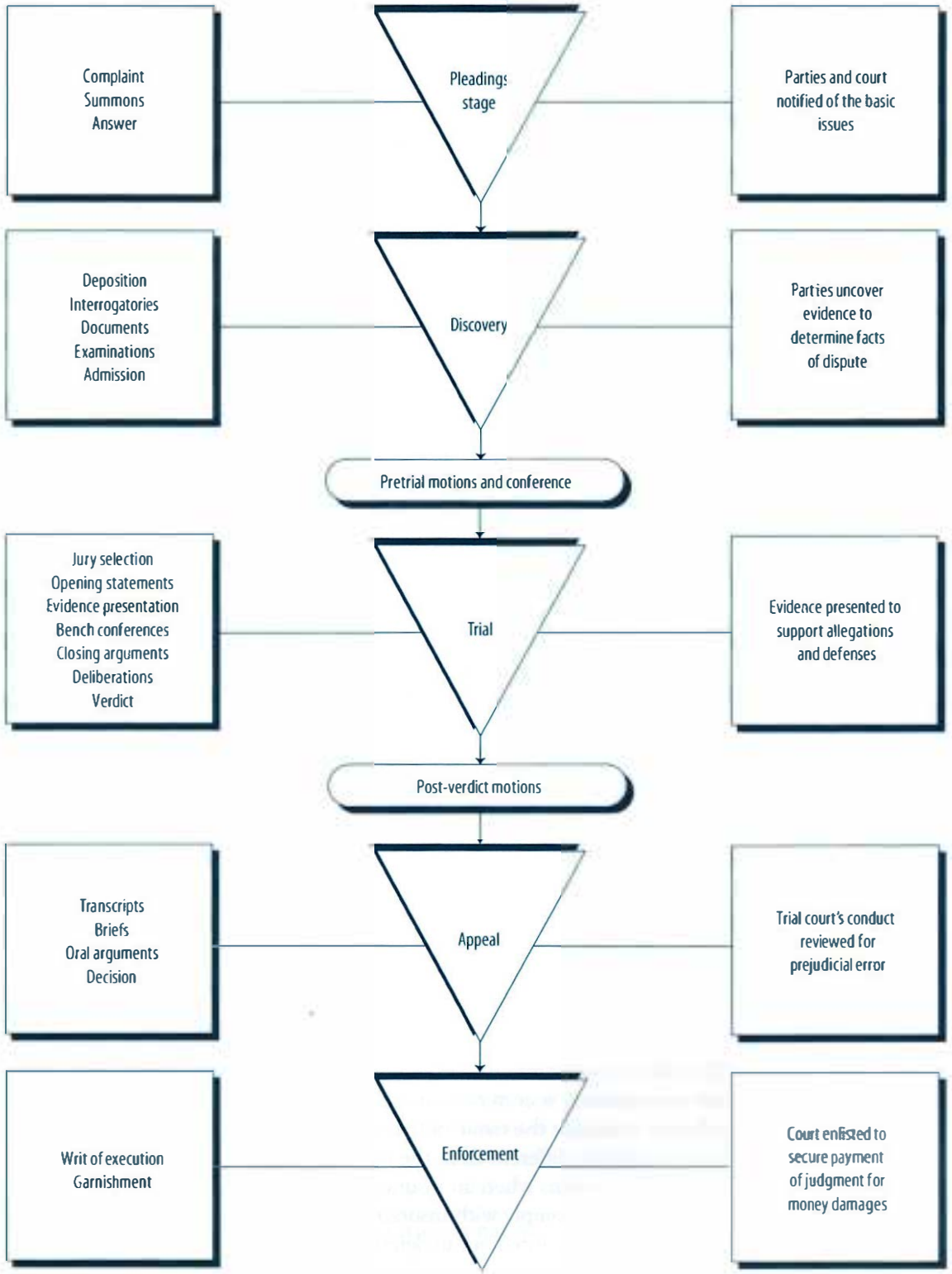
The appeals process is lengthy. A complete trial transcript must be certified and transmitted to the appeals court along with all physical evidence introduced at trial. After the parties file appeals briefs, a hearing is held, and attorneys for each party argue for or against the appeal and answer questions raised by the appellate justices. The decision of a state's highest appeals court is final and concludes the matter. Exceptions involve cases appealed based on the U.S. Constitution, which can be appealed to the U.S. Supreme Court. Unlike most state supreme courts, the U.S. Supreme Court chooses the cases it will hear.

