EAGLE INTERNATIONAL ASSOCIATES

Presents

INSURANCE CLAIMS:
Some Are More Complicated Than Others

October 19, 2018

Hartford Marriott Downtown
Hartford, CT

EAGLE INTERNATIONAL ASSOCIATES

MISSION STATEMENT

Eagle International Associates is an international network of independent law firms, adjusters and claims related service providers throughout the United States and Europe. Eagle members are dedicated to providing insurance companies and self-insureds with the highest quality legal and adjusting services for competitive and fair compensation. As members, we are committed to the highest ethical standards and act with professionalism and civility in all our endeavors. Eagle members exceed their clients' expectations for quality and service. At every opportunity, we promote the use of Eagle and its members and refer existing relationships through active participation in Eagle's meetings, programs and seminars.

DIVERSITY POLICY

Eagle International Associates, Inc. is of the strong belief that our organization is stronger, more valuable, and more effective through the inclusion of adjustors and attorneys of diverse gender, sexual orientation, racial, ethnic, cultural backgrounds, and all religious or non-religious affiliations. Eagle recognizes that the inclusion of such diversity is vital in order to achieve excellence and to serve its clientele effectively. Eagle is committed to a further understanding of its cultural filters and the absolute need to accept each person as a valued, talented, unique individual, which, when working with other Eagle members, will bring the organization and all its members genuine benefits and competitive advantage in the marketplace.

Eagle
International Associates

Insurance Claims: Some Are More Complicated Than Others

PROGRAM

7:45 am **Registration / Buffet Breakfast**

8:30 am **Welcoming Remarks**
John W. VanDenburgh, Esq., Napierski, VanDenburgh, Napierski & O'Connor, LLP
Chair, Eagle International Associates
Program Introduction
Mitchell A. Orpett, Esq., Tribler Orpett & Meyer, P.C.
Vice Chair, Eagle International Associates – Program Emcee
Eagle Member Host Introduction
James F. Sullivan, Esq., Howard, Kohn, Sprague & Fitzgerald

8:45 am **Keynote Speaker**
The Honorable Luke Bronin, Mayor of Hartford

9:00 am **Navigating Ethical Pitfalls in Defending Claims: What Insurers Can and Can't Expect of Panel Counsel**
Moderators:
Jeremy D. Hawk, Esq., Scott Sullivan Streetman & Fox
James F. Sullivan, Esq., Howard, Kohn, Sprague & Fitzgerald
Panel:
Stephanie Lizotte, Esq., AVP, North American Claims Group, Allied World Insurance Company
Venessa Perkins, AIC-M, AINS, CCP, Casualty Manager-South, Pure Insurance Company
Steven C. Velardi, Esq., Claims Counsel, Navigators Specialty Insurance Company

9:50 am **The High Price of #MeToo: Contending with New Expectations, New Standards and New Judgments in Sex and Gender-Based Claims**
Moderators:
Alison M. Crane, Esq., Bledsoe, Diestel, Treppa & Crane LLP
Christopher M. Harrington, Esq., Howard, Kohn, Sprague & Fitzgerald
Panel:
Heather A. Lacey, Esq., Vice President and Associate General Counsel, Legal Seafoods, LLC
Neal A. Murphy, Senior Director and Counsel, Aetna
Chryl A. Resnick, JD, CPCU, AIC, SCLA, National Liability Adjuster, Hanover Insurance

10:40 am **BREAK**

11:00 am **Adjusting Your Exposure: How Independent Adjusters' Professional Liability Claims Can Be Defended and Prevented**
Harvey Lightstone, Vice President and Director of Claims and Risk Management, Claim Professionals Liability Insurance Company RRG
Kathleen E. Nelson, Esq., Gianfrancesco & Friedemann
Mitchell A. Orpett, Esq., Tribler Orpett & Meyer, P.C.

11:50 am **Avoiding Stupid Mistakes with Experts**
Moderators:
David M. Macdonald, Esq., Macdonald Devin , P.C.
John Egan, Esq., Rubin and Rudman LLP
Panel:
Norman D. Bates, Esq., President and Founder, Liability Consultants, Inc.
James J. McNamara, Supervisory Special Agent, F.B.I. (Retired), Behavioral Criminology International
Chryl A. Resnick, JD, CPCU, AIC, SCLA, National Liability Adjuster, Hanover Insurance

12:40 pm **Closing Remarks**

12:45 pm **Reception and Lunch**

Insurance Claims: Some Are More Complicated Than Others

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MODERATORS and PANELISTS

Norman D. Bates, Esq., President and founder of Liability Consultants, Inc., is a nationally-recognized expert in security and the law. For over thirty years, he has been providing security management consulting services to private industry as well as court-certified expert witness services nationwide to both plaintiff and defense firms in civil cases regarding inadequate security, negligent hiring or training, use of force and workplace violence.

A frequent media spokesman, Mr. Bates has been interviewed and commented on current news stories regarding crime and liability for *ABC's 20-20, CBS News, NBC Nightly News, The Wall Street Journal, The New York Times, U.S. News and World Report, USA Today, Security* magazine and others.

Formerly, Mr. Bates was an Assistant Professor of Criminal Justice at Northeastern University in Boston and Director of Security and Legal Counsel to the Saunders Hotel Corporation. He received his Juris Doctor degree from Suffolk University and a Bachelor of Science degree in Criminal Justice from Northeastern University. He is a member of the Massachusetts Bar (admitted in 1985), the International Association of Professional Security Consultants (President 2009-2011), the National Crime Victim Bar Association, ASIS International, Society for Human Resource Management, and the International Association for Healthcare Safety and Security. He is a former member of the American Association for Justice (formerly ATLA) , the Defense Research Institute (DRI),the American Bar Association, and the Massachusetts Bar Association.

Luke Bronin is the 67th mayor of the City of Hartford.

Mayor Bronin has had the opportunity to serve in senior positions in both federal and state government. In 2013, he was appointed by Connecticut Governor Dannel P. Malloy to serve as General Counsel. In his position as the governor's chief lawyer, Bronin partnered with legislators and state agency officials to advance the Governor's agenda, and he was deeply involved in developing policies to combat veterans' homelessness, expand economic opportunities, reform our criminal justice system, and protect our environment.

Prior to his role in Governor Malloy's office, he served as the Deputy Assistant Secretary for Terrorist Financing and Financial Crimes at the U.S. Department of the Treasury in Washington, D.C. In that role, he helped lead the federal government's efforts to isolate and disrupt international terrorist groups, and advanced U.S. national security and foreign policy interests.

Previously, he served as the Senior Advisor to the Deputy Secretary of the U.S. Treasury, as an international affairs fellow with the Council on Foreign Relations, and as Chief of Staff to the President of Property and Casualty Operations at the Hartford Financial Services Group, one of the capital city's largest employers. He also served as an officer in the U.S. Navy Reserve and was a member of the military's anti-corruption task force during his deployment to Afghanistan from September 2010 to April 2011. Most recently, Bronin worked as a partner at the law firm Hinckley Allen. Prior to his election, Bronin proudly served on the boards of the Hartford Public Library and the Amistad Center for Arts and Culture.

Bronin earned his B.A. and J.D. from Yale University and his M.A. from Oxford University, where he studied as a Rhodes Scholar. He and his wife Sara live in Hartford with their three young kids.

Alison M. Crane is a partner with Bledsoe, Diestel, Treppa & Crane, LLP in San Francisco, California. Her practice focuses on complex personal injury, wrongful death and business litigation, including products liability, industrial and construction accidents, unfair competition, and employment litigation. Alison graduated from Villanova University in 1995 and received her J.D. from Boston University School of Law in 1998. She is a member of the Judicial Nominations Evaluation Commission for the State Bar of California and serves as Chair of the Queen's Bench Mentorship Committee. She is also active in the American Inns of Court which promotes legal excellence, civility, professionalism, and ethics and the Association of Defense Counsel for Northern California and Nevada.

John Egan is a partner with Rubin and Rudman, LLP, a 75-lawyer general practice firm in Boston, Massachusetts. He is a trial attorney with over 35-years experience in a wide variety of product liability, toxic tort, asbestos, personal injury, property damage, fire, professional liability, housing and employment discrimination, insurance coverage and bad faith, and other claims. Has tried over 75 cases to verdict, and has briefed and argued over 30 appeals. He received his B.A. from Bates College in Lewiston, Maine, and his J.D. from the Catholic University of America in Washington, DC. He is a member of the Massachusetts and District of Columbia bars, as well as the bars of the U.S. District Court for the District of Massachusetts, the First Circuit Court of Appeals and the United States Supreme Court. He is a member of the American, Massachusetts, and Boston Bar Associations, the Defense Research Institute, and is a founding member of Eagle International Associates.

Christopher M. Harrington is a partner at Howard, Kohn, Sprague & FitzGerald in Hartford, Connecticut which is the oldest, continually-operating law firm in the country. Chris practices in the areas of personal injury, insurance defense, commercial litigation, business torts, premises liability, workers' compensation and landlord/tenant disputes. He received his J.D. from Western New England College School of Law in 1994 and his undergraduate degree from the State University of New York in 1990. Prior to obtaining his undergraduate degree, he worked as a federal agent with the United States Border Patrol in South Texas and before that as an EMT in New York City. Chris has tried over twenty-five cases to verdict and has argued several cases before the Connecticut Appellate Court. Chris is a currently the Chairman and immediate past-President of the Connecticut Defense Lawyers Association and will be Connecticut's DRI representative starting next year.

Jeremy D. Hawk is a partner with the Mississippi office of Scott, Sullivan, Streetman & Fox located in Jackson, Mississippi. There are 20 attorneys practicing with his firm in Mississippi and Alabama. His law practice is primarily focused on the representation of Insurance Carriers and their Insureds through the State of Mississippi. He has a significant practice in the defense of claims in Premises Liability and Security, Bad Faith, Automobile Liability and Uninsured Motorist claims, Professional E&O, Attorney Malpractice and Property Damage Claims. He is a member of the Defense Research Institute, the Mississippi Tribal Bar, Mississippi State Bar and various local civic organizations. Mr. Hawk received his B.A. from the University of South Alabama in 2000 and his J.D. from Mississippi College School of Law in 2003. He has been married to his wife, Claire, since 2002 and has 2 children, Lucy (11) and Liam (9). Mr. Hawk is an avid golfer and coach for multiple sports programs involving his children.

Heather A. Lacey serves as Vice President & Associate General Counsel of Legal Sea Foods, LLC, a nationally acclaimed seafood and restaurant company. Over the last thirteen (13) years, Ms. Lacey has served Legal Sea Foods' senior executives, directors, managers and human resource professionals in all matters involving employees, including, without limitation: performance management issues; investigations, claims of harassment/discrimination, wage and hour issues, workplace safety, benefits, and recruiting. She has

developed and implemented policies and training materials. In addition, Ms. Lacey defends Legal Sea Foods against complaints filed in various federal and state agencies, including the Equal Employment Opportunity Commission and the state counterparts. Ms. Lacey also manages outside attorneys representing Legal Sea Foods in employment and civil litigation matters by actively directing strategy and managing to reduce litigation costs. She also manages the Risk & Safety Department which is responsible for: insurance procurement (property, general liability, employment practices liability, auto, unemployment, workers compensation, directors and officers, liquor, and others), work place safety, and loss control and claims handling (workers compensation, unemployment, and general liability). She works closely with senior leaders on strategic business issues that have potential legal risks from an employment and litigation perspective. Prior to joining Legal Sea Foods, Ms. Lacey worked in several Boston-area firms representing corporate entities (including Legal Sea Foods), employers, and individuals with respect to employment and business litigation issues. She earned her J.D., Suffolk University School, 1997, *cum laude and* B.A., University of Delaware, *cum laude*, 1993.

Harvey Lightstone was born in Montreal, Quebec, Canada and served in the Royal Canadian Engineers from 1961 – 1968. During that time, he graduated from the Royal Canadian School of Military Engineering. Though even he has a problem believing it, this is his 50th year in this business. He has been retired twice (against his will) as the result of a merger and an acquisition, but he just can't give it up. Harv has served in pretty much every claim capacity from adjuster trainee to claim V.P., including a couple of years as an independent adjuster. The companies he served over the years include Safeco Ins Co, Industrial Indemnity Co, 21st Century Ins Co, Balboa Ins Group and Workmans Auto Ins Co. For the past 11 years Have has served as Vice President and Director of Claims and Risk Management at Claim Professional Liability Insurance Company, a risk retention group. Their risk retention group provides both E&O as well as general liability coverage for more than 500 member firms. While the majority are independent adjusting firms, there are others in the group who are forensic engineers or accountants, construction consultants, fire causation investigators and private investigators. Harv is currently the president of the Pacific Claim Executives Association, a past president of the Orange County Claim Managers Council and a past president, as well, of the American Youth Soccer Organization.

