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Litigation Management Report

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Executive Editor's Report



The book reviews in this issue of the Litigation Management Report feature discussion points on disruption. I encourage you to read it for insight on how companies like Google and Facebook burst out of college dorms and into dominant positions in their respective market places in a relatively short period of time. You'll appreciate that what you're seeing in this issue is far from disruptive. What you're going to enjoy reading as always is the orderly transition of a leading edge information publication for litigation managers into its logical next generation. The all important law firm interview continues with Chuck Deluca providing litigation managers with a window to look through to see how a best practices insurance defense firm is dealing with the changes and challenges in the evolving insurance defense legal services. One of those challenges is maintaining the level of professionalism that is core to the level of best practices outlined in the other must read text in this issue, **The Power of Professionalism**. Plus, we also dig deeper into the topic of convergence with a best practice focused article from Bottomline's industry expert Karen Fettig.

Enjoy the read as always,
John G. Kelly
Executive Editor

Opinion

Picking and Sticking with the Winners

How do you pick the e-billing vendor that will be the best long term fit for your organization? Once picked, how do you stick with one another? What you're not looking for is technology. What you're looking for is how to leverage a technology platform to either solve a legal expense problem or shift from bill review to legal expense management.

The starting point in picking an e-billing vendor that's the best fit is to realize that the source of a legal expense management problem is complex. There are, invariably, a series of questions that need to be asked. The people with the capability to do the asking and answering are resident in the litigation management team. If they aren't then that's the root cause of the problem. Any e-billing solution must encompass a mechanism for building a litigation management team that can function at best practices level.

The litigation management team's work is closely associated with that of the claims adjuster. Historically, many adjusters had the responsibility for both referring work to outside law firms when the initial damage claim wasn't settled at the initial offer stage and, in effect, actively monitoring the claim to the litigation management level. Claims adjusters are key front line players in cost effective claims management. However, selecting and managing outside law firms isn't necessarily a core competency associated with adjusters. There may be an outdated relationship in place between adjusters and outside law firms whereby everything from the initial referral to ultimate claims management needs to be reconfigured in a more cost effective manner.

However, even if the insurer has the right mix of outside law firms, specific cases aren't necessarily being referred to the most appropriate legal service provider. Moreover, how are assignments being allocated? Are partners with the highest billing rates performing associate level work? Does the firm have adequate paralegal staffing levels that can be assigned to do document management work? And then there's the emerging utili-

zation of outsourcing to cut down costs. To what extent is cost effective outsourcing being utilized by the outside law firms?

Even though the opening paragraph cautions litigation managers against framing the e-billing question in the context of technology, when all is said and done, the litigation management team will be purchasing an e-billing system. No e-billing system acquisition initiative should be undertaken without technology expertise, integrated into the team. If the organization doesn't have in-house expertise it needs to access it. A peer network can be very useful in finding out what vendors have systems that work well. A vendor referral can also be valuable. A series of face-to-face exchanges with a reputable e-billing vendor often proves to be an excellent source of information. Finally, you can retain the services of a third party consultant. A word of caution; consultants are inclined to tell you what you want to hear, not necessarily what you need to know. If you decide to retain an external expert, make certain that their expertise is in e-billing technology.

You've asked yourself all of the right questions and you know what you're looking for. Who should you be looking at? Installation of an e-billing system will mark the commencement of what will become an ongoing relationship between the litigation management department and the e-billing vendor. You can't determine the potential to develop a constructive relationship from reading an RFP or putting prospective vendors through a dog and pony show. Everyone has 15 minutes to make a good first impression and they will. Dog and pony shows are like first dates. Everyone is on their best behavior, including the litigation management department acquisition team.

The foundations for good marriages are compatible backgrounds and similar tastes. You're not just a client. You're going to be a working partner. The e-billing vendor is going to provide you gated legal bills. In other words, you as the client will dictate what format and level of initial inspection you want the bills to have gone through prior to your receiving them. However,

in latest generation e-billing systems the vendor will provide you with add-ons that enable you to analyze and measure performance. You and the vendor are going to have to become engaged in a mutually beneficial working relationship to add value to the system.