Once a judgment is final, the plaintiff moves to enforce the judgment. In most instances, the defendant makes arrangements to pay the plaintiff. If the defendant is indigent or unable to pay in full, the plaintiff may file a lien with the court to enforce the judgment should the defendant later be able to pay.

Exhibit 8-5 summarizes the process of a typical lawsuit.

EXHIBIT 8-5

Process of a Typical Lawsuit



MANAGING A BAD-FAITH LAWSUIT

Although the trial process is the same for third-party lawsuits and bad-faith lawsuits, the claim representative's roles and responsibilities differ. Bad-faith lawsuits are often referred to specific claim representatives who are also attorneys. Most insurers believe that bad-faith lawsuits should be handled by someone other than the claim representative who handled the claim, whose actions are the basis for the lawsuit. Many insurers create a new claim file for the bad-faith lawsuit that is separate from the underlying claim file. In some circumstances, the bad-faith allegation has no reasonable basis, and the insurer prefers not to reassign the claim to another claim representative.

Receiving the Summons and Complaint

Because a bad-faith lawsuit is usually filed against the insurer, the summons and complaint may be served on the insurer's corporate office, the local office, or an insurer representative. Insurers have guidelines about who should receive the summons and complaint and how to respond. The guidelines may direct the lawsuit to the claim representative's supervisor or manager or to a corporate claim person who specializes in bad-faith lawsuits. The time limit for answering a bad-faith lawsuit is the same as for any other lawsuit; therefore, the summons and complaint must promptly reach the designated person.

Checking the Summons and Complaint

Similar to other lawsuits, on receipt of a bad-faith lawsuit, the claim representative must check the summons and complaint to identify the parties in the complaint, determine the applicable statute of limitations, verify the jurisdiction and venue, and check the allegations to determine what defenses may be available.

Parties

Generally, bad-faith lawsuits are brought against the insurer and not against the individual claim representative because the insurer has sizable assets available to satisfy a judgment. However, a claim representative may be named as a defendant. If so, the claim representative should verify that the insurer will handle his or her defense. If the insurer refuses to provide the defense, the claim representative must retain personal counsel to protect his or her interests.

The claim representative handling the bad-faith lawsuit should confirm that the defendant insurer is correctly identified in the summons and complaint. A policyholder could get the name of the insurer incorrect, or the name of the actual insurer could be different from the parent company that has been named in the lawsuit. This occurs when an insurance company writes policies under many different names to comply with insurance admission laws in various states. These errors should be pointed out to defense counsel, who will move to correct them.

Service

The claim representative handling the bad-faith lawsuit should determine how service of the summons and complaint on the insurer and other related defendants was accomplished. The rules of service for a bad-faith lawsuit are the same as those for any other lawsuit. A potential problem in a bad-faith claim is that the service may have been accomplished at a location far from where the claim is being handled. For example, service may have been made at the insurer's corporate headquarters rather than at the local claim office. Particularly when service has been made at a distant location, the claim representative must determine who received the service and whether it was proper.

Time to Answer

The statutory time in which to file an answer in a bad-faith lawsuit is specified in the summons and complaint. The claim representative handling the lawsuit should make every effort to comply or to secure an extension from the opposing party.

Statute of Limitations

The claim representative handling the bad-faith lawsuit should check the applicable statute of limitations in the state in which the bad-faith lawsuit is filed to determine whether the lawsuit has been filed within the time limit. The claim representative should also determine whether the policy applicable to the underlying claim specifies a time limit for filing a lawsuit if the bad-faith claim is included in a lawsuit for coverage.

Jurisdiction and Venue

As for other lawsuits, the claim representative checks jurisdiction and venue for a bad-faith lawsuit. Forum shopping may be an issue in a bad-faith lawsuit. The plaintiff may have filed the lawsuit in a jurisdiction that was more favorable to insureds than to insurers, even though another jurisdiction might have been more convenient for all parties.