Stephanie P. Lizotte is Assistant Vice President, North American Claims Group for Allied World Insurance Company. She assists in overseeing all coverage litigation brought by or against Allied World in the U.S. Prior to assuming this role, Stephanie assisted in the management of Allied World's E&O team which handles lawyers errors and omissions (E&O) liability, insurance agents and brokers E&O liability, miscellaneous professional liability, tech/privacy professional liability and architects and engineers professional liability lines.

Prior to joining Allied World, Stephanie held the position of Senior Claims Counsel at XL Professional in Hartford, CT, handling high-severity public and private directors and officers (D&O) liability claims as well as employment practices liability matters and fiduciary liability matters.

Stephanie's previous professional experience includes practicing as an insurance defense and personal injury attorney with Noble, Young & O'Connor, P.C. in Hartford, CT as well as clerking with the Danbury Superior Court. Stephanie earned her B.A. at The Catholic University of America and her J.D. at Pepperdine University School of Law. She is a member of the Connecticut Bar and is admitted to practice before the United States District Court for the District of Connecticut.

David M. Macdonald is a founding and named partner of Macdonald Devin, P.C., located in Dallas, Texas. David specializes in products liability, toxic tort, pharmaceutical defense, complex civil litigation and defense of various religious organizations throughout the Southwest. David is an active member of numerous professional organizations and a frequent speaker on defense topics.

Some of David's notable defense assignments: Provides counsel and defense for insurance companies and various religious organizations across the Southwest and has defended hundreds of sexual assault, negligent hiring and negligent supervision claims for religious organizations. National Coordinating Defense Counsel for a chemical company in the national thimerosal/pharmaceutical litigation and Statewide Defense Counsel. Statewide Litigation Counsel for a neutraceutical manufacturer in the ephedra litigation. Statewide Defense Counsel for various Defendants in the silica and asbestos multi-district litigation in Texas. Presently represents Defendants in the ongoing surgical mesh multi-district litigation consolidated in Charleston, West Virginia. Has previously acted as National Defense Counsel for the Latex Litigation. Represented Defendants in the National Litigation for Phen-Fen and PPA. Previously served as Coordinating Defense Counsel for 200+ lawsuits alleging exposure to Hepatitis B and C in Las Vegas, Nevada. Acted as Statewide Defense Counsel for a pharmaceutical compounding company located in Massachusetts allegedly responsible for numerous deaths from meningitis.

Jim McNamara retired from the FBI after 25 years of service, the last 18 years assigned to the FBI's Behavioral Analysis Unit, National Center for the Analysis of Violent Crime in Quantico, Virginia.

A former Marine Infantry Officer, he has been a consultant to law enforcement agencies throughout the U.S., Canada, Europe, Australia, New Zealand, Asia and Latin America on thousands of cases. He has provided operational investigative support and training in violent crime and white collar crime to law enforcement and intelligence agencies, military units, mental health professionals and academia, both nationally and internationally.

Jim was the FBI Program Manager of a Forensic Psychiatry and Psychology Fellowship Program sponsored by the Department of Psychiatry, Walter Reed Army Medical Center. He is Adjunct Faculty with the Department of Psychiatry at the F. Edward Hebert School of Medicine, Uniformed Services University of the Health Sciences, Bethesda, Maryland and the Forensic Psychology Graduate Program at George Washington University in Washington, D.C.

He is a Fellow in the American Academy of Forensic Sciences, has conducted research and published on criminal behavior, and has provided expert commentary for media organizations including CBS, CNN, FOX News Channel, MSNBC, National Geographic, Smithsonian (US), Discovery (International) and the British Broadcasting Corporation (BBC).

Jim provides analysis and testimony in civil and criminal litigation with Behavioral Criminology International in Fredericksburg, Virginia.

Neal A. Murphy is Senior Director and Counsel at Aetna responsible for all aspects of domestic employment law for Aetna, which now has nearly 50,000 US employees. Mr. Murphy manages a team that counsels Aetna in all aspects of employment and labor law, including the development and implementation of proactive policies, wage and hour, discrimination, leave, non-competition, whistleblower and public policy, and many other areas. He represents Aetna before all federal and state administrative agencies and also manages an extensive portfolio of employment-related litigation including discrimination, wage and hour, class actions, unfair competition and many others. Prior to working for Aetna, Mr. Murphy worked in-house

for other Fortune 500 employers in these areas and also devoted considerable time to collective bargaining and all matters connected to the National Labor Relations Act. He is a graduate of Cornell University's college of Industrial Labor Relations and received his J.D. from the Franklin Pierce Law Center in Concord, New Hampshire.

Mr. Murphy is an active participant in the Equal Employment Advisory Counsel and other organizations that focus on labor and employment law for corporations. He has been an active participant in Aetna's Pro Bono's lawyers' project and other charitable projects in the Greater Hartford area. Mr. Murphy and his wife Alicia have four children.

Kathleen E. Nelson joined Gianfrancesco & Friedemann, LLP in 2018. For the past twenty-seven (27) years, Attorney Nelson practiced insurance defense litigation at the Law Offices of Patricia E. Fraizer in Boston, the Hartford Insurance Group's New England Staff Law Office. She held the position of Senior Trial Counsel. Attorney Nelson has an extensive background and is an experienced litigator in both state and federal courts in Massachusetts and Rhode Island with over 20 years of trial experience. During her twenty-seven (27) years with the Hartford, Attorney Nelson's practice included defending general liability, products liability, toxic tort, lead paint, closed head injury cases, municipal liability and medical malpractice matters. Prior to joining the Hartford, Attorney Nelson was a registered nurse in critical care at the Massachusetts General Hospital in Boston in the Emergency Department and Medical Intensive Care Unit. Attorney Nelson graduated from New England School of Law and Northeastern University, and is admitted to both the Massachusetts and Rhode Island bars and their Federal Courts. She is a member of the Rhode Island Bar Association and the Justinian Law Society.

Mitch Orpett, as Eagle's attorney representative for the State of Illinois, is a founding member and former managing director of Tribler Orpett & Meyer, P.C., a Chicago law firm serving the insurance and business communities. He was one of six lawyers who formed the firm in 1984. His practice is devoted to the defense of various professional and casualty claims and to the resolution of insurance and reinsurance disputes. He has been active in litigation, arbitration and other methods of alternative dispute resolution and has served both as advocate and arbitrator. He has been listed in all editions of Euromoney Publications' *Guide to the World's Leading Insurance and Reinsurance Lawyers* and in *Who's Who Legal, Insurance & Reinsurance*. He has also been named as an Illinois "Super Lawyer" and to the Illinois Network of Leading Lawyers, in recognition of his work as an insurance and reinsurance lawyer.

Mitch has devoted nearly 40 years of service to the profession, holding numerous leadership positions in the American Bar Association, among others. He was elected to the ABA's Board of Governors and served for many years on its policy-making body, the House of Delegates. He was the chair of the ABA's Section Officers Conference, in which capacity he represented the approximately 240,000 members of the sections and divisions of the American Bar Association. Previously, he was chair of the ABA's 30,000 member Tort Trial and Insurance Practice Section and of the ABA's Standing Committee on Continuing Education of the Bar. He was also vice chair of the ABA's Presidential Commission on the Unintended Consequences of the Billable Hour (United States Supreme Court Justice Stephen G. Breyer, honorary chair).

Mitch is a graduate of the University of Illinois, where he earned his bachelors and masters of arts degrees. He is a 1978 graduate of that institution's College of Law.

Venessa Perkins currently serves as a Casualty Manager at PURE Insurance. Venessa has designations in Associate in Claims (AIC), Associate in General Insurance (AINS), Certified Claims Profession (CCP), and Certified Claims Profession: Mediation (CCMP). She has over a decade of experience in the insurance industry handling auto, homeowners, marine, and liability claims. Venessa began as a Claims Analyst at PURE in 2011 handling a wide variety of high exposure claims. Her excellence as a Claims Analyst led to her promotion to Casualty Team Leader and now to Casualty Manager. In her current role, Venessa manages a team of Claim Analysts responsible for as many as 700 claims. Venessa has also contributed greatly to the training of various other roles in the claims department here at PURE. Her experience and excellence has made her an invaluable part of PURE's claims team for the past 7 years.

Chryl A. Resnick is National Liability Adjuster for Hanover Insurance Company. Chryl is starting her 9th year with Hanover where she handles mostly sexual assault and rape cases and abuse cases involving schools, colleges, universities and various human services organizations. She also handles most of the durable medical equipment claims for the company and is responsible for overseeing Hanover's fairly new line of business, on the claims side, Life Sciences, as well as coverage litigation. Prior to joining Hanover, Chryl was a Large Loss Adjuster with Great American Insurance Company handling all of the highest exposure liability litigated files for the company for 9 years. She received her law degree from the University of California Davis Martin Luther King Jr School of Law and practiced as an insurance defense lawyer for 4 years for Lord Bissell & Brook in Los Angeles. Chryl was born in Cape Town, South Africa and just a few weeks ago became a naturalized citizen of that country.

James "Jamie" F. Sullivan is managing partner in Howard, Kohn, Sprague & Fitzgerald, LLP. He practices in the areas of personal injury, commercial and corporate, professional and product liability, employment, education, consumer, construction and class action litigation. He is an AV rated lawyer with Martindale-Hubble. He received his education and J.D. with Honors from the University of Connecticut School of Law, where he was Editor-In-Chief of the Connecticut Law Review and had received numerous academic awards. Upon graduation from Law School, Jamie clerked for Justice Robert J. Callahan of the Connecticut Supreme Court. Jamie has lectured and given seminars on trial practice, legal ethics, legal writing, and various aspects of civil litigation before a number of groups. He is a member of the American Board of Trial Advocates. Jamie has published a number of articles in the field of civil litigation, products liability, corporate liability, employment and constitutional law in the Connecticut Bar Journal, The Law Tribune, ABA Litigation Monograms, and The Connecticut Lawyer. He has tried many cases to verdict or judgment. He co-authored a book Connecticut Legal Ethics and Malpractice, the only such treatise of its kind in Connecticut. The third edition of this book was released in 2016. He is the co-author of a chapter on Connecticut Tort Law in Morton E. Daller's "Tort Law Reference: A Fifty-State Compendium" and a chapter on Connecticut Product Liability Law in Morton E. Daller's "Product Liability Law Reference: A Fifty-State Compendium." Jamie is a member of the House of Delegates and Board of Governors of the Connecticut Bar Association. He is a past President of the Hartford County Bar Association and is chair of its Professional Responsibility Committee. He is a member of the Executive Committee of the Litigation, the Employment, and Federal Practice Sections of the Connecticut Bar Association. He is on the board of editors of the Connecticut Law Tribune. Since 1993, he has been an editorial board member of the Connecticut Bar Journal and serves as its survey editor.

John W. VanDenburgh is a founding partner of the firm of Napierski, VanDenburgh, Napierski & O'Connor, LLP and in 30 years of practice he has successfully tried numerous cases to verdict. Mr. VanDenburgh handles a wide range of cases including, construction law & accident claims, professional liability including medical & dental malpractice defense, products liability actions, motor carrier litigation, environmental claims, premises liability, general accident claims, insurance coverage issues, employment liability and civil rights

actions. He has received Martindale-Hubbell's AV Preeminent peer review rating, the highest rating in legal ability and ethical standards. John has been recognized by U.S. News & World Report as one of New York's Best Lawyers in the field of plaintiff's personal injury and as an Upstate New York Super Lawyer in the area of personal injury and medical malpractice defense.

Steven C. Velardi is Claims Counsel, Casualty Claims, at Navigators Claims in Stamford, Connecticut. His responsibilities include the hiring and managing of attorneys nationwide to defend Navigators' insureds. He takes an active role in claims handling and litigation including involvement in motion practice, litigation planning, early resolution strategies, expert witness retention, and trial monitoring. Steven handles mostly major bodily injury losses, and has broad experience with dram shop cases, in addition to large premises accounts. Prior to Navigators, Steven was a practicing trial attorney in Connecticut. Steven graduated from Quinnipiac University in 2007 with a B.S. and graduated from Quinnipiac School of Law in 2011. Steven maintains his license to practice in Connecticut.

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NAVIGATING ETHICAL PITFALLS IN DEFENDING CLAIMS:

What Insurers Can and Can't Expect of Panel Counsel

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Navigating Ethical Pitfalls in Defending Claims: What Insurers Can and Can't Expect of Panel Counsel

I. Introduction

It is important for all insurance carriers and corporations to have a trusting and productive relationship with panel counsel and independent adjustors. This portion of the seminar addresses and reviews the relationship between insurance companies, panel counsel and independent adjustors. It will review the roles, expectations and general issues traditionally seen in the industry with third party venders, along with assessing some ethnical components involved in the process.