I've used the terms "first date", "engagement" and "marriage" advisedly. You know from your personal life that a knock out first date doesn't necessarily blossom into a long-term engagement or solid marriage. Engagements have traditionally been used as a pre-cursor to marriage for a reason. You interact with the prospective partner and a proposal for marriage follows in due course when there is a sufficient comfort level between you.

It isn't surprising that in many instances litigation managers are victim to the first date syndrome. An RFP blossoms into a dog and pony show where the client is wowed by a knockout presentation by a vendor that leads to what is more often than not a force fit marriage. A year down the road, the talk is all about divorce rather than moving forward.

Picking a winner requires a combination of a cool head and a willingness to invest time and money in developing a relationship with a compatible vendor. For litigation managers the starting point is developing a dialogue with a vendor who has a combination of people and technology that have competencies in bill review and performance management of outside law firms. The dialogue should focus on solutions first and cost second. The emphasis should be on how the vendor can demonstrate that the combination of their expertise and technology and your interest in developing cost effective litigation management can be leveraged into a mutually beneficial relationship. Once picked, the litigation management team must then resolve to stick with the program and the vendor, realizing that in the short term there will be successes and setbacks. However, relationships do mature and a compatible vendor will have the team and technology that can work through a learning curve that leads to long term added value in litigation management through dynamic bill review.

An Interview With Chuck Deluca



Ryan Ryan Deluca LLP is a litigation law firm with a 40+ year history in Connecticut. It has grown to become one of the largest firms in Stamford and Fairfield County. The firm's focus is on insurance and business-related litigation. The firm is listed in Best Lawyers and one of the top law firms in Connecticut by Super Lawyers.

Charles A. Deluca has litigated complex cases on behalf of individuals, businesses and insurance carriers since 1977. His primary areas of practice are major tort litigation, products liability, insurance coverage, professional liability and commercial litigation.

Chuck is a Fellow of the American College of Trial Lawyers (ACTL). The ACTL is composed of the best of the trial bar in the United States and Canada. Fellowship is by invitation and limited to 1% of the Bar. Fellows must have a minimum of 15 years of experience. Chuck has received the highest Martindale-Hubbell rating.

Chuck, I notice that you're a Fellow of the American College of Trial Lawyers. I want to congratulate you on being invited to join. I know that the readers would be interested in finding out a bit about that.

I regard my membership in American College of Trial Lawyers (ACTL) as the highest honor I've received as a lawyer and consider it to be the pre-eminent organization for trial lawyers in America and Canada.

It's not a business generator as such. It's an indication to clients and potential clients that I've been accepted into a very prestigious organization. I've been judged by my peers as being capable of handling complex litigation matters

Is it just a fellowship or do you, as a peer group, meet and discuss best practices?

Yes. There's an annual meeting and ongoing meetings during the year that discuss trial practice and the administration of justice. At the last meeting I attended there were several Supreme Court justices participating. Quite frankly, I'm humbled that they chose me as a member.

Your firm bio lists you a major tort trial firm. Tell me about some of the work that you do.

We're a litigation boutique. We cater primarily to the risk industry. However, we do commercial litigation as well. We've been involved in major cases in Connecticut. For example, we represented Paul Newman in his litigation over the famous salad oil case in the early 90's. We got a winning verdict for Paul Newman and Newman's Own Salad Oil. It's an amazing company with all profits going to charity.

Tell me about the tort litigation work you do and specifically about insurance defense.

In terms of insurance we do a lot of medical malpractice defense. We have a significant practice in representing nursing homes. We do public sector defense representing municipalities in civil rights cases. We have an active transportation practice, especially in the railroad industry. We've been representing a number of railroads in Connecticut since the 1980's. We have a trucking practice and retail defense practice. We now do a significant amount of legal malpractice defense as well as products liability defense work. In addition, we do general P & C defense work for insurance carriers.

What are one or two of the main areas of growth you see in risk defense?

That's a good question. I know what's shrinking. An increasing amount of personal lines defense work is going in-house. Many large carriers are bringing standard homeowner related litigation in-house and those firms are doing an excellent job. We're seeing more specialized legal work in the areas that I mentioned. For example, we're seeing an increase in legal malpractice cases. Some of that is due to the fall out associated with residential real estate work. There's an increase in nursing home litigation due to the aging of the population. There's also an uptick in work from more specialized carriers that don't have in house legal department in the State of Connecticut.

