

## TRILATERAL LITIGATION PROTOCOL

The following protocol is adopted for use in all lawsuits being handled by the Office of the Attorney General (OAG) on behalf of another state agency (Agency) covered by Risk Management (RM), pursuant to Chapter 284, Part II, Florida Statutes. This protocol is adopted to improve communications and to insure the best possible representation of the clients' interest.

1) The OAG will assign an appropriately qualified assistant attorney general (AAG) as the specific case may require. An AV rated lawyer should be assigned to any case involving: a realistic exposure of \$1,000,000 or more; a challenge to any agency program; any significant (non pro se) civil rights lawsuit [since there is no financial cap to our exposure]; or, any statutory challenge. Another lawyer may be assigned upon approval by the Assistant Deputy Attorney General.

2) The Agency will assign an appropriate non-lawyer agency representative (with factual or program knowledge) and an agency attorney (with agency subject matter legal knowledge) to act as litigation liaisons to assist the AAG with discovery, trial preparation and obtaining policy decisions, etc. from the Agency.

3) RM will assign an appropriate risk claims specialist.

4) The AAG shall keep all case dockets current (i.e., docket everything within seven [7] days).

5) The AAG (within seven [7] days) shall advise the Agency and RM of all significant developments in the litigation and reply to all requests for additional information. At a minimum, that advice shall include copies of: all pleadings and amended pleadings (complaints, petitions, answers and affirmative defenses, counterclaims, cross claims); all orders; substantive motions (motions to dismiss, motions for summary judgment, pretrial stipulations, motions for new trial, judgment N.O.V., etc.); expert reports; notices of mediation, pretrial or trial; notices of appeal and briefs.

6) The AAG shall coordinate a conference with RM and the Agency a minimum of 14 days (time permitting) prior to any substantive hearing, mediation, pretrial conference or trial to discuss policy issues, settlement, offers of judgment, strategy, law, facts, need for experts, etc.

7) The AAG shall prepare timely RM case assessments and risk reports as directed by RM.

8) The AAG shall consult with and obtain the prior approval of the Agency and RM prior to retaining any expert or incurring any extraordinary expense (>\$1,000).

9) In all cases, the AAG shall brief the Agency and RM on the status of the case not less than every six months. (Note: RM guidelines specify written progress reports every 45 days.)

10) In all cases, the AAG shall select a "second chair" AAG and paralegal at least 60 days prior to the close of discovery and so advise RM and the Agency. All trials shall be conducted with a second

chair and paralegal. In those exceptional cases identified by either the OAG, RM, or the Agency, the "second chair" and paralegal shall be selected prior to the filing of an answer. These exceptional cases [class actions, damages exceeding \$1,000,000, outrageous or inflammatory facts (rape, severe abuse of a child or an incompetent individual, etc.) cases affecting Agency mission, etc.] shall be more stringently monitored by the OAG, RM and the Agency.

11) All requests for settlement authority shall be made by the AAG in writing to RM and the Agency with a minimum of 14 days notice. All approvals of settlement authority shall also be made in writing by RM and the Agency to the AAG.

12) RM's "Defense Counsel Assessment Report" must be submitted to the risk claims specialist 45 days prior to trial (see Attachment #1). Post-trial reports must be submitted to RM within 14 days of the end of trial.

13) The risk claims specialist must be consulted prior to the selection of a mediator and the dates and time of mediation.

14) RM shall continue to have (read only) access to the OAG's computer-based docket, which (when properly input) provides notice of all pleadings, motions, notices, etc., filed in the case. The RM claims specialist shall actively monitor the case docket.

15) In the event the AAG does not keep RM or the Agency properly advised (i.e., conform to the protocols in ¶¶ 4, 5, 6, 7, 8, 9, 10, 11, 12 & 13), either RM or the Agency shall advise the AAG's immediate supervisor and, if necessary, the assistant deputy for resolution so that the case can proceed appropriately. Similarly, if the Agency liaisons do not provide appropriate assistance with discovery, trial preparation or obtaining policy decisions, etc., or the RM claims specialist does not provide appropriate assistance in obtaining experts, approving other necessary expenses, obtaining settlement authority or otherwise facilitate the defense of the case, the AAG shall advise the liaison's or the claims specialist's supervisor for resolution so that the case can proceed appropriately.

