8 – Litigating Claims

# 1 – Overview of the Civil Trial System

**Objective**: Show how the following concepts apply to both the federal and state court systems: Jurisdiction over parties; Subject matter jurisdiction; Appellate levels

Although most claims are resolved without litigation, claims representatives are responsible for managing claims that do result in litigation. Therefore, they must have a solid understanding of the civil trial system.

Most lawsuits are initiated on claims that are actively handled by the claim’s representative. These lawsuits may be filed because the statute of limitations is about to expire or because of unproductive negotiations. The claimant is the plaintiff – the party that files the lawsuit. If someone other than the insured files the lawsuit, it is a third-party lawsuit. The defendant, the party being sued, is usually the insured and/or the insurer, although other parties may also be defendants.

An understanding of the legal process can also help claims representatives avoid errors in handling claims that can lead to bad-faith lawsuits. Claims representatives should recognize that ever claim is a potential lawsuit and should remember this potential throughout the claim handling process.

## Civil Trial System

**A lawsuit is initiated by a complaint and summons. It is critical that the claims representative notify defense counsel upon receipt of the complaint and summons because of the time limit to provide an answer.** Failure to respond to the complaint and summons could jeopardize defense of the lawsuit and result in a bad-faith lawsuit by the insured. A claims representative may be aware that a lawsuit will be filed in a claim before receipt of the formal pleading (a formal written statement of the facts and claims of each party to a lawsuit). This informal knowledge of an impending lawsuit can result from unsuccessful settlement negotiations or a statement of intent by the claimant’s attorney. **When the claims representative knows that a lawsuit will be filed, it can be helpful to select and notify defense counsel**.

The discovery phase often determines the outcome of a lawsuit. If sufficient evidence refutes all or some of the plaintiff’s allegations, the claims representative and defense counsel may reach a successful compromise settlement before trial. **The claims representative should provide a copy of the entire claim file, including all investigation results, to defense counsel**.

|  |  |  |
| --- | --- | --- |
| Complaint  Summons  Answer | **Pleadings Stage** | Parties and court notified of the basic issues |
| Deposition  Interrogatories  Documents  Examinations  Admissions | **Discovery** | Parties uncover evidence to determine facts of the dispute |
|  | **Pretrial Motions and Conference** |  |
| Jury selection  Opening statements  Evidence presentation  Bench conferences  Closing arguments  Deliberations  Verdict | **Trial** | Evidence presented to support allegations and defenses |
|  | **Post-Verdict Motions** |  |
| Transcripts  Briefs  Oral arguments  Decision | **Appeal** | Trial court’s conduct reviewed for prejudicial error |
| Writ of execution  Garnishment | **Enforcement** | Court enlisted to secure payment of judgment for money damages |

A significant source of bad-faith lawsuits is an expectation by some plaintiffs and policyholder attorneys that the insurer should settle a claim within policy limits before trial, regardless of the particular facts of the case. Although claims representatives and their insurers want to achieve cost-effective settlements, they must be realistic about the chances of prevailing at trial and the potential for a jury award that exceeds policy limits. Claims representatives should always have a thoughtful discussion with defense counsel about the trial’s potential outcome before proceeding.

When a cast goes to trial, either party may be dissatisfied with the jury’s verdict and award. If there are sufficient legal grounds, either party may appeal the verdict and/or the amount of the award. The appellate process often presents additional opportunities to settle the claim.

If a settlement has not been reached after formal litigation concludes, the insurer must pay the award if the case was decided in favor of the plaintiff. There are time limits for payment, and pre-judgement and/or post-judgement interest may be due on the award depending on policy terms. The claims representative is responsible for timely payment of the appropriate amount owed by his or her insurer. The claims representative may also be responsible for pursuing payment owed to the insurer if the defendant wins the case.

## Jurisdiction and venue

The Claims representative must understand the jurisdiction and venue for any lawsuit filed and comply with the appropriate state or federal rules of civil procedure. An understanding of US court systems will help. The US has both state and federal courts. State courts are created by each state’s constitution. The single federal court system is created by the US Constitution and acts of Congress.

**Whether a lawsuit is filed in state court or federal court depends on jurisdiction. Specifically, the court must have jurisdiction over the parties, the subject matter, and the dollar amount**.

**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**. Example, a Pennsylvania resident who causes an automobile accident in NY is subject to the jurisdiction of the NY courts.

State court systems are similar to federal court system, but the court names at various levels may vary among US States and territories. Every state has a trial court level where most litigation starts. General jurisdiction courts 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 or county courts, which typically hear cases involving limited amounts of money. Additionally, there are administrative court systems that handle certain types of cases, such as workers compensation.

**Most states have 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, while other states use different terms**.

**State Court Systems**

|  |
| --- |
| **Highest Appellate Court**  (Court of last resort)  Names include Supreme Court and Supreme Judicial Court |
|  |
| **Intermediate Appellate Courts**  Parties appeal here from trial courts before going to the highest appellate court  Names include Appeals Court and Superior Court |
|  |
| **Trial Courts**  (Courts of general jurisdiction)  Names include Court of Common Please, District Court, and Supreme Court (in New York) |
|  |
| **Courts of Limited Jurisdiction**  Names include Probate Court, County Court, and Municipal Court |
|  |
| **Lowest Courts**  Names include Municipal Courts, Small Claims Courts, Magistrate Courts, and Mayor’s Court |

In addition to jurisdiction over the lawsuit’s parties, courts must have jurisdiction over the lawsuit’s subject matter. For example, a federal tax 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 US Constitution for federal courts.

The federal court system has trial courts, called **US District Courts, and courts of appeal in thirteen multistate judicial circuits. These courts handle lawsuits that deal with federal issues, such as those involving the US Constitution, federal laws, and the US as either a plaintiff or a defendant**. In addition, there are special federal courts, such as the US Customs Court and Bankruptcy Court and the Patent Appeals Court, that have specific subject matter jurisdiction. There are also federal administrative courts that handle types of cases, such as Social Security Appeals.