Do you do much referral work from Third Party Administrators (TPAs) who are very active in health care and nursing home administration?

Yes. TPAs refer work to us either through direction from their carriers or in their own right. It's good work because TPAs handle claims very professionally.

Thomson Reuters has just acquired a law firm e-billing outsourcer. All of your bills can be outsourced to it via the Cloud. You would prepare bills, e-mail them to Thomson who would take care of all the formatting and e-bill transmitting to a client. What's your response to that?

That's fascinating. We put a lot of time and effort into complying with billing guidelines. We have fairly sophisticated billing technology. We would approach the concept of outsourcing very carefully. But I can see where the product could be fairly attractive to a firm like ours so long as you got through all of the attorney client privilege issues. It's a very sensible thing to do. We would certainly be interested in seeing how it works.

In-house billing is very time intensive. If we could eliminate that it would be very appealing. I'm assuming that they would collect all of the billing data and compile it to conform to billings guidelines. If that's the case it might be worthwhile.

continued on page 4

We're a litigation boutique. We cater primarily to the risk industry. However, we do commercial litigation as well.

continued from page 3

They will amass all of the billing guidelines in place by the major insurers and develop formats that ensure your data could be formatted into bills that would comply with those guidelines. Once formatted they would be electronically transmitted to the insurer for payment. A properly formatted and pre-vetted bill would eliminate rejections for non-compliance and be processed and paid in the shortest time period. What's your response?

We spend a lot of time vetting our bills in-house. Partners go over bills and usually cut out what they see as non-compliant entries prior to submission in an effort to avoid the inevitable rejections and write downs associated with improper bills. However, I'd be interested in learning more about it.

You're aware that outsourcing in general in areas like document production and e-discovery is growing. What's your response to that?

We haven't really engaged in outsourcing to any degree to date. I'm not able to make any informed comparisons at this point in time. I know a lot of large firms outsource document review but we're more comfortable doing that work in-house. We do use external vendors for e-discovery projects.

What's your perspective on the emerging practice of off shoring routine documentation work to India where lawyers with excellent common law training perform routine legal tasks for substantially lower fees than domestic lawyers?

We've not gone that route and I don't see us going there in the near future. When we have a large case that requires extra personnel or the need to process a significant volume of legal documentation we bring in temporary lawyers.

This enables us to provide the level of oversight we believe is necessary for good quality work. The Connecticut bar has an intricate Practice Book which sets out our local civil procedure. I'd be reluctant to refer work to a source that I wasn't able to oversee in conformance with our state bar practice requirements.

Is there a good network of temporary lawyers you can bring in as and when needed on a major case?

Yes, especially now. The market for lawyers fresh out of law school or even with a couple of years of practice is actually quite healthy. It's relatively easy for us to hire good lawyers on short - term contracts. In fact, there are a number of lawyers who prefer to work on temporary assignments rather than seek full time employment with a firm. That works well for us. Sometimes when the project is finished we'll hire them on if their performance warrants doing so.

An added benefit of having a lawyer on staff is that the work they do is protected for confidentiality purposes under the work product doctrine. We like to control our own destiny and protect the reputation of our practice.

Clients are objecting to paying law firms for "earn while they learn" programs put in place for junior associates. How's your firm approaching this issue?

That's an issue that a lot of firms like ours are having to deal with. In the past we did hire lawyers fresh out of law school and develop them through an associate ladder over a period of years to the partner level. There is certainly impetus for firms like ours to shift away from that model and to hire laterally. We can bring in lawyers who are already experienced and can hit the ground running.

On the other hand, when we do hire lawyers directly out of law school we don't bill for every hour they've worked on a file. We'll look at a bill and reduce it to the extent that it reflects value to the client. Even though this is a loss leader it enables us to bring in a lawyer and train him or her on our dime. We recognize that there's a practice and the professional need for young lawyers to have a chance to develop into the next generation of trial lawyers.

This is a very important point because many insurers believe they're being billed for work that isn't generating sufficient value for them. How do you let your clients know that you're shouldering this responsibility?

I don't think we put this message out as effectively as we could. We do provide clients with a budget. If we find that by assigning work to a junior associate we've gone over budget we bear the cost of that. In other words, we self regulate ourselves.