16) All verdicts (or judgments) shall be discussed with RM and the Agency within seven (7) days of the verdict to determine what post-trial motions, if any, should be filed and whether an appeal is appropriate.

17) The AAG shall comply with RM's attorney guidelines (see Attachment #2) as required by the Risk claims specialist assigned to the specific case, in the event of conflict with this protocol.

**Attachment #1**

**DIVISION OF RISK MANAGEMENT, STATE OF FLORIDA  
DEFENSE COUNSEL CASE ASSESSMENT AND STATUS REPORT**

**(CONFIDENTIAL AND PRIVILEGED)**

INSURED AGENCY: \_\_\_\_\_

PLAINTIFF: \_\_\_\_\_

CLAIM NUMBER: \_\_\_\_\_ DATE OF THIS REPORT: \_\_\_\_\_

DATE OF LOSS: \_\_\_\_\_ CO-DEFENDANT: \_\_\_\_\_

VENUE: \_\_\_\_\_

TRIAL BY:      **G** JURY                      **G** BENCH                      **G** BIFURCATED

TRIAL DATE: \_\_\_\_\_

FIRM MEMBER TRYING CASE: \_\_\_\_\_

PLAINTIFF'S ATTORNEY'S NAME: \_\_\_\_\_

IS THIS A CASE OF LIABILITY: **G** YES                      **G** NO                      EXPLAIN: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

DEMAND:    DATE: \_\_\_\_\_                      AMOUNT: \_\_\_\_\_

OFFER:        DATE: \_\_\_\_\_                      AMOUNT: \_\_\_\_\_

BRIEF OBSERVATIONS ON PARTICIPANTS/FORUM

1)            Opposing Counsel (weak/strong, etc.) \_\_\_\_\_

\_\_\_\_\_

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2) Assigned Judge (weak/strong, Plaintiff/Defendant oriented, etc.) \_\_\_\_\_

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3) Forum (State or Federal, Removal/Change of Venue, etc.) \_\_\_\_\_

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Are all witnesses available?	G Yes	G No
Will unavailability hinder defense?	G Yes	G No
Will Plaintiff make a favorable impression?	G Yes	G No
Will defense witness make a favorable impression?	G Yes	G No

REQUIRED DISCOVERY (Briefly describe minimum required to effectively handle case.)

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RECOMMENDED DISPOSITION (e.g., pay claim, settle, M/SJ, trial)

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EXPECT VERDICT FOR PLAINTIFF?      **G** YES      **G** NO

VERDICT RANGE: \_\_\_\_\_ OUR CHANCES OF WINNING: \_\_\_\_\_

RECOMMENDED OFFER TODAY: \_\_\_\_\_

RECOMMENDED OFFER BEFORE TRIAL: \_\_\_\_\_

COST/ATTORNEY FEES

Estimated Total to Date: \_\_\_\_\_

IF SETTLED, APPROXIMATE  
FEES & COSTS: \_\_\_\_\_

IF TRIED, APPROXIMATE  
FEES & COSTS: \_\_\_\_\_

INJURIES & DAMAGES:

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POTENTIAL CONTRIBUTIONS/INDEMNIFICATION POSSIBILITIES:

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WE SUGGEST THE FOLLOWING ADDITIONAL INVESTIGATION:

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COMMENTS & SUGGESTIONS/ASSESSMENTS:

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BY: \_\_\_\_\_ DATE: \_\_\_\_\_

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## Attachment #2

### RISK MANAGEMENT ATTORNEY GUIDELINES

#### Attorney Guidelines

##### Introduction

The Division of Risk Management, Bureau of State Liability Claims, is tasked with the overall responsibility of providing a defense and managing all litigation filed against the State for tort negligence, auto liability, federal civil rights, and employment discrimination matters statewide.

