

**LIBERTY MUTUAL INSURANCE COMPANY**  
**BAD FAITH/EXTRA-CONTRACTUAL/H-FILE PROTOCOLS**  
**JANUARY 1, 2019**

These Home Office Litigation Protocols (“Protocols”) are incorporated into the Liberty Mutual Insurance Company, Liberty Mutual Helmsman Management Services LLC, & Ironshore (which includes Liberty Internal Underwriters-NY) Guidelines for Law Firms (“Guidelines”). See Guidelines at Section IV, Paragraph A, Subsection (c). Failure of outside counsel to comply with the Protocols may result in reassignment of cases and removal from the Home Office Litigation/Compliance Panel.

The Protocols apply to all litigation pertaining to Home Office litigation/compliance disputes, filed against a Liberty Mutual Insurance entity/underwriting company ("LM"), as well as Home Office litigation/compliance matters contemplated by LM.

**Home Office Litigation/Compliance Matters** include all suits where there is:

- (1) Litigation, credible threats of litigation and/or counterclaims containing allegations of bad faith, punitive or extra-contractual damages made directly against a Liberty Mutual member company on any policy or bond issued by a Liberty Mutual member company or underwriting unit.
- (2) Class actions, RICO or anti-trust claims or lawsuits against a Liberty Mutual member company related to its operations;
- (3) Situations where it is alleged, for any reason, that our actions have caused a business to discontinue operations, file for bankruptcy protection or suffer other severe financial or reputational harm;
- (4) Any other extra-contractual payment not associated with the above. While these claims or suits often include common law or statutory bad faith allegations, they may also include allegations of intentional or negligent misconduct, breach of contract, violations of state insurance regulations, insurance or consumer protection statutes, or violations of other statutes that allow penalties or damages beyond the limits of an insurance policy;
- (5) Bankruptcies by an insured, premium collection/claims mishandling cases.

## **1. Selection of Home Office Litigation/Compliance Counsel**

For all Home Office litigation/compliance matters, the LM Home Office Compliance Attorney (“HOCA”) is responsible for selection of outside counsel. The HOCA or support staff for HO Legal will provide your firm with all materials needed for initial review and evaluation, including all relevant certified policies, underwriting files and claim files.

If you receive a referral on a Home Office litigation/compliance matter from claims or another source, please contact the HOCA. Otherwise, the legal department may not be aware of the ongoing activity.

Your firm is not permitted to accept service on Liberty’s behalf unless expressly permitted to do so in writing by the HOCA.

## **2. Conflict Check**

Upon receipt of referral of a new matter, a conflict check shall be completed as soon as practicable but no later than 2 days from the date of referral. A written confirmation that outside counsel has no conflicts must be provided. For ongoing expectations with respect to conflicts, please see Guidelines Section I, Paragraph C.

## **3. LM Entities**

Your firm is required to confirm the correct LM entity involved in the litigation. Counsel is not permitted to file litigation on behalf of one LM entity against another Liberty entity. A list of LM affiliates is linked in CounselLink.

## **4. Strategic Consultation Required**

To ensure Home Office litigation/compliance matters are handled in the most efficient manner, within (30) thirty days of referral, unless advised otherwise, you shall provide an initial case analysis which is to include a budget. The budget must be updated periodically or where appropriate.

If the matter contains a breach of contract action, you will need to provide the appropriate claims contact with the analysis as well but with the "bad faith" discussion/analysis redacted. A strategic consultation with you, the claims adjuster (if applicable), and the HOCA must take place early in the case to ensure early analysis of potential extra-contractual exposure and potential early resolution.

In the initial case analysis, your firm shall provide an objective, candid, and frank assessment on the strengths and weaknesses of the case, likelihood of success, alternatives to litigation, and potential consequences of litigation. You should provide a clearly outlined litigation plan, including discovery strategy, and a rough estimate of litigation cost.

#### **5. Pleadings and Dispositive Motions-Advance-HOCA Approval Required**

Your firm shall provide the HOCA with drafts of all pleadings and dispositive motions, including, answers, motions to dismiss, and motions for summary judgment, for review and approval, prior to taking any action such as service, filing or communicating to adverse parties. These drafts must be provided no later than (7) seven days in advance of any due date. Pleadings and dispositive motions should not be filed without approval by HOCA.

