

The Employment Law Counselor Hosted by Jeff Stewart Episode 7

PLUS Staff: [00:00:00] Welcome to this PLUS podcast, the Employment Law Counselor Hosted by Jeff Stewart. Before we get started, we'd like to remind everyone that the information and opinions expressed by our speakers today are their own, and do not necessarily represent the views of their employers, or of PLUS. The contents of these materials may not be relied upon as legal advice.

Jeff Stewart: Hello, everyone, and welcome to the Employment Law Counselor podcast. I'm your host, Jeff Stewart, and today we'll be looking at the relationship between insurers and panel counsel. This podcast is a collaboration between White and Williams LLP and Professional Liability Underwriting Society, commonly referred to as PLUS.

Usually, I'm joined by one of my colleagues at White Williams, but today I thought it made more sense to reach out to one of my friends within the insurance industry to get his perspective on our topic. So today, I'm joined by Mitch Terk, the Vice President of Claims for the U. S. for Nexus Specialty. How are you doing today, Mitch?

Mitch Terk: Hey, Jeff, thanks for having me.

Jeff Stewart: Absolutely. Can you give our listeners a little background on yourself [00:01:00] and, uh, and Nexus?

Mitch Terk: Yeah, absolutely. So, I've been with Nexus for about three years now, run the claims operation in the U. S. Prior, I was with Everest, was with Arch before that, and I started off my insurance foray with Zurich.

I was in private practice for a couple of years before that. Most of my time spent with, you know, handling management liability, employment practices, that sort of thing.

Jeff Stewart: And what does the vice president of claims do?

Mitch Terk: So, I oversee all of our claims operations. So, whether that's our management liability side, which most of our listeners are probably more familiar with, also oversee trade credit, political risk.

We do some product recall. We also handle cyber most recently. So, each of our claims teams report up to me and, and kind of oversee in that regard, also claims operations, which includes the content of our podcast today, talking about the panel relationships.

Jeff Stewart: Okay, well, great. Let's jump right into our discussion.

So typically, there's quite a process to becoming a panel counsel, or to approving [00:02:00] a counsel to be part of the panel. Would you agree that it's quite a process?

Mitch Terk: Yeah, it is. You know, it depends on the company. Everyone has their own secret formula, but there's definitely a bit of a process to put everything together to ensure that, you know, we're offering our insureds the best selection that we can.

And so, you know, putting that all together definitely is, is both a time intensive and, and sometimes laborious on, on both sides process.

Jeff Stewart: And can you give our listeners a little bit of an idea, how many panel counsel would you have?

Mitch Terk: You know, it depends on, on what it is that you're doing well in terms of types of claims, what it is that your outlook on what your need will be is.

So, you know, a company like Nexus where we're an upstart, you know, we only came over to the U S in the last three years prior to that Nexus was a pure Lloyd's entity, and so we don't have the, or we didn't have the need as we were originally putting together our panel council for having [00:03:00] 35 different firms, uh, on that panel as we built it out.

It's, we've added, we've added both geographically, we've added in terms of content that firms handle. But then, of course, when there's different lines of business, you need different panels to be able to handle that.

Jeff Stewart: And do you seek out attorneys? Do they seek you out? How's that process work?

Mitch Terk: It's a little bit of both.

You know, my panel and my philosophy is built on relationships and built on, you know, making sure that there's attorneys that I know will be responsive, that their firms have the requisite knowledge, that they have the requisite folks that, that can help out with who it is that we're adding. There's also plenty of contacts made by attorneys that either I don't know personally, sometimes it's, it's firms that we don't know. You know, it depends on, on what it is that we're doing and who it is that we're, we're building out for.

And, you know, quite honestly, it's a lot of it is just based on geographics, right? And you know, I have been in the greater New York city [00:04:00] area for all of my career. I have a lot more contacts in this area, but if I need somebody in, you know, North Dakota, South Dakota, I have less contacts there.

And so there it's a little bit more finding the folks that have the requisite knowledge, but also sometimes that I've reached out that, you know, I've been, been able to build a relationship with.

Jeff Stewart: So, it's really about the relationships and about getting to know the attorneys and their abilities and their firm's abilities.

Mitch Terk: Absolutely. I mean, it's, it's, you know, at the end of the day, right. My, my customers are, are insured and we need to make sure that they're getting the attorneys that are going to best. handle what their, their cases are and, and be able to assist them. But I need to know that there's somebody that I can call if there's any sort of issue, or if there's any sort of need who is going to be able to assist and who can, you know, get me the right folks within their firms, wherever the case may be, that can best provide that service for our insureds.