Allegations

The allegations in a bad-faith lawsuit provide details of the activities on which they are based. These allegations may be specific to how the underlying claim was handled, or they may be general, alleging a pattern or practice occurring with many different claims. In contrast to the relative simplicity of investigating allegations that involve a single claim, investigation of a pattern of practice over many years can be complicated, possibly requiring review of computer printouts, archived claim files, and other claim department documents.

Damages

Because damages in bad-faith claims are punitive in nature, the dollar value of damages sought is often extremely high. The claim representative handling

the bad-faith lawsuit should not be surprised or alarmed by these amounts, because they may be unrealistic. A familiarity with customary bad-faith damage awards in the lawsuit's jurisdiction can put the demand into perspective. If a claim representative has not yet acquired this information from experience, the attorney assigned to the case should be able to provide it.

Such information is also helpful for reporting. The claim representative must keep various members of corporate claims and finance apprised of the lawsuit and the potential for a judgment against the insurer. Generally, insurers do not set up claim reserves to cover potential judgments against them, because bad-faith lawsuits are not claims against policies. However, if the potential for a sizable bad-faith judgment is significant, corporate finance may want to show the lawsuit as a liability on its financial statements.

Referring the Lawsuit to Defense Counsel

Just as in other lawsuits, the claim representative handling the bad-faith lawsuit must assign it to defense counsel for handling. Most insurers have a list of attorneys they prefer to defend bad-faith lawsuits. These attorneys are usually experienced litigators with knowledge of the insurer's claim practices.

As in other cases, the claim representative provides defense counsel with a set of instructions and a copy of the claim file and associated material. The content of the instructions does not differ markedly from that used in other lawsuits. Because it is the subject matter of the lawsuit, the complete claim file must be given to counsel, including any e-mail and voice-mail messages and any other messages stored in an electronic format that may pertain to the underlying claim but that are not part of the file.

Assisting Counsel

In comparison with other lawsuits, the claim representative who handles a bad-faith lawsuit may be more actively involved in the discovery and trial preparation. In a bad-faith lawsuit, the attorney's client is the insurer, and the claim representative handling the lawsuit is the primary point of contact with the client. Because most of the material to be discovered in a bad-faith lawsuit exists within the insurer, the claim representative must comply with the discovery requests.

Litigation Plan

A litigation plan should be created for the defense of the bad-faith lawsuit just as for other lawsuits. The claim representative and defense counsel must review all information available about handling the underlying claim to determine if a bad-faith loss exposure exists. They must communicate openly with one another about the contents of the claim file, and they must be realistic about the potential for significant financial consequences and loss of public trust that may result from a bad-faith lawsuit.

The litigation plan for a bad-faith lawsuit has the same goal as the plan used for other lawsuits: defend, settle, or obtain more information to decide whether to defend or settle. To determine whether the insurer faces a bad-faith loss exposure in the case, the claim representative and defense counsel evaluate the actions of the claim representative who handled the underlying claim in light of the bad-faith law in the jurisdiction.

They may decide to settle the case whether or not an exposure exists. Bad-faith litigation can be expensive and time consuming, draining the insurer's resources that are better used elsewhere. Bad-faith litigation can also be invasive, requiring the insurer to produce records and documents that it would prefer not to become part of the trial record. Testimony of corporate officers may be called for, requiring them to fit depositions and trial testimony into their business schedules. Producing a corporate officer for deposition can also lead to the disclosure of information that is not really pertinent to the case. Bad-faith litigation can also harm the insurer's reputation with the general public.

If the claim representative and defense attorney decide that the lawsuit should be defended, they must agree on how this is to be accomplished. If they decide the lawsuit should be settled, they must agree on a negotiation strategy. If insufficient information is available to decide whether to defend or settle the case, they must agree on what additional information is needed and how to obtain it.

Complaint Answer

Procedurally, answering a bad-faith complaint is no different from answering any other lawsuit. The answer must respond to the allegations raised in the complaint and provide affirmative defenses. It must be filed within the statute's deadline or within the extension granted by the opposing party. Failure to file a timely answer can result in a default judgment.