A. Roles of Panel Counsel, Independent Adjustors and Insurance Companies

The relationship between third party vendors (law firms and independent adjustors) and insurance companies is a very intriguing one. Most insurance companies will use outside approved or panel counsel to defend insureds or direct actions in each state. Panel counsel is generally defined as an attorney or law firm chosen by an insurance company to represent its policyholders in defending liability claims. Defense firms are selected for the panel based on their expertise in handling claims involving the coverage lines written by the insurer and their willingness to use billing rates acceptable to the insurer. When a policy is written on a duty to defend basis, either the insurer selects, or the insured can select defense counsel from one of the firms contained within the panel. However, in some instances, insurers allow insureds to choose law firms that are not part of a panel. This is especially true if (1) the request is made prior to policy inception, and (2) the insured's preferred firm has demonstrated capabilities in the applicable line of coverage. An

independent adjustor is traditionally defined as an adjuster who works independently of any company but hires their services out to insurance companies and other necessary organizations for investigating, negotiating, and settling claims on behalf of the company. It is somewhat different in choosing independent adjustors to assist in a claim, as the insurance company will likely have a panel or vendor list, but the insured will not have the option to choose which independent adjustor will be used on the claims. Traditionally, panel counsel and independent adjustors are selected for various reasons, including specific expertise in area of law, experience with company and/or claims personnel, trial experience and associations with various organizations. Insurance companies are constantly developing, changing and overhauling panel counsel lists. As litigation management continues to go through various "tune-up" stages, one area of significant concentration is relative to selection of outside panel counsel. After all, regardless of your handling guidelines, billing procedures, and electronic billing, if you do not have the best firm for your needs, you may never experience true litigation management success. Most involved in the administration of litigation management issues know the success stories of large insurers and corporations, and how they were successful at identifying their areas of concern and outlining specific action plans to assist in reducing and controlling legal costs and exposures.

II. General Expectations and Functions of Panel Counsel and Independent Adjustors

A. Expectations of Panel Counsel

1. Communication

Insurers expect reasonable communication directly with panel counsel and with their insureds. Insurers also expect their insureds to be kept up to

speed on major issues contained within the litigation. One the most frustrating issues involved between insurers and panel counsel is the inability for the claims handler to communicate with defense counsel. Currently, with communications being extremely user-friendly, it is not unreasonable for insurers to expect return calls and emails within a twenty-four period. Regarding insured persons and companies, defense counsel typically creates their own relationship with those clients. The insured will likely advise defense counsel how often they want to be provided with updates on the litigation since they are a party. One good practice is to copy the insured on anything defense counsel forwards to the insurance carrier, so the insured will always be on the same page as the carrier when it comes to making decisions, evaluations and negotiations. Obviously, each settlement demand shall be conveyed to both the insurer and the insured, even if the insured has no decision-making authority about responding to the demand under the terms of the policy. Finally, at the close of any litigation, whether it be due to dispositive motion practice, settlement, trial or appeal, the insured and carrier will require notice of the final disposition of the matter and copies of settlement documents for their file.

2. Reporting

Each insurance company or corporation has different and distinct reporting guidelines. Most companies will require an initial confirmation of the accepted assignment by panel counsel. Once the litigation commences, most companies require an initial report and evaluation thirty to sixty days

after receipt of the assignment and, at a minimum, quarterly reporting thereafter. It is a good practice for the claims handler and defense attorney to identify what requirements are present regarding reporting and develop deadlines based on the company guidelines. If the case is in a different posture than a normal suit, such as pre-suit investigation/negotiations, coverage determination or stayed because of something like a bankruptcy, the reporting requirements may need to be adjusted by both parties.

3. Budgeting

Budgets, cost projections, expenses and similar components have become required aspects of defending lawsuits for insurance companies. Insurance companies want to know up front what is it going to cost for the defense of the litigation, what expenses are going to be entailed and what defense counsel plans for the file life. Budgets and budget requirements are also dictated by the insurance company guidelines. Most insurance carriers require some form of electronic billing submission through third party vendor sites, such as Counselink, Tymetrix or other similar type litigation management software. Defense counsel should be realistic in their evaluation of the fees and costs associated with the case being handled for the carrier. The claims professional and defense attorney should discuss the proposed budget being submitted the carrier for approval before it is presented either directly to the claims professional or into a third-party billing site. Budgets are usually due within sixty days of the assignment being made to defense counsel. Sometimes the defense of claims requires

an updated or supplemental budget due to various factors, such as complexity of case, actions of opposing counsel, addition of parties, etc. In these situations, the claims professional should be made aware of the change in circumstances and the need for an updated, proposed budget to be submitted. The goal for defense counsel should be for no surprises for the claims professional or insurance company about attorneys' fees and expenses incurred in the defense of a claim.

4. Guideline Compliance

Insurance companies expect that panel counsel will follow their guidelines strictly. Compliance ensures that law firms will remain on panel counsel and that the relationship between the insurer and counsel continues to be a successful one. Different companies have very different requirements for defense counsel and it is incumbent for each law firm to be familiar with company guidelines in handling their cases. Being compliant with each carrier's guidelines cuts down bill reviews/audits, ensures quick and accurate payments from the client and provides the carrier with efficient file handling by counsel. Some important insurance company guidelines to consider are as follows:

- The number of lawyers who can attend the same events such as depositions, hearings, trials, etc.
- What are attorneys expected to handle as opposed to what paralegals are expected to handle?
- What can attorneys bill for?
- What expenses or other tasks do attorneys have to require permission before the task is performed?

- Can the firm bill for in-house communications?
- Are there restrictions on the amount of research to be performed for a dispositive motion?

These are simply some items which are often covered or addressed in insurance company guidelines which every panel counsel law firm should be aware of and follow to ensure a pleasant relationship with the company.

5. File Evaluation

Insurance companies expect panel counsel to provide an accurate and realistic evaluation of exposure to the insured and/or carrier. It is also important for panel counsel to evaluate exposure in a timely manner, so the carrier can make a financial decision to invest in the litigation and incur defense costs or, in the alternative, look at resolution options. If the exposure changes during the litigation because of party credibility, new evidence, court rulings or due to some other reason, the carrier needs to know immediately so reserves can be adjusted, excess coverage be put on notice and a plan updated about handling of the case. It is important that the carrier be advised of these changes immediately. A general practice tip is to advise the carrier of several different outcomes if the case is moving towards trial, such as the Plaintiff's best day in court, an average outcome and if everything goes in favor of the Defendant. These outcomes could be dramatically different, but the insurance company typically wants to know all possible options about evaluating outcomes. One frustrating issue for insurance companies is for the evaluation of a case and possible exposure to change dramatically prior to trial or a pretrial conference. Only in rare

circumstances should a total change in the case on the eve trial warrant the exposure being adjusted. Too often defense counsel works a file to a certain point in the litigation advising the carrier of great, sustainable liability or medical defenses, only to perform a complete one hundred, eighty degree turn in their position. Carriers are not a fan of this turnabout and it can create many issues for defense counsel remaining on the panel counsel list in the future.

B. Expectations of Independent Adjustors

C. **Common Issues Associated with Panel Counsel**

Issues between insurance companies and panel counsel range from guideline compliance, overbilling, efficiency and reporting. Most of these issues can be resolved easily between the claim's handler and defense counsel. Prolonged issues can lead to the law firm being placed on a probationary period with the carrier and/or removal from the panel counsel list for your state. Below are some topics which will be discussed during the panel session involving specific issues that arise with panel counsel and the handling of claims:

- Attorneys who give the impression of not wanted to try cases or not trying enough cases for the carrier to verdict;
- Limiting the number of people working on a file in a law firm;
- Expectations about counsel returning calls and emails;
- How many partners and associates per file;
- Expectations of use of associates' time on files;
- Attorneys who want to always settle before trial; and
- Timely reporting.

D. Common Issues Associated with Independent Adjustors

III. Ethical Considerations Associated with Panel Counsel and Independent Adjustors

A. Coverage Situations and Reservations of Rights Issues

Every claims handler and panel counsel need to be aware of the rights and duties owed to the insured where a coverage issue arises and/or a reservation of rights letter to triggered. In these situations, knowledge of each state's law will ensure that the file is handling properly, and no bad faith is committed by the company. Communication with the insured is key in these situations and they will need to be alerted to the specific coverage issue immediately. Once the coverage issues are identified by the carrier, the insured needs to be advised in writing of the specific actions or damages that are not covered and an explanation given, citing to the insurance policy provisions as to why the actions or damages are not covered. The carrier has the option to employ panel counsel or an independent adjustor in certain circumstances to investigate the coverage matter further or in greater detail. Panel counsel can typically perform a formal coverage opinion for the carrier providing coverage options and recommendations based on the law in a specific state. Panel counsel can pursue a declaratory judgment on the coverage issue for the carrier if needed to ensure complete protection from any bad faith allegations or litigation for decisions made by the carrier on coverage. In a situation where the insurance coverage is being investigated by the carrier, a reservation of rights letter is typically extended

to the insured advising of the status of the matter. In the majority of jurisdictions, a reservation of rights letter will trigger and allow the insured to hire personal or conflict counsel to represent them. Conflict counsel is generally paid for by the insurance company while the reservation of rights is pending. The insurance company should always explain the option of conflict counsel with the insured and advise the insured of the options of hiring their own counsel due to the coverage investigation. In many situations where conflict counsel becomes involved, the insurance company will have coverage counsel and defense counsel both involved in the case, along with paying for personal, conflict counsel for the insured.

B. Conflicts of Interest

As discussed above, a conflict of interest is created for panel counsel when the reservation of rights is issued by the carrier to the insured. If the insured chooses not to hire conflict counsel and remain with panel counsel, a waiver of the conflict of interest should be obtained in writing from the insured. Other types of conflicts can arise during the representation of the insured or when the file is assigned to panel counsel. These conflicts of interest are typically identified by each state's ethics rules and some general conflicts of interest are:

- Simultaneous representation, which is when one attorney represents two clients who are adversaries in a case;
- When an attorney represents two clients in separate cases where the legal position of one will have negative consequences for the other;
- When an attorney represents a client in a matter that may be adverse to that of a former client;

- When an attorney acts as a witness in a case in which the attorney is also representing a client; and
- When an attorney enters into business transactions with a client.

It is the duty of the panel counsel to identify initially whether any conflict of interest exists in the representation of the insured or carrier in each matter, or if a conflict arises during the litigation which needs to be addressed.

C. Tripartite Relationship

Panel defense counsel should be familiar with the "tripartite" relationship. Those insurance-appointed counsel who defend under a reservation of rights especially should be aware of the potential conflicts that befall such representation. The "tripartite" relationship refers to the relationship among an insurer, its insured, and defense counsel retained by the insurer to defend the insured against third-party claims. This relationship can present actual or potential conflicts between the insurer and the insured, placing defense counsel in difficult, and often confusing, positions. This relationship creates some questions inherent in litigation such as who the client is, how does the attorney client privilege play out in these situations and what about the minority of states who do not recognize the dual-client relationship.

D. Relationships between vendors and insurance companies

Over the last decade, personal relationships between panel counsel and insurance company employees has been changed significantly. Dinners, lunches, drinks about the town and gifts have been eliminated from

consideration. Personal visits and in-house seminars have also been reduced by carriers. However, many firms still choose to provide academic materials and resources to insurance companies and employees. The insurance industry most likely finds these materials helpful as many claims professionals handle different jurisdictions with very different laws. Some resources that law firms provide to insurance carriers are:

- Newsletters
- Legislative updates
- E-alerts
- Seminars/Training
- Desk Reference Materials
- Venue Maps.

IV. Conclusion

Panel counsel, independent adjustors and insurance companies have an interesting and mutually beneficial relationship. It is everchanging based on the needs on the companies for each area of law, lines written and availability of law firms for each state in each specialty. The needs of the insurance industry will continue to dictate how the panel counsel firms handle the future of this relationship.

Defending Sexual Misconduct Allegations in the #MeToo Era

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Defending Sexual Misconduct Allegations in the #MeToo Era

Harvey Weinstein. Bill Cosby. Kevin Spacey. Once among the list of Hollywood elites, those names now evoke a much different reaction.

A year and a half ago, a criminal jury failed to convict Bill Cosby on sexual assault charges arising from allegations he drugged and raped an unconscious woman. Six months later, the New York Times exposed the sordid allegations against Harvey Weinstein, spawning a movement with social media hashtags like #MeToo, #TimesUp, and, most significantly for those assessing risk, #believewomen. In April 2018, Cosby was convicted on all charges.

From a legal perspective, the Cosby trials were different, with a retrial never being identical to the first. The lead defense attorney for Cosby was different as, of course, was the jury. In the second case, five other alleged victims were permitted to testify, compared to one in the first trial. Finally, the recent case was tried in the #MeToo era. Has the cultural awakening occasioned by the #MeToo movement changed how people think about allegations of sexual misconduct? Or is the Cosby case, with its notoriety and sheer volume of allegations, too far outside the norm to serve as a bellwether for future cases?

