



### UE Defense Counsel Guidelines

United Educators (UE) believes that successful insurance defense requires a three-way joint approach. UE works closely with our member institutions (i.e., insureds) and outside defense counsel to reach the best possible conclusion for each matter reported to us. In some cases that may mean seeing a claim through a summary judgment motion or trial (and even appeal), but in many others it means a negotiated resolution. UE must receive sufficient information about each matter for which we provide coverage to evaluate its merits. To that end, for each matter we require that defense counsel:

- complete an early assessment and budget,
- consider whether mediation or another form of ADR may be appropriate,
- respond promptly to all UE requests (whether by phone, letter, or email) for information about the claim,
- routinely provide copies of all major pleadings for matters in litigation,
- report timely any significant events that may cause a change in exposure for the institution or UE,
- consult with UE and the member about major strategy decisions and before preparing or filing dispositive motions,
- notify UE and the member promptly of any settlement demands, and
- provide timely, appropriately detailed invoices for professional services to both UE and the member.

These Guidelines govern all claims for which UE provides insurance coverage, regardless of whether the member or UE has the right to choose defense counsel, and apply to both Educators Legal Liability (ELL) and General Liability (GL) claims. Failure to comply with the Guidelines can have serious consequences. Inappropriate or unauthorized legal fees and costs may be disallowed, and in some cases UE's member may lose valuable insurance coverage. Egregious or repeated instances of failure to comply with the Guidelines may result in our revocation of defense counsel's appointment.

**Exceptions to the Guidelines.** UE occasionally may approve departures from the Guidelines. Although it should be the exception rather than the rule, if you believe that a deviation from the Guidelines is necessary, you must bring the situation to UE's attention before incurring any additional expenses that are inconsistent with these Guidelines. It is counsel's responsibility to request any exceptions to the Guidelines, and obtain the claims analyst's approval, *in advance*. Otherwise, the unauthorized costs will be disallowed.

**Staffing of cases.** UE typically appoints a particular attorney, not the attorney's firm, to represent a member. We consider the attorney we appoint (or approve) as the "Primary Attorney," who will have ultimate responsibility for all legal work in the matter. Generally, we expect the Primary Attorney to personally handle most of the significant work and appearances in the case. We also expect the Primary Attorney to use "billing judgment" and make any appropriate adjustments to invoices before submitting them for payment. *Unless UE approves a different arrangement in advance, each claim should be staffed by a maximum of two attorneys, generally one partner and one associate, assisted by one paralegal.*

If staffing changes or substitutions are necessary during the pendency of a claim, UE should be advised as soon as possible. Defense counsel should not bill UE or its member for any transition time that a new attorney or paralegal spends becoming familiar with the matter.

Defense counsel should not bill for more than one attorney to attend or participate in witness interviews, depositions, court hearings/arguments, or settlement negotiations (including mediations).

**Communication.** Consistent with our belief that a team approach is essential and to avoid surprises for both UE and our members, we place great importance on communication among our claims analysts, defense counsel, and our members. In addition to requiring counsel to be responsive generally to our inquiries about the status of claims, UE also expects that we (along with the member) will be advised promptly of all important court dates, including but not limited to discovery deadlines, dispositive motion deadlines, trial setting conferences, settlement conferences, and trial dates.

Absent other arrangements, in each matter UE should routinely receive copies (electronic format preferred) of:

- All substantive pleadings
- Copies of legal research or factual investigative memos
- For GL cases, summaries of written discovery responses, including medical records, which address how the information may affect previous assessments of liability and damages
- When requested by the UE claims analyst, deposition transcripts or (if prepared) summaries.

**Communication with UE Members.** Defense counsel should keep both UE and its member fully informed of developments in the claim. The member, as well as UE, should receive copies of case assessments, status updates, substantive motions, pretrial briefs, and mediation statements.

