



# Workers' Compensation Program Litigation Guidelines

May 2014

PARSAC is a joint powers authority that provides self-insured Workers' Compensation coverage for its Members, cities and towns throughout the State. An integral part of the Program is comprehensive, proactive litigation management.

Cases are assigned to attorneys that are determined to be the most qualified to defend the public entity considering their background, experience, and the facts of the case. The primary goal is to produce the best possible outcomes through an efficient, cost effective defense without compromising quality representation.

The purpose of the Litigation Guidelines is to establish a clear understanding of the expectations and requirements of PARSAC. Nothing contained in the Guidelines is intended to hinder Defense Counsel's ability to exercise their professional judgment or interfere with any ethical obligations in their rendering of legal services.

Defense Counsel may periodically be asked to assist PARSAC's Claims Examiner in the following areas:

- Case-specific advisory legal opinions before and during the course of litigation
- Subrogation
- Training and education
- Coordination of related employer liability
- Legal representation in other forums

## **A. PHILOSOPHY**

It is PARSAC's philosophy to resolve compensable claims equitably and as soon as is practical to preserve a positive relationship between the Employee and Member. Defense Counsel is expected to work proactively toward resolution while implementing the most reasonable and cost effective approaches available. Litigation is considered a "last resort" in this program; however, cases that are determined to be non-meritorious should be litigated to the fullest extent reasonable.

PARSAC believes all involved parties are integral to achieving the best possible outcome in litigated cases. We encourage a collaborative defense strategy and open communication between Defense Counsel, Claims Administrator (TPA), PARSAC, and the Member. In the event that a dispute or disagreement arises between any of parties regarding the handling of a case, PARSAC's General Manager should be notified immediately. The General Manager will facilitate constructive discussion. While always mindful of the members' preferences, PARSAC remains the final decision-making authority when there is potential to exceed the member's self-insured retention (SIR).

## **B. ASSIGNMENT OF CASES**

PARSAC assigns defense counsel for all members with a zero retention (first dollar coverage). Members with a self-insured retention may assign panel counsel from the list of approval panel firms (Resolution 2014-02, Exhibit A).

Assignments are made to a specific attorney with the expectation that the selected attorney will handle the litigation to conclusion. Although Defense Counsel may occasionally seek assistance from an associate within the firm, no significant work may be performed by another attorney without PARSAC's prior approval. Defense Counsel will be provided all relevant information available upon assignment of a case, which may include but is not limited to:

- Medical reports;
- Legal notices, including DWC-1;
- Legal correspondence;
- Investigation reports;
- Medical records;
- Court records;
- Wage, personnel, and grievance information; and
- Any other information deemed pertinent to the defense of the case.

The Claims Examiner shall also provide the following with the case assignment:

- Summary of the case;
- Issues requiring defense;
- Applicant's occupation;
- All payment periods to date and wage/rate basis for payment;
- Contact information for PARSAC and Member;
- Member and/or PARSAC input which may influence defense strategy; and
- Status of medical exams or other legal actions schedule or pending.

Defense Counsel should send a written acknowledgment of the case assignment within seven (7) days to the Claims Examiner, PARSAC and the Member. Any matters of immediate concern should be addressed, such as conflicts of interest, potential for early resolution, or indications of fraud.

## **C. COMMUNICATION STANDARDS**

All communication shall be directed to PARSAC's Claims Examiner, PARSAC Risk Manager, the Member, and the Member's claims examiner, if different than PARSAC's.

**D. CONFLICTS OF INTEREST**

Defense Counsel shall review all cases for potential conflicts of interest before accepting an assignment and shall immediately report to PARSAC any conflicts that may arise during the handling of any case.

**E. INSURANCE REQUIREMENTS**

Defense Counsel shall maintain coverage for errors and omissions (legal malpractice) and commercial general liability, each with a minimum of \$1,000,000 per occurrence limits, as well as workers' compensation coverage up to statutory limits. Certificates of Coverage shall be provided to PARSAC within thirty (30) days of case assignment and annually thereafter for the duration of the assignment. PARSAC reserves the right to reassign any case should a lapse of insurance coverage occur. PARSAC, its members, officers, officials, and employees shall be named as Additional Insureds for liability.

**F. REPORTING**

**I. Initial Report**

Within thirty (30) days of the assignment, Defense Counsel must provide a preliminary evaluation including the following:

- a. A brief summary of the allegations set forth by the applicant(s).
- b. The factual basis of the litigation.
- c. An evaluation of liability and exposure, including: Summary and analysis of the injuries, our exposure in the case, and impact of Medicare on potential settlement. The evaluation should include the worst case scenario as well as settlement potential, availability of alternative dispute resolution, and impact of prevailing law on the defense strategy, if any.
- d. A strategy describing the amount and type of discovery anticipated to properly evaluate the case. If you believe a case is of liability, efforts should focus on resolving the case without incurring unnecessary discovery costs. Counsel is not authorized to assign subrosa without prior approval from PARSAC.
- e. Counsel must submit a litigation budget which shall specify the means by which litigation is to be advanced, including descriptions of the activity and objectives reasonably anticipated given the current facts and analysis.