**US 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**.

**A losing party in a lawsuit before a federal district court can appeal to the appropriate US Court of Appeals if there are legal grounds. The losing party on a court of appeals case can appeal to the US 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 choose **only about 100 cases to review annually**.

|  |
| --- |
| **US Supreme Court** |

|  |  |  |  |
| --- | --- | --- | --- |
| US Circuit Court of Appeals  (13 Courts) | Court of Federal Claims | Court of International Trade | Court of Appeals for the Armed Forces |

|  |
| --- |
| US District Courts  (94 Courts) |

# 2 – Starting The Claim Litigation Process

**Objective**: Examine the claim representative’s role in receiving and reviewing a summons and complaint for procedural information

As insured or a third-party claimant who is disappointed with a claim decision or settlement offer will often file a lawsuit against the insurer in an attempt to attain a better outcome.

The claims litigation process, which carries forward through discovery, pretrial activities (such as motions to dismiss, or requests for summary judgement), trial, and posttrial activities, begins with the receipt of a summons and complaint. It is the claims representative’s responsibility to analyze the allegations within the lawsuit, along with the parties, service, statute of limitations, jurisdiction, and venue noted within the complaint, before deciding what course of actin to take in response.

The journey of a Summons and Complaint:

|  |  |  |
| --- | --- | --- |
| Accident can be part of life | Often, each party blames the other for what happened | Sometimes a claimant retains an attorney to pursue legal action |
| In such an instance, the insured is served with a summons and complaint | The insured then gives the summons and complaint to his or her agent or insurer | A claims representative in the office reviews and sends it to defense counsel |
| The defense attorney and claims rep collaborate on the defense plan and budget | Next, the attorneys engage in discovery to reveal the facts of the accident | The attorney may make pretrial motions and attend conferences |
| If the case is not settled privately, the matter will go to trial | In some cases, the insured will prevail | In some cases, the claimant will prevail |

Receiving The Summons and Complaint

The summons and complaint announcing the initiation of a lawsuit will contain the plaintiff’s allegation, which serve four functions:

* **To give notice** – **the complaint will summarize who the parties involved are, where the lawsuit was filed, and why it was filed**
* **To reveal facts** – the facts of the case will be laid out. **The claims representative should review the claim to determine whether the insurance policy in question provides coverage**. If not, the insurer may need to issue a reservation of rights letter to the policyholder declaring that the insurer will be providing a defense of the lawsuit, but that coverage could be denied later is warranted. However**, before the letter is sent, coverage counsel should be consulted, and the insurer’s procedures, such as a managerial review, should be completed**. It may be necessary to provide an answer to the complaint or otherwise notify the court of the insurer’s decision. If coverage is provided, the claims representative should review the facts to see whether they are supported by the evidence found during the claims investigation.
* To formulate legal causes of action **– the complaint will take the facts of the incident at the center of the lawsuit and apply them to a legal cause of action, such as negligence or breach of contract**. The claims representative should verify the cause of action fits the alleged facts and then determine whether coverage is provided.
* **To state the damages sought** – Complaints generally conclude with a demand for damages. **If it appears that the damages could exceed limits of the insured’s policy, the claims representative should notify the insured in an excess letter, which may also serve to inform the insurer that he or she has the option of hiring separate defense counsel.**

A summons and complaint will be delivered via service of process. When the insurer receives the summons and complaint, it should go directly to the claims representative handling the claim so it can be processed.

Sometimes an insured will receive the summons and complain, rather than the insurer, and in these cases he or she should deliver it to the insurer or producer as soon as possible. Because the time available to respond is limited, overnight delivery with confirmation of receipt should be used.

## Reviewing the Summons and Complaint

**After receiving a summons and complaint, the claims representative should follow this procedure:**

* **Identify the parties in the complaint**
* **Check how service was accomplished**
* **Determine the time available to answer**
* **Determine whether a statute of limitations applies (and, if so, whether it expired)**
* **Verify that the jurisdiction and venue are correct**

Because an insurer’s duty to defend is broader than its duty to pay damages, it is usually obligated to defend the insured against any allegations that could potentially be covered by the policy, even if they are frivolous or fraudulent.

Under some circumstances, however, an insurer can deny coverage and refuse to provide any defense. Examples of such instances are claims in which the allegations involve an event that occurred outside the policy period, or the named defendant is not an insured, or the allegations are obviously not covered by the policy.

## Identify the Parties in the Complaint

Complaints usually identify the parties to a lawsuit by name and address, while also providing the name and address of the plaintiff’s attorney. Once the claims representative is aware of the party named as a defendant in the lawsuit, he or she should verify that the defendant is an insured under a policy with the insurer. For matters involving personal insurance, such as an auto policy, this can be straightforward, but it can become complicated with a commercial policy. For example, if a general contractor has an insurance policy that covers various subcontractors by endorsement, the claims representative would have to review all of the endorsement to determine whether coverage apples to any subcontractors named in the complaint.

## Check How Service Was Accomplished

**State and local laws often determine who can be served with legal papers and how that service is required to be accomplished.**  (The Federal Rules of Civil Procedure outline similar rules for the service of federal lawsuits are a set of rules established to ensure that civil actions and procedures move through the US district courts as quickly as possible). **The Claims representative should determine whether the appropriate party was served and that the manner of service was correct by becoming familiar with the rules that apply in the jurisdiction of the lawsuit. If it appears that the service was improper, the claims representative should advise defense counsel, who may file motions with the court or assert he improper service as a defense in the lawsuit.**

Although actual service is the preferred method (hand delivery of a S&C to a defendant) of delivery for legal papers, substituted service (constructive service) which is any method of notifying a defendant of a lawsuit other than personal delivery of a S&C, such as publishing a notification in a local newspaper, may be permitted.

## Determine the time Available to Answer

When reviewing a summons and complaint, the claims representative needs to take note of the deadline for filing an answer or appropriate motion. If the deadline passes, there could be severe consequences for the insured and insurer, including the loss of any opportunity to defend themselves against the allegations. **The deadline to file an answer can vary, but it is often twenty days from the date the summons and complaint was received by the party being served**.