At bottom, a he said/she said case begins as a coin flip, with available evidence and the credibility of the accused and accuser tipping the scales in favor of one party. The #MeToo movement has been an important catalyst in creating a conversation about power and abuse. As a result, bad behavior is less likely to be seen as a one-off comment or an innocent misjudgment of circumstances. The notion that any one incident is part of a larger, more pervasive underbelly that permeates both personal and professional settings, is no longer a bridge too far in the mind of the public. On a practical level, whether the allegation involves harassment, assault or other misconduct, the accused is more likely to feel he must disprove the allegation to have a credible chance of prevailing in the matter.

With wave after wave of accusations breaking on a seemingly daily basis, how does that affect the value of pending cases? Is this the time to be trying a sexual assault or harassment claim before a jury? Or should it be avoided at all, or nearly all, costs? Of course, there are no

easy answers to those questions, and cases find their way into trial departments for reasons as varied as the claims themselves. Regardless of the news of the day, these claims can be successfully navigated and resolved with a steady hand and well-developed plan to gather and present the evidence necessary to the defense.

The Importance of an Early Investigation

The most compelling means to gain the leverage needed to drive the narrative in a sexual misconduct claim is objective evidence that can create a timeline – a timeline of the evening, the relationship, the behavior of the parties after the fact. Depending on the circumstances, surveillance, receipts, photos, texts, phone calls and other objective data can buttress a narrative in a way that even third-party witnesses cannot. In investigating claims, prioritize efforts to preserve data with a limited shelf life when the means to do so is available.

- Surveillance - While today's surveillance footage tends to be stored on larger digital storage devices than in the days of a single tape that repeated, it often disappears quickly. If possible, endeavor to obtain or preserve video footage within the first 72 hours after an incident.
- Texts - Records of the fact that texts were exchanged may be available months and years after the incident from a wireless carrier, but the *content* of text messages is generally lost in 30-60 days, unless it is preserved by the sender or recipient on a personal phone.[1] Take steps to ensure important information is downloaded and/or backed up when possible. Moreover, take steps to investigate if backups of the messages were preserved on the phone or *other devices*.
- Photographs – Photos can be found both on the camera roll of a phone and/or within apps designed to transmit images. When looking for photos, check all possible locations and ensure that opposing counsel does so as well.
- Metadata – Gather documents or photos in their native digital format. Utilize the information contained within digital files like photos. A simple right click on an image will give an option for "properties" while online EXIF readers such as www.metapicz.com will allow you to input an image and receive detailed

[1] If the matter involves a police investigation, the contents of the phones of the alleged victim and/or the accused may have been preserved by law enforcement using Cellebrite or similar technology.

information about the photo, including the specifications of the camera it was taken on as well as time, date and, sometimes, location. If the information is valuable, appropriate steps can be taken to lay the foundation for that evidence and to secure appropriate experts to testify about it if necessary.

- Social Media – Social media accounts can be a valuable source of information on both liability and damages. Such accounts are also easily manipulated, and privacy settings controlled. To the extent they are publicly viewable, capture full digital versions of any available social media as soon as possible. If litigation has commenced, a complete download of social media accounts can be requested in discovery.[2] Trying to obtain account information directly from social media providers is inevitably a difficult and often fruitless endeavor.
- Credit Card Receipts – Credit card transactions will appear on bank statements that can be subject to subpoena but the actual receipts signed at a restaurant or other point of sale are kept by the business for a more limited period. In a case involving disputes about timing, intoxication or other capacity issues, receipts can

[2] Exemplar requests: **facebook:** A complete copy of the ELECTRONIC DOWNLOAD of YOUR Facebook information. [For purposes of this Request only, the "ELECTRONIC DOWNLOAD" is to be acquired through the following steps: 1. Click at the top right of YOUR Facebook page and select "Settings"; 2. Click on "Download a copy of your Facebook data" below YOUR general account settings; 3. Click "Start My Archive"; 4. The resulting files are to be provided to Propounding Party in electronic form (i.e. Compact Disk, Flash Drive, Dropbox, etc.) **Twitter**: A complete copy of the ELECTRONIC DOWNLOAD of YOUR Twitter archive. [For purposes of this Request only, the "ELECTRONIC DOWNLOAD" is to be acquired through following these steps: 1. Go to your account settings by clicking on the profile icon at the top right of the page and selecting Settings from the drop-down menu; 2. Click Request your archive; 3. When your download is ready, Twitter will send an email with a download link to the confirmed email address associated with YOUR Twitter account; 4. Once you receive the email, click the Go now button to download a .zip file of your Twitter archive. The .zip file is to be produced to Propounding Party in electronic form (i.e. Compact Disk, Flash Drive, Dropbox, etc.).] Dropbox, etc.) **Instagram**: A complete copy of the ELECTRONIC DOWNLOAD of YOUR Instagram archive. [For purposes of this Request only, the "ELECTRONIC DOWNLOAD" is to be acquired through following these steps: 1. Go to http://instaport.me/; 2. Click the "Sign in with Instagram" bar on the left side; 3. Sign into Instagram utilizing your credentials; 4. You will be prompted by Instagram to "authorize" Instaport to access your basic information. Click the green "Authorize" button; 5. Under "choose your export options" confirm the "All my photos" option is selected by toggling the button to the left; 6. Click "Start Export"; 7. The archive will begin to download. Once it is finished, click the "download only" option in the box on the right and save the .zip file. The .zip file is to be produced to Propounding Party in electronic form (i.e. Compact Disk, Flash Drive, Dropbox, etc.).]

offer time stamps as well as evidence of the ability to calculate a tip or sign legibly in the appropriate location.

- Law Enforcement Investigations – Information gathered in connection with a criminal investigation that did not result in a prosecution may not be preserved for the duration of an associated civil action. If information gathered during an investigation may be important to you, check the retention and destruction policies for relevant laboratories and agencies and consider whether a letter seeking the preservation of evidence is warranted or desired.

Formulate and Execute a Clear Defense Strategy

Many misconduct claims are driven by the amorphous concept of "consent." Rarely is detailed affirmative consent sought or obtained in sexual encounters. In 2014, California became the first state to require colleges to use affirmative consent as the standard in campus sexual assault adjudications with several states following suit thereafter. Affirmative consent requires "an affirmative, unambiguous and conscious decision" by each party to engage in sexual activity. Similar definitions have been adopted in other states. According to the State University of New York, affirmative consent requires that partners must explicitly agree to engage in sex, consent can be withdrawn at any time during an encounter, and "silence or lack of resistance" does not imply consent. Further, a person cannot consent while intoxicated and partners must consent every time a sexual encounter occurs, regardless of whether they've consented to a particular type of behavior in the past.

In reality, consent is inevitably clearer in the moment and less ascertainable in hindsight – particularly when allegations of lack of consent or inability to consent are made. As consent is an element of nearly any claim of sexual impropriety, it is up to the plaintiff to prove she *did not* consent to the conduct in question. In some instances, a reasonable and good faith belief that the accuser did consent can be a defense to the claim, even if that belief was mistaken.

When alcohol or other substances were involved, the lines blur quickly. (Pun intended). The aforementioned investigative evidence, properly preserved, provides objective datapoints on which to build the defense of the case. Creating a timeline of events with unassailable evidence builds credibility and brings a strong, persuasive quality to your presentation of the events.

Ultimately, your case will be adjudicated in the #MeToo era but cannot be defined by it. In some cases, an entity may have a defense that, regardless of the conduct alleged, they were

unaware of the propensities of the accused or are otherwise not legally responsible for their conduct. But often the credibility of the accuser and the accused take center stage. Challenges to the accuser's credibility, recollection and damages, will undoubtedly prompt charges of victim blaming and simply must be met head on. An evaluation of the behavior of the accuser before, during and after the alleged incident are all fair and necessary inquiries. Where the behavior is inconsistent with allegations of unconsented to contact, the explanation for those inconsistencies should be explored.

At the same time, defense counsel must be cognizant of the dynamics of the jury. Where the accused's behavior is problematic, a candid assessment of the risks and potential damages associated with the action should be made as early as possible. While direct victims are likely to be excused for cause in the *voir dire* process, some portion of the jury is likely to have friends or family that have been touched in some way by the issues of abuse or harassment. Care must be taken to ensure credibility hits against the accuser are targeted and supported by the evidence to avoid backlash and maintain higher ground. This is particularly true where the accuser claims a lack of recollection of the events in question whether due to trauma, injury or incapacity.

Developments in the Law that Affect the Trial and Resolution of Your Case

In assessing risk and ultimately, trial strategy, it is important to understand the legal framework against which evidence will be measured.

1. "Me Too" Evidence

If a case involves charges of anything other than an isolated incident, the admissibility of "me too" evidence should be ascertained and explored. Since 2011, the case of Pantoja v. Anton has been cited to frequently for the proposition that courts may consider certain "me too" evidence in harassment and discrimination cases. ((2011) 198 Cal.App.4th 87.)

In Pantoja, the plaintiff, a law firm employee, alleged she had been subjected to a pattern of abusive conduct by defendant Anton before she was fired. She sued Anton and his law corporation for employment discrimination, wrongful termination in violation of public policy, battery, sexual battery, and intentional infliction of emotional distress.

A key issue at trial was whether Plaintiff could introduce evidence from other former employees who allegedly suffered similar harassment by Anton. Plaintiff admitted she did not witness the alleged "me too" evidence, some of which took place before she was employed, and thus it did not affect her work environment. Plaintiff offered the evidence to show Anton had a

discriminatory intent and to rebut his testimony that he never engaged in, nor would tolerate, any harassing conduct. The trial court found the evidence was inadmissible to prove Anton's intent or to impeach him, because it did not concern facts that took place while Plaintiff was an employee. And as the Plaintiff did not "personally witness[] such acts" they did not "adversely affected her working environment."

On appeal from a defense verdict, the Court of Appeal reversed, holding the employee need not show the conduct was motivated by sexual desire because the law prohibits all severe and pervasive demeaning misconduct based on an employee's sex. Rather, a sexual harassment claim based on a hostile work environment exists under both federal and state law, generally, where the employee was subjected to unwelcome conduct or comments because of his or her sex and the result was harassment so severe or pervasive that the conditions of the employment were altered.

While inadmissible as character evidence, evidence that Anton harassed other women outside of Plaintiff's presence could have shown the jury that he harbored a discriminatory intent or bias based on gender. Further, admission of the evidence would have allowed the jury to evaluate the credibility of Anton and other defense witnesses who claimed the conduct alleged did not occur, as well as Anton's claims that he did not have a discriminatory intent.

The court's very broad view of the admissibility of "me too" evidence is concerning for employers. While allegations of bad behavior generally, or with regard to persons not similarly situated to the plaintiff, is not necessarily relevant, the decision can significantly expand the scope of discovery in a harassment case as well as the dynamics of trial.

2. Rape Shield Laws

In the late 1970s, and into the 1980s, states began taking steps to protect alleged victims of sex crimes. Most states, as well as the federal system, have some variation of rape shield laws.

In California, in a civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion, reputation, or evidence of specific instances of a plaintiff's sexual conduct, is not admissible by the defendant to prove consent by the plaintiff or the absence of injury to the plaintiff, unless the claim is for loss of consortium. However, the

prohibition does not extend to exclude evidence about the accuser's past sexual relationship *with the alleged perpetrator*.[3] (Cal. Evidence Code §1106(b).)[4]

Prohibitions on the use of a plaintiff's past sexual experiences are not absolute, though exceptions are limited and likely to be hard fought. The notable exception is when such information is relevant to attack the credibility of the plaintiff. As a prerequisite to introducing otherwise prohibited evidence to attack credibility, a motion must be made pursuant to Evidence Code §782 and the court must grant approval to proceed. Perhaps unsurprisingly, trial judges have narrowly exercised this discretion so as not to allow the credibility exception to undermine the legislative intent in creating the rape shield protection.[5]

Similarly, Federal Rule of Evidence 412 precludes admission of evidence offered to prove that a victim engaged in other sexual behavior (F.R.E. 412(a)(1)) or evidence offered to prove a victim's sexual predisposition (F.R.E. 412(a)(2).) Rule 412 applies in any civil case in which a person claims to be the victim of sexual misconduct, such as actions for sexual battery or sexual harassment.

In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy. (F.R.E. 412(b)(2).) As in the state procedure described above, a noticed motion is required to seek admission of evidence otherwise precluded by the Rule. (F.R.E. 412(c).)

The balancing test the Court will employ requires the proponent of the evidence to convince the court that the probative value of the proffered evidence "substantially outweighs the danger of harm to any victim and of unfair prejudice of any party." This test for admitting evidence offered to prove sexual behavior or sexual propensity differs from the general rule governing admissibility set forth in Rule 403 (more prejudicial than probative) in several key

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[3] In Rieger v. Arnold (2002) 1041 Cal.App.4th 451, 464-5, the Court of Appeal determined that the term "perpetrator" in Evidence Code §1106 was broader than the term "defendant" in § 1103 (criminal rape shield statute) and includes "not only the named defendants but also any other actor whose conduct the plaintiff seeks to ascribe to the employment entity." In Rieger, the court admitted evidence about plaintiff's prior sexual conduct with "the individual defendants, or others whose conduct the plaintiff ascribed to the employer, regardless of whether it occurred within or outside the workplace."