##### Philosophy

The Division of Risk Management, Bureau of State Liability Claims, has adopted a philosophy of proactive litigation management principles in the handling of lawsuits filed against the State for general liability (tort), auto liability, federal civil rights, and employment discrimination matters. The overall responsibility for management of these matters is delegated to the Risk Management Program Specialist who is assigned the claim. The Risk Management Program Administrators are delegated the task of supervising and monitoring all litigation files assigned to their specific unit.

#### A. SCOPE OF SERVICES

1. The Attorney shall provide a defense for the State, its agents, employees, and volunteers against lawsuits assigned by the State to the Attorney for handling. The Attorney will work under the direction and coordination of the Risk Management Program Specialists assigned the claim.

2. The Attorney shall review and analyze State legal files, data, documents, and other materials and formulate an agreed plan of defense for approval by the Risk Management Program Specialist, within two (2) weeks of receipt of the case.

3. The Attorney shall prepare and file, with proper authorization from the Insurance Specialist, pleadings, motions, or briefs which may be required and represent the State in any related litigation. A copy shall be provided to the Specialist.

4. The Attorney shall initiate and conduct discovery to include depositions on behalf of the State and represent the State in discovery initiated by the opposing parties.

5. The Attorney shall represent the State at trial. He/she may also be called upon at the discretion of the Division of Risk Management to represent the State at the appellate level.

6. The Attorney shall attend and participate in conferences, conference calls, mediations, and report on the status of these legal matters, no later than seven (7) days after the occurrence.

#### B. ASSIGNMENT OF DEFENSE ATTORNEYS

1. Assignment of a case is contingent upon the requirement that the Attorney possesses fundamental working knowledge of applicable state and federal case law and statutes (specifically, Section 768.28, Florida Statutes, encompassing sovereign immunity, 42 U.S.C. § 1983, ADA, employment, etc.). An Attorney being assigned a case involving an area of law in which that Attorney does not possess the

requisite basic knowledge shall immediately inform the Division of this fact and cooperate with Division staff in the transfer of such case to another Attorney. Additionally, there may be other special bodies of law such as federal admiralty law, police civil negligence, medical malpractice and Title VI actions to which requirement may apply.

2. The Risk Management Program Specialist (hereinafter referred to as Specialist) will contact the selected Attorney prior to transmittal of the complaint to ensure that the firm can provide the defense for the case. During this conversation, the Specialist will advise of any special circumstances that may require immediate attention. This may be but is not limited to answer due dates, responsive pleadings, hearing dates already established by the court.

3. Written confirmation of the assignment will be received together with a complete copy of the claim file and copy of the complaint. The Specialist will provide you the name of the agency designated contact person for the purposes of obtaining additional information, contracts, deposition scheduling, and any other information that may be needed in the defense of the agency.

4. Following the transmittal of the complaint and claim file, the Attorney will immediately acknowledge receipt of same to the referring Specialist.

5. Any change or addition of an Attorney in a defense firm must be approved by the Specialist. Should the status of the assigned firm change and/or the Attorney leaves the firm, the determination of continued representation of a case will be made by the Division of Risk Management.

#### C. DEFENSE ATTORNEY PERFORMANCE GUIDELINES

1. Within two weeks after a case's initial assignment, the Attorney should be prepared to discuss the case in detail with the Specialist. A mutually agreeable plan of defense should be established prior to the implementation of a defense plan. The file should be analyzed in sufficient detail to enable a discussion on all relevant aspects of the case, including, but not limited to the following:

- a. All causes of action available to and/or raised by the plaintiff(s).
- b. Any coverage defenses available to the Division of Risk Management, pursuant to Chapter 284 and Section 768.28, Florida Statutes.
- c. The feasibility of all pre-answer motions, i.e., change of venue, motion to dismiss, failure to perfect service, and statute of limitation issues.
- d. The immediate need to join and/or cross-claim against additional parties.
- e. The feasibility and practicability of all responsive pleadings and affirmative defenses, including sovereign immunity, eleventh amendment immunity, qualified immunity, limitation of value under admiralty law (timed pleading), and any other defenses unique to the State or its agencies, subdivisions, and/or employees.
- f. All factual issues and discrepancies and a presentation of the discovery needed and proposed time line and cost estimate for completion.
- g. Any special issues unique to the State or its agencies or employee(s) being defended, i.e., conflict among defendants, course and scope of employment issues.