## Determine Whether a Statue of Limitations Applies

In some instances, a statue of limitations provides a time limit to file a lawsuit after the originating event occurs. **The claims representative should check the complaint for the date of the alleged offense and compare the amount of time that has passed to any statutes of limitations that might apply**. If an applicable statute of limitations has expired, defense counsel should be advised because he o she may be able to file a motion to dismiss the lawsuit.

## Verify That the Jurisdiction and Venue Are Correct

**Jurisdiction is the power of a court to decide cases of a certain type or within a specific territory**. **Venue determines in which city, county, or state the lawsuit will be heard**. State and federal rules of civil procedure determine each, and the claims representative should review the summons and complaint carefully to make sure both comply with any laws that apply. **It may be beneficial to have defense counsel perform a review as well, because an attorney can seek to have a case dismissed if the chosen court does not have the jurisdiction to hear it**.

If a case’s amount of damages in question is over $75,000 and the parties to the case reside in different states, a federal court may opt to hear a case instead of a state court, through what is known as diversity of jurisdiction.

**When several different courts meet the requirements of jurisdiction and venue, the plaintiff’s attorney will usually choose the court that is most likely to render a favorable verdict. Although that is an accepted practice, some plaintiff’s attorneys engage in a questionable practice called forum shopping. In which the facts of a case are manipulated to take advantage of a favorable venue**. Occasionally, a defendant can successfully file a motion to transfer the suit to a venue that is more appropriate under all of the circumstances. Example: West Virginia is frequently chosen as a venue for asbestos lawsuits because West Virginia laws allows claims from all over the country to be litigated there. Litigating in asbestos claim in West Virginia typically adds $1M to the baseline award.

If the claims representative doubts the validity of the chosen venue, the defense counsel should be advised in case it is possible to have the lawsuit moved to a more appropriate location.

# 3 – Defense Counsel and Civil Complaints

**Objective:** Evaluate these claims activities in response to lawsuits: Referring the lawsuit to defense counsel; Answering a civil complaint

Although a claim reps key responsibility after receiving a summons and complaint is to refer the lawsuit to defense counsel quickly, the rep should also remain alert while investigating the claim for any possible defenses to be used in the case.

Reps should have a fundamental understanding of the civil trial system and litigation process. **Beyond referring a lawsuit to defense counsel, they should approach claim investigations by seeking evidence that supports potential responses to the lawsuit. Further, the rep should always be mindful of newly discovered factors that may lead to a reevaluation of the insurer’s position.**

## Referring a Lawsuit to Defense Counsel

Referring a lawsuit to defense counsel is not a one-step process. Although timing is important because of court-imposed deadlines, a claims representative should make sure the referral is completed properly, to the greatest benefit for the insured.

## Defense Counsel selection

The process of selecting defense counsel varies by insurer. Defense counsel may be selected by the claim representatives or by a litigation specialist or claims manger – often from an insurer’s approved panel.

**Many insurers use a stable of laws firms to act as defense counsel for their cases, periodically reviewing their performances in areas such as legal expense, outcomes, and length of litigation**. Other insurers have attorneys on staff, providing a dedicates source of defense counsel. Some insurers will use a combination of the two, relying heavily in in-house counsel while using outside law firms for specialized defenses, to handle overflow cases, or for conflicts of interest arising when more than one insured is a defendant in a case.

In some instances, even if an insurer has its own in-house defense attorneys, it may need to hire outside counsel. For example, **with coverage issues, the insure may appoint and pay for independent defense counsel for the insured to avoid the appearance of a conflict of interest. Additionally, certain insureds, such as large commercial account with significant deductibles, or loss-sensitive programs, may have the contractual right to help select defense counsel**.

**The expertise and experience of the attorney chosen should match the type of case that is being assigned**. For example; an attorney who specializes in commercial auto liability would probably not be the best choice to handle the defense of a product liability claim. He or she must also be able to work with the rep and the insured, especially when the insured is closely involved in the claim. Although the attorney may have specialized knowledge and skills, the rep and the insured should be included in and informed about the litigation process.

## Transmittal Form Completion

Once counsel has been selected, the rep will share a set of instructions, along with the summons and complaint and a copy of the claim file. If the lawsuit is the first notice of the claim, the lawsuit transmittal letter informs defense counsel of how the claim representative plans to investigate the allegations.

Although lawsuit transmittal documents vary by insurer, they should contain these elements:

* Case caption
* Title of the court in which the lawsuit is filed, along with the court’s location
* Court claim number
* Insurer’s name and claim number
* Date of loss
* Name and address of the plaintiff’s attorney
* Plaintiff’s attorney’s claim number, if applicable
* Details of service of process
* Named and address of the insured
* **Identity of all defendants to be defended by the appointed attorney, along with any relevant information regarding defendants in the lawsuit not to be defended by counsel**
* Policy number and policy type
* Policy limit
* Deductible, if applicable
* Presence of demand in excess of policy limits
* **Results of investigation conducted to date**
* **Additional planned investigation**
* **Details of any settlement negotiations conducted**
* Billing guidelines, if not already provided
* Litigation reporting schedule by defense counsel, if not already provided
* Request for liability analysis
* Request for litigation plan

In addition to this information, the rep should prepare the claim file for transmittal. Many insurers send the file electronically, while other may sent a physical copy of the file to the attorney with the summons and complaint. Whatever form of the file is provided, the claims representative should ensure that is contains all documents pertinent to the claim, including copies of the email messages and activity notes. In most cases, a copy of the applicable insurance policy should also be included.

## Insured Notification

Once an attorney has bee selected, either the claims representative of defense counsel should notify and provide contact information to the insured. (If the claims representative sends the notification, a copy should be provided to defense counsel with the transmittal letter). At the same time, **the insured should be instructed not to discuss the case with anyone other than the claims representative, defense counsel, or persons authorized by the claims representative**.