**II. Mandatory Status Reports**

Status reports are required as developments occur or if the facts of a case change or every sixty (60) days. In long periods of inactivity, a brief note or email indicating "no significant developments" is sufficient. It is preferred that reports contain new information and a brief description of the facts and action to be taken. Routine submission of repetitive, non-substantive status reports is unnecessary. Status reports should include the following:

- a. Updated budget;
- b. Ongoing strategy for defense or resolution of the case, noting any significant changes.
- c. Synopsis of any discovery completed since the last report.
- d. Description of planned discovery and timetable for completion, as well as purpose, value of information being sought, cost, and potential for adverse consequences.
- e. A concise summary of deposition testimony, including counsel's opinion on the appearance of witnesses and what effect the deponents' testimony may have on the case. Lengthy deposition summaries are not desirable or needed.
- f. Court dates, including but not limited to mandatory settlement conferences, trial setting conferences, and hearings.
- g. Current settlement demand, noting any significant changes.
- h. Assessment of the probability of success for each action identified or recommended.
- i. Status of applicant's current Medicare eligibility and potential impact on settlement, such as necessity for Medicare Set Aside, negotiation of medical liens, and Section 111 compliance.
- j. Reporting to include excess carrier when total incurred value is \$250,000 or greater.

### III. Hearing Strategy Report

At least thirty (30) days before a hearing, a Hearing Strategy Report should be submitted which shall include assessments of the following:

- a. Member's (defendant) exposure.
- b. Applicant's damages.
- c. Witness testimony including credibility and demeanor of witnesses.
- d. Legal defenses and probability of prevailing, including significant arguments of each party and expected counter arguments.
- e. Unique characteristics of the jurisdiction, board/hearing officer or judge, and opposing counsel.
- f. Potential award value assuming full liability.
- g. Settlement value, considering exposure and chances of prevailing.
- h. Status of settlement discussions.

In the event that less than 30 days notice is given to prior to a hearing, the strategy report will be prepared and submitted within 48 hours. In certain cases, PARSAC may require a conference, either in person or by teleconference, prior to the hearing to discuss the above strategy and/or any issues that must be resolved.

## **G. SETTLEMENT DISCUSSIONS**

All settlement demands made by the applicant or their attorney must be forwarded immediately to the Claims Examiner. Settlement negotiations are a team effort and require close coordination of strategy with PARSAC, Defense Counsel, Claims Examiner and Member. When a settlement conference is scheduled, Defense Counsel will confer with the Claims Examiner, PARSAC, and the member (if the settlement value is below the SIR) to determine who shall attend.

Defense Counsel is expected to identify any potential multiple forum exposures and develop strategies to fully resolve liability at the lowest feasible cost. PARSAC's preference is to resolve cases by Compromise and Release whenever possible.

Within ten (10) days following the mediation or conference, a full report on the outcome and recommendations for further handling shall be submitted to the Claims Examiner, PARSAC and the Member.

## **H. COLLATERAL SOURCES**

Defense Counsel is expected to evaluate all collateral sources which may impact, either negatively or positively, claim resolution. Potential sources include, but are not limited to:

- a. Non-industrial health and disability benefits;
- b. Eligibility for retirement benefits;
- c. Personally purchased disability insurance;
- d. State disability insurance;
- e. Unemployment insurance;
- f. Social security benefits; and/or
- g. Medicare benefits.

## **I. SETTLEMENT AUTHORITY**

Settlement Authority will be granted by PARSAC and/or the excess provider (for settlements above \$500,000) only after discussion with the Member and/or the PARSAC Board of Directors.

Defense Counsel may seek authority solely from the Member only when the total incurred value, inclusive of Medicare liens or other expense, is less than the member's SIR.

## **J. EXPERTS**

PARSAC is not adverse to retaining experts as consultants and may encourage the use of experts with widely divergent points of view (on a retainer) on complex cases. Retention of experts requires prior approval and close coordination with PARSAC. PARSAC maintains relationships with a nurse advocate and a wide range of medical professionals who can provide their services, if needed.

**K. SUBROGATION**

The following factors should be considered to determine if and how subrogation may be pursued:

- Expected recovery amount compared to estimated legal expense to pursue;
- Comparative fault by employee and employer and its anticipated affect on recovery;
- Business reasons or relationships which might affect decision to subrogate; and
- Statute of limitations issues.