### **Initial Assessments and Budgets**

The UE claims analyst's initial appointment letter generally requests an early assessment and litigation budget. The preferred formats for those reports will be included with the letter. (For certain claims that are not yet in litigation, such as EEOC charges or attorney demand letters, we typically request only a brief assessment and no budget.) The letter will specify a due date; if the materials are not received by that date, and no extension has been arranged with the claims analyst, UE may disallow fees and costs incurred between the due date and the date the items are received. This means that those charges would not be paid by UE or credited against the member's self-insured retention.

Although UE understands that it may be difficult at an early stage to assess a claim or budget for it through trial, we believe it is very important to do so. In our experience, this exercise enables all of the concerned parties (UE, our member, and defense counsel) to obtain the information needed to evaluate the case properly at the earliest possible date and, if liability appears likely, to consider settlement.

**Assessments.** The full initial assessment should include:

- The results of defense counsel's factual investigation of the claim, including any problems with witnesses or any documents damaging to the defense
- Legal and factual defenses to the claim, including any applicable immunities or caps on damages
- Whether counsel considers the claim a case of liability or exposure
- Monetary damages and any other relief that may be recoverable by the claimant
- The strengths and weaknesses of each party's position
- Counsel's recommended defense strategy (including anticipated discovery, motion practice, expert witnesses, ADR recommendations, and settlement strategies)
- The probable range of verdicts if the case is tried
- An evaluation of the claim's settlement value, including possible non-monetary aspects.

For GL claims, specific items that should be considered and addressed in the assessment include:

- Liability and causation issues
- Joint and several liability
- Negligence of others/fault of non-parties
- Indemnity, contribution, and collateral source
- Medical specials (past, present and future)
- Loss of earnings (past, present and future)
- The possible range of non-economic damages.

**Budgets.** UE asks outside counsel to provide the most realistic budget possible through trial, including fees projected for any likely dispositive motion work. Budgets may specify any reasonable assumptions, such as the number of depositions anticipated or the anticipated course of action by adversary counsel. Consistent with UE's preferred format, budgets should be broken down into the stages of litigation (e.g., discovery, pretrial pleadings and motions, trial preparation and trial) and show approximately how many hours of work in each stage counsel anticipates being performed by the assigned partner, associate, and paralegal.

We will review and approve a budget for the litigation, but UE does not necessarily "hold" counsel to this original budget. We understand that developments in litigation may require increases, and we expect to be advised promptly when that occurs. If counsel exceeds the original budget **without** having first notified UE of needed modifications, however, any fees and costs incurred that exceed the original budget may be disallowed.

#### **Pretrial Assessments and Budgets**

In addition to the initial assessment and budget, UE requires a Pretrial Assessment (PTA) and updated budget information for claims that will be tried. We generally require completion of the PTA at least 45 days before trial. Our preferred format for the PTA is also sent with the attorney appointment letter.

#### **Invoices and Billing Practices**

Unless agreed otherwise with UE in advance, counsel should submit detailed invoices for professional services and disbursements (expenses) on a monthly basis. Invoices must include the following information:

- A description of the specific task performed by an attorney or paralegal; if multiple tasks are aggregated in a single time entry, that time will be disallowed
- Time billed for a specific task in increments no greater than .1 (one-tenth) of an hour
- The hourly billing rate of the attorney or paralegal who performed the task
- A summary of hours billed and the billing rate for each timekeeper on that invoice, accompanied by a summary of fees to date
- An itemized statement of expenses, including the number of photocopies billed.

Before the member's self-insured retention (if any) has been satisfied, all invoices should be sent to the member, with a copy to the UE claims analyst. This is necessary so that UE can track where the self-insured retention stands and determine when we should begin paying defense costs on the member's behalf. Once the self-insured retention is met, UE's billing department typically contacts the member to determine how future invoices will be handled. In any claim without a self-insured retention (i.e., many GL claims), the invoices should be sent to the UE claims analyst for payment, with a copy to the member institution.