## Assisting Counsel

The rep’s responsibility in handling the claim continue after the claim has bee referred to defense counsel. **The reps should be involved in all aspects of the defense, including assessment of coverage, investigation of liability and damages, claim evaluation, and attempts to resolve the claim**.

**Communication between defense counsel and the rep throughout the litigation process is essential**. The rep should promptly forward copies of investigative reports and other relevant documents. Defense counsel should contact the rep after depositions of witnesses, motion hearings, and other litigation activities.

## Litigation Plan

After defense counsel analyzes the lawsuit and the claim file, the attorney and claims representative should work together to develop a litigation plan and budget. The plan should also outline the roles and responsibilities of the attorney and the rep.

Generally, litigation plans outline a strategy to reach on of these objectives:

* Defend the lawsuit at trial
* Settle the lawsuit
* **Conduct additional investigation to decide on the goal**

**Litigation plans should be adjusted as additional information is obtained. If the plan is to investigate further, a timeline should detail when a decision will be made. The plan’s objective does not have to be permanent**, however. For example, an objective of settling a lawsuit may be changed to defending at trial if a witness provide new information indicating that the insured was not responsible for the damages or if the plaintiff’s attorney will not reduce an unreasonable demand in negotiations.

## Answering a Civil Complaint

The initial response to a complaint’s allegations, referred to as an answer, will often deny many of the plaintiff’s factual allegations. There are other possible responses, however, including these:

* Affirmative defenses
* Counterclaim
* Cross-claim
* Third-party claim

### Affirmative Defenses

The answer offers an opportunity to present affirmative defenses to the allegations (a legal defense arguing that even if the plaintiff’s factual allegations are correct, there are overriding reasons the defendant should not have to pay damages). As opposed to negative defenses, which seek to disprove a plaintiff’s allegations, **affirmative defenses present new information in an attempt to have the lawsuit dismissed in the defendant’s favor.**  Reps should be aware that precise definitions for these defenses may vary by jurisdiction.

**Examples of affirmative defenses are asserting that the lawsuit was not filed within the appropriate statute of limitations, that the court in which the lawsuit was filed lacks jurisdiction, and that the venue is not correct**.

### Counterclaim

There is also an opportunity for defense counsel to file **a counterclaim** in the answer. 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 irresponsible driving**.

### Cross-Claim

**Defendants can also file cross-claims against other defendants in a case**, A defendant’s cross-claim, which is often heard simultaneously with the original lawsuit, **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 sub-contractor assumes responsibility for any damage that occurs while the subcontractor is working on the project. After an accident at the worksite, the customer sues for damages and names both the general contractor and the subcontractor as defendants in the suit. If the damages are awarded against the general contractor, it would file a cross-claim against the subcontractor to argue the subcontractor should have to pay the general contractor’s damages because of the indemnity contract in effect.

### Third-Party Claim

**Another way a defendant can bring a third party into a lawsuit is by filing a third-party compliant. In doing so, the defendant alleges that the third party should bear some or all of the responsibility for the occurrence**. In the example of the general contractor and subcontractor, if the subcontractor was not named a s a defendant in the plaintiff’s lawsuit, the general contractor defendant could third-party claim against the subcontractor. Courts usually hear third-party complaints simultaneously with the original lawsuit.

**While defense counsel will decide when to use a counterclaim, cross-claim, or third-party complaint, the claims representative should be alert for facts in the claim that may lead to these types of legal actions. Those facts can then be discussed with defense counsel as a litigation strategy is developed.**

It is critical to answer the complain promptly or to obtain an extension of time to do so to avoid a default judgement (an automatic judgment against a party to a lawsuit who fails to appear in court or to answer a pleading). **Default judgements automatically give the plaintiff all the damages asked for in the complaint. If the insured was served a summons and complaint that was not properly forwarded to the insurer, a default judgment may be the insurer’s first notice that a lawsuit has been filed. Although it may be possible to have a default judgment vacated (withdrawn), the outcome is not guaranteed**.

# 4 – Discovery in the Claims Litigation Process

**Objective:** Demonstrate the 5 most commonly used methods of discovery

Discovery is the stage of a lawsuit in which the opposing legal teams obtain any relevant evidence that is not privileged (such as attorney-client communications) or otherwise protected (such as an attorney’s or insurer’s work product prepared in anticipation of trial). It can narrow the issues of the lawsuit, which may lead to an earlier resolution.

A court’s rules of civil procedure (form and substance of all documents that must be filed with the court) govern permissible discovery methods, the definitions of each method of discovery, deadlines for exchange of discovery information, and penalties for noncompliance. The litigation plan devised by the defense counsel and claims representative will outline which particular methods of discovery they will use. These are **the 5 most commonly used methods of discovery:**

* **Requests for production of documents**
* **Interrogatories**
* **Depositions**
* **Physical or mental examinations**
* **Admission of fact not in dispute**

**Attorneys can use discovery methods in any order, but they generally use them in the order listed because the information gathered in one method is used in the next method. Example: produced documents and answers to interrogatories provide information that forms the basis of the questions asked in depositions**.

## Requests for Production of Documents

Discovery usually begins with a request for production of documents. This sort of tangible evidence includes video, diagrams, photographs, electronic records, and records in any medium used to transmit or preserve information. **Any of the requested documents that a party posses or can obtain must be produced unless the document is privileged. To withhold a document as privileged, the party must identify the document, the parties communicating in the document, and the basis for exercising privilege**. Attorneys may contest which types of documents are subject to privilege, but state statutes define privileged evidence and relationships.

## Interrogatories

After receiving and reviewing the requested documents, the attorney creates interrogatories. In some cases, the interrogatories may be sent with a request for production of documents**. Interrogatories allow each side to discover the other side’s position about the facts of the case and the applicable law. Because written answers offer no opportunity for follow-up questions, interrogatories are best used to identify specific facts and sources of information**.

