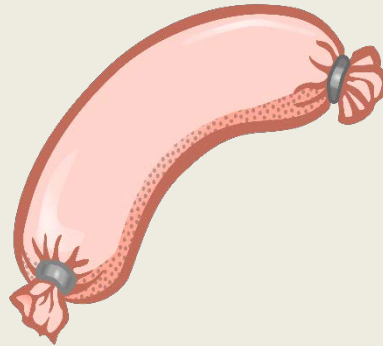


# ***Making Sausage Out of the Undesirable Things a.k.a Making the Best out of a Bad Case***



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# Notice of Claim or Incident

Investigate to Litigate!

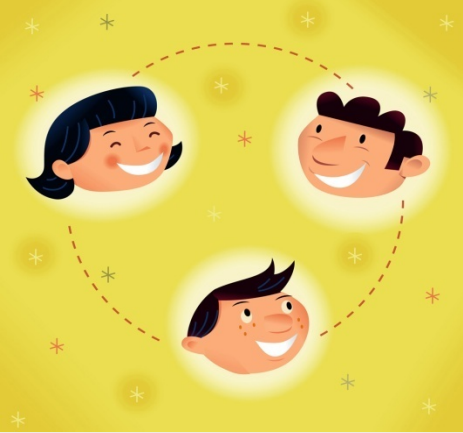


- **Benefits of early investigation**

- Identification of strengths and weaknesses early in the process
- Surprise Avoidance
- Potential for quiet resolution.
- Economical
- Psychological/Strategic advantage over adversary for settlement or defense trial preparation.
- Preservation of Attorney/Client privilege.
- Having a “litigation ready” claims file..providing defense counsel with a file containing items they want and need!

# Investigate....

- **Early use or retention of experts.**
- **Collaboration with Counsel in preparation of defenses and formulating strategy.**
- **Scene documentation.**
- **Document identification and preservation.**
- **Witness identification, the good and the bad.**
- **Preservation of Attorney/Client privilege**
- **Having a “litigation ready” claims file...providing defense counsel with a file containing items they want and need**



# Communication



- a) Communicate with your organization's stakeholders.
  - Stakeholders do not enjoy surprises!
  - Provide the strengths and weaknesses.
  - Articulate how strengths will be exploited and how weaknesses will be addressed.
- b) Communicate with opposing counsel.
  - You need information they have and they need information you have.
  - Building bridges for a professional litigation atmosphere & cooperative spirit. (Or identifying a crusader or difficult adversary...)
- c) Communication with the Public, aka the press....
  - Avoid being defensive or admitting fault.
  - Empathy is okay.
  - If the situation warrants it, use a Public Information Officer.
  - There should be one message and one messenger.
- d) Communicate with Insurer early (excess carrier, JPA's, retention pools etc.)

# You Have Been Served!...

## Now the Fun Starts

### 1. “What do we do now?”... aka Initial Handling

- a) Meet with defense counsel (hopefully this is not your first meeting).
- Focus on liability, damages, the aforementioned strengths, weaknesses and how these relate to the litigation strategy.
  - Counsel should provide early budgetary outlines/projections and a **COMPREHENSIVE** litigation plan. The *complete claims file* that is chalk full of items counsel suggested would be beneficial during the claims stage and the accuracy of the early budget and litigation plan will be more accurate. (See “importance of communicating with stakeholders”...information is king and accurate information is even better!)



# Law & Motion

- Purposes
  - Disposition of Threshold Issues
  - Educating the Judge
- Types
  - Demurrers/Motions to Strike
  - Motions to Dismiss
  - Motions for Summary Judgment/Adjudication
- Issues which Cater to Summary Disposition
  - Immunities
  - Statutes of Limitations Duty Issues
  - Duty Issues

# Litigation Fun continued....

2) How Defense counsel and risk manager/claims professional can work together better.

a) Why is this important?