[4] In a civil action for sexual battery brought by a minor against an adult, prior sexual history is inadmissible to establish consent.

[5] People v. Chandler (1997) 58 Cal.App.4th 703, 708.

respects. First, it alters the burden such that the proponent of the evidence must demonstrate its admissibility as opposed to the party opposing its use demonstrating prejudice sufficient to warrant exclusion. Second, the standard expressed in subdivision (b)(2) requires that the probative value of the evidence *substantially* outweigh the specified dangers. Finally, the test considers "harm to the victim," in addition to prejudice to the parties.

3. Civil Rights Statutes

Since 2002, California has had a "gender violence" statute which was purportedly created to address limits in existing laws which did not adequately prevent and remedy gender-related violence. (Cal. Civil Code §52.4). The statute was specifically enacted in response to the United State Supreme Court's decision in U.S. v. Morrison (2000) which held that Congress lacked authority to create the civil damages remedy of the Violence against Women Act (42 U.S.C.A. §13981.)

Section 52.4 offers two definitions of "gender violence." The first defines gender violence as consisting of "one or more acts that would constitute a criminal offense under state law that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, committed at least in part based on the gender of the victim, whether or not those acts have resulted in criminal" charges. (Cal. Civil Code §52.4(c)(1).) The second defines gender violence as consisting of "[a] physical intrusion or physical invasion of a sexual nature under coercive conditions, whether or not those actions have resulted in criminal charges." (Cal. Civil Code §52.4(c)(2).) Phrases such as "physical intrusion," "physical invasion," and "under coercive conditions" are not defined and the legislative history is not illuminating on those points. If a man reasonably believes that a woman wants him to have physical contact with her, but she's only acting that way because she feels pressured, is that coercive? Despite being in place for over 15 years, the statute has rarely been the subject of appellate decisions or clarification.

Subdivision (a) establishes the cause of action and states that the plaintiff may seek "actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, or any other appropriate relief." The same subdivision provides that a "prevailing plaintiff may also be awarded attorney's fees and costs" - a significant point of leverage for the accuser.

Despite the intent of its authors, there are several other statutes which provide a remedy for gender-related violence including the Ralph Act (hate crimes) Civ, Code §51.7; Civ. Code §51.9 (sexual harassment in business, service, or professional relationships); Civ. Code §1708.5 (sexual battery); and Civ. Code §1708.7 (stalking); and Civ. Code §1708.6 (domestic violence).

But, a comparison with each of the other statutes reveals that Section 52.4 offers something that each of the others lack. A Section 52.4 claim carries a longer statute of limitations than a Ralph Act claim, at least as to a plaintiff who was victimized when she was a minor.[6] A Section 52.4 claim is more attractive to a plaintiff than a claim for sexual battery in that the former has a longer statute of limitations (three years versus two) and provides for an award of attorney's fees. Moreover, Section 52.4 prohibits some misconduct that the sexual harassment cause of action in Civil Code §51.9 and the torts of domestic violence and stalking do not, such as a sexual assault not arising out of a business or intimate partner relationship.

Notably, an employer is not liable for gender violence "unless the employer personally committed an act of gender violence" making the normal rules of agency liability of an employer inapplicable in a Section 52.4 claim.

4. Confidentiality Provisions in Settlement Agreements

a. Sexual Assault and Abuse Cases

Confidentiality provisions in civil settlement agreements have received a new level of scrutiny in recent years with some quick to point to such provisions as a means to silence victims and perpetuate abuse. Effective January 1, 2017, Section 1002 of the California Code of Civil Procedure prohibits any provision of a settlement agreement from preventing the disclosure of factual information establishing a cause of action for civil damages for an act that may be prosecuted as a felony sex offense, or for an act of childhood sexual abuse, sexual exploitation of a minor, or sexual assault against an elder or dependent adult. (Cal. Code of Civ. Proc. § 1002(c).) Any such provision in a settlement agreement is void, and a court may not enter any such order in any such action, whether by stipulation or otherwise. (Cal. Code of Civ. Proc. § 1002(a), (d).) Indeed, the statute goes so far as to advise that attorneys may be disciplined for demanding such a provision, or even advising a client to sign an agreement containing such a

[6] If the plaintiff was a minor at the time of the alleged misconduct, the limitations period is eight years "after the plaintiff attains the age of majority or…three years after the date the plaintiff discovers or reasonably should have discovered the psychological injury or illness occurring after the age of majority that was caused by the act, whichever date occurs later. (Cal. Civ. Code § 52.4(d).)

provision, and directs that the State Bar "shall" investigate and take appropriate action in any matter brought to its attention. (Cal. Code of Civ. Proc. § 1002(e).)

However, Section 1002 does not preclude the parties from making an agreement to prevent the defendant from disclosing any medical information or personal identifying information about the victim or any information revealing the nature of the relationship between the victim and the defendant. Notably, the statute does not preclude the right of a victim to disclose this information. Lastly, the section does not prevent a nondisclosure agreement regarding the settlement amount.

b. Proposed and Enacted Legislation Regarding Employers

i. California

In August 2018, Senate Bill 820 was passed and codified as Code of Civil Procedure § 1001.[7] This law prohibits the inclusion of nondisclosure terms in settlement agreements relating to actions alleging claims of sexual harassment or discrimination in the workplace.

As it relates to the workplace, Code of Civil Procedure § 1001 builds on and broadens Code of Civil Procedure § 1002 by including actions seeking civil damages for sexual assault, sexual harassment, or workplace harassment or discrimination based on sex or failure to prevent an act of workplace harassment or discrimination based on sex. Unlike Cal. Code of Civil Procedure §1002, however, Code of Civil Procedure § 1001 permits the inclusion of nondisclosure terms upon the request by the complaining party.

ii. New York

The State of New York is also imposing limits on confidentiality in similar cases.[8] In March 2018, the New York State Senate passed S-7848A, a bill which: (i) prohibits mandatory arbitration agreements for sexual harassment complaints; (ii) bans confidential sexual harassment settlements unless the confidentiality provision is separately considered and consented to by the complainant; (iii) creates a statutory definition of "sexual harassment"; and (iv) expands state-law protections against sexual harassment to independent contractors. In April 2018, Governor Andrew Cuomo signed into law a 2019 New York budget implementing the provisions of S-7848A.

[7] Effective January 1, 2019.

[8] Bills that would ban the use of nondisclosure agreements when settling sexual-harassment claims have also been proposed in Massachusetts, Pennsylvania, New Jersey and Washington.

The new legislation prohibits sexual harassment of "non-employees in the employer's workplace," including "contractors, subcontractors, vendors, consultants or other persons providing services pursuant to a contract in the workplace or who is an employee of such contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace."

The legislation also provides that any settlement, agreement or other resolution directly relating to sexual harassment claims may not include language that prevents the disclosure of the underlying facts unless the plaintiff (1) has been given 21 days to consider the confidentiality/non-disclosure provision and 7 days to revoke the agreement after signing. Furthermore, mandatory arbitration agreements with respect to sexual harassment claims will no longer be enforceable and shall be deemed null and void. However, mandatory arbitration agreements that include sexual harassment disputes remain enforceable with respect to all other claims.

iii. Changes in Federal Tax Laws

On the federal level, Section 13307 of the Tax Cuts and Jobs Act of 2017 amends Section 162 of the Internal Revenue Code to eliminate a tax deduction for sexual harassment-related settlements if the settlement or payment is subject to a nondisclosure agreement. Under the Act, employers may now have to choose between deducting as business expenses settlement payments for sexual harassment or sexual abuse claims and maintaining the confidentiality of such settlements.

What will follow from these changes in the law remains to be seen. While introduced to address legitimate and reasonable concerns in some instances, these new laws may well cause a dramatic shift in the way sexual harassment and misconduct claims are handled. For example, where new laws apply only to settlements reached after litigation has commenced, they could pressure employers to settle matters pre-litigation, thereby increasing the value for factually questionable claims. To the extent a lawsuit is filed, potential unintended consequences include dis-incentivizing defendants to settle claims due to the public nature of such settlements. Ultimately, such provisions may steel the resolve of defendants to take a case to trial as the only means to clear their name.

Funneling more cases towards trial may ultimately not be in the best interest of alleged victims. Trials of such matters are emotionally taxing for all involved. They generally involve

challenges to the credibility of the accuser, or unflattering details about the nature of the encounter or relationship aired in a public forum. When both sides are represented by counsel, confidentiality is a mutual decision which can be negotiated and bargained for. Taking that off the table can operate to eliminate something that can have value to both sides.

CONCLUSION

One thing is certain, the #MeToo movement is likely to bring about more claims for misconduct. As with any subject, those claims will cover the gamut from meaningful to meritless. Navigating these claims requires a comprehensive investigative plan, a solid litigation strategy and a clear understanding of the best possible outcome for the client under the circumstances.

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Provided By:
Claim Professionals Liability Insurance Company

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TPA CLAIMS

Acknowledgement

Generally, no acknowledgement is sent since the loss comes directly from the client, who is self-funded. The loss will show up in the next month's loss run. All claims should be sent up within 24 hours in a risk management information system.

Contact Time

Contact should be made within 24 hours to all important parties – claimants, employees, doctors, etc. This is particularly true of self-funded workers' compensation. Contacts should be made by telephone whenever possible. Mail or email is acceptable depending upon the circumstances. This should be documented in the notes section, as well as in the paper file or, if imaging is used, in the imaged file.

Investigation

Each set of notes should begin with an outline for handling the claim put together by an adjuster and a supervisor unless the claim is a simple one. This should include field investigation as appropriate.

Notes

Because TPA programs are supported by extensive risk management information systems, the notes are extremely important. This is a major communication tool between the adjuster and the client.

The client should have access to all notes. The access should be via the Internet. Remember, the importance of HIPAA and state information security statutes. Make sure that access to your system is only by a password, and potentially, encryption.

The notes should detail the actions to be taken, and the results of those actions. This should be backed up in the paper or imaged file.

Reporting & Communication

Reporting is minimized in TPA programs, because the client has access to notes. More serious claims would take a standard full formal report unique to that type of claim.

While communication is partly through the computer notes and through email, I cannot emphasize how important it is to maintain good overall communication via telephone with the client. These programs live and die on communication.

Legal Files

As with any other claim file, lawyers should be given instructions, detailing what we want them to do when the file is assigned. This is basic to maintaining control of counsel.

Legal bill review should be used.

When an Account is Acquired

The following things are mandatory when an account acquired:

1. Set up good communication lines between your adjusters, support people, and the contacts at the client.
2. Do a full computer conversion, including all history of payments, and reserves. If you do not, you will regret it later, particularly when it comes time to report to excess carriers, or to state regulators.
   This writer has never had a client refuse a full conversion, and I find the conversion costs are not the issue when obtaining an account. However, if you do not get authority to do a full conversion, make sure that you have it in writing from the client that a full conversion is not required. Also, make sure that the client understands, in your letter, which reporting you will be unable to do because you don't have all the data necessary. If possible, build it into your contracts so the client signs it.
3. Set up regular claims meetings with the client.
4. Make sure all client emails and communications show up in your notes in some fashion, either by typing in the information, or using a "cut and paste" system.
5. Develop the means to send monthly computer reports to the client electronically.
6. Review reserves every time file is handled. Stair stepping reserves will get you in trouble with excess carriers, and will create almost as many problems for you as poor communication.
7. Close files in a timely fashion. This clears reserves. You don't want files that should be closed to be open at renewal time. The reserves will then be reported to the excess carrier and may result in a higher premium for your client.

TPA (Independent) Adjuster vs. Public Adjuster

Property claims handled for self-insured TPA clients present a unique challenge. Many TPA programs involving casualty lines (automobile liability, general liability) also include property. Each of these lines may have its own retention. After the retention is exhausted, an insurance company will respond.

Several of these programs have individual carriers on each line. However, all lines aggregate programs may have one carrier or a group of carriers on all lines.

Generally, the TPA has a contract with the self-funded client to handle all lines of claims, including property claims. Please note this contract is between the TPA and the client, and sets the rates to be charged.

A TPA's position when it involves property claims changes. You do not represent the client anymore; you represent the insurance company. To do otherwise would put you in the position of a public adjuster.

This writer is not aware of any state that allows an independent adjuster to also be a public adjuster.

It is imperative that an agreement be reached with the property insurers allowing the TPA to handle claims on behalf of the property insurer, particularly in times of catastrophe. Hurricane claims in the Southeast have highlighted this problem in 2004 and 2005.