The other side of that argument that clients often don't appreciate is that firms like yours know that lawyers need to be trained and supervised to become competent. That costs time and money. How should this be addressed to make insurers aware that the development of competent lawyers isn't a one way street? They need to shoulder some of this responsibility.

I'm sure many carriers appreciate the way we develop talent. We have a training manual. We have ongoing sessions with associates where we go over cases, procedures and client expectations. All of this training is done so we can provide clients with the work product they want. We're more than happy to do that because it's to our benefit that we have well qualified lawyers on staff. We also endeavor to attract young lawyers with clerking experience in working with judges. For example, we have lawyers with clerking experience working for appellate court judges. We've just hired another lawyer who clerked in the appellate division in New York who came to us with significant research skills.

Do you have a formal training/mentoring program?

We have a training manual we put together for all of our lawyers to use. As mentioned previously we have weekly training meetings for associates. Also every junior associate is assigned to a partner who acts as a coach/mentor.

A traditional lateral hiring route was to take note of young lawyers working in-house for insurers in captive law firms and recruit strong performers. Is that still standard practice?

That will continue to go on. These lawyers get great practice experience. Any time we can hire one of those lawyers we'll usually do that. Then again it depends on our needs. If we need a researcher we'll look to clerks and recent grads.

Best Practice Advice to Make Convergence Work For You

By Karen Fettig
Bottomline Technologies

As we discussed in the last issue of the Litigation Management Report, firm convergence is still one of the best ways to keep costs down and ensure the best results possible for both the organization and the law firm. It's a proven approach that provides operational efficiencies and improved communication, which ultimately leads to lower costs and better quality services.

In the past few years, companies have changed their cost control methodologies from firm convergence to focus on other strategies, including bill review, Alternative Fee Agreements, firm audits, rate negotiations and even removing expenses (like asking their firms to help by not ordering deposition transcripts unless absolutely necessary). These activities do help, but like firm convergence they are just one piece of the pie.

So how does a company employ this strategy to realize the best gains and maintain the best outcomes?

First, review the data – as you will see, the emphasis in this report is placed on how to use the data that you have obtained over the years to continue to move your company forward into even better control situations. In this instance, preparing a firm “scorecard” that includes all the critical firm performance metrics, with certain metrics weighted higher than others, is a great starting place. By comparing results across firms, it will be fairly easy to identify the firms that stand out both on managing expenses and getting great results.

Second, possibly use the request for proposal (RFP) process. Although the relationship between your company and a firm is possibly closer knit than the relationships maintained with other vendors, the RFP process adds a level of formality that is necessary to the overall process. In addition, the process might provide decision makers with information not considered.

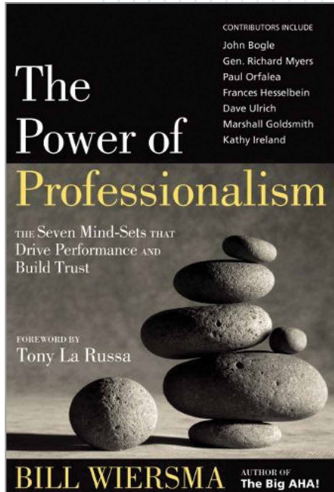
Third, keep a competitive environment. Don't reduce the number of firms in any one line of business or geographic area to only one, which then provides the primary law firm with no competition. If possible, try to either maintain relationships with more than one firm in any geographic area or at least ensure that other primary law firms on the list will service other areas where coverage may be limited to one firm.

Fourth, take time to set the right expectations regarding the partnership, including what the volume will look like and how long before volume decreases might occur. Share detailed company or insured information so the firm can take advantage of its detailed inside knowledge during its representation.

Finally, after successful convergence, continue to monitor and communicate with the firms about performance. This program can provide a long term successful partnership for both your company and your primary law firms, but like any relationship – it needs continuous attention or the gains could decrease over time.

Keep a competitive environment. Don't reduce the number of firms in any one line of business or geographic area to only one, which then provides the primary law firm with no competition.