#### **6. Discovery Must Be Coordinated With HO Legal**

Upon receipt of discovery in Home Office litigation/compliance matters (Interrogatories, Requests for Production of Documents, Deposition Notices or Requests for Admissions), your firm must immediately send such discovery to the assigned HOCA and LM Compliance Paralegal to assist with the document search and identify appropriate persons to respond to the discovery. Your firm must provide draft discovery responses to the adjuster (if applicable), HOCA and the Compliance Paralegal at least seven (7) days before they are due for review and approval.

#### **7. Confidentiality Agreement/Protective Order Required**

Certain documents, including but not limited to claims guidelines, underwriting manuals and training materials, should only be produced subject to a confidentiality agreement agreed to by all parties and if a confidentiality agreement cannot be voluntarily obtained, a protective order should be obtained from the Court.

#### **8. Status Updates Required/Early Resolution**

Your firm is required to keep the adjuster (if applicable) and the HOCA informed of all significant developments in the litigation by providing regular status updates, which include an assessment of the Home Office litigation/compliance matter, a summary of case activity, discovery and motion practice, developments in the case, and recommendations on a going-forward strategy. These updates shall be provided at least quarterly and more often if appropriate. The HOCA should be consulted on strategy discussions relating to the direction of the case, including dispositive motions and whether appellate review is appropriate.

Additionally, files should be analyzed to determine whether they should be targeted for settlement before additional litigation costs should be expended and identified in the quarterly update. It is important to identify these early resolution opportunities very quickly to stop any wasteful litigation activity.

## **9. Approval Required For All Appeals**

All appellate filings, including briefs, must be approved by the HOCA. Please refer to the LM Appellate Protocols linked in CounselLink for additional information.

## **10. Depositions of Liberty Mutual Employees**

Deposition notices seeking testimony or documents from LM personnel served in Home Office litigation/compliance matters must be immediately referred to the assigned HOCA and the Compliance Paralegal. All LM employees are required to confer with the handling HOCA prior to providing testimony and/or documents. You and your firm should not identify and/or produce a LM employee as the deponent, unless a discussion relating to the suitability of the proposed witness first takes place and possible alternatives are explored.

## **11. Expert Retention**

LM has formulated Home Office Litigation Expert Guidelines that are attached as Appendix 1. All outside experts must be approved prior to their retention. When suggesting an expert for a case, please provide a CV and rate information for the HOCA for review.

## **12. Settlement**

At least (30) thirty days prior to a mediation, a settlement analysis shall be provided. The analysis should include details concerning the potential exposure and projected damages as well as a recommendation for settlement authority.

Settlements of Home Office litigation/compliance matters should always contain confidentiality language and any settlement offers/discussions should clearly undertake to make this requirement known up front. We expect all settlements to be confidential and if confidentiality is objected to from any of the adverse parties, please contact the HOCA to discuss options.

### **13. Trials**

Generally, at least (45) forty-five days prior to trial, please send a pre-trial report to the HOCA and the adjuster (if applicable). The pre-trial should include a description of: 1) trial strategy; 2) a trial plan overview; 3) a liability assessment; 4) probable damages discussion; 5) worst case and best case scenarios 6) assessment of the judge, opposing counsel and the jurisdiction; 7) jury verdict analysis; 8) estimate of defense costs through trial; 9) recommendations for settlement; and 10) consideration of other sources of recovery (ex. Excess or Umbrella carrier).

### **14. Billing**

The Guidelines referenced in the preamble above outline all expectations with respect to billing and invoice submission. In particular, per the Guidelines, invoices should be submitted quarterly (90 day cycle) commencing with the assignment of the case. Prior to that time, please do not attempt to submit invoices unless your billing exceeds \$5,000.

For questions concerning invoices, please contact:

LABS\_Support@LibertyMutual.com

Telephone number: 800-371-9248, option 2

If you have any questions or concerns regarding these Protocols, please contact your assigned HOCA to discuss. Thank you.