This can be a contentious area, and all parties need to understand the relationship that the TPA bears to the client, and to the insurance company, before claims occur.

One other thing to keep in mind: This problem generally occurs only for larger claims, or for many claims arising out of one occurrence, such as a hurricane, where an aggregate limit may be attached.

Major Area for E&O Claims

The largest potential source of E&O claims in TPA business is not reporting large claims to excess carriers in a timely fashion. Other articles in this area have pointed out the importance of having computer reports that will highlight larger claims, early in their life. This is an absolute necessity.

Each TPA should make sure it acquires a copy of the contracts under which it is working. Review the contracts and make sure you know what the reporting requirements to each excess carrier are.

Once you have done this, set up your internal systems to warn you of that reporting requirement well before it becomes due. There are various ways to do this, but the easiest way is to look at total incurred at a point where it is one-half what the excess carrier requires for reporting.

Remember, this applies to all policy years you are handling for a client. In many cases, when you are taking over a long-term, self-insured program, you will have to go back many years to make sure you have proper policy and reporting information. This can be tricky.

Please make sure that you address a letter to your client, and the broker involved if necessary, pointing out that you must have all prior insurance information, contracts, and forms, or you will not be responsible for late reporting in any year where you do not have complete information.

Always follow this guideline: When in doubt, report it to the excess carrier.

K.M. Johns, III, CPCU, AIM, ARM

Risk Management – CPLIC Claims Handling Guidelines

PROFESSIONAL LIABILITY/ MEDICAL MALPRACTICE FILES

ACKNOWLEDGEMENT

The claim should be acknowledged as promptly as possible upon receipt so that the party who has submitted the claim is aware that the claim has been received. Acknowledgement can be one of various forms, including typed acknowledgements, emails, fax, etc.

CONTACT TIME

First of all, the information that was submitted with the claim should be thoroughly reviewed and an interpretation as to the issues in question should be determined. If there is insufficient information with the claim assignment, then the necessary parties should be contacted as promptly as possible and the additional information obtained. Contact with the insured should be within 24 hours and certainly no later than 48 hours. Contact is normally by telephone. If telephone contact is not possible, then a contact letter should be sent clearly indicating that telephone attempts or any other type of attempts have been made without success, and request that the party get back to the requesting party as soon as possible.

INVESTIGATION

Professional Liability and/or Medical Malpractice files require a very different type of investigation than others in the claim management arena. In these cases, there is normally a claim alleging that there has been some professional violation, either in regard to the violation of law in a particular jurisdiction, or in the case of medical malpractice, an event by a medical provider that caused or contributed to the new or worsening medical condition to the plaintiff. In no case, in a claim of this type, should formal statements be obtained from the insured or insured's personnel due to the discovery provision applicable in most jurisdictions. A thorough review of the allegations made should be conducted and a good program scheduled for a complete and thorough investigation.

The parties against whom the claim is brought should be interviewed face to face. Copies of any and all pertinent documents involved in the alleged incident should be obtained. This would include, in the case of professional liability, copies of contracts, drawings, diagrams, etc. In the case of medical malpractice, it should be the complete medical chart as it relates to that provider's care of the person bringing the claim. If possible, medical records from other providers should also be obtained, and there are times when the person for whom the claim has been brought against will have records from other providers in his or her file. Care should be taken to make certain that there is no violation of the obtaining of such records, and particularly since the HIPAA provision is involved in all medical issues. Care must be taken to determine the statute as it relates to the timeframe for which a claim can be brought. In some jurisdictions, the statute is a certain number of years, but that can vary. Normally, in the event of minors, the statute begins to toll at the time the minor reaches age 18. In other cases, the statute begins to toll from the time the claimants knew or should have known that the problem for which they are alleging malpractice brought on the matter for which the claim has been brought.

During the course of the interview, a complete history regarding the background of the party to whom the claim has been brought against should be obtained with regard to all education, years in practice, experience, etc. Copious notes should be taken but should be kept to factual information. Personal impressions should be kept separate from any issues involving the professional involvement of the party to whom against the claim is brought.

EXPERT/CONSULTANT

If the issue involves an issue in a specialized area, the use of an outside expert or consultant should be considered. An expert or consultant who may be considered should provide a complete history of the work done in the past, curriculum vitae, education, etc. An agreement between the client and the investigator should be obtained before retention of any expert/consultant. Once an expert or consultant, including defense attorney is engaged, clear direction should be given to each party as to what is expected, reporting timetable, format, etc. Care should be taken to make certain that the expert/consultant and/or attorney comply with the guidelines.

After all medical records from all applicable sources have been obtained; they should be reviewed, not only by the claim personnel but also by an independent physician who can be truly objective. This review should be done to determine whether or not there is in fact any evidence to indicate any malpractice on the part of the insured or any error or omission, in the event of professional liability against the insured. Client pre-approval may be necessary.

REPORTING

Reporting should be done in a captioned format outlining all of the factual information. This would include names and addresses of the party who has had the claim brought against them. This would also include the information obtained at the time of the interview including education, and all professional information that has been obtained. The report should be free of personal comments. The report should be serious in nature and no effort should be made to minimize any fact of the investigation or to be humorous in the reporting format.

Initial report should be submitted within 15 to 20 days and absolutely no later than 30 days from the date the assignment was received. Follow-up reports should be on a time schedule agreed to between the client and the investigating facility.

Long-term files require a reporting schedule consistent with file activity. Respect the attorney client relationship.

OPPOSING COUNSEL

Often times, the first notice of claim can be a letter from the opposing counsel. If this is the case, the letter should be acknowledged professionally. It should be brief and to the point indicating that the claim has been received and that an investigation is underway and that the attorney will be advised as to our position upon completion of the investigation. Any commitment made in that letter, which should be kept to a minimum, must be met to avoid any problem in the future.

Information given to the claimant attorney should be very carefully considered as to avoid providing any information to which the attorney may not be entitled.

DEFENSE ATTORNEY

Defense attorney may be engaged by the carrier or a request may be made to the investigating company for recommendations. In all cases, the selection of the defense attorney should be carefully undertaken to make certain that the attorney has a great deal of expertise in the field with which the claim deals. The attorney should be advised as to exactly what is expected and there should be a reporting timetable established with the attorney.

There are times when the reporting is done directly between the investigator and the defense attorney to avoid discovery. If it can be determined that the investigator may have been secured by the defense attorney and there is no evidence of reports going to anyone than the defense attorney, often times the discovery problem can be avoided. This is a very involved situation and would need to be carefully explored before entering into any such agreement.

BILLING

Files should be billed on a regular basis. Clients most often prefer billing on a regular basis rather than letting bills run for extremely long periods of time and incurring large invoices. Whenever a bill is submitted, it should be a fully itemized bill, which would clearly outline for the payor the work that was done and the amount charged accordingly.

Coding of work completed is not a good idea and should be avoided.

FILE STORAGE

An agreement should be established with the client as to where the file will be sent for storage, and length of storage, upon completion of the investigation and resolution of the claim.

Files should be retained at a minimum for the length of time specified by local statute or law.

Risk Management – CPLIC Claims Handling Guidelines

GENERAL LIABILITY CLAIMS

ACKNOWLEDGEMENT

The claim should be acknowledged as promptly as possible upon receipt so that the party who has submitted the claim is aware that the claim has been received. Acknowledgement can be one of various forms, including typed acknowledgements, emails, fax, etc.

INVESTIGATION

First of all, the information that was submitted with the claim should be thoroughly reviewed and an interpretation as to the issues in question should be determined. If there is insufficient information with the claim assignment, then the necessary parties should be contacted as promptly as possible and the additional information obtained. Contact with the insured should be within 24 hours and certainly no later than 48 hours. Contact is normally by telephone. If telephone contact is not possible, then a contact letter should be sent clearly indicating that telephone attempts or any other type of attempts have been made without success, and request that the party get back to the requesting party as soon as possible.

Once it has been determined what it is that is being alleged in the claim, a thorough investigation outline should be determined. This outline should include the parties that need to be contacted and the type of information to be obtained from each party. This information can be obtained by way of statements, preferably recorded, or in some cases, interviews with the appropriate party. There are times, because of the discovery in the court system, that we do not want formal statements of any kind in the file. Therefore, an interview with adjuster notes is deemed to be appropriate and often= times are less damaging in the event of litigation than formal statements.

All parties in the claim process should be interviewed or statementized as needed according to the investigation outlined. If the claim involves an incident at a particular location, the location should be inspected and photographed, and documented as to the extent possible.

Efforts should be undertaken to obtain copies of each and every document involved in the claim from all parties. Documents contain a great deal of information that can be very helpful, particularly indemnity (hold harmless agreements) etc. Care should be taken in reviewing all documents making certain as to the information and its bearing on the claim.

Photographs are always helpful and should be taken whenever possible. Photographs can either be good quality 35 MM or digital depending on the request of the client and the reporting format that has been agreed upon.

Partial investigations should be mentioned as sort of a disclaimer to the entire investigation process. Our clients dictate the scope of our work (more now than at any time in the past).

EXPERT/CONSULTANT

At some point in the claim process, it may be determined that an outside expert/consultant is necessary. Care should be exercised that the expert/consultant is thoroughly knowledgeable and trained in the area for which the need arises. The background or curriculum vitae of any outside expert/consultant should be

obtained and reviewed prior to the engagement of such expert or consultant. Client approval should be obtained prior to retaining outside experts.

REPORTING

It is my opinion that reporting should always be in a captioned format. I do not believe "form" reporting is a good idea in any type of claim. The report should be outlined by various captions that are pertinent and on target with the issues involved in the claim. The information contained within each of the captions should clearly outline the information that has been obtained. Personal comments should not be included in the reporting format unless specifically requested and should be under a separate caption so that it is not included in any of the factual information.

Initial report should be submitted within 10 to 15 days unless otherwise instructed. There are clients in the industry who use a 20 day or 30 day guideline for initial reports, but again this would vary with clients.

Once the initial report has been submitted follow-up reports should be guided by a timeline with a time period, such as 20 days, 30 days, or more frequent depending on information that is received and pertinent to the ongoing investigation of the file.

Short form reporting is permissible but should be limited to very minor claims or to very limited partial investigations where basically the report is being used more as a transmittal medium than a detailed report.

Long-term diaries are acceptable when dictated by the loss.

OPPOSING PARTIES

In the claim process with regard to general liability, there may be counsel on the part of the claimant or other parties involved in opposition to the insured. In all matters, correspondence should be professionally written, or done by way of telephone or other means. The information exchanged between parties should be professional in nature and limited to the necessary information. The letter should be formal doing away with any potential allegation of relations that may in fact not exist, but may be inferred by informal greetings, such as addressing the correspondence by the individual's first name. Remember, when claimants are represented, we should have no contact with them without= the express written consent of the claimant's counsel.

EXPENSE CONTROL

In addition to the investigation of the file itself, there are other expenses which would include outside experts, defense attorneys, etc. Exercise should be taken to control expenses and the activities of the outside parties. Files should not be simply turned over to outside experts or attorneys carte blanch. Instructions should be given and regular reviews should be conducted to make certain that the guidelines are being followed.

COVERAGE ISSUES

While there may be some indication of a coverage issue at the time the claim is originally received, there may be other issues or a coverage issue not determined until the investigation is well underway. Regardless of what situation may exist, if indeed there is a coverage issue, the matter should be thoroughly discussed with the carrier and if deemed necessary by the parties in control, the issue may be sent to counsel for

interpretation of coverage. At all times, if there is a coverage issue, a non-wavier or reservation of rights should be rendered to the insured.

BILLING

Files should be billed on a regular basis. Clients most often prefer billing on a regular basis rather than letting bills run for extremely long periods of time and incurring large invoices. Whenever a bill is submitted, it should be a fully itemized bill, which would clearly outline for the payor the work that was done and the amount charged accordingly.

Coding of work completed is not a good idea and should be avoided.

FILE RETENTION

An agreement should be established with the client as to where the file will be sent for storage, and length of storage, upon completion of the investigation and resolution of the claim. Please see File Retention suggestions in this section.

EDITOR'S COMMENTS

Two items that are important to general liability claims are not addressed in the above guidelines.

Status: Many jurisdictions recognize that people who come on to your property come for different purposes, and, therefore, the duty you owe to them may be different. This is generally called "status". There are three statuses that people generally fall into:

1. *Trespasser* – This is a person you do not want on your property. Generally, the duty is to refrain from setting traps.
2. *Licensee* – This is a person you do not wish to exclude from your property, but don't necessarily invite on your property either. An example would be someone who goes into a grocery store to use the restroom, but has no intention of shopping. The duty, in general terms, is to warn of obvious hazards.
3. *Invitee* – This is a person you wish to have on your property so that you can transact business with them. The greatest duty is owed to them. You have a duty not only to warn of obvious hazards, but to be aware of, and to make the customer aware, of any hidden hazards.

