



**Lowenstein Sandler's Insurance Recovery Podcast:  
Don't Take No For An Answer**

**Episode 5 - Duty to Defend: Who Picks the Lawyer?**

By [Lynda A. Bennett](#) and [Michael D. Lichtenstein](#)

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- Michael Lichtenstein:** Hi, everyone. Welcome to our insurance recovery Podcast, Don't Take No For An Answer. This is Michael Lichtenstein, and I'm here with my partner, Lynda Bennett. And today's topic is the duty to defend who picks the lawyer. So Lynda, who gets to pick the lawyer under most insurance policies.
- Lynda Bennett:** Well, for this one, Michael, we've got to go back to our foundational principle that the words of the insurance policy matter. So step one in figuring out who gets to pick the lawyer is you got to see if your policy has a panel counsel provision. So by way of example, we talked in an earlier episode about the commercial general liability policy. Generally those policies don't have a choice of counsel provision in them. Whereas your EPL policies, your DNO policy, your cyber policies, many of those do have what's called a panel counsel provision. And what that provision says is we have a list of approved law firms and when you submit a claim under this policy, you are required to pick off of that list.
- Michael Lichtenstein:** So Lynda, if there's a panel counsel provision, does that mean you have to use them or that they're pre-approved? Are there circumstances when you could go outside that list and seek the carriers approval of non panel counsel?
- Lynda Bennett:** So in the first instance, the carrier is going to take the position that the panel counsel provision governs and that you are in fact required to pick off of that list. However, in practice, we are often able to get the insurance company's consent to go off that panel list. If we've got a client that has a law firm that is very well versed and knows the business inside and out, we are able to get the carrier's consent to use that other law firm. But then we're going to get into the issue of what are going to be the hourly rates that are going to apply?
- Michael Lichtenstein:** Which leads us right into another topic for today, which is rate disputes. Let me just raise an issue under CGL, because under the CGL policies, carriers oftentimes have the right to pick the council for you. And not surprisingly, they

like to use lawyers who charge rates that are oftentimes substantially lower than market rates for counsel, for a particular type of claim. And in that circumstance, Lynda, does a policyholder have the ability to say, whoa, I'm not using ABC Law Firm. So Lynda let's take an example under a CGL where it's a trademark issue, and there is potential coverage under the CGL policy. Does an insured have to use the ABC Law Firm picked by the carrier? Or can they actually go to a law firm that specializes in defending those types of claims? And not surprisingly, they may charge rates that are significantly higher than the rates of the counsel that the carrier selected.

**Lynda Bennett:** Well, fortunately, most policies have really crystal clear, non vague language at all that says it's got to be reasonable and customary rates.

**Michael Lichtenstein:** Lynda's being super sarcastic there folks. But go ahead, Lyn.

**Lynda Bennett:** Exactly. And this has spawned some litigation and this is actually interesting. We see this dispute all the time, but if you actually go and research this issue under the various states law, another one of our guiding principles that the jurisdiction that you're in may answer this question differently, depending on what state you're in. But in many jurisdictions, the carriers don't get to force that \$200 an hour for partner rate down your throat. Instead, the courts will look at interpreting that language of reasonable and necessary or reasonable and customary language by really taking a look at what are the prevailing rates in the jurisdiction where the case is going to be defended. As Michael alluded to what is the level of complexity of the claim? Because a \$200 an hour rate may work perfectly well for a car accident defense case, but when you're dealing with that trademark case, Michael, that you were talking about, that is certainly going to command a much higher rate to get the sophisticated counsel that you need to adequately defend you in that case.

**Michael Lichtenstein:** And I'll say Lyn, and you know this, that some of my nastiest fights with insurance carriers have come over rates trying to explain why the lawyers that our clients need to adequately defend a claim, a claim that is oftentimes, has a big downside, why the rates that those lawyers are charging are reasonable and necessary. And folks, what Lynda was referring to is that defense costs are normally defined in a policy as the reasonable and necessary cost of defense. And that's as far as they're defined. And that's why there has been litigation over what that means, because obviously what is reasonable and necessary is in the eye, maybe of the beholder or of the payer. So from that insurance company's perspective, reasonable and necessary, may be a \$250 rate, but from the policy holders perspective, it could be substantially higher.

And I'll also say that I often don't really understand why we have these fights, because if the claim is covered, the carriers should want to have really good lawyers defending the claim so that it reduces or eliminates anything on the indemnity side. So I have always viewed this as sort of penny wise, pound foolish to try and save a few nickels on the front end, which might lead to paying a lot of dollars on the backend.

**Lynda Bennett:**

And Michael, to that point, I think what a lot of our clients will do in that instance, and we will negotiate on their behalf and get the carrier off of their panel rates to something that is more reasonable, but maybe not all the way to what the chosen lawyers actually charge. And our clients will recognize that penny wise and pound foolishness and fill the gap that's left by what the carrier's willing to pay and to have that sleep at night comfort that you have your lawyers in there defending you. Some of our clients will do that.