Some insurers may have corporate guidelines to assist defense counsel in answering bad-faith complaints. Such guidelines usually seek to ensure company-wide uniformity of the insurer's answers to lawsuits. Inconsistency of answers to similar allegations in different lawsuits and in different states does not serve the insurer well.

The biggest challenge in a bad-faith lawsuit is providing the content of the answer to the complaint. It must be accurate and consistent with corporate policy. Formulating an answer to allegations in a bad-faith complaint can require substantial research by the claim representative. An allegation may be broad, for example: "All claims in the state of New Jersey involving red cars were wrongfully denied." This example is exaggerated to make a point. To answer this allegation, the claim representative would need to research all New Jersey claims to select those involving red cars and then determine the outcome of each claim. Depending on the type of data contained in the claim processing system, it may or may not be possible to electronically sort

accident claims by the color of the cars involved. The claim representative or the insurer's data managers may also have to review thousands of claim files to find the data because no time period is specified in the allegation. Such a search can be time consuming and costly. If a complaint contains overly broad allegations, defense counsel can object or can include a statement in the answer asserting that the research required in ascertaining the information is too difficult, time-consuming, or costly to perform.

When drafting the answer, the claim representative and defense counsel also discuss whether the insurer should file a counterclaim against the plaintiff or whether a declaratory judgment action is appropriate. A counterclaim may be useful if the insurer suspects that the plaintiff acted in bad faith. A declaratory judgment action may be appropriate if the bad-faith lawsuit resulted from a coverage denial based on the insurer's good-faith opinion that the policy did not cover the loss. This reason for denial can also be used as a defense to the bad-faith allegation. Whether any of these actions can be taken depends on the facts of the case and the applicable state law.

Discovery

Discovery in bad-faith claims can be very demanding. Claim representatives who handle bad-faith claims must be able to locate information from many sources within the insurer. Depending on the allegations and the applicable state law, the discovery may concern only one claim, or it may be so broad that it encompasses the patterns and practices of the insurer in similar claims. Defense counsel usually objects to extremely broad discovery requests. In some cases a court may require justification for the objection; therefore, the claim representative should be prepared to explain to the court why a request is prejudicial, irrelevant, or burdensome.

Three areas of discovery can cause significant concern for insurers and defense counsel: (1) the discovery of corporate financial information, (2) the discovery of documents believed to be privileged, and (3) the discovery of the claim file itself. The discovery of corporate financial information and the discovery of privileged documents is best left to the claim representative handling bad-faith lawsuit and the insurer's defense attorney. Because the claim file is the record of their claim activities, claim representatives should be aware that any claim file may be subject to a discovery demand.

Bad-faith lawsuits are filed long before the plaintiff's attorney receives a copy of the claim file. They are based on the actions and communications of the claim representative. Once a lawsuit is filed, the plaintiff's attorney uses the claim file to prove the allegations. The claim file's content can be the insurer's best defense or its worst nightmare. Even the most innocent of entries in a claim file can be used by the plaintiff's attorney to sway a jury.

Traditionally, much of the claim file has been protected from discovery by state and federal rules of civil procedure that protect attorney work products (materials prepared in anticipation of litigation) and attorney-client communications

from discovery. Work product information is generally not discoverable unless those demanding it can prove substantial need or an inability to obtain the information through other sources without undue hardship.

However, in jurisdictions that permit bad-faith causes of action, some courts have held that the bad-faith allegations themselves create a substantial need for information that cannot be obtained from another source. Other courts have held that claim file materials are part of an insurer's normal business operations and are not created in anticipation of litigation. Therefore, these courts have concluded, such materials are not entitled to protection. Consequently, plaintiffs in bad-faith lawsuits can see all or almost all the claim file's contents, including relevant e-mail and voice-mail messages, text messages, and data back-ups.