And so, you know, my goal and the way that I look at it for, for our panel [00:05:00] firms is that there's going to be one person that I get in contact with wherever the case may be, and that's who I want to be able to give a call to if there's any sort of issue. And so that relationship is very important.

Jeff Stewart: And how are rates set? Because panel counsel, at least in the attorney world, in the legal world, you know, the thought is, well, there's definitely a reduced rate for being on an insurance panel. But from your perspective, how are rates set?

Mitch Terk: Yeah, so it's interesting, right? It depends on, on the company. And I certainly only want to speak for where I am and what I know, but it's sort of twofold.

On the one hand, we hope to get competitive rates from the firms that we're working with that are in line with what the rest of the industry is doing. And quite honestly, with the, the amount of work that we're hoping to be able to send to each of the firms. With that said, you know, from a personal perspective, I want to make sure that the firms that I'm working with are getting paid A, what they deserve for the, [00:06:00] the, the background that they have in the industry, but B, that they want to do work for myself and my insureds and that they're not sort of harboring any sort of, of bad feelings that they're only getting paid, you know, half of what they could, if they were working with a different insured, working with a different insurance company, working on the open market. So, it's sort of that give and take and finding that middle spot is important.

Jeff Stewart: All right. Well today, you know, this podcast is focused on employment practices, liability insurance, but would you say that the process that you've been describing is similar for all of the lines that you carry?

Mitch Terk: It is, I mean, it's in terms of the panel process building out, you know, that's going to be one in the same, regardless of the line of business, just a matter of you know, making those relationships in each different line that the firms that are involved are different.

The major players might be a little bit different. Sometimes, you know, there's some crossover, but it all just depends on what the line of business is.

Jeff Stewart: Now, [00:07:00] sometimes an insured will seek to have their personal attorneys approved to handle work even though they're not part of your panel. How do you handle such a request?

Mitch Terk: Yeah, you know, it depends, and I'll give the lawyerly answer of it depends.

Jeff Stewart: That's my answer. You're supposed to give different answers.

Mitch Terk: So, you can take the lawyer out of private practice, but you can't take it out of his personality. Right. You know, it depends on where the case is, what the content of the case is, who the lawyer is. You know, all of our policies at Nexus are duty to defend and we try to stress, you know, "hey, the insurance company has the right and duty to defend, including to assign counsel."

And so, we try not to go off our panel, unless there's an absolute requirement. Certain states provide that requirement. In California, if there's any sort of fraud

allegation, they're going to have the right to Cumis counsel, and we're going to have to go off of a panel if they request it. But you know, where it's just, "hey, I have comfort with this lawyer," we'll try to [00:08:00] A, let them know that it's our decision and do so in a delicate way, but let them know, B, let them know that, "hey, you're getting the benefit of the rates that we've pre-negotiated, which are probably better than if you were walking in off the street, C, that we have lawyers that are experts in this field. You know, when we're working with a panel firm, they've been vetted, right?"

They've gone through that process that, that we talked about before. And so, it's, they're not getting somebody that might dabble in the particular area. They're getting somebody that's a real expert in what it is that they're handling.

So, it's important for us to make sure that we're using the counsel that we selected.

Jeff Stewart: Now, do some insureds actually write their attorneys into a policy?

Mitch Terk: Yeah. You know that there's the ability to endorse on choice of counsel. Again, it's more, that's more of an underwriting decision and certainly my underwriters will often write that, uh, or write to me and ask about that, but you know, it's not something that we see frequently, but it is something that, that they have the ability to do. [00:09:00]

Jeff Stewart: And in fact, in full disclosure, that's how Mitch and I first met each other.

Mitch Terk: Exactly. And that's, that's where it goes to the relationship, right? And so, we were able to work together on a number of cases where White and Williams was written into the policy. But you know, when you start to work together and build out the relationship and realize, hey, this is a firm and an attorney that can really help us as we're putting it together.

That's exactly why we're chatting now.

Jeff Stewart: Absolutely. So, let's shift gears a little bit to how the panel counsel and the insurer work together when handling a claim. So, when a claim is made and an employer notifies their insurance company, from your perspective, what happens next?

Mitch Terk: Absolutely. So, the very first thing is it gets assigned, right?

And so again, every company is slightly different. Our operations are out of LeBlanc, Malaysia. And so there's, there's folks in LeBlanc that will send it over to me and then I'll assign it to whoever the particular claims professional is that that's going to be handling it. They'll start their [00:10:00] review take a look through determine, you know, 'hey, this is within the policy ambit, this looks like it would fall within coverage based on, you know, their view of the policy their experience, etc.'