The duties outlined above for the three categories are very general. You should check with your own jurisdiction to make sure how these are interpreted.

Constructive Notice: The other item I would like to comment on is constructive notice. This essentially means that a property owner is entitled to an opportunity to learn of hazards on his property. If he should have learned of the hazard, but did not, and therefore did not warn his customers of them, he could be liable.

Again, you should understand exactly how constructive notice is handled in your jurisdiction.

Risk Management – CPLIC Claims Handling Guidelines

GENERAL LIABILITY CLAIMS – Another View

Liability Assignment Investigations

Receipt of Assignment

Acknowledge by office.

Preferably same day by email to assignment Adjuster.

Suit files require immediate attention.

Watch decisions on late notice.

Use of Reservation of Rights Letter

Reservation of Rights to insured by certified mail and regular mail almost immediately, do not hesitate.

Always watch late notice issues. Some carriers will deny because of late notice, some carriers will not. It pretty much depends on your state.

Coverage

Never assume. Endorsements change everything.

Watch coverage. Ask if they have any other insurance.

If the insured is a roofer and the suit claims plumbing, be sure he is within his description of insurance coverage's.

Contact

To insured by phone as well as by mail if necessary, separate from the Reservation of Rights letter.

On all correspondence, once you send out the Reservation of Rights Letter or take a Non-Waiver include the paragraph.

To witnesses send a letter, make a phone call.

To claimants, call and send correspondence introducing yourself to the claimant.

When the claimant is Attorney represented, call counsel, leave a message, call several times and leave several messages if necessary. Follow up with a documentation letter request. Don't be surprised if you are ignored.

If Defense Counsel is involved, call them, depending upon your relationship they might return the phone call, chances are good if they are involved at the start they will send a document request letter to the insured. If we send one as well, and they haven't told you they have, it will just confuse the insured even more.

Investigation Time

By whatever instructions the carrier gives you, by your own suggestion, as need be by common sense, tailoring your investigation by type of assignment. Do what is necessary but don't overdo it.

Its up to you to secure the necessary documentation as in leases, contracts, estimates whatever is written, that you think you might need, ask the insured for that documentation verbally and in writing. When you are with the insured, and need to make a copy of

something, remember a digital camera is a great tool these days for making copies of a document the insured does not want you to take with you.

When the investigation begins, depending upon your client, get a feel for a budget of time or money allowance. Feel free to call the client when you hit a certain agreed upon dollar amount so that your bill does not become excessive or a surprise to the client.

Get time sensitive items such as scene photographs soonest. Document your efforts in investigation. Take meaningful photographs not just to bill the expense. Remember all dates are important. Remember to relate photographs to diagrams and to the loss itself. Letters are important.

Do your homework. Remember the internet is there for you to use for research. If you gain knowledge that is pertinent to the investigation, put it in the report. Remember if you talk to the inside Adjuster on the phone about what you've learned and forget to put it into the report, they may forget it as well.

Experts

When experts are retained, manage them. Tell them what you want. Seek official reports early. Remember the phrase "Confidentiality".

Follow up with the insured for documents. They tend to be lax in their response. Speak with the assigning Adjuster re: progress. Even if it's an email, keep it brief and to the point. Once you put paragraphs into an email they belong in a report.

Report Time

Your first is usually due with ten days or as company requires. Additional reports every thirty days after. Make your reports say something. Outline a plan of action. Tell them what you are going to do. Show them you followed up.

Remember Plaintiff Counsel will see everything in your file. Never use words with two meanings. No words such as "cursory", say what you mean. Don't repeat and stay to the point. Litigation says defense Counsel has probably been asked for your file. Make your reports say something instead of just "another report".

If your state requires snowflake letters, send them. be prompt.

If your state requires statutory letters, send them, be prompt.

Reporting Correspondence

How often should be when information is pertinent and make it a letter report. By all means send out snow flake letters and statutory letters. Call, leave messages, send letters. Be proactive rather than reactive. Remember we must maintain one "one file only". That does not mean you have separate files in separate places. Remember email is discoverable. If you send it, save it. Avoid one line dialogues in emails, the meaning tends to be forgotten. Be direct, make no extemporaneous comments. Remember never, never, never say "thanks for the tickets".

Watch typos on letters. Use diaries to follow up. Note the file. Use tools such as outlook to leave yourself reminders.

Always think in terms of moving the file. Remember on a general liability file you still have to adjust the loss if a damage claim is involved even if coverage might be questionable. Ask the carrier whether they want the inventory done or an estimate written. Have good notes or a clear scope as you someday might not be the one writing that estimate.

Plaintiff/Claimant Counsel

Depending upon Plaintiff Counsel, most likely they will ignore you. You should request a statement from the claimant as early as possible. You should endeavor to get it even if that means an after 5:00 or sometimes a weekend appointment. Remember they don't have to cooperate unless there is something in it for them.

When speaking to Plaintiff Counsel if nothing else, at least get the background on the claimant as in working or married, information about injuries and treatments. If it's a general liability or property damage claim, see if you can get them to give you a claim.

Be persistent, tell them what you seek as in police reports, etc. Seek to share if possible when we can. If you will be in a position to settle, tell him. Don't be afraid to ask for an extension of time if suit has been filed. If they think that there will be a settlement, they most likely will grant you time to do the investigation we need to do. You might be refused, but at least ask. If it's granted, remember it's important to follow up in writing and by the agreed upon date, take whatever actions you need including having Defense Counsel file an answer.

Collateral Sources/Subrogation

Is anyone else involved, is anything else involved in this claim. Is it a repair person, a service provider or manufacturer. Think subrogation, think collateral sources.

Remember if there is a municipality involved, there is typically a statutory time limit for which they must be placed on notice. That notice most likely must go to the County Clerks office by certified mail. Remember certified mail cannot go to a post office box.

Watch potential conflicts. Don't have your office handle two sides of a file. In the same office, it is a conflict.

When speaking to an insured and discussing the word "employee", is this an individual really an employee receiving a W-2 or is he paid cash. Does he receive a 1099. Is he a sub-contractor. It does make a difference.

Watch having to put people on notice.

Evidence

Watch evidence.

It probably should never come into your hands. Let the expert deal with it.

Discuss the insureds cooperation with the carrier. If cooperation problems surface, you should report immediately to the carrier.

Ask whether the carrier wants a statement tape, and preferably send it to them anyway.

Interim Bill

Smaller bills look better. Your initial report should have information contained within it if it's available. By your third report which is most likely 70 days down the road, you should pretty much be ready for an interim billing. Remember the initial work should be done by your first report if possible by all means, the second report and if not by the third you should be well on your way in the investigation.

Activity Sheets

Be timely with notes to the file. Your activity time. If you put s/w co .5, someone eventually will ask you what you need to discuss for one half hour for without further note taking.

If you put full s/w "co" or lmtc, someone will ask you what the codes are. Plaintiff counsel will love to harass you on what your codes mean. Leave no comment in the notes that could be

questioned. Make no doodles or other in or on the file that could be questioned as derogatory towards an insured.

Bill accurately. Your time sheet bill will most likely be blown up to show to a jury that "you" got paid, why should the claimant not.

Recommendations

Make recommendations to the client. Call them to discuss. If its unequivocally something we owe, tell them. In litigation, it saves the client money. Base your written comments on the client. Some do not want it in writing.

In General

Never quote law, it's not what we do.

Be careful with the claimant and damage. They don't understand denial or the words no coverage for the loss.

This outline is by no means complete in what steps you should or should not take when adjusting or investigating a claim or loss. It is my personal take. It's an abbreviated version and changes greatly based upon what needs to be done by the terms and agreements for any individual assignment.

Some files will require massive amounts of time for the simplest loss, some files require no great amount of time for the most difficult loss.

Risk Management – CPLIC Claims Handling Guidelines

SUGGESTED RECORD RETENTION CONSIDERATIONS

Proper record retention is a function of the law, licensing, proper risk management and contracting with clients and business partners. A claim professional is exposed when records are not maintained in compliance with expectations and requirements.

For guidance on records to be retained for tax purposes, please consult with your tax advisor.

CPLIC provides these general record retention suggested considerations to assist insured claim professions with planning for a successful retention program. These suggestions may not cover all areas of concern for your practice. You are responsible for the completeness and accuracy of your retention program.

Claims professional should carefully assess whether the records in their possession are original documents or copies. For each client a clear understanding should exist regarding the collection and storage of original documents. Where a written agreement is in place, record storage responsibilities should be clear.

Digital images are an important and evolving aspect of modern business. Their status as a substitute original is also evolving. Great care and attention to the fact and circumstances should be applied before destroying originals in favor of retained digital copies.

You should assess whether original documents will be preserved before concluding that copies are duplicates. If originals are with another party, you should assess whether you will have access to them should the holder become an adversary.

Copies of documents may be part of an audit trail that must be preserved to support financial transactions and accountabilities for execution of responsibilities under the law, contracts and licensing requirements.

Legal and licensing requirement generally escalate where you are the claim administrator, or are involved with disbursement of funds. Each state's licensing requirements may include record retention requirements. Each state's claims practices acts may contain record retention requirements. Record retention provisions of law may exist at the local, state and federal levels of government.

The statue of limitation applicable to any type of program or file should be considered along with the subject of the claim. Fraud situations may not be subject to a limitation under the statues.

Where performing work on public entities the record retention may be dictated by regulations promulgated at the local, state or federal levels of government. Local government units may be funded in part by federal money which may trigger regulations from the issuing federal departments.

Most public entities are regularly audited by external and government auditors. Knowing the audit process and cycle time is important so that documents can be preserved for audit purposes.

Where a claim professional is responsible for reporting to excess carriers regarding specific and aggregate retentions practices should accommodate the potential for extended retention as all claims may need to settle before recoveries are fixed.

Where an incident regarding a claim indicates that actions on the claim may need to be defended, retentions should be appropriately extended. Subrogation activities and litigation on a file may indicate that retention periods should be extended.

Where a claim is expected to stay open for an extended period, such as with lifetime medical, the retention period may need to be extended.

Where a successor claim handler is appointed for a claim or program, the signoff on the transfer should contain a release regarding records that complies with regulators requirements such as with a TPA to TPA transfer on self-insured workers compensation accounts.

When taking on responsibility for the records from another TPA, care should be taken to ensure that the records received are complete, before executing a release of the prior claim handler. A conditioned release may be in order.

CLAIM PROFESSIONALS
LIABILITY INSURANCE COMPANY
A RISK RETENTION GROUP
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DEALING WITH EXPERTS

Disclaimer:*This piece is prepared for the members insured by Claim Professionals Liability Insurance Company, RRG ("CPLIC"). The information provided in this document is not legal advice. It is prepared by fellow CPLIC members as an evolving, working document to assist members in the normal day-to-day claim handling operations. As with all CPLIC guides and documents, if you have any questions about applicability of the concepts outlined, please seek assistance of local counsel and the specific client(s) for whom you provide claim-related services.*

PRINCIPLE OF AGENCY

In most states and situations, the independent adjusting company ("IA") serves as a hired consultant to the insurance or self-insurance organization. This is commonly referred to as a relationship of agency. When hired to investigate a claim or under contract as a third party claims administrator, the IA firm becomes an agent of the insurance or self-insured organization, referred to as the principal. In such a relationship, the IA firm is only empowered to investigate and act upon a claim up to the level of authority conferred upon it by the hiring organization. As with many topics covered by CPLIC Risk Management, the concept of agency and the limitations to authority conferred upon the IA from the principal must be acknowledged and staff trained to understand fully the limitations of the authority. Staying within the conferred authority in each and every claim assigned to the IA is a primary key to effectively managing the IA organization's exposure to professional liability (Errors and Omissions). This concept is very important when considering the retention of an expert on a claim.

WHAT IS AN EXPERT?

One way to look at the expert topic is to first address who is *not* an expert. In the insurance and self-insurance claims industry, experts run a wide gamut, from a painter in a local body shop to a forensic psychologist. The number of variables in expert investigation and testimony is nearly infinite, varying with the number of differences in claim situations. With the exception of claim investigation policies and procedures, it is important to remember and train the IA staff that independent claims professionals are *not* experts. While staff may deal with a certain type of claim or situation on a high volume basis and see many hundreds or even thousands of situations in the development of claim information, and therefore develop a keen eye to identifying situations, staff remains essentially the eyes and ears for the principle (insurance or self-insured organization).

An expert for the purposes of this presentation is one who has training, education and real-world experience in a specific topic or specialty, whose specific experience is necessary to the proper investigation and determination on the claim at issue. Most IA staff is trained in the investigation and handling of claims. Most are not trained in forensic psychology, accident reconstruction, and so on. While the principal, carriers and self-insureds, may "expect" staff's opinion on who is at fault for the accident, and staff's opinion based upon their many years of handling similar claims may be valid and most times correct, such opinions do not qualify as expert opinions. Staff should be trained and procedural checks and balances put in place to ensure that reports and communications with the principal and others involved in a claim to clearly identify that the opinions of the IA are not expert in nature, but limited to common observations of the trained claims professional.