Failure to answer all interrogatory questions completely precludes the responding party from subsequently relying on undisclosed information. If, for example, a defendant withheld information about why he detained the plaintiff after an alleged shoplifting, the defense would not be able to use that unrevealed information later

**Defense attorneys may request that claims representatives help answer interrogatories, especially when the plaintiff raises issues about the claims process. The Claims representative should respond promptly because of deadlines for answering interrogatories are usually short, and failure to meet filing requirements can result in sanctions, such as fines or a finding in favor of the interrogating party**.

## Depositions

Attorneys often use the answers to interrogatories and information obtain through other evidence as the basis for deposition. Because the testimony at a deposition is either typed by a court reporter or recorded, depositions can be used as evidence at trials.

**Depositions have 2 purposes. 1st they allow each party to the lawsuit to discover what the other party’s witnesses know about the facts of the matter or the opinions of physicians or expert witnesses. 2nd 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**.

Attorneys can depose **two types of witnesses: Party witnesses and nonparty witnesses**

**Party witnesses are parties to the suit, such as the plaintiff or the defendant. When a corporation is a party to a lawsuit, a representative or an employee acts as the party witness.** Prior to deposition, a party witness and his or her attorney usually review anticipated questions. Attorneys may not always know the name of the corporate representative with the relevant information. In such cases, the attorney may request a deposition from the person with the most knowledge about the allegation in the complaint and answer.

**Nonparty witnesses include anyone else with knowledge of the case. Nonparty witnesses may be eyewitnesses to an accident, expert witnesses, or record custodians who can testify to the validity of certain records**.

**During a deposition, opposing counsel should display professional courtesy. Harassing or intimidating a witness or asking irrelevant questions will likely lead to an objection on the record by the other party’s counsel. However, attorneys can ask questions out of order, rephrase previous questions, and use other tactics to catch the deposed person off guard and reveal contradictions in his or her testimony. Observing witnesses during a deposition also helps lawyers evaluate how they will testify in court**.

**When a claims representative is deposed, he or she should prepare by reviewing the claim file and notes and discussing the purpose of the deposition and potential questions with defense counsel. Courts differ on whether a claims representative is required to produce claims notes, but defense attorneys should object to the production of the claims representative’s notes as privileged or protected work product**.

## Physical or Mental Examinations

Information obtained through discovery may lead defense counsel to requires a mental or physical examination of the opposing party. **Request for independent medical examinations (IMEs) are most common in claims for bodily injury and psychological injury and are usually initiated by the defendant 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 claims representative and the defense attorney decide when an IME is needed, and the claims representative usually makes the necessary arrangement with a medical practitioner the claims representative and defense counsel select.

## Admissions of Facts Not in Dispute

After receiving the information compiled through the other methods of discovery, one or both parties to the lawsuit may decide to request admissions. **Admissions can reduce the number of facts to be decided at trial. Facts that are usually admitted by the parties before trial include the names and address of the parties, date of certain incidents, and similar facts that are not disputed but would otherwise need to be proven at trial.**

**Whether each party admits certain facts is up to the respective attorneys**. When the defense receives a request for admissions, the attorney may send it to the claims representative for review. **Although some attorneys may not want to admit any facts, such as an approach can unnecessarily prolong litigation**. For example, if the complaint alleges that the insured owns a 2018 Toyota Camry and the insured does own such a vehicle, this fact should be submitted.

**After the completion of discovery, the claims representative and defense counsel should review their litigation plan to determine whether the information obtained requires a change in strategy**.

# 5 – The Civil Trial Process

**Objective**: Assess the aspects of preparing for and participating in a civil trial: Preparation activities by defense counsel and the claims rep; Components of a trial and the claim reps role therein

Before a trial begins, claim reps must gather information to aid the defense counsel. The responsibilities do not end when the trial starts, however.

Claim reps should work closely with defense counsel while preparing for trial. They should be aligned on defense strategy and level of investigation needed. Once a trial begins, claim resp may need to file reports about it, so they should have an understanding of the trial process.

## Preparing for a Civil Trial

Four key objectives are involved in preparing for a civil trial:

* Trial strategy
* Pretrial motions
* Pretrial conferences
* Additional investigation

These aspects often overlap. For example, a motion to dismiss may be filed while the defense attorney is still developing the trial strategy. Or, while discussing the trial strategy, the defense attorney and claim rep could decide that additional information is needed.

### Trial Strategy

**As preparation for trial begins, defense counsel will create a trial strategy and communicate it to the claim rep, usually in the form of a pretrial report outlining the strengths and weaknesses of the defendant’s and plaintiff’s cases**. The report may include a synopsis of applicable law and a range for settlement and/or probably jury awards.

**The defense attorney may research court decisions in similar cases to find a favorable precedent for the defense’s position based on the principle of stare decisis, which is translated as “stand by that which has been decided”. Attorneys also work on distinguishing their cases from unfavorable precedents on finding ways to apply precedents that are less directly related**.

**Although precedents can strengthen a legal argument, they are not always set in stone. Court decisions based on precedents can be reversed on appeal if a higher court rules that the precedent used has become obsolete because of changes in statutory law, technology, or society in general**. Example; The 1999 US Supreme Court case Sutton v United Air Lines decided that an employee whose health condition could be mitigated by medication was not considered disabled. However, the ADA Amendments Act of 2008 changed statutory law so that such employees may still be considered to have a disability. The 2008 act rendered the Sutton obsolete and left court decisions based on Sutton vulnerable to being overturned.

Defense counsel often includes citations for precedent cases in their pretrial reports or case analysis. These citations allow readers to find the original court opinions, which are chronicled in publications referred to as reporters or in online legal databases.

Case Citations provide this 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

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| ***Brown V*** | ***Board of Educations,*** | ***347*** | ***US*** | ***483,*** | ***US Supreme Court*** | ***(1954)*** |
| Plaintiff | Defendant | Volume | Reporter | Page | Court | Year |

Published court decisions usually start with a short case synopsis and a summary of the court’s decision, followed by a full account of the courts decision and any concurring and dissenting opinions, as applicable. Claims representatives may find it helpful to stay abreast of changes in case law that affect the claims they handle in addition to reading the court opinions relevant to a particular claim in litigation.

