



# Defense Counsel Guidelines

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*At United Educators (UE), the Resolutions department helps educate our members on how to prevent claims and resolves claims that do occur. In our work, we strive to demonstrate an understanding of educational institutions' needs, strengthen relationships, and preserve the economic well-being of our member-owned company.*

*Guided by the understanding that diverse perspectives help us deliver superior service to members, we make intentional decisions as to which defense counsel will best represent our members and UE.*

# Defense Counsel: Our Philosophy

UE believes successful insurance defense requires a three-way approach; we work closely with member institutions (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. To evaluate the merits of each matter for which we provide coverage, UE must receive sufficient information. To that end, for each matter we require that defense counsel:

- Complete an early assessment and budget by the given deadline
- Opine quarterly about whether mediation or another form of alternative dispute resolution (ADR) may be appropriate
- Respond promptly to all UE requests (whether by email, phone, or letter) for information about the claim
- Routinely provide copies of all pleadings and key documents
- Promptly report any significant events that may cause a change in exposure for the member or UE
- Consult with UE and the member about strategy decisions and before preparing or filing dispositive motions
- Provide monthly appropriately detailed invoices for professional services to UE and the member
- Immediately notify UE and members of settlement demands
- Obtain UE approval before engaging in settlement discussions (including offers, counteroffers, or acceptance)

These guidelines govern all claims for which UE provides insurance coverage. Failure to comply with the guidelines can have serious consequences. Inappropriate or unauthorized legal fees and costs will 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 will result in our revoking 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 the primary attorney believes deviating from the guidelines is necessary, the attorney must bring the situation to UE's attention before incurring expenses that are inconsistent with these guidelines. Counsel is responsible for requesting exceptions in writing and obtaining the Resolutions Analyst's written approval *in advance*. Otherwise, unauthorized costs will be disallowed.

## Assignment and Staffing of Cases

UE typically appoints a particular attorney, not the attorney's firm, to represent a member as defense counsel. We consider the attorney we appoint (or approve) as the attorney with ultimate responsibility for all legal work in the matter. Resolutions Analysts will directly contact the primary attorney for appointment.

- After conflicts checks are completed, the primary attorney, or that person's authorized designee, **must accept the appointment in CounselLink**. (The Resolutions Financials team can help law firms not registered with CounselLink prior to the attorney's appointment.)
- By accepting the appointment, the primary attorney or authorized designee **agrees to adhere to these defense counsel guidelines and affirms to having the authority to accept the appointment** and agree to the guidelines.
- After being assigned a new claim, the primary attorney or designee will **use CounselLink to submit for UE's review and approval a "Modify Change Request" of current individual rates** for each timekeeper expected to perform work on the claim.
- **Unless UE approves a different arrangement in advance, a maximum of two attorneys – generally one partner and one associate, assisted by one paralegal – should staff each claim.**

- **These billing rates are to remain constant for the life of the claim unless UE determines extraordinary circumstances have developed that justify an increase and the assigned analyst provides prior approval for a rate.** Generally, we expect the primary attorney to personally handle most of the case's significant work and appearances.

If staffing changes or substitutions are necessary during the defense of a claim, the primary attorney must consult UE immediately. Without prior approval, defense counsel shouldn't bill UE or its member for additional staff and shouldn't bill for any transition time that a new attorney or paralegal spends becoming familiar with the matter.

Defense counsel shouldn't bill more than one attorney to attend or participate in meetings, telephone conferences, witness interviews, depositions, court hearings/arguments, or settlement negotiations (including mediations). We expect the primary attorney to use "billing judgment" and make appropriate adjustments to invoices before submitting them for payment. Submitted charges exceeding the approved CounselLink "Fee Offer" rate for a timekeeper will be reduced to the approved rate.

## Communication

Consistent with our belief that a team approach is essential and to avoid surprises for UE and our members, we place great importance on communication

among our Resolutions Analysts, defense counsel, and our members. In addition to requiring counsel to be responsive 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 scheduling conferences, settlement conferences, and trial dates.