UE expects to receive the final bill (which should be marked as such) within 60 days after a claim is completely resolved.

**Permissible Expenses.** UE will cover the actual cost of the following expenses:

- Photocopying (maximum .10/page)
- Long distance telephone charges
- Approved out of town travel (including the lowest available coach class airfare and reasonably priced hotels/meals)
- Deposition transcripts
- Computer research
- Medical records
- Court filing fees
- Witness fees
- Approved outside vendor costs (including experts)

**Overhead Expenses.** UE does **not** cover, and counsel should not bill for, the following expenses that we consider overhead:

- Word processing
- Clerical or secretarial salaries or overtime
- Work that is clerical in nature, even if performed by attorneys or paralegals
- Training of firm personnel
- Library charges
- Office supplies or software
- Local travel (mileage and parking)
- Meals (unless related to approved out of town travel)
- Messenger services
- Fed Ex and other overnight delivery services (with limited exceptions for necessary court filings)
- Postage
- Fax charges
- Database management/imaging (unless we have given prior approval)
- Entertainment or personal expenses
- Preparation of bills or responding to billing inquiries or audit inquiries

**Experts and Jury Consultants.** UE must approve the use of any expert witnesses or jury consultants in advance, and counsel must provide an estimated budget for their work and consult us if any budget increases appear necessary. Fees or expenses that exceed the budget may not be covered.

**Internal conferences.** Defense counsel should not bill for more one than timekeeper attending an internal office conference on the case. Billing by additional timekeepers for the same meeting generally is disallowed. In addition, the time entry must describe the specific issue discussed. General entries such as “discussed status” do not meet this standard and will likely result in the time being disallowed.

**Billing for basic research.** UE appoints or approves defense counsel primarily on the basis of their expertise in areas of law germane to the particular claim. Counsel should not bill either UE or its members for basic research on areas where we would reasonably expect the attorney’s firm to have adequate experience and existing research – for example, the plaintiff’s burden of proof in a Title VII discrimination claim, or the notice standard in a premises liability case.

**Billing by summer associates.** As a rule, defense counsel should not bill for summer associate time, which we consider part of a firm's overhead and training costs. However, if counsel believes that a summer associate can make a valuable contribution in a particular case (e.g., a discrete research project on a novel issue of law), approval for that work should be sought from the UE claims analyst in advance. If the claims analyst approves the summer associate work, he or she may cap the time that will be covered.

### **Mediations and Settlements**

UE encourages mediation in general. Depending on the circumstances, the UE claims analyst may or may not need to attend and participate in the mediation, so defense counsel should not schedule any mediation without consulting the analyst in advance. UE generally requires that counsel complete a written pre-mediation analysis of the claim no later than 30 days prior to the mediation. This analysis should include:

- a brief summary of the facts,
- an overview of the applicable law,
- a discussion of liability that applies the governing law to the facts,
- the likelihood of prevailing on any pending dispositive motions,
- history of any negotiations between the parties,
- claimed damages,
- for GL cases, medical specials and wage loss (past, present and future),
- likely range of jury awards, and
- a recommended settlement range.

***All settlements, regardless of whether they are achieved through mediation, require UE's prior approval.*** Accordingly, any settlement demands received by counsel should be reported promptly to the UE claims analyst as well as to the UE member. Similarly, defense counsel should not initiate any settlement discussions or make any settlement offers without consulting UE in advance. Failure to do so will likely result in the loss of the member's insurance coverage for the amount of the offer. Particularly if counsel requests UE's approval of a significant settlement, we may request written justification before giving authority for the settlement.

### **Application of the Guidelines in Amended/Modified Reporting Situations**

By endorsement to their ELL policies, some of UE's large members have special reporting arrangements under which they need report matters to UE only after defense costs have reached a certain level. In those cases, once the matter is reported to UE, we typically request copies of all past bills, but apply our Guidelines on a "going forward" basis only.