And then, that's when they'll start to, to think about, "okay, we have to assign counsel who is the right fit for that particular case, again, given expertise, given geographics, given experience that the claims professional has." And that's when they'll look to our panel folks for assistance at that point.

Jeff Stewart: Now, when you say you're assigning it to a claims professional, what size is your team divided geographically? Like this person handles the Midwest. This person handles the Northeast. This person handles Southeast, or is it literally on a case by case, they could be handling things anywhere?

Mitch Terk: Yeah. So, they can be handling things anywhere.

And, and what I've found to be more. from [00:11:00] a relationship perspective, from a getting to know the insured perspective and just a continuity perspective is to keep our claims professionals assigned by account. So, if there's five claims for ABC company, we tend to have one claims professional that's handling all of those claims.

We don't, because of the size of our particular company, we don't break down into a D&O claims professional, versus an EPL claims professional, versus a fiduciary claims professional. So, there are, our claims professionals are handling, you know, various coverage sections within the policy, but it's, it tends to be more assigned based on the particular account so that the insureds get to know one person.

They know who to call if there's any issues that the, the claims professional knows who to turn to at the insured if there's any issues, that sort of thing.

Jeff Stewart: So again, we're developing a relationship between the insured and yourselves.

Mitch Terk: That's exactly right. I mean, the types of insureds that we work with, which tend to be on the smaller end of the spectrum from in terms of company [00:12:00] size and just the service model of our particular business.

It helps to be able to provide that service to be able to make sure that our insureds know that there's a person that they're turning to that can assist at Nexus and who's going to be there to help.

Jeff Stewart: Does that claims professional also begin to evaluate the claim? What, you know what this may or may not be worth in the grand scheme of things?

Mitch Terk: I mean, it all begins day one, right? Like all the information that they're taking in is part of the ultimate puzzle to decide what that claim is worth from a financial perspective. We're not necessarily reserving, putting up dollars day one, but you're starting to gather the data and put together that puzzle to determine ultimately, "hey, I think that this claim is worth X amount, and here's what we're going to do to try to resolve it."

Jeff Stewart: Okay. And, when the assignment is made, then there's things panel counsel must also do and from my perspective when I get [00:13:00] an email or a phone call saying, "hey, there's a new claim." First thing I'm doing is a conflict check, obviously to make sure that there's no conflict there. And then the next thing I'm doing is I'm asking for who's the contact person at the insured so that I can begin to reach out and again, start to develop a relationship there because, you know, we're on the same team. We need to be working together. I need to find out what we have document-wise, what we have, what kind of information we have and what this claim is all about.

Mitch Terk: Absolutely. Absolutely. And, and again, you know, hit the nail on the head, it's, it's, it's a relationship industry, right?

And, and as much as it's transactional at times, and as much as it's about getting to a result on case one so that you can move on to case two. It's those relationships that sustain what it is that we're doing that keep insureds, you know, signing back up with the insurance company or keeping the, the clients wanting to work with [00:14:00] you again and again for the future issues that they hopefully don't, but probably will, have.

Jeff Stewart: Absolutely. Now, one of the things I'm also doing when I get these is, I'm doing an initial evaluation. And you said that your claims professional also does an initial evaluation. What happens from your perspective when the two evaluations are very different? Because that does happen.

Mitch Terk: It does, you know, we're each using our respective experience to figure out what we think something might be worth communication is the name of the game, right?

At the end of the day, although there might be a different view on what the claim is worth, as long as we're keeping open lines of communication with regard to why, there's times when attorneys that I've worked with that have said, look, Okay. This is a six-figure claim, and I'm convinced that it's not, or vice versa.

As long as we're on the same page in explaining to each other why we think what we think, and how we're going to ultimately try to get to a place of [00:15:00] resolution, you can work together to get there. The opposite of that, when you're kind of holding on to your own view of things, and not communicating, and not trying to understand why, as you said before, the folks on your own team think the way that they do.

That's when you can run into some issues.

Jeff Stewart: Absolutely. No one wants to be blindsided with an opinion on a case or something like that. And I know you and I have had discussions on cases and, you know, things that frankly, we're messy at times and "hey, let's how are we going to attack it and let because we are on the same side."