Tips for Keeping the Claim File Objective and Balanced

- Do assume that the entire claim file and related documents are discoverable and may be seen by a jury.
- Do not make gratuitous comments on any topic.
- Do not make entries in the file that show self-interest on the part of the claim representative or insurer.
- Do not use language that gives the impression that the claim representative has already taken a position about the validity of the claim.
- Do justify reserve amounts and ensure that reserve changes reflect new or additional information received.
- Do not use color highlighters, punctuation, or any other method to emphasize a point.
- Do not use descriptive terms when stating facts. Imagine having to clarify the distinction between the following two entries: "The claimant carried two bags of groceries from the car to the house very easily" and "The claimant carried two bags of groceries from the car to the house."
- Do not erase, white-out, or otherwise alter claim documents. If a correction is necessary, merely put a line through the wording to be corrected and write the correction in the margin. Do not attempt to conceal the original entry or writing in any way. If possible, attach an explanation in for the correction in the document.
- Do not discard material from the claim file.
- Do not put material belonging to another claim in the claim file. Only the documents relating to the specific claim belong in the file.
- Do not put personal notes in communications. This tends to happen in e-mails, such as "looking forward to lunch next week."
- Do not include facts that are not material to the claim. If the claim involves water damage, the file should not include facts about the insured's poor driving record.
- Do not include humor in the claim file. Light-hearted comments would not be well received by the insured or the jury.

It is likely the claim representative will be deposed on the claim file's contents at some point during a bad-faith lawsuit. This deposition may occur years after the claim representative made the entries in the claim file. Explaining opinions, gratuitous comments, corrections or deletions, unrelated material, and humor years after the fact is extremely difficult. It is far easier to explain the basic facts as reflected by the documents and entries in the claim file.

Trial Preparation

Once discovery is completed, the focus shifts to trial preparation. As with other lawsuits, all information gained during discovery must be reviewed to determine whether the original litigation plan should be revised. If the insurer decides to settle the bad-faith lawsuit, then the claim representative and the defense attorney initiate settlement discussions. If the insurer decides to defend against the bad-faith lawsuit, the claim representative and defense attorney begin their trial preparations. These preparations usually begin with a report from counsel outlining the case's strengths and weaknesses and the applicable case law. It may also include information about verdicts from similar cases.

After reviewing the trial strategy offered by defense counsel, the claim representative and counsel decide whether to make any pretrial motions. Such motions are particularly important in bad-faith lawsuits because they can narrow the issues to be tried and minimize the likelihood of the unnecessary disclosure of information.

During trial preparation, the claim representative may be asked to re-verify and update information that was used in discovery. The claim representative may also be asked to participate in witness preparation. This activity is important because many of the witnesses in a bad-faith lawsuit are insurer executives, not just the original file handler.

Trial Assistance

The trial assistance the claim representative provides in bad-faith lawsuits is similar to that provided in other lawsuits. In a bad-faith lawsuit, it is extremely important for the claim representative to report to the insurer regularly on the trial's progress. It is also important to keep the lines of communication open with the plaintiff in the event that a sudden turn in the case may make settlement more likely.

Post-Trial Activities

The post-trial activities for a bad-faith lawsuit mirror the post-trial activities for other lawsuits, as follows:

- Possible judgment notwithstanding the verdict
- Motion for a new trial
- Adjustment of damages awarded
- Appeal to a higher court
- Enforcement of the judgment

Bad-faith litigation is a relatively common occurrence. At some point in their careers, most claim representatives will receive complaints that contain bad-faith allegations. Properly handling the underlying claim and any bad-faith allegations that arise are key in mitigating any exposure.

Managing litigation, for bad-faith claims as well as for insured and third-party claims, is a significant part of a claim representative's job. Crucial to managing litigation is effectively managing the costs associated with litigation.

MANAGING LITIGATION EXPENSES

In recent years, substantial public discussion has centered on the volume and cost of litigation in the U.S. For the fiscal years 2002 and 2003, more than 512,000 civil cases were filed in federal district courts. Twenty percent of these cases were tort cases, and 2 percent of these tort cases were resolved at trial.[1] More than 16 million civil cases were filed in state courts in 2002. Jury trials accounted for less than 1 percent of all civil dispositions in state courts.[2] The cost of the U.S. civil tort system was $233.4 billion in 2002 (this amount includes the cost of legal defense and claim handling, payments to plaintiffs and claimants, and administrative costs of all claims, including those settled out of court).[3]

Managing the costs associated with litigation is only one aspect of a claim representative's duties, but it can have noticeable financial effect on the insurer. The use of a litigation plan, a litigation budget, legal bill audits, and evaluation of defense counsel's performance can contribute to an effective defense of the insured at a reasonable cost.