h. The need for any specialized legal research in furtherance of a particular defense strategy and an estimate of the time and cost necessary to accomplish it. Note: All research MUST be approved in advance by the Specialist. Research that has been done without approval will not be reimbursed.

i. Your evaluation of the State's liability exposure (both in terms of dollar value and legal precedent), the plaintiff(s) comparative negligence, if applicable, and your initial feeling of the prospects of prevailing at trial and of the potential for appellate review. If in the event you are unable to make such an evaluation at that time, you are to indicate the discovery required in order to furnish a knowledgeable response (this information is critical to determining settlement and defense strategy and should be furnished as soon as possible).

j. Any potential rights of contribution, subrogation, cost judgments and/or Attorney fees and 57.105, Florida Statutes, fees that may be available to the State.

k. The defense counsel's assessment form will be forwarded to the Specialist on all cases where authority for any amount is sought. It is also required for all mediation hearings and pretrial reports. It is utilized for formulating offers of judgments.

l. A cost budget of legal service for the plan defense.

m. The need for any additional investigation by the Specialist.

n. The pursuit of any indemnification or contribution.

#### D. MEDIATION

1. It is the policy of the State of Florida to mediate whenever appropriate and necessary. However, certain procedures are established to ensure success of the process.

2. Suit does not have to be filed to participate in the process. The State is favorable to pre-suit mediation when circumstances dictate.

3. The Risk Management Program Specialist will be consulted prior to the selection of a mediator, dates, and a time of mediation.

4. Mediation will be scheduled in coordination with the Specialist and not agreed to without their approval. The Division of Risk Management requires a minimum of 14 days advance notice. This is necessary in order to have travel approved and take advantage of cost-saving travel. A copy of the court-ordered mediation or letter of agreed mediation stating the date, place and time is the minimum requirement for effecting travel. Any fees/ sanctions incurred because of inadequate notice to the Specialist will be paid by the defense counsel.

5. The State does not effect structured settlements.

6. The State by statute cannot agree to the confidentiality of any settlement.

7. The Risk Management Program Specialist will discuss with the Attorney the manner in which the State's position will be presented during the mediation. No later than two (2) weeks prior to the mediation, the Attorney will provide to the Specialist a pre-mediation report, copy of the State's mediation summary, and a Defense Counsel Assessment Report.

8. The Risk Management Program Specialist retains monetary authority and control of the

mediation process.

#### E. STATUS REPORTING

1. Progress reports will be made in writing to the Specialist every 45 days. The Attorney is expected to report any significant development regardless of the time interval. The Attorney will forward for review copies of substantive pleadings, key depositions, and expert reports, as requested by the Specialist.

2. No later than 45 days prior to trial, a pretrial report and Defense Counsel Assessment Report must be submitted to the Specialist with the following:

- a. A factual resume of the case, including a summary of each issue of material fact and admissible evidence available to each party in resolving each such issue.
- b. The nature and extent of continuing discovery efforts of each party and their anticipated completion dates.
- c. Any further recommended investigation and/or discovery on behalf of the State.
- d. All legal action to date, i.e., pending motions, offer of settlement.
- e. Recommended procedural strategies prior to and during trial.
- f. The extent of legal research and preparation anticipated prior to trial and associated costs.
- g. Any issues that may relate to the taking of an appeal by either named party and the associated costs.
- h. The existence and extent of settlement negotiations, present status of negotiations, and recommendations.
- I. Dates of pretrial and trial (position on docket and likelihood of being reached during the calendar call).
- j. All defenses available to the State.
- k. The State's liability exposure and potential damage range, including your opinion of the likelihood of a defense verdict, anticipated range of verdict, being as specific as possible, and nuisance value considerations. If you anticipate the type of verdict that would not be payable under the Risk Management Casualty Trust Fund pursuant to Chapter 284, Part II, Florida Statutes, and Section 768.28, Florida Statutes, please indicate.
- l. Your general recommendations and comments concerning the case.
- m. Estimated cost to defend the case.
- n. As soon as practical, but no later than two (2) weeks following trial, a post-trial report must be completed and submitted to the Specialist.