One thing I did want to also mention though, is when the policy does not have that panel counsel provision hereto, you may need to look at state law. There are some jurisdictions, the most famous of which is California that says when the insurance company receives your claim and offers a defense subject to a reservation of rights, by law, by statute, actually in California, you are entitled to pick your lawyer. New York doesn't have the same statute, but does have the same concept that when a carrier reserves their rights, the policy holder does have the ability to select their counsel. But by the way, that still brings you back to what counsel with what rates? So if you don't have a panel counselor provision in your policy, state law is going to matter not only on the who selects, but the same rate issue that we were just talking.

**Michael Lichtenstein:**

Right. And I see that again all the time. I mean, the nasty fight is almost always about the rate. The carrier oftentimes easily gives in on who the lawyer's going to be, as long as they'll work for 240 an hour. And as you said, our clients are often willing to bridge that gap, but they really shouldn't have to in a lot of cases where, because the rate that the carrier is offering, they may deem it reasonable. But it really isn't reasonable when you actually look at the marketplace. So speaking of reasonable, let's talk for a minute about litigation management guidelines. Lynda, can you tell our listeners a little bit about what they are and how these things really can gum up the works?

**Lynda Bennett:**

Sure. Litigation guidelines are a very interesting dilemma for policy holders to navigate. In the first instance, it's important for you to note whether the lit guidelines were in your policy at the time that it was issued to you, or whether they're being provided to you only after a claim has been presented. We have had success in the past, taking the position the carrier does not have the right to impose those lit guidelines on our client when they are not a term or condition of the policy.

**Michael Lichtenstein:**

Exactly Lyn. And I've had this conversation, I'm not exaggerating. It must be 100 times with claim managers, for carriers explaining to them. Look, the most your lit management guidelines are, are your interpretation of what is reasonable and necessary under your policy. And that's all they are. They're not binding on us. They're not part of the policy. They weren't negotiated as part of the policy. And you can't unilaterally impose them on us. You can use them as your expression as to what you believe is reasonable and necessary for a defense, but that's all that it is. And they're almost always subject to negotiation in my experience.

**Lynda Bennett:**

Yeah. And just to give the carrier's perspective on that and what we routinely hear from our clients is look, these are here to help you. These are here to preserve the limit of your policy, to make sure that the policy is not going to be prematurely eroded, but the problem and the devil gets into the details of what it actually says, and we'll go back to our trademark example before, very complicated claim like that, that's going to require a lot of deep thought and analysis to develop an effective defense for that. Many of the lit guidelines just have bright line rules in them, such as you're not allowed to have internal, interoffice conferences to discuss a case. You're not allowed to have more than one person attend to hearing or a deposition. And again, for a car accident case that makes perfect sense. For a half a billion dollar trademark infringement case, it makes no sense at all.

And staying true to our promise to you in this podcast of being practical, I try to get ahead of the lit guideline disputes at the front end, when we're negotiating who's going to defend the case and what the defense is going to look like. I really try to organize a lot of calls early on between the claims representative and the defense counsel, because the more that the carrier feels like this is a partnership and there will be full and free flowing discussion as the defense strategy is developed, the more likely it is that they're going to waive a lot of those more difficult and stringent guidelines that are in the actual document.

**Michael Lichtenstein:**

I agree Lyn and I have found that when a claims representative is being reasonable, they'll always agree to, hey, if you need a second lawyer at a deposition, ask me before it comes up, explain why it is that you need it. And they'll almost always approve it. The issues I've had with guidelines is when you completely ignore them, submit invoices from lawyers to be reimbursed. And then you start getting dinged because you weren't in compliance. So I agree. Getting out in front of it is a great approach, explaining to a carrier, well, these things are not going to fly no matter what, I can't meet this, this or this. But on certain things, I'm happy to give you advance notice, and I'll explain to you why I need it. And hopefully a deviation at that point will be approved.

**Lynda Bennett:**

And on the off chance that you get that inflexible claims representative, I will note with interest that there are several jurisdictions that have found these lit guidelines to violate the rules of professional responsibility for lawyers. And that's always a nice card to pull out of your deck and throw onto the table if the claims rep is not being reasonable. It's kind of, I liken it to when the insurance company tells me that my cardiologist's telling me that I need to have a valve replacement isn't necessary. I'm going to rely on what the doctor tells me as opposed to what the insurance company is willing to pay for.

**Michael Lichtenstein:**

Any last words on this one Lynda before I wrap it up?

**Lynda Bennett:**

Yeah. With respect to the duty to defend my parting shot here is that communication early on in the claim process and trying to collaborate with the insurer is going to yield better results than either side taking extreme positions.

**Michael Lichtenstein:** Great Lynda. Thanks.

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