Must Reads

The Power of Professionalism

By Bill Wiersma
Ravel Media Los Altos C.A. (2011)

The traditional professionals like doctors, lawyers, engineers and accountants have in essence hijacked the concept of professionalism in the author's opinion. They've manipulated it into a marketing moniker to grant themselves elevated status and to create an impression that "non-professionals" are functioning on a lower plateau. Elaborate rules of professional responsibility and ethical conduct are frequently utilized to set out the required code of conduct for the professional in the practice of their respective profession. However, as the author reiterates throughout the book, standards and rules in their own right do not make one a professional.

"For instance, the practice of law has (at least on paper) an exceptionally high threshold when it comes to ethical standards. Some of these standards are set by individual firms, but many more are set within the profession's governing bodies. Yet, today the public opinion of lawyers has never been lower—hovering at only 19 percent—just a notch above the bottom-dwelling media at 14 percent."

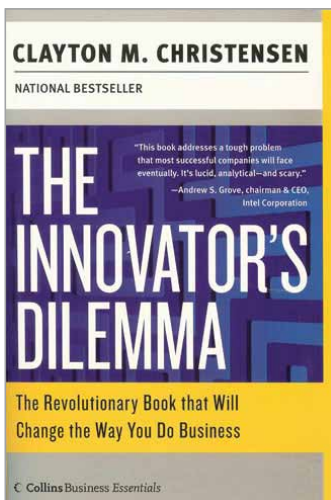
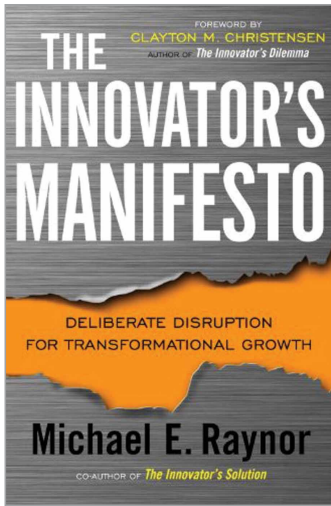
The true professional is one who aspires to a personal code of conduct that focuses on working with integrity to generate results that add value to the client they are serving. A flight attendant on an airplane who adheres to a prescribe standard of conduct and utilizes it to strive to provide exemplary service to passengers, even when it requires them to make that extra effort not normally required of them, is a true professional. Wiersma uses examples like this throughout the book to get the reader to think about common place situations where we've been impressed by the way ordinary folks have provided us with an extraordinary service. These are the true professionals. At the other end of the spectrum the author refers to increasingly

highly publicized situations and examples of accountants, lawyers and similarly credentialed professionals whose conduct has been demonstrated to be extremely unprofessional. The books' mission, and Wiersma clearly states that he's on a mission, is that we can all aspire to be professionals in the course of our own ordinary lives if we adhere to what the author maintains are the following seven essential defining characteristics of a professional.

1. Professionals have a bias for results.
2. Professionals realize (and act like) they're part of something bigger than themselves.
3. Professionals know things get better when they get better.
4. Professionals have personal standards that often transcend organizational ones.
5. Professionals know that personal integrity is all they have.
6. Professionals aspire to be masters of their emotions, not enslaved by them.
7. Professionals aspire to reveal value in others.

Every litigation manager would be well advised to read this book. It's an excellent guide for personal/professional development. It can also serve as a solid foundation for drafting rules of engagement that set out results based expectations that create value for the client.

"Ask litigation attorneys and they'll acknowledge how much critical pretrial work is done by their paralegals. Yet law schools do not include the training of paralegals within their programs. Seemingly, there would not be a better environment than a law school in which to train paralegals, but the American Bar Association (ABA) actually forbids law schools from training paralegals in conjunction with their programs. Why? Because the ABA considers the work that paralegals do as a vocation, not a profession. Some states, however, recognize paralegals as a profession."



The Innovator's Manifesto

By Michael E. Raynor
Crown Business – Random House (2011)

The Innovator's Dilemma

By Clayton M. Christensen
Harvard Business Review Press (2011)

This is an innovative book review in that I'm providing you with a 2 for 1 synopsis of books by authors that are all intertwined with one another. Clayton Christensen, author of the ground breaking business strategy book, *The Innovator's Dilemma*, has facilitated ongoing development of his model by supporting and encouraging the research and writing of, among others, these two books. In the original seminal text Christensen explained how the model worked. In this most recent book he and co-authors Jeff Dyer, also a Harvard Professor and Hal Gregersen, an Insead Business School professor tell us what the makeup on an innovator is. Even though many innovations in recent years are centered on technology, a tech geek is not necessarily a successful innovator. For example, the computer mouse and icon screen weren't invented by Steve Jobs. The Xerox Palo Alto Research Center (PARC) was the inventor. However, it was Jobs who was able to associate the mouse with an entirely different way of working with a computer that re-invented the retail computer industry. The key to innovation is the ability to engage in "associative thinking". In other words, think outside the box.