Mitch Terk: That's exactly right, and I think you hit the nail on the head when you said no one wants to be blindsided, right? The name of the game is no surprises. I mean, that's the ultimate from the insurance perspective. The ultimate point is we don't make up the facts, right? We are here to help assist an insured who's in a dirty situation, clean it up.

Sometimes that's going to be an expensive cleanup. Sometimes that'll be a less expensive cleanup. But if we can [00:16:00] get out in front of it, that's, you know, what our job is to do. If we're surprised, you know, on the eve of trial or on the eve of some other inflection point with bad facts or a different valuation, that's when there starts to be problems.

Jeff Stewart: Absolutely. Now, you mentioned a couple of times the importance of communication and I would absolutely echo that. I think communication is key between an insurer and panel counsel, but how often do you want to hear from your panel counsel, or at what inflection points, particularly because you always run the, or you try to balance between communicating regularly, and being an annoyance.

Mitch Terk: Sure. And, you know, for me, there's never too much, right? The, I could always move an email over to a folder and not necessarily respond with some substantive thought [00:17:00] process on a particular email. You know, the worst thing you can do is be non-communicative and non-responsive. And, and that usually is not an issue with our panel counsel.

I mean, that's one of the things that we're vetting out. And one of the reasons why, as I mentioned before, I like to have that one point of contact. So, if, God forbid, there was somebody that wasn't answering and I reached out to you, Jeff and said, "hey, you know, we're working on this case together. I haven't heard from attorney Smith in the last two years because they just haven't answered any emails."

I know that you would be able to get on the horn with them and get them responding right away. With that said, certainly we try not to lose sight of the forest for the trees, right? Where we don't need to be involved in the day to day handling of any given claim in terms of, you know, "hey, we had a phone call with the opposing council to set a deposition date and here were the options that they gave and, you know, do you want to review the deposition date options when we're not going to be participating in the deposition?" Things like that. [00:18:00] To answer your question with regard to inflection points, I mean, there's any time that a major event happens in a case, right?

Any sort of dispositive motion, any sort of mediation, any sort of arbitration hearing that might be had, any sort of trial date. Those are all very important, but there's smaller dates too that are important, right? If there's a deposition that changed the value of a case, that's important to know. Those are the things that we want to know about.

So, anything that's going to, to make a dent in how it is that we see the value of the case that's important.

Jeff Stewart: Absolutely. And, and in the EPLI world, many times you file a response to the EEOC and then it sits in the EEOC, and it could be sitting, sitting there for a year. I've had some sit there for two and three years and my practice, and you know, I'd like to get your opinion on this is even when things are filed, I try and do an every 90 day follow up.

And sometimes it's an email. Nothing has happened in the [00:19:00] last 90 days. "Just wanted you to know it's still sitting there. We're waiting for a response." Is that kind of communication useful in your eyes?

Mitch Terk: Extremely useful. My folks are busy. We have a lot of files that we're handling and we're sometimes jumping from one to another.

That 60, 90, sometimes 120 day check in is even to say, Hey, there's nothing going on is hugely invaluable because they can put that in their file. They can show that, you know, "hey, I was doing my job in terms of communicating with counsel and getting an update." And like you said, sometimes these things can drag out a while.

You know, the EEOC is busy. The state and local equivalents are sometimes even more busy and less staffed. And so, to know that nothing is going on, as opposed to just hoping that nothing is going on is important.

Jeff Stewart: I want to shift gears a little bit now, you know, we've talked about the communication on the substantive aspect, but one of the other areas of where I think communication is important is with [00:20:00] regard to the budget of a case, because as you know, normally, somewhat early on, panel counsel is asked to provide a budget for a case and what we anticipate and that budget frankly can change 10 20 times over the course of a case.

So, I guess, first question I have for you is how important is that initial budget that you get?

Mitch Terk: You know, it's important in terms of sort of setting goalposts, right? And having an idea of A, is from our perspective, "is counsel having a realistic view of where this case might be headed?" You know, if we get a budget that just doesn't fit in how we see a particular case going, we can start that conversation of "hey, we might not be on the same page right now, but let's get there and help me understand why it is that you think that this case would either cost this much, this little, et cetera, to get to a point."

I look at budgets and [00:21:00] stages. I think it's important to do that. And so, you know, the most important piece is where are we now and what is it going to cost to get me to the next stage, right? And so, if we're in the EEOC phase of a particular matter. I'm less concerned with what the, the trial cost is going to be in four years than where it is when we're in the investigatory phase.