As a rule, UE will participate in ADR or settlement conferences where UE is expected to contribute to the settlement. When coordinating dates and selecting mediators/arbitrators, defense counsel must involve UE in all discussions.

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

- All substantive agency/court pleadings, briefs, and responses
- Copies of legal research or factual investigative reports

- Summaries of written discovery responses, including records, that address how the information may affect previous assessments of liability and damages
- Deposition transcripts and/or summaries with analysis of the impact of the testimony, when UE's Resolutions Analyst requests it
- Expert reports and/or summaries with analysis of the impact of the expert's opinion, when UE's Resolutions Analyst requests it
- All settlement demands whether written or oral
- All releases, settlement agreements, dismissals, or final judgments

## **Communication With UE Members**

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

# Assessments and Budgets

The UE Resolutions Analyst generally will request an early assessment and litigation budget. (For claims that are not yet in litigation, we typically request only a brief assessment and no budget.) UE will specify a due date; if materials aren't received by that date, and no extension has been arranged with the analyst, UE may disallow fees and costs incurred between the due date and the date the items are received. This means UE wouldn't pay those charges or the charges would not be credited against the member's self-insured retention (SIR).

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

## Assessments

Each 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

For general liability claims, the assessment should consider and address these additional items:

- Causation issues
- Joint and several liability
- Negligence
- Medical specials (past, present, and future)
- The possible range of non-economic damages

## Pretrial Assessments

UE requires a pretrial assessment for claims that

will be tried. We generally require completion of the assessment at least 45 days before trial. UE will provide our preferred format for the assessment.

## 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 submitted within CounselLink will be allocated by the stages of litigation (discovery, pretrial pleadings and motions, trial preparation, and trial) and show approximate hours of work anticipated in each stage by the assigned partner, associate, and paralegal.

We will review and approve a budget for the litigation. We understand 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 or timely submitting a supplemental budget, subsequent invoices will be rejected within CounselLink. In addition, any fees and costs incurred that exceed the original budget may be disallowed. UE won't pay incentive bonuses or other flat fee "rewards" unless we had provided written approval for the specific amount.

For more information, see the Initial Assessment Format in [Appendix A](#).

# Billing Practices

Unless agreed otherwise with UE in advance, counsel should use CounselLink to submit monthly detailed invoices for professional services and disbursements (expenses). Invoices must include:

- A description of the specific task an attorney or paralegal performed (if multiple tasks are aggregated in a single time entry, that time will be disallowed)
- All legal services, itemized by Uniform Task-Based Management System (UTBMS) codes
- A unique invoice number and invoice date
- Time billed for a specific task in increments no greater than one-tenth of an hour
- Each timekeeper's name or ID, hourly timekeeper rate, and the timekeeper's title or level
- 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

Counsel also should send the member all copies of invoices uploaded into CounselLink. This is necessary so the member can pay invoices within its SIR, if applicable. Once the SIR is met, the Resolutions Financials team will collaborate with the member to determine how to handle future invoice payments.

***UE expects to receive the final bill (which should be marked as such) within 60 days after a claim is formally resolved.*** Invoices received more than 90 days after a claim is resolved will be rejected and won't be paid absent extenuating circumstances.

## Permissible Charges

UE will cover the actual cost of the following expenses:

- Photocopying (maximum 10 cents per page including color copies)
- Charges for cellular, conference services, local or long-distance calls
- Deposition transcripts
- Medical records acquisition fees
- Court filing fees
- Expert witness fees
- Witness expenses
- Approved outside vendor costs

### ***Travel***

UE will pay for certain necessary travel expenses.