"The key point here is that large companies typically fail at disruptive innovation because the top management team is dominated by individuals who have been selected for delivery skills, not discovery skills. As a result, most executives at large organizations don't know how to think different. It isn't something they are taught within their company, and it isn't something they are taught in business school. Business schools teach people how to be deliverers, not discoverers."

Innovators don't necessarily work hard but they think hard. They're well known for just seemingly sitting around and taking things in. Breakations are frequent. Rather than obsessing they take a pass on the frenzy and opt into serenity. "If all else fails when trying to figure out a problem go to sleep" empty your head and re-energize.

Seasoned venture capitalists are aware of this and are more interested in identifying the off the wall character who has

the ability to think and act laterally and not just execute. It's the person who can adapt to constant change that has the potential to be the disruptive innovator. Leading edge innovative organizations embrace associative thinking and make space to facilitate creativity. Google allows employees to devote as much as 20% of their time, equivalent to one working day, to think and work outside the box on their own personal pet projects.

Innovator's buy into "rapid failure." A mistake is a lesson learned if corrective action is taken quickly. Innovation is not for the faint of heart. "Disruptors do not merely pick a different spot on the frontier of an existing business model. Instead, they create a new business model with an entirely different frontier."

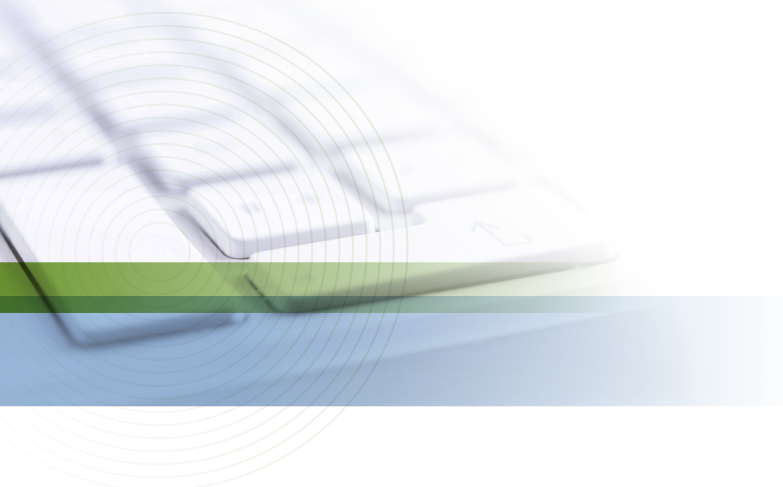
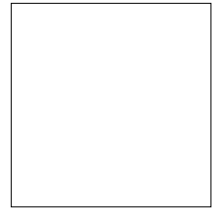
An innovator shouldn't be confused with a new entrant. A new entrant attempts to compete with an existing group of providers by differentiating their product or service. Price is often the most common strategy utilized by a new entrant to provide an established customer/client base with an alternative. Litigation managers are familiar with the new entrant law firm that offers to provide a similar service to existing firms on a panel for a lower price. The differentiation makes them a niche provider. It may gain them a foothold but it doesn't change the name or rules of the game. Eventually they may increase their presence but they will always be in the position of competing against established players on terms and conditions that are already in place.

In disrupting the market and creating an alternative, innovators invariably also create a problem. There is an experiential value curve associated with every innovation. Initially enthralled customers become discontent with the status quo and push for the next generation. If the innovator fails to respond correctly they are in danger of being relegated to a secondary status category of provider as emerging competitors endeavor to become niche providers in what has become a newly established market. In short, innovation is a journey down a risky road that only the best of breed innovators eventually succeed in. However, when they do the rewards can be astronomical. Just ask Bill Gates.



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