## Appendix 1

# LIBERTY MUTUAL INSURANCE HOME OFFICE LITIGATION GUIDELINES FOR EXPERT WITNESSES

These Home Office Litigation Guidelines for Expert Witnesses (“HO Expert Guidelines”) seek to promote effective and efficient case management, consistent with the expert witness’ professional responsibilities and Liberty’s expectations. The HO Expert Guidelines constitute Liberty’s understanding regarding expert witnesses retained by Defense Counsel in litigation involving Liberty Mutual Insurance, its employees, its policyholders and/or customers. By engaging in preparation and accepting a matter requiring retention of an expert witness, Defense Counsel and the Expert Witness are expressly agreeing to abide by the policies set forth in these HO Expert Guidelines.

## I. PREFACE

- A. **Philosophy:** The Expert Witness is expected to work with Liberty Mutual Insurance (hereinafter “Liberty”), its assigned Defense Counsel, and the insured/customer to provide an opinion that is thorough, accurate and is done in a timely, efficient, and cost-conscious manner consistent with Liberty’s interests and the Expert Witness’ ethical obligations. Nothing contained herein is intended to nor shall restrict the Expert Witness’ independent exercise of professional judgment in rendering an expert opinion or testimony.

## II. CASE HANDLING AND REPORTING

- A. **Budget:** A budget may be required. If requested, the Expert Witness shall provide an initial budget which realistically sets out only those expected costs for reviewing any and all documentation provided to the Expert Witness, drafting an expert report, preparing for deposition, and being deposed. The budget should also include an estimated time for trial preparation. As the case develops and changes in preparation time are anticipated or complexity requires a change, an updated budget should be provided.
- B. **General Confidentiality:** The Expert Witness shall treat any Liberty business, financial or claims information, and Liberty’s claims and litigation management approaches as confidential and shall not disclose such information and approaches to the public or media absent written consent from Liberty. Any public or media inquiries made to the Expert Witness about Liberty or any claim or case shall be referred to Liberty. The Expert Witness shall not use Liberty or any of its Affiliates’

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names, or claim or case-specific information, in public statements or marketing materials.

### III. BILLING

- A. **Frequency:** Invoices should be submitted at the conclusion of an event requiring travel, quarterly (every 90 days), or sooner if the billing exceeds \$5,000 during that 90 day cycle. Final invoices should be submitted promptly (i.e., within 90 days of the conclusion of the case or the Expert Witness' engagement).
- B. **Timeliness:** All invoices shall be submitted within 90 days following the end of the billing cycle. The end of the billing cycle is the last day of service appearing on an invoice. Invoices received in excess of 90 days, without an adequate explanation of the lateness appearing in the Invoice Description Field on the invoice, may not be paid. We ask that you do not have overlapping dates of service between invoices.
- C. **Submission:** All invoices shall contain the case caption, H File Number, and claim number (if applicable). The first page of the invoice must also include the Expert Witness' tax identification number. Final Invoices must be clearly marked on the first page. Invoices must include daily entries showing: (1) the date the work was performed; (2) the initials of the person providing the service; (3) a description of the work performed by single activity; and (d) the actual time in tenths of an hour for each single activity.
- D. **Charges for Service:**
  - 1. **Time:** All charges must be recorded daily based upon actual time spent in one-tenth hour increments. Time billed in excess of .1 hour should be billed by rounding up or down to the nearest increment. Overall time billed shall not exceed actual time spent; billing some lines at zero is the preferred way to indicate the task was included in the collective overall actual time it took to perform the task.
  - 2. **Single Entry Timekeeping:** The time for each activity should be separately stated. Block billing should not be employed.
  - 3. **Descriptions of Services:** Descriptions should provide the nature, purpose or subject of the work performed, and the specific activity or project to which it relates. Expert Witnesses should be sure to include detail such as the number of pages, or other information to quantify the volume, reviewed to support the time billed. For example, entries regarding medical records reviewed should specify, i.e. "reviewed 40 pages of hand-written physical therapy daily notes in preparation for drafting expert report regarding causation."

4. Compensation: The Expert Witness' hourly rate will be agreed upon before retention. The agreement will be all-inclusive, and detail the Expert Witness' hourly rate for preparation, travel, and attendance, or flat rate as necessary.