Settlement of third party cases must comply with Section E - Settlement Authority (above). Other employer losses beyond direct workers' compensation costs may be recoverable from the third party, such as extended sick leave, salary continuation or property damage and should be coordinated with the other insured and/or self-insured programs.

**L. WAIVERS, EXTENSIONS AND CONTINUANCES**

Defense Counsel will obtain prior approval from PARSAC before waiving any rights such as third party recovery, causes of action against a third party, restitution, or liens.

**M. APPEALS**

PARSAC respects the wisdom and counsel of its Defense Panel, and requests that prior to filing a Petition for Reconsideration, Answer to Petition for Reconsideration, Writ of Review, or any appeal to a higher court, Defense Counsel consult with PARSAC regarding the course of action being recommended and obtain authority prior to taking further action at the WCAB.

**N. FRAUDULENT CLAIM REPORTING**

Defense Counsel will notify PARSAC if a claim appears to be fraudulent and will cooperate with any subsequent investigation necessary to verify the claim. Fraudulent claims are reported to the Bureau of Fraudulent Claims and the local District Attorney's office.

**O. BILLING**

All attorney fee bills should be submitted on at least a monthly basis, or sooner if the bill is in excess of \$10,000. All charges must be in accordance with the agreed maximum hourly rate established by Resolution 2014-02 as follows:

Partners/Principles	\$175.00
Associates	\$145.00
Paralegals	\$ 75.00

Rates charged in excess of the above fee schedule are the responsibility of the member entity and will not be paid by PARSAC or reduce the member's SIR amount. Only those fees and expenses considered to be reasonable and necessary will be considered for payment or reduction of the Member's SIR.

A final invoice should be submitted within thirty (30) days after the case has concluded.

#### I. Billing Format

Bills should itemize the amount of time expended in increments not larger than 1/10<sup>th</sup> of one hour with each activity separately indicated. "Blocked entries", i.e. a line item with a single time being charged for multiple activities, are not acceptable.

Each bill submitted by defense counsel should include:

- a. The name of the Member (defendant) and Applicant;
- b. The date the bill was prepared;
- c. Defense counsel's tax identification number;
- d. A cumulative total of the billings for the case to date;
- e. A description of legal services provided;
- f. Name of attorney or paralegal providing legal services;
- g. Rate billed per hour for legal services; and
- h. Itemized listing of other billable services (see below).

#### II. Litigation Teams

The assigned attorney is required to remain the sole attorney handling the matter to conclusion. It is also understood Defense Counsel may seek assistance from colleagues within the firm. Collaboration with colleagues within the firm and the astute use of resources is encouraged. If a "litigation team" approach is a necessary strategy for a specific case, each member of the team must be previously identified and approved by PARSAC before their hours are billable.

#### III. Other Billable Services

- a. Photocopying: Maximum \$0.10 per page copied. Bill should indicate total number of pages, date copying occurred, and the rate per page.
- b. Messenger/Expedited Mail: Only acceptable under special circumstances.
- c. Faxing: Actual cost for sent faxes only. A copy of the corresponding telephone bill must be provided.
- d. Mileage: Reimbursed at the current IRS per mile rate. Bill should indicate trip purpose, date of travel, and number of miles.
- e. Travel: Air, hotel, and meal expenses must be approved in advance and receipts must be provided.

- f. External Costs: Actual cost of services without mark up. Copies of original vendor invoice(s) must be provided. Invoices in excess of \$1,000 may be submitted to PARSAC for payment directly to vendor.

#### IV. Ineligible Fees

Activities and supplies considered to be a normal cost of doing business will not be paid by PARSAC. This includes but is not limited to:

- Clerical services, regardless of who performs the task(s). Some examples include: typing, filing, subpoena preparation, processing bills, scheduling appointments, mail processing, or telephone calls made to confirm hours, receipt of materials, etc.
- Overhead costs including office supplies and postage.
- Standardized forms or pleadings (actual time spent editing documents for a specific case may be billed).
- Computer Assisted Research or Resource Libraries (actual time spent accessing such online databases may be billed).
- Duplicative tasks or analysis, interoffice conferences, attendance of more than one counsel at any appearance, and general supervisory reviews.
- Legal research, experts, discovery, subpoena, travel, or other external costs not previously approved by PARSAC or its Claims Examiner.
- Non-essential expenses such as in-office meal service, catering, alcoholic beverages, car service, entertainment, personal care, etc.

Although PARSAC will reduce payments for clear violations of these Guidelines, our primary goal is to identify issues and assist firms in correcting billing problems.

Questions regarding these policies should be directed to:

Public Agency Risk Sharing Authority of California  
(916) 927-7727

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