### Pretrial Motions

After reviewing the trial strategy and case analysis, the claim rep and defense attorney should agree on any pretrial motions. **Common issues are whether certain evidence can be admitted at trial, certain persons can be called as witnesses, and sufficient legal grounds exist for the case to proceed**.

Motions are governed by rules of civil procedure, which designate when and why a motion can be brought, what must be included in a motion, and when opposing counsel must respond to a motion. Claim reps should be familiar with three common pretrial motions:

* Motion to dismiss
* Motion for summary judgment
* Motion in limine

**A motion to dismiss could be filed early in the proceedings for several reasons, including a defective complaint or the plaintiff’s failure to state a legally recognized cause of action. A motion to dismiss is a request that a court terminate an action because of settlement, voluntary withdrawal, or procedural defect. Unless a good legal basis exists for filing this motion, the claim rep should recommend against it because of the expense in filing a motion that is virtually certain to be denied.**

Before the trial, but after discovery, which is the period of time during which both sides of the case gather as much information as possible**, either the plaintiff or defendant can file a motion for summary judgement**, Which is a pretrial request asking the court to enter a judgment **when no material facts are in dispute**.

Any party to the lawsuit may file **a motion in limine (“in Limine” translates to “at the threshold”), in an effort to exclude evidence that is harmful to their case.** For example, if the plaintiff offers photographs showing bloodstains on a vehicle involved in an accident, defense attorneys may attempt to exclude them for these reasons:

* **They are highly prejudicial** (bloodstains tend to influence jurors, whether or not they help determine fault
* **They are cumulative** (other photographs show the damage to the vehicle without showing the bloodstains)
* **The fact confirmed by the photos is not in controversy** (the defendant admits that the car was damaged.

After motions and responses are filed, the court may hold a hearing to questions the attorneys about the bases for their respective motions or their opposition. In considering a motion, the judge assumes that all of the pleadings of the party opposing the motion are true.

### Pretrial Conferences

**Pretrial conferences are called at the judge’s discretion to settle the case or resolve certain issues. The judge may ask whether any possibility of settlement exists or may wish to limit the issues presented at trial.**

**Claim reps may be asked to attend a pretrial conference by either the court or defense attorney. Before the conference, the claims representative and defense counsel should agree on the conference’s expected outcome and the claim reps role, in any, in the conference**. For example, they should be ready for the possibility that the judge may attempt to persuade the claim rep to participate in settlement negotiations.

### Additional Investigation

As part of trial preparation, the claim reps may gather additional information, such as more photos of the accident scene or medical records. Claim reps may also help maintain a chain of evidence – a record showing who has possession of or access to the evidence and when. Keeping track of this information can come into play in a claim against a potentially responsible third party, because an insurer could be denied the ability to recover damages if evidence has been lost or destroyed.

Similarly, an insurer defending a first-party coverage lawsuit could be found liability if evidence is intentionally or negligently lost or destroyed. The claim rep shares responsibility for preserving evidence with the property owners, the defense attorney, and any expert given access to that evidence.

## The Civil Trial Process

**The litigation reports most insurers ask claims reps to file during a trial inform various parties associated with the insurer, such as the underwriter and home office Claims department, about the progress and the outcome of the case.** To prepare these reports, and to be able to participate in a meaningful way during the trial, claim reps should be familiar with components of the trial process:

* Nonjury and jury trials
* Jury selection
* Opening statements
* Introduction of evidence
* Trial motions
* Summations
* Jury instructions
* Verdicts

### Nonjury and Jury Trials

A trial can be a jury trial or a nonjury trial. A jury is a group of people who hear and consider the evidence of a case and decide which facts are true. In a jury trial, the jury decides all questions of fact, and the judge decides all questions of law. A jury may have 6-12 members, including alternate jurors who hear the evidence but do not deliberate, or provide input on the verdict, unless another juror is unable to serve throughout the trial. **In a nonjury trial, the judge decides all questions of both fact and law**.

The right to trial by jury, as well as the number of jurors on a given jury, may depend on the dollar amount in dispute or on a particular are of law that applies to the facts of the case. In a civil trial, the plaintiff and defendant may agree to have a case heard by a judge rather than a jury, which is called a bench trial, or trial by court or judge. In cases in which the type of trial can be selected, claims reps should discuss with defense counsel the better option for the facts of the case.

### Jury Selection

Jurors are selected from a jury pool. Potential jurors are questioned by the judge and/or attorneys about their knowledge or opinion of the parties to the litigation and the issues to be decided in the case. During this **voir dire** (from French, meaning “to speak the truth” **process of examining potential jurors about their possible interest in the matters, their ability to decide the case fairly, and overall competence to serve as a juror)** process, attorneys attempt to select jurors that they believe would be favorable to their clients.

Depending on the statute or a court rule, attorneys for each party are given a set number of **peremptory challenges** ( ability to object to a potential juror’s placement without having a specific reason). After using the allotted peremptory challenges, attorneys must state a reason for excluding potential jurors.

**In third-party lawsuits against insureds, jurors are not informed of insurer involvement in the case. This is so the jury is not affected by the fact that an insurer will have to pay the judgement or is providing the insured’s defense**. The trial should be conducted as if no insurers are involved, even when it is apparent that they are. For example, it is common knowledge that parties involved in an automobile accident are likely to have insurance. Nevertheless, any mention b a party that the insurer is involved could be grounds for a mistrial.

**In cases with great significance, financial or otherwise, for the insured and/or the insurer a jury consultant may be hired to assist with jury selection**. Along with defense counsel, the claim rep should be involved in deciding whether to hire such a consultant, setting a budget, and choosing the consultant.

### Opening Statements

Once the jury is assembled, the trial begins with attorneys’ opening statement. **An opening statement does not introduce evidence but provides a summary of the case and the proof the attorney intends to present. Because the plaintiff has the burden of proof, the plaintiff’s attorneys go first. They usually summarize the facts of the case and the issues the jury will decide. The jury is generally told which witness will testify, how this testimony relates to the issues it will decide, and why it should rule in the plaintiff’s favor**.