- Approved out-of-town travel (including the lowest available coach class airfare and reasonably priced hotels/meals)
- Reimbursement for a rental car up to mid-size class (if necessary for out-of-town travel)

- Mileage will be reimbursed at the current IRS rate for use of a personal vehicle for approved out-of-town travel

## Prohibited Charges

### ***Overhead***

UE doesn't cover, and counsel shouldn't bill for, the following expenses that we consider overhead:

- Computerized legal research services, including but not limited to Westlaw, LexisNexis, or PACER
- Postage
- Shipping and other overnight delivery services (with limited exceptions for necessary court filings)
- Messenger/courier services
- Overtime expenses including overtime hours, meals, and transportation
- Training of firm personnel, attendance at seminars, continuing legal education or conferences, or professional association fees

- Library charges, subscriptions, books, periodicals, or publications
- Rent/utilities, space usage, or supplies
- Database management/imaging (unless we have given prior approval)
- E-discovery fees in excess of \$350 per hour for collection; \$100 per gigabyte (GB) for processing; \$75 per hour for predictive coding; \$40 per hour for production; and \$20 per GB each month for hosting
- Entertainment or personal expenses, group outings or hospitality, or client entertainment
- Interest on unpaid invoices or in-house accounting fees
- Technology costs including internet service, hardware, software, licenses, database administration/maintenance, storage, imaging, and support
- Scheduling appointments, events, depositions, conferences, deliveries, or travel
- Calendaring/docketing
- Time spent photocopying
- Word processing/typing
- Data entry/processing
- Document scanning or printing
- Dictating or transcribing
- File maintenance including opening, updating, closing, and storing physical or electronic files
- Labeling, collating, Bates numbering, indexing, coding, or binding documents
- Preparation of timesheets or invoices, or responding to billing inquiries or audit inquiries
- Preparation of budgets

### **Travel**

UE won't pay for the time spent traveling unless the time is being used for other substantive legal work. In that case, it should be billed as such.

- Travel time
- Local travel (within 50 miles of office) including mileage, parking, car rental/car, and tolls
- Meals (unless related to approved out-of-town travel, trials, meetings, or depositions)
- Personal travel
- Limousine service, though taxi or ride share services (Lyft, Uber, etc.) is allowed

### **Clerical Services**

UE doesn't cover, and counsel shouldn't bill for, work that is clerical or secretarial in nature – regardless of personnel performing the tasks. We consider charges for these tasks to constitute administrative overhead costs to be borne by defense counsel.

- Conflicts of interest review
- Work that is clerical or secretarial in nature, regardless of personnel performing the task

### **Excessive Billing**

UE won't pay for more than 10 hours of time spent by any one timekeeper on any one matter in a day, unless approved in advance. Exceptions include preparing motions, ADR attendance, or court appearances. In addition, UE won't pay for work performed that exceeds originally agreed-upon parameters of the requested defense representation, such as revising internal member policies or conducting in-service trainings.

### **Vague and Untimely Charges**

“Block-billed” descriptions (multiple activities grouped under a single time charge) are prohibited. Similarly, incomplete or vague charge descriptions — such as disbursements billed as “miscellaneous” — are unacceptable. Invoices with charges dated in the future will be rejected. Charges for time expended or costs incurred more than 90 days prior to the billing cycle are considered untimely in most circumstances and may not be paid. Invoices that are duplicative of prior bills will be rejected. Invoices will be accepted for up to 90 days after UE has advised that a claim has been closed.

## Experts and Jury Consultants

UE must approve, in advance, the use of expert witnesses or jury consultants. To approve an expert, the primary attorney or the legal team must promptly provide the Resolutions Analyst a fee schedule, curriculum vitae, and W-9. If the expert/consultant requires a retainer fee, the retainer agreement must be submitted with the aforementioned approval documents. Counsel also must provide the claims handler with an estimated budget for the work and consult us if any budget increases appear necessary. Don't submit this budget via CounselLink.

## Multiple Timekeeper Billing

Defense counsel shouldn't bill for more than one timekeeper's participation in internal or external meetings or on conference calls. This includes attendance at:

- Witness interviews or prep
- Depositions
- Court hearings
- Settlement conferences
- Mediations

The claims handler must approve exceptions to this rule in advance of the meeting. In addition, the time entry must describe the specific issue discussed. General entries such as "discussed status" don't meet this standard and likely will result in the time being disallowed.

## Billing for Basic Research

UE appoints or approves defense counsel primarily based on the attorney's expertise in areas of law germane to the particular claim. Counsel shouldn't bill 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, local rules, the plaintiff's burden of proof in a Title VII discrimination claim, or the notice standard in a premises liability case. Unless the total research will be completed within less than four hours for each subject matter, generally the attorney would discuss all research with the Resolutions Analyst in advance.