5. Non-compensable Fees: Activities that Liberty considers to be support/clerical or administrative in nature are non-compensable and should not be billed by the Expert Witness. Such tasks, which Liberty will not pay for, include, but are not limited to:

- a) Preparing, reviewing and/or following up on invoices; preparing responses to billing disputes;
- b) Receipt and distribution of mail/records;
- c) Maintenance of calendars;
- d) Booking travel or changing travel arrangements;
- e) Copying or faxing;
- f) Conflict checks; and
- g) Emailing "cover letters" enclosing documents.

6. Travel Time: Travel time should be handled differently depending on whether it is local or non-local travel.

- a) *Local Travel* is defined as any travel within a 50 mile radius (100 miles round-trip) from the Expert Witness' office. *Non-Local Travel* is defined as any travel exceeding a 50 mile radius (100 miles round-trip) from the Expert Witness' office. All travel, attendance, and preparation time should be billed as separate entities.
- b) *Local Travel* may be billed at full actual time and full hourly rate.
- c) Liberty will reimburse *Non-Local Travel* time at half the normal hourly rate, unless the Expert Witness is able to perform actual Liberty billable work. Actual billable work should be billed at the full hourly rate, just as if it were performed at the Expert Witness' office. The total amount of travel time where no billable work was performed should then be billed as "Non-Local Travel Time" and should not include any time where actual billable work was performed.
  - i. Example: An Expert Witness with a regular hourly rate of \$200 takes a trip that involved driving to an airport, waiting, flight time, and time from the airport to hotel/deposition/etc., that took a total of 8 hours, but only involved 3 hours of actual billable work being performed (i.e. preparation for deposition in reviewing reports and medical records while on the plane)



would bill the 3 hours at the full \$200/hour rate, but would bill the remaining 5 hours as Non-Local Travel Time at half the regular hourly rate (i.e. \$100). The total trip time should be indicated in the travel line item (8 hours, even though only 5 were billed as Non-Local Travel).

7. Disbursements:

- a) Liberty anticipates that incidental expenses and routine or recurrent tasks are considered overhead. Any associated cost or expense is assumed to have been incorporated within the Expert Witness' agreed to hourly rate or fee structure.

This includes, but is not limited to:

- i. Subscriptions and educational materials
- ii. Facsimile charges
- iii. Local Travel related expenses (<100 miles round trip);
- iv. Meals, unless related to non-local travel
- v. Office supplies
- vi. Photocopies
- vii. Postage

b) Travel Expenses:

- i. *Local Travel:* Expenses and disbursements incurred in local travel are considered overhead and within the Expert Witness' rate structure. Travel within a 50 mile radius of the Expert Witness' office (100 mile round trip) is considered local travel.
- ii. *Non-Local Travel:* The Expert Witness should consult with Defense counsel, who shall consult with Liberty, prior to incurring Non-Local Travel expenses to secure agreement that Liberty will reimburse the Expert Witness for reasonable travel expenses. What constitutes reasonable reimbursement for hotel accommodations, meals, and ground transportation depends upon the locale visited. However, examples would be coach airfare and business class hotels. Mileage will be reimbursed at the IRS rate prevailing on the date of travel. Invoice information should contain the number of miles and rate per mile charged.
- iii. *All travel* must include the destination, reason for travel, number of nights, number of meals, and method of travel with sufficient detail. Receipts for each expense incurred must also

be provided. These need to be detailed receipts, not credit card statements.

#### **IV. INVOICE AND FILE REVIEW**

- A. **Review:** The Expert Witness recognizes that Liberty has the right to review all invoices for services and disbursements pertaining to the matter for which the Expert Witness has been engaged by Defense Counsel for Liberty.
  
- B. **Billing Dispute Resolution:** If Liberty adjusts an Expert Witness invoice, explanation for such action shall be given by Liberty, and the Expert Witness shall be given the opportunity to explain the disputed items and appeal such adjustments. The Expert Witness must provide sufficient detail to allow the reviewers to accurately assess the activity. Appeals submitted after 45 days from the date of payment may not be considered.