Rather then immediately following the plaintiff’s attorney’s opening statement, attorneys for the defendant can opt to postpone or reserve, their opening statement until after the close of the plaintiff’s case. Whether the defendant’s attorney reserve the opening statement is a matter of strategic planning and personal preference.

### Introduction of Evidence

**The plaintiff’s attorney then introduce evidence by calling witnesses and questioning them to establish the plaintiff’s case. To satisfy their burden of proof, plaintiffs must generally prove al the essential elements of their case by a preponderance of evidence (evidence supporting the jury’s decision that is of greater weight then the evidence against it).**

For a judge or jury to determine a preponderance of evidence, the basis and extent of witnesses’ knowledge, the type and quality of information they prosses, and their manner of testifying are more important than the number of witnesses. Determining the preponderance of evidence is a subjective judgment and is a much lower standard of evidence that what is used for criminal trial, where guilt can only be determined by evidence beyond a reasonable doubt (in other words, there is no other reasonable explanation for what happened other than that the accused party committed the crime).

The defendant’s attorney is entitled to cross-examine the plaintiff’s witnesses. **Cross-examination is essential because 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, such as to elicit additional evidence**. Successful cross-examination can 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 witnesses to testify. The plaintiff’s attorney may cross-examine defense witnesses.

Witnesses may be **lay witnesses – people who have no special expertise** in the matters about which the testify buy have firsthand knowledge of those matters, based on observation – **or expert witnesses, who have specialized knowledge in a particular field (such as the doctor who performed the IME).** Whether a witness is qualified to be an expert is determined by the judge presiding over the trial. Often, both parties will 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 identifying artistic forgeries**.

**As the trial moves along, claims representatives may need to produce physical evidence and locate witnesses, as well as assist with their attendance. If witnesses have moved or are otherwise difficult to locate, claim reps may need to hire private investigators to help find them. They may also help choose expert witnesses**.

### Trial Motions

Motions can be made during the course of the trial. After 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**. If this motion is granted, the verdict favors the defendant, and the trial concludes. Directed verdicts are rarely granted – and when they are, they are often appealed. Names and standards for various trial motions that can conclude a case vary by jurisdiction, and claim reps should become aware with relevant local court procedures.

Motions regarding the evidence presented can also be made during trial. For example **a motion can be made to strike evidence from the record or to request that the judge instruct the jury to disregard a portion of a witness’s testimony. Motions for mistrial may be made if a particular damaging piece of evidence is introduced that opposing counsel believe is highly prejudicial and was improperly introduced or if there are factors that seem to prevent fair and impartial tria**l.

### Summations

After all evidence has been presented, attorneys for each side are given an opportunity to address the jury through closing arguments. Each attorney typically summarizes the facts presented in a light most favorable to his or her client.

At any point throughout the trial process, cases can be settled. Claims reps should discuss any settlement possibilities that arise with defense counsel and weigh the opportunities against the cost of continuing the litigation and the probability of a favorable outcome.

## Jury Instructions

**After closing arguments, the judge instructs the jury about the law to apply in deciding the case**. For example, in automobile accident trial, the judge instructs the jury in the principle of negligence and fault and explains which party has the burden of proof.

**Attorneys usually submit written proposals for instructions, but it is the judge’s choice whether to incorporate these proposals into the jury instructions. A losing party may appeal a case on the grounds that the judge incorrectly instructed the jury**.

## Verdicts

After receiving the judge’s instructions, the jury retires to the jury room to decide the case. The deliberations have not time limit and continue until a verdict is reached or until the jury decides, with the judge’s involvement, that it is impossible to reach a verdict. In some jurisdictions, a verdict does not have to be unanimous as long as a quorum, or a set number is reached.

After reaching a verdict, the jury returns to the courtroom, and the verdict is read in open court.

**Summary**: **As the trial moves along, the claim rep may need to produce physical evidence and locate witnesses, as well as assist with their attendance. If witnesses have moved or are otherwise difficult to locate, you may need to hire private investigators to help find them. You may also help choose expert witnesses and will have to file litigation reports to inform various parties associated with the insurer such as the underwriter and home office Claims Department, about the progress and outcome of the case**.

# 6 – Posttrial Activities

**Objective:** Evaluate the role of a claim rep in a civil trial’s posttrial activities such as court-initiated actions, appeals, and judgement enforcement.

Although a trail concludes with the verdict, the same cannot be said for the claim rep’s and defense counsel responsibilities

Three major activities can occur after the conclusion of a trial:

* Court initiated actions
* Appeal of verdict
* Judgement enforcement

## Court-Initiated Actions

At the conclusion of a trial, several actions are available to the court. Most often, the court will accept the jury’s verdict and enter a judgement to that effect. However, on rare occasions, **the court can act on its own initiative or on a motion of the losing party and enter a judgement notwithstanding the verdict (judgement n.o.v. a judgement in favor of one party even though the jury’s verdict favored the other party**).

For example; if a jury finds a defendant liability for the plaintiff’s injuries without evidence to support that verdict, the court can enter a judgement for the defendant, notwithstanding the verdict. Sometimes the losing party must file a motion for a directed verdict before a judge can grand a judgement n.o.v.

**The court also has the option of granting 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, or a verdict contrary to the judge’s instruction. However, trial judges seldom grant new trial**s.

**Another option the court has at the conclusion of a trial is to adjust the damages awarded by the jury if the judge considers the jury award excessive or insufficient. This typically happens when a jury awards an extraordinarily high judgement that is disproportionate to the damages**.

## Appeal of Verdict

Either party can appeal a court verdict to a higher court, although it is usually the losing party that does so. **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, but rather limit their opinions to a review of the application of law to the facts decided by the judge or jury**.

**The distinction between the facts and the law can be subtle**. For example, if the trial court found a motorist drove 35 mph in a 25 mph zone, an appeals court would not review that finding. However, the appeals court might review whether the judge gave correct instruction to the jury on the law of negligence as applied to the fact that the motorist was speeding.