Creating a Litigation Plan

A litigation plan is essential to the insured's defense and to managing the cost of the litigation. The prior discussion of the litigation plan focuses on how it provides a defense to the insured (or the insurer in a bad-faith case). This discussion examines how the litigation plan can save costs while enhancing the insured's defense.

By working with defense counsel to establish a litigation plan, the claim representative fosters a sound relationship with counsel. The need for continual review and updating of the plan ensures that the claim representative and the defense counsel frequently communicate with one another and that they are always aware of major activity in the litigation.

Many of the activities in a litigation plan relate to discovery. The claim representative and the defense attorney agree on the discovery needed for the case and on who will perform the discovery. For example, medical records may be sufficient to provide needed information, rather than a deposition of a doctor. If the defense attorney agrees, the claim representative can obtain the medical records more cost-effectively than the defense attorney can simply because the attorney bills for the activity. Claim representatives should never hinder

an attorney's representation of the client by refusing to allow a deposition, research, or any other activity the attorney deems necessary. However, defense counsel should be able to explain why an activity is necessary to provide the insured with a professional defense and how the activity fits into the overall litigation plan, and should be able to estimate the cost of the activity.

The litigation plan can help reduce costs because it ensures that the claim representative and defense attorney are working toward a common goal. If these two parties direct their activities toward different goals, they may end up working at cross purposes, resulting in duplicated effort, unmet expectations, and additional legal expense to rectify the situation.

Creating a Litigation Budget

In addition to the litigation plan, the attorney and the claim representative should create a litigation budget. Most attorneys are comfortable working within a litigation budget because they know they can make reasonable adjustments as the needs of the case change during the course of litigation. The budget depends on the type of fee arrangement the attorney has with the client/insurer. The most commonly used fee arrangement is the hourly fee; the attorney submits an itemized bill for the hours spent on the case. However, other fee arrangements can be used, such as **flat fee** (the attorney agrees to handle the case from start to finish for a specified, or flat, fee) or **phased fee** arrangements (the attorney agrees handle each phase of litigation for a specific fee.). Most insurers have agreements with the attorneys most frequently retained in litigation about how the fees are to be handled. Such agreements relieve the claim representative of having to negotiate the type of fee arrangement.

Flat fee
A fee arrangement in which the attorney agrees to handle the case from start to finish for a specified amount.

Phased fee
A fee arrangement in which the attorney agrees to handle each phase of litigation for a specific fee.

Having reached agreement about the goal of the litigation and the type of fee for the case, the claim representative and the attorney can establish the tasks required to reach the goal. In establishing a litigation budget, the claim representative and the attorney should consider the activities that must occur to provide the best defense. These activities can be broken down into several categories, as follows:

- Case review, including initially reviewing material from the claim representative and interviewing the insured and other involved parties
- Legal research
- Initial pleadings, including drafting an answer to the complaint, and cross-claims or counterclaims
- Discovery, including drafting interrogatories, answering the opponent's interrogatories, preparing for and attending depositions, and complying with document production requests
- Locating and retaining experts
- Motions
- Negotiations and conferences
- Trial

Within each of these categories are numerous tasks that must be completed. The tasks and costs should be recorded in a table, such as the following example showing the tasks that may be required in the case review category:

Task	Responsible Party	Time
Initial review of file	Primary attorney	2 hours
Interview insured	Primary attorney	3 hours
File appearance	Paralegal	0.5 hour
Obtain police report	Claim representative	0.5 hour

Each task should include the name of the party assigned to perform the task. The claim representative should determine which people on the attorney's staff will actually work on the case. In many cases, it is cost-effective to have an associate or paralegal perform some tasks rather than the defense attorney.

The table should show a time estimate for each task. An additional column may show the cost estimate. The cost estimate may be a simple calculation of the number of hours multiplied by the hourly rate, or it may be a "not to exceed" estimate, which places a limit on the amount the attorney can spend without first discussing it with the claim representative. Legal research often uses a "not to exceed" figure. Outside expenses, such as travel costs, court reporters' fees, and expert witness fees, should also be budgeted.