- This “*partnership*” enhances the ability to forge an effective defense. Each professional has perspectives, experience and knowledge of issues that they bring to the table and with egos in check this collaboration of intellectual resources can be very beneficial.
- Avoids counsel or the risk manager from being blind-sided by an issue.
- *Let the litigator litigate.* The Risk Manager or claims person is a resource and conduit to the organization and a valuable member of the litigation team, but you are not a trial attorney and at the end of the day it is your defense counsel standing in front of the judge and jury, *so it is important to remember to be a resource to help facilitate a good outcome and not part of a litigation problem.*
- This is achieved through regular communication, reporting and accessibility. File reviews and strategy sessions help in this endeavor.

# Elements to Consider in Evaluating Settlement v. Trial:

It shouldn't be a guess as to whether your litigation sausage is a 'mystery' or kosher?

## 1. Liability

- a) Why is the issue of liability so important in evaluating settlement versus trial?
  - It is the 1<sup>st</sup> question on the special verdict form. Need we say more?
- b) Issues to consider in evaluating liability.
  - What are the facts? The Good and the Bad.
  - What is the theme of the case? I.e. what story are you going to tell? Will the story "sell" to the jury?
  - How does the plaintiff present? Age, sex, ethnicity, education, employment, truthfulness, proactive or apathetic, exaggerator, whiner, victim mentality or rugged individualist/survivor/fighter etc.
  - How well do your witnesses come off in front of the jury? Just because they may be technically proficient does not mean they do well in front of a jury and hostile plaintiff counsel questioning.





# Evaluating the Encased Meat Product

- Plaintiff attorney; skill, trial experience, reputation, results, crusader, folds on the court house steps?
- Is there one theory of liability or multiple theories?
- Are there “non-negligent” theories of liability? Can this place defendant on the defensive and open a door to punitive damages?
- Is there a human face to the defendant, or is the defendant a faceless entity? Does the organization have an important part in the community?
- Input from third-parties, i.e. jury consultants, mock trials, internet research etc.



## 2. Damages

### a) Issues to consider.

- How sympathetic is the plaintiff? The facts may not be good, however the plaintiff may be worse.
- Extent of injury; catastrophic, grotesque, bad “on paper” but appearance is not noticeable, etc.
- General Damages v. special damages. It is easier for a jury to award objectively verifiable damages such as medical expenses, loss of earnings, etc.
- Life expectancy issues
- Occupation or career/educational path of plaintiff
- Child v. adult v. senior citizen
- Verdict search review for similar cases/facts with similar damages/injuries



# Evaluation is more than liability & damages;

## 3. Venue

- a) Location of venue is IMPORTANT
- b) Is there a “home court” advantage

## 4. Judge..Dredd?

- a) Judge v. Jury trial?
- b) Evaluate your judge!
  - Plaintiff , defense or neither oriented? Wildcard?
  - Judicial profile
  - Ask those in the know; speak with colleagues and claims folks who are familiar.
  - Judge’s proclivities toward summary judgment
  - Defense counsel or plaintiff’s counsel relationship with judge, respected, disliked, ever papered the judge?

# Economic\$

## 5. Cost v. Benefit

- a) Assess projected cost early on and provide periodic updates concerning projected cost issues.
- b) Determining settlement value. All projected costs plus projected cost through trial and appeal. The value of a case does not increase with time; in other words- “value of settlement” + remaining cost of defense = settlement value.
- c) Settlement timing
- d) If considering a settlement at “case value” late in litigation, ask yourself “what do we know now that we didn’t know \$100,000 ago?” This helps one determine if they are simply “trial averse” or has something really changed in the evaluation of the case’s strength?

# \$trategies

## 6. Settlement strategies

- a) Mediator Selection
- b) Confidential / non-confidential briefs
- c) Use of demonstrative evidence
- d) Evidence Code Section 1152

## 7. Organizational culture

## 8. Wildcards....

- a) Publicity
- b) Insurance coverage issues. Duty to defend v. duty to indemnify
- c) New information, silver bullets, smoking guns etc.

**Questions?**

**&**

**Thank You for supporting PARMA**

*Palm Springs*  
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