#### F. SETTLEMENT NEGOTIATIONS

1. All settlement authority, including the conduct of negotiations, rests with the Specialist. This authority may be delegated to the defense Attorney at the discretion of the Specialist or other officials in the Division.

2. All offers of judgment, offers of settlement must be authorized by the Specialist.
3. Any offer that is negotiated or tendered without the authorization or approval of the Specialist or other Division official becomes the responsibility and liability of the person, agency, or firm communicating the offer.
4. When an offer is accepted and a case is settled, the Specialist must be notified immediately, in writing, so that a settlement check may be promptly processed. The Specialist must be provided with the precise information that is to be printed on the check, to include how it is to be made payable to and where it is to be forwarded.

G. DEFENSE ATTORNEY BILLING GUIDELINES/FORMAT FOR INVOICES

1. Legalservices billed must conform to the Legal Services Contract and must reflect tasks that were performed during the effective period of the contract with the Division of Risk Management.
2. All fee payments for tasks performed will be based on hourly rates specified in the current written contract.
3. Payments will be made to your firm as its name appears on the Legal Services Contract on file with the State's Division of Risk Management.
4. All defense firms on contract with the Division are to maintain a current resume of Attorneys who will associate or assist in the handling of the Division's assigned cases.
5. Billings for legal services will be submitted on a quarterly basis. (Any other arrangement must be approved by the Specialist handling the case and the Administrator.)
6. Voluntary activities undertaken by defense Attorneys without prior approval of the Specialist may be denied for payment. The only exception will be those emergency actions necessary to protect the State's interest.
7. The billings for service rendered must include at a minimum the following criteria:
  - a. the date the task was performed
  - b. Concise description of nature of the task
  - c. Length of time spent doing that task in tenths of hour or actual minutes
  - d. The file name and claim number
  - e. Firm taxpayer ID number
  - f. Name of Specialist handling
  - g. Initials of handling Attorney
8. All invoices must be accompanied by an adding machine tape or computer generated tabulation on letter size paper, subtotaling fees and costs, and a final total of the entire bill. All tasks described must basically conform to the agreed plan of defense that existed at the time the task was performed. If any of these elements are missing, a portion of or the entire invoice may be sent back for

compliance.

#### H. COMPENSATION OF COSTS

1. Reimbursement for travel expense is limited to the terms and rates established in Section 112.061, Florida Statutes. All travel must be authorized by the Specialist.

2. All requests for travel reimbursements should include the following: a detailed itemization of the nature and extent of expense; all supporting evidence of the occurrence, such as copies of tickets, receipts, travel itinerary, rental car, and hotel invoices, etc.

3. Travel reimbursements must be submitted on the State of Florida Voucher for Reimbursement of Travel Expenses Form (D-14-500).

4. Routine office overhead, such as local phone calls, routine postage, courier service, copy work, local travel expense, messenger service, clerical/secretarial support services, library/resource needs, etc. are expected to be included in your hourly contract rates.

5. Non-routine expenses, such as long distance telephone calls, requested faxed material, research (including Westlaw), requested courier service, and bulk mailing in a specific case must be clearly indicated and justified in your billing.

6. Copy charge reimbursements will be made as follows:

a. Copy costs reproduced by an outside vendor, approved by the Specialist, and accompanied with a receipt for fees submitted.

b. Bulk copy cost (when 100 or more copies are made at one time) approved by the Specialist, and submitted at a charge of no more than \$.20 per page.

#### I. OTHER AVAILABLE SERVICES

1. The Attorney upon receiving approval from the Specialist may use subcontractors for professional service (e.g., computer assisted research, court reporters, expert witnesses, etc.) in the defense of the State's case. When such services are available to the State under state contract, such as court reporters, the Attorney must use the contractor designated by the Specialist. The State will be responsible for paying vendors under state contract.

2. Payment to subcontractors acquired by the Attorney will be paid by the Attorney and will be reimbursed by the State.