Jeff Stewart: And, to that end, Mitch, and sorry if I'm interrupting you. I know when I do this, and I work with the claims professional who's assigned to my matter, I will only provide a, this is the administrative phase budget. Because who knows where litigation is going to be, let alone be able to say whether we're going to do a motion to dismiss or summary judgment, right?

Because we're so early on, it's like, let's get through the administrative process. If there is litigation, I will provide a litigation budget. I don't know if I'm unusual in that regard, or if that's something that's rather accepted.

Mitch Terk: No, and I believe you and I have chatted about this, especially [00:22:00] in the administrative phase.

Look, we can justify via a half a million-dollar budget when we're in the administrative phase, why we could resolve something for way too much money at any point, right? But it's not, we're not there yet. We're not actually in litigation. So, let's look at it as a pre litigation matter. And so, we definitely do that for our administrative cases.

And again, even when we're in litigation, if there's the opportunity to resolve something for an amount that makes sense for both sides of the house to do. The motion summary judgment phase of the budget is, is less important, right? We're not there yet. We aren't down that road. And so, you know, as we mentioned, it's more important what the particular different stages of the budget are than looking at it as some sort of fulsome number that we're getting to at some point.

Jeff Stewart: And how often would a typical budget get revised? And let's say starting from the lawsuit being filed forward, [00:23:00] how often do you see them being revised?

Mitch Terk: You know, they are revised. It depends on, on the case, right? And one of the, it's sort of a double-edged sword on the one hand, new information is going to change how it is that we're viewing the, the cost of litigating the case, how it is that we're viewing the cost of resolving the case. From my perspective, we also don't want to see the budget changed 15 times because to me that gives a little bit of a red flag of, "okay, is our counsel properly evaluating this, you know, on a fulsome level, or are they just making changes for the slightest of different information?"

Because a lot of cases, it's, you're never going to pinpoint the exact cost of a case as we're going through, but you know, a particularly bad deposition or a particularly good motion outcome might change in terms of what your strategy is, but it probably shouldn't change in terms of what your, your view of how much it costs to litigate an employment case in a particular locale is, something like that. [00:24:00]

So, you know, you might have a couple of changes on the way through. We're hopeful that it's not a significant amount that are, you know, seesawing what the value of a case might be.

Jeff Stewart: Normally, from my perspective, where I have changed budgets, most is, you know what, we're going to need to take an additional three depositions that were not anticipated because witnesses A, B, and C were identified during the plaintiff's deposition.

Mitch Turk: Without a doubt. I mean, it's where there's significant material changes, right? If, if half of a case gets thrown out by a court and all of a sudden, you're expecting to take less discovery, or if you were very confident on your summary judgment motion and everything survived in the case as opposed to only one count going forward.

You know, that might make a difference in terms of what it is that you think you have to do going forward.

Jeff Stewart: Absolutely. Well, Mitch, I always like to, in these podcasts, give our listeners one or two key takeaways. So, I guess I'm just going to tee you [00:25:00] up for this. What do you think makes a successful relationship between an insurance company and their panel counsel?

Mitch Turk: Absolutely. So, trust, right? Knowing that there's a firm, an attorney that we can turn to help our insureds resolve what their issues might be at amounts that are appropriate for a given case. Communication, as we mentioned before, making sure that we're hearing from our council that they're providing the information that we need to properly assess what our cases are worth to properly allow us to resolve those sort of cases. And then, the last point expertise, right? I mean, nobody wants to have been assigned a counsel by an insurance company that seems like they don't know what it is that they're doing and aren't able to help them resolve a case.

Like I said before, you know, our job sometimes is, is a bit of a country called maitre d. It's kind of holding the hand of our insured and walking them through and and making sure that they can get their problems solved. [00:26:00] And so each of those three pillars helps us to be able to do that.

Jeff Stewart: Well, Mitch, I'm going to echo that and, and add in that regular communication that we talked about and building that relationship.

You and I have known each other for several years now and have, I'd like to think built that relationship and, frankly, led to you being a guest here. And I thank you very much for your time and sharing your expertise with all of our listeners.

Mitch Terk: Absolutely. I appreciate you having me.

Jeff Stewart: And to our listeners, I want to thank you for joining us here today on the Employment Law Counselor Podcast, where we try to make sense of the world of labor and employment law from many different perspectives.

On behalf of myself and Mitch Terk, we thank you for listening. If you enjoyed this episode, please leave us a five-star review, tell your friends, and subscribe to the podcast. For more information on this and many other topics, please visit the White and Williams website at www.whiteandwilliams.com, where you can visit [00:27:00] our blog and learn more about the firm until next time, stay safe and stay compliant.

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