## Billing by Summer Associates/Law Clerks

As a rule, defense counsel shouldn't bill for summer associate or law clerk time, which we consider part of a firm's overhead and training costs. However, if counsel believes a summer associate or law clerk can make a valuable contribution in a particular case (such as a discrete research project on a novel issue of law), the claims handler should seek approval in advance for that work. If the matter contact approves the summer associate or law clerk work, the contact may cap the time that will be covered.

## Invoice Appeals

Defense counsel may appeal disallowance of charges or rejection of invoices. Defense counsel should discuss the charge(s) in question with the matter contact listed in CounselLink. If a charge is subsequently allowed, defense counsel should submit a new invoice containing just the charge in question; use the original invoice number followed by an "A" to denote the appeal.



# Mediations and Settlements

In general, UE encourages mediation. Defense counsel should consult with the UE matter contact in advance of scheduling any mediation. No later than 30 days prior to the mediation, UE requires counsel to complete a written pre-mediation analysis of the claim. This analysis should include:

- A brief summary of facts
- An overview of applicable law
- A discussion of liability that applies the governing law to the facts
- The likelihood of prevailing on any dispositive motions or at trial
- History of any negotiations between the parties
- Claimed damages
- Medical specials
- Wage loss (past, present, and future)
- Likely range of jury awards
- Settlement ranges for comparable claims

***All settlements require UE's prior approval.*** Any settlement demands counsel receives should be reported promptly to the UE Resolutions Analyst and the UE member. We require written justification authorizing the settlement. Defense counsel shouldn't initiate any settlement discussions or make any settlement offers without consulting UE in advance. Failure to do so could result in the loss of the member's insurance coverage for the amount of the offer.



United Educators (UE), a reciprocal risk retention group, is a licensed insurance company owned and governed by nearly 1,600 members representing thousands of schools, colleges, and universities throughout the United States. Our members range from small independent schools to multi-campus public universities. UE was created in 1987 on the recommendation of a national task force organized by the National Association of College and University Business Officers. Our mandate is to provide schools, colleges, and universities with a long-term, stable alternative to commercial liability insurance.

EduRisk™ from United Educators provides members with risk management resources to help prevent incidents that put people and institutions at risk. And, when claims do occur, UE protects our schools, colleges, and universities with education-specific coverage and an experienced claims management team. This prevention and protection philosophy enables UE to reduce the overall cost of risk for our policyholders.

For more information, visit [www.ue.org](http://www.ue.org) or call (301) 907-4908.

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# Appendix A

## Initial Assessment Format

**Member/Client:**

**Plaintiff/Charging Party:**

**Result of counsel's factual investigation:**

### **Liability**

- Does counsel consider this a case of liability and basis for opinion?
- What are the case's strengths and weaknesses?
- What is the credibility of defense witnesses?
- Does documentation support the defense? Are there troublesome documents?
- How suitable are dispositive motions and what is the likelihood of (percentage) success?
- Is expert testimony likely to be needed?

### **Damages**

- What is counsel's estimate of potential damages exposure, including:
  - Economic damages (including back pay and front pay)?
  - Likelihood of emotional distress damages and punitive damages?
  - Prejudgment interest?
  - Availability of plaintiff's attorneys' fees?
  - For EEOC/state agency charges (if applicable, damages available from the agency)?
- What is the probable range of verdicts if the case was tried?

### **Settlement**

- Do you have recommendations for ADR? If not, why not?
- Do you expect settlement demands from the plaintiff?
- Have there been negotiations to date?

### **Defense strategy**

- What defense strategy do you expect to undertake over the next six months to a year:
  - Additional investigation?
  - Anticipated discovery and expected discovery disputes? Motion practice?
  - Use of experts?

### **Other considerations**

- What is your opinion of plaintiff's counsel (ability and general reputation)?
- What is your opinion of the judge?
- Have other unique issues been presented or are there extraordinary costs that may be required?