**Appeals are most commonly based on matters of evidence, meaning that a party may appeal a verdict on the grounds that the judge’s decision to admit or exclude certain evidence altered the outcome of the trial. Appeals could also be made on instructions the judge may have given to the jury or a judge’s error in stating the law**.

The appeals process can be lengthy. After the parties file briefs, a hearing is held. The attorneys for each party argue for or against the appeal and answer questions raised by the appellate justices. Generally, the decision of a state’s highest appeals court is final and concludes the matter, unless an appeal is attempted to the US Supreme Court based on an issue related to the US Constitution. However, the US Supreme Court chooses the cases it will hear, and it selects for review only the cases it finds to be most important.

**Because of the cost and time involved in appeals, insurers typically have an internal review process under which one or more managers approve the appeal of a verdict that was unfavorable to an insured. There are time limits to file an appeal, and claim representatives must work closely with defense counsel in following the insurer’s procedures to advance a timely appeal when appropriate**.

## Judgement Enforcement

Once a judgement is final, the plaintiff moves to enforce the judgement. In most cases, the defendant arranges to pay the plaintiff, if necessary. In some cases an insurer may owe prejudgment and/or post-judgment interest, depending on the terms of the policy. **Claim reps are usually responsible for managing payment of judgements owed by the insurer, and they should be certain they understand the court’s order and any applicable laws or rules regarding how and when payment should be made. Penalties may apply for failing to properly pay an award**.

# 7 – Managing Litigation Expenses

**Objective**: Evaluate the role of a claims representative in planning, budgeting, and managing litigation expenses in a civil trial

Failure to manage litigation expenses properly can lead to adverse financial consequence for both the insured and the insurer; therefore, managing those expenses is a critical aspect of the claim reps role in litigation.

Claim reps who use a litigation plan, a litigation budget, and legal bill audits and who evaluate defense counsel’s performance can contribute to an effective defense of the insured at a reasonable cost.

## Creating a Litigation Plan

By working with defense counsel to establish a litigation plan, the claim rep fosters a sound relationship with counsel. Continual review and updating of the plan will ensure that the claim rep and defense counsel are always aware of major activity associated with the litigation.

**Activities related to discovery contribute a large portion of the litigation plan, and the claim reps and defense attorney will need to agree on who will perform the necessary discovery**. For example, medical records may be sufficient to provide needed information, rather than a deposition of a doctor. If defense attorney agrees, the claim rep can obtain the medical records more cost effectively than the defense attorney simply because the attorney bills for the activity.

**Claim reps should never hinder an attorney’s representation of a 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 a given activity is required** to provide the insured with a **sound defense and how that activity fits into the overall litigation plan.** He or she should also be able to **estimate the cost of the activity**.

## Create a Litigation Budget

In tandem with establishing the litigation plan, the attorney and the claim resp should create a litigation budget. The budget will depend on the type of fee arrangement the attorney has with the client/insurer. The most common fee arrangement is an hourly charge, but others can be used, such as flat fee (specified amount) or phased fee (each phase of litigation for a specific fee) arrangements. Most insurers have agreements with the attorneys they frequently retain in litigation about how fees are to be handled, which relieves the claim reps from having to negotiate the type of fee arrangement.

**When establishing a litigation budget, the claim rep and the attorney should consider the activities that must occur to provide the best defense. These activities can be broken down into several categories and should be recorded in a budget:**

* **Case review, including initially reviewing material from the claim reps and interviewing the insured and other parties involved**
* **Legal research**
* **Initial pleadings, including drafting an answer to a 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**

**Each task listed in the budget should include the name of the party assigned to perform it. The claim rep should determine which people on the attorney’s staff will actually work on the case. It is often cost effective to have an associate or a paralegal perform some tasks rather than the defense attorney.**

**The budget should include a time estimate for each task, and an additional column may show the cost estimate. The 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 rep. Legal research often uses “not to exceed” figure**.

## Auditing Legal Bills

**Most insurers have attorney billing guidelines that usually require a detailed itemized record of work performed that includes the task, 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 may 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**.

Many insurers have designated staff, usually attorneys, to review legal bills. Insurers may also use outside bill auditing firms, except in states that prohibit such arrangements. In either case, the claim rep should carefully review legal bills for compliance with agreed upon fees and guidelines. Any bill that does not provide sufficient information for review or does not comply with the guidelines should be returned to the attorney for explanation.

Checklist for Reviewing Legal Bills

* Dates of the major activities on the bill should correspond to date of the same activities in the claim file. If the bill lists a 30-minute phone call with the claim rep, the claim log should have a note
* Only the work of parties (partner, associate, paralegal) agreed to in advance by the handling attorney and the claim rep should be included in the bill
* Mathematical computations should be checked for accuracy
* Only authorized investigative activity should be included in the bill
* Only authorized attorneys should have appeared at depositions, hearings, motions, or trials.
* Itemized incremental billing should be based on a reasonable amount of time for the specific activity billed. Example; unless a letter is extremely long is does not take 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 agreed to.
* Airfare, hotel, meal charges should comply with the billing guidelines

**When a claims representative believes a portion of a legal bill should be challenged, he or she should be prepared to explain the concerns to the attorney and suggest an appropriate amount to be paid. To determine a figure, the claim rep should carefully weight the merits of the particular item, the associated fee, and any circumstances that may affect the fee**.

## Evaluating the Litigation Plan and Counsel Performance

**Once a claim in litigation has been resolved, the claim rep may evaluate the litigation plan and the attorney’s performance on the case. These question may be helpful to the claim reps in the evaluation:**

* **Was the final outcome of the case satisfactory?**
* **Was the case’s final outcome the one that was specified in the plan at the beginning of the case? If not, why?**
* **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 rep and the attorney, or where the changes mad unilaterally?**
* **Did the attorney adhere to the plan?**
* **Were any expenses incurred that were unanticipated by the plan and the budget? If so, who could this be avoided in the future?**

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

The claim rep 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 an annual review process. Others may have the claim rep 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.