The litigation budget is a tool the attorney and claim representative can use to ensure the best representation of the client. The budget should be reviewed periodically and changed to reflect case developments.

Auditing Legal Bills

As previously mentioned, most insurers have billing guidelines for the attorneys who defend insureds or the insurer. These billing guidelines usually require a detailed, itemized record of work performed, which includes the task performed, how long the task took in tenth-of-an-hour increments, the name of the attorney or paralegal who performed the activity, and any expense associated with the task. The billing guidelines also specify the hourly rate to be charged by each attorney and paralegal; travel expenses allowed; and associated expenses, such as overnight mailing or photocopying charges, that can be charged to the case. Agreeing to these details at the outset of the relationship with the attorney allows the claim representative and the attorney to focus fully on the defense of the insured or insurer instead of negotiating fees during litigation.

Even with billing guidelines in place, the claim representative should carefully review legal bills for compliance with fees and agreed-to guidelines. Any bill that does not provide sufficient information for review or does not comply with the billing guidelines should be returned to the attorney for explanation. The following box lists some of the items a claim representative should look for when reviewing a legal bill.

Checklist for Reviewing Legal Bills

- Dates of the major activities on the bill should correspond with dates of the same activities in the claim file. For example, if the bill lists a thirty-minute phone call with the claim representative on a specific date, the claim representative should have a corresponding entry in the claim activity log.
- Only the work of parties (partner, associate, paralegal) agreed to in advance by the handling attorney and the claim representative should be included on the bill.
- Mathematical computations should be checked for accuracy. Despite law firms' use of computerized billing systems, errors do occur.
- Only authorized investigative activity should be included on the bill.
- Only authorized attorneys should have appeared at depositions, hearings, motions, or trials. Billing for any additional attorneys or legal staff should be questioned.
- Itemized incremental billing should be based on a reasonable time for the specific activity billed. Attorneys bill in tenth-of-an-hour increments, so 6 minutes equals 0.1 hour, 12 minutes equals 0.2 hour, 18 minutes equals 0.3 hour, and so on. For example, unless a letter is extremely long, it usually does not take someone 18 minutes to review it.
- Absent a compelling reason, most attorneys should not bill more than 10 hours per day.
- Administrative costs, such as general postage, local travel, word processing, and other items of overhead, should not be billed unless specifically agreed to, either in the billing guidelines or by the claim representative.
- Airfare, hotel, and meal charges should comply with the billing guidelines.

Because reviewing legal bills can be time-consuming, many insurers have designated specific staff, usually attorneys themselves, to perform the review. In some states, insurers may use outside bill auditing firms to perform these reviews. Usually, insurers' billing guidelines address who is to perform the bill review.

Claim representatives should not hesitate to request an explanation of any item or charge on a legal bill. Usually the explanation is sufficient to resolve any questions the claim representative may have. However, when some portion of a legal bill must be challenged, the claim representative should be prepared to explain the reason for the challenge to the attorney and suggest a realistic amount to be paid. To determine a reasonable amount, the claim representative should carefully weigh the merits of the particular item, the fee associated with it, and any circumstances that may affect the fee.

After reviewing a legal bill and determining the amount that should be paid, claim representatives should make every effort to ensure that the bill is paid promptly. Prompt payment helps maintain a good relationship with counsel. If there is a reason for delayed payment, the claim representative should advise the attorney.

Evaluating the Litigation Plan and Counsel Performance

Once a claim in litigation has been resolved, the claim representative may evaluate the litigation plan and the attorney's performance on the case. A review of the litigation plan should cover the original plan and any subsequent revisions. The following questions may be helpful to the claim representative in the evaluation:

- Was the final outcome of the case satisfactory?
- Was the case's final outcome the outcome that was specified in the plan at the beginning of the case? If not, why not?
- Was the original plan realistic, given the facts known at the time?
- Was the plan revised in a timely manner to reflect changes in facts as they became known?
- Were the plan and any subsequent revisions agreed on by both the claim representative and the attorney, or were changes made unilaterally?
- Did the attorney adhere to the plan?
- Were any expenses incurred that were unanticipated by the plan and the budget? If so, how could this be avoided in the future?

It is possible that a case may be resolved satisfactorily even if the litigation plan is not followed; however, adhering to a plan can usually reduce the overall cost, duration, and stress of the case.

The claim representative begins the attorney's performance evaluation by looking at the result of the case. Was it satisfactory? Was it the agreed upon resolution? Another item to consider is whether the attorney was cooperative and responsive to the claim representative throughout the case and whether the attorney's handling of the case was cost-effective. The claim representative should share the results of the performance evaluation with the attorney. Some insurers may have a formal means of providing this feedback, such as a mid-year and yearly review process. Others may have the claim representative provide the feedback directly, shortly after the case has been resolved. Most attorneys welcome the feedback because they want to have a good working relationship with their clients. They would also like to have a long-term relationship, so they have a vested interest in keeping the claim representative and the insurer satisfied with their performance.

SUMMARY

Many claims turn into lawsuits, so claim representatives must be prepared to handle these lawsuits. The activities involved in handling litigation are similar for third-party lawsuits and bad-faith lawsuits. When a summons and complaint (or similar documents) are received, the claim representative usually logs the lawsuit into a tracking system or database and reviews the

complaint. The claim representative reviews the summons and complaint to determine the following: whether the parties are covered by the insurance policy, how service of process was accomplished, what the deadline is for filing an answer, whether the case has been filed within the appropriate statute of limitations and in the appropriate jurisdiction and venue, and whether the allegations contained in the complaint are covered by the policy.

The claim representative then selects the defense attorney best suited to handle the case and refers the lawsuit to defense counsel for handling, along with a transmittal form or letter outlining the facts of the case. The claim representative then notifies the insured that a defense attorney has been selected and provides identifying information. The claim representative assists the attorney by continuing to perform investigation as needed and works with the attorney to create a litigation plan to guide their activities throughout the case.

The claim representative can be involved in many aspects of the defense, including assisting in preparing the answer, gathering information to respond to requests for production of documents and interrogatories, attending depositions, and arranging for IMEs and other expert reports. The claim representative may also attend the trial to assist the attorney. At the trial's conclusion, the claim representative discusses possible post-trial actions with the attorney.

The process of handling the trial portion of a bad-faith lawsuit is the same as that used for third-party lawsuits. However, the handling of the lawsuit by the claim representative differs. Many insurers create a separate file for the bad-faith lawsuit and assign it to a claim representative other than the one who handled the underlying claim. The claim representative handling a bad-faith lawsuit must be diligent in providing accurate information for the answer to the complaint that is also consistent with corporate policy. Discovery can be difficult because it may involve requests for corporate financial information and privileged documents and because the entire claim file is subject to discovery.

Managing litigation includes managing the cost of litigation. For each case, the claim representative and the attorney prepare a budget that works in conjunction with the litigation plan. The budget, like the plan, is revised as circumstances dictate. During and after the case, the claim representative reviews the legal bills submitted to ensure that they adhere to billing guidelines. Any part of the legal bill that is in question should be addressed with the attorney. When the issues are resolved, the claim representative should pay the attorney's bill promptly.

Once the case has been resolved, the claim representative should evaluate the success of the litigation plan and budget and the performance of the attorney. Most attorneys welcome this feedback because they want to maintain good working relationships with insurers and claim representatives.

CHAPTER NOTES

1. "Federal Tort Trials and Verdicts, 2002-03," Bureau of Justice Statistics bulletin, August 2005, NCJ 208713, www.ojp.usdoj.gov/bjs, p.1 (accessed August 19, 2005).
2. Court Statistics Project, "Examining the Work of State Courts 2002," National Center for State Courts, www.ncsonline.org/D_Research/csp/2003_Files/2003_Main_Page.html, p. 10 and p. 18 (accessed August 19, 2005).
3. U.S. Tort Costs: 2004 Update, "Trends and Findings on the Cost of the U.S. Tort System," Towers Perrin, www.towersperrin.com/tillinghast/publications/reports (accessed August 19, 2005).