Another reason why IA staff is generally not to be considered an expert is conflict of interest. Staff is generally responsible for investigation of facts surrounding a claim situation, from coverage to liability. The individual that gathers the information should not and cannot be the same person that serves as an expert for the application of that information. In a worst-case scenario, such as a bad faith law suit alleging improper claims practices, IA staff may be asked to identify specifically what qualifies them to have made certain representations as to coverage, liability or amount of damages. Such a situation is more easily defended by counsel when IA staff has avoided even the appearance of a conflict of interest. The topic of conflict of interest is too broad for this document. However, it is important to remember, check for and internally proceduralize the review and elimination of conflicts which may reflect poorly upon the IA in the claim or in later litigation.

So who qualifies as an expert? A generally accepted definition of the term expert when used in conjunction with claims handling is:

> ***Expert:*** *One who through education, training and experience has special skill or knowledge in some particular field and will be viewed by a court as a specialist and/or authority in that particular field.*

As is evident, IA staff might be considered "expert" in the investigation and handling of claims, but few would qualify as an "expert" on topics beyond the investigation and handling of claims. Therefore, it is important to identify in reports, letters, e-mails and other communications that the opinions and observations of IA staff are just that, opinions and observations...not to be confused with expert level opinions that may be necessary to make a reasonable claim determination at the client / principal level. Simply stated, train staff to not overstep their bounds when communicating to the client or to others involved in a claim.

To complete the discussion of "What is an Expert?", it is important that an IA create through questioning, observation and investigation demonstrable qualifications of an expert considered for use on a claim. The commonly obtained documentation includes:

- the expert and/or firm resume,
- list of higher education and recent continuing education / training,
- list of expert and/or firm references,
- list of similar situations handled previously, and so on.

Qualifying an expert is one of the single best protections against a claim against an IA for negligent hiring / retention of an expert. Check references. Document why the knowledge and experience of the expert is required on the claim.

WHEN IS AN EXPERT REQUIRED?

One of the things that IA staff struggle with, particularly when dealing with multiple client organizations, each with their own rules, procedures and requirements, is identification of when an expert is required as a necessary step in the investigation. Further, each client organization has its own "taste" for use of (and payment of service fees for) an expert. Internal communication between IA staff and management is effective at addressing this on a case by case basis. The goal is to seek a reasonable balance between the "perfect", court-ready investigation and the day-to-day claim procedures and expense pressures upon client organizations.

Retention of an expert is generally indicated when the issue is technical beyond the common understanding of the layperson and community at large. For example, consider a case assigned where a person walking on a sidewalk is struck and killed by a falling 20 ton satellite. An expert would most likely not be necessary to determine the cause of death. Most non-industry people would recognize that a 20 ton satellite falling from orbit and landing on and crushing a human body was probably the cause of death. One would still in most cases want to obtain the coroner's report, but retention of a physician to secondarily opine on the cause of death is probably not indicated. A rule observed by many is: "If it's obvious, an expert is probably not required." Using the same hypothetical, determination of what caused the satellite to fall from orbit is likely an issue for an expert. Most would commonly agree that a contributing cause of the satellite crashing to earth was gravity. However, the claim made by the estate of the deceased will most likely allege negligence of a person or organization that allowed the natural force of gravity to pull the satellite to the ground. It is the investigation of this potential negligence that is beyond the common understanding of a layperson and best commented upon by an expert in satellite technology in this example.

WHO IS AUTHORIZED TO HIRE / RETAIN AN EXPERT?

In the context of agency, the IA organization is only authorized to the level explicitly provided by the principal. In some cases, an IA has a specific written contract or agreement (such as a workers' compensation third party claims administration contract) that specifically grants authority to the IA to hire experts. The retention of an expert under such an agreement is controlled by the agreement. However, care should still be given to communicate timely with the client prior to the hiring of the expert to assure

concurrence. While the IA may identify need for an expert, even if the agreement confers a level of authority for retention of an expert, a claim of professional liability becomes much easier to defend / defeat if the client has agreed with the decision to hire an expert before the expert is retained. Not only is this a good practice from a professional liability risk management perspective, such proactive communications between the IA and the principal can tend to make the relationship much stronger and trusting over time as well.

In all other situations where there is no formal contract or agreement, the IA must ASSUME THAT THERE IS NO AUTHORITY to hire an expert on a case. Any assumption to the contrary may lead to a claim of professional liability, ranging from the obligation to pay the expert's fees up to a worst case result of the IA's obligation to reimburse the principal for payment of the claim. Staff should be trained to assume no authority and act to hire an expert only when such authority is explicitly provided by the insurance or self-insured organization.

Having no authority to directly hire an expert does not eliminate the IA's responsibility to identify the need of an expert on a claim to the principal. Staff should be trained to identify such needs on claims and, with internal review and authority completed, communicate the need(s) to the principal. Failing to identify the claim need for an expert can be an equal exposure to a claim of professional liability.

WHO HIRES THE EXPERT?

An expert on a claim is a service provider to the principal. This must be clearly communicated to the expert from the moment retention is discussed, preferably in written form. Should an issue with fees or work product later arise, the IA needs to be in a position to have not directed or controlled the work of the expert in order to mitigate any claim of IA professional liability. The expert works for the client insurance or self-insured organization. The IA provides necessary information to enable the expert's work, passes through information and direction from the principal to the expert and finally communicates the experts opinion(s) to the principal for inclusion in its decision making process.

This sounds easy to accomplish, but those in the IA business know that the shades of gray are limitless. Many IA firms have relationships with experts that they "have used" on many occasions. In some jurisdictions, such as in a rural area, there may be very few selections to choose from. For example, there may be only one fire cause and origin investigator located within 300 miles of the fire location. Problems can arise when these relationships become too casual or too close. It is important to do everything possible to encourage and enhance the IA relationship with experts in its area to get the highest quality results. At the same time, the IA firm must remain firm in its implementation of an arm's length relationship between the IA firm, its staff and the expert and ongoing communication of who the expert's client is...the principal.

In many cases, this is addressed by use of an assignment form which outlines who the client is, the scope and depth of the assignment, the purpose of the assignment and in some measure what role the IA firm serves in the process. In the cases where allegations of professional liability have been alleged against an IA for improperly retaining an expert or hiring the wrong expert, language on an assignment form of this nature, which is provided to the expert and principal concurrently, provides a strong defense.

WHAT IS THE EXPERT HIRED TO DO?

The written assignment form discussed above is simply the most effective method of retaining an expert. This includes the scope and depth of the assignment. Staff should be trained with specific examples and annual refreshers what specifically is to be communicated through use of the assignment form. In addition, staff should be trained to obtain a signed copy of the form back from the expert before the work begins to assure that the expert understands the scope and depth of the assignment.

Leaving an expert assignment "open" is an exposure to professional liability for the IA. For example, a principal makes a claim against the IA when they receive a bill for $50,000 from an expert for "services rendered". The principal understood the assignment to be limited to "viewing of the accident scene and an informal opinion of the cause of the auto accident". The expert, on the other hand, took physical measurements, obtained video from 15 surrounding surveillance cameras, created a database and created a computerized reconstruction of the accident. If the assignment was not specific in scope and depth, and acknowledged in writing by the expert prior to work beginning, the huge service fee may be claimed by the principal as a professional liability of the IA.

The IA firm must be specific with a retained expert as to who their client is, who is responsible for the service fee, what the purpose of the assignment is and what the scope and depth of the assignment is. In summary, if the IA is not specific as to these issues in the process of retaining an expert, the IA may be exposed to an increased risk of professional liability.

WORKING WITH AN EXPERT

Restating, the definition of an expert is one, who through education, training and experience, is uniquely qualified to render an opinion. An expert is hired on a claim to investigate and evaluate a specific topic, such as fire cause and origin, medical causation of a particular condition, and so on. It is important to "let them do their job".

A classic argument made against an IA in the context of a bad faith type claim is that the expert's opinion was directed by or tarnished by actions of the IA. From a risk management standpoint, use of an assignment form which clearly and timely delineates the purpose, scope and depth of the assignment as authorized by the principal is the single best defense against claims made later by any of the parties involved in the claim against the IA and its staff.

Once the expert is retained and the assignment communicated, it is important to "let them do their job". Follow up by IA staff is necessary on a timely basis to assure that expert results (report, video, etc) are received in the form and within the time parameters necessary for the claim. Otherwise, "let them do their job".

SUMMARY

Claims made against an IA firm or its staff for professional liability arising out of the hiring of an expert on a claim or series of claims are relatively infrequent, but an ongoing, ever-present exposure. Managing the risk from the standpoint of the IA is relatively simple:

1. Remember that the IA serves as an agent of the insurance or self-insurance organization, and as such are authorized to retain an expert only when provided express authority to do so;
2.

Train and educate IA staff what constitutes an expert and the limitations upon an IA staff member with respect to their opinions and observations on claim issues;

3 Timely identification of the need for an expert and varying levels of IA staff involvement in reviewing situations to ensure experts are recommended to the client when necessary;

4 Effective and timely communication, in writing, of the purpose, scope and depth of the expert's job on the claim;

5 Always avoid actual and the appearance of conflict of interest, and:

6 Allow the expert to do their job.

Prepared by:

Michael J. Marsh, RPA, President, Midland Claims Service, Inc., Billings, Montana

Date: June 17, 2008

☰ RISK MANAGEMENT

Overview (http://www.cplic.net/risk-management/overview/)

Guidelines (http://www.cplic.net/risk-management/risk-management-guidelines/)

Risk factors (http://www.cplic.net/risk-management/risk-factors/)

Things good adjusters do (http://www.cplic.net/risk-management/things-good-adjusters/)

Suggested forms (http://www.cplic.net/risk-management/suggested-forms-letters-wordings/)

Claims handling (http://www.cplic.net/risk-management/commentary-claims-handling/)

Dealing with experts (http://www.cplic.net/risk-management/dealing-with-experts/)

What CPLIC sees (http://www.cplic.net/risk-management/cplics-claim-department-sees/)

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LATEST NEWS

AVOIDING STUPID MISTAKES WITH EXPERTS

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"Avoiding Stupid Mistakes with Experts"

Some Examples of E-Mail Communications between Defense Attorneys and Experts:

Example 1:

"Dear Bill,

"Last weekend was a blast fishing…per our discussion, please review the enclosed file that we discussed. I need your expert report in one week…"

Example 2:

"Dear Dr. White,

"I am pleased you have agreed to take this case. I know your history with the plaintiff's attorneys; I think you will really enjoy testifying against them in this case…."

Example 3:

"Dear Mr. _____,

Per our discussion, this is clearly a case of no liability. I have enclosed a copy of my file for review…."

Example 4:

"Dear _____,

"The plaintiff is clearly exaggerating her injuries. I will forward you the diagnostic films and the medical when I receive them next month..."

Better Way to Retain Your Expert:

1. Interview
2. Check Curriculum Vitae
3. Determine that your expert will survive a "Daubert" or "Frye/Reed" or other corresponding state challenge as to your expert's credibility
4. Try to minimize paper and electronic trail between client/attorney and expert
5. Engage expert initially as a "consulting expert" for initial consulting opinion subject to possible designation as a testifying expert *(See Attachment 1)*
6. Bates stamp all documents produced to expert or otherwise identify specifically for identification purposes later *(See Attachment 2)*
7. Send consulting expert Docket Control Order and any applicable protective orders along with a list of documents and data produced (index) via Federal Express

8. Then schedule a telephonic review of initial opinions after consulting expert has had sufficient time to review material
9. Then designate consulting expert as testifying expert
10. Produce written report subject to FRCP 26

Federal Rule 26(a)(2)(B) – Expert Reports:

On December 1, 2010 Congress approved an amendment to Rule 26 governing expert reports.

Rule 26 provides guidelines to the discovery process and the disclosure of information and documents between the expert and the client attorney. In civil lawsuits, United States District Court procedures are governed by the Federal Rules of Civil Procedure (FRCP). Any Court may have its own additional requirements regarding written reports and these requirements are generally available through the Clerk of the Court. Always check the local rules.

State v. FRCP 26:

While rules of the disclosure for experts vary from state to state, there are approximately 35 states that have adopted the FRCP 26 with slight variances. If you practice in a state that has not adopted the context of FRCP 26, then all information, flow and documents between client/attorney and expert maybe discoverable if the expert is ultimately designated as a testifying expert. Be careful!

Rule 26 General Provisions Governing Disclosure Expert Testimony:

1. Identify name of expert
2. Unless otherwise designated as stipulated, disclosure must be accompanied by a written report prepared and signed by expert witness.
    A.) the report must contain –
        1) A complete statement of all opinions the witness will express and the basis and reasons for them
        2) Facts and data considered by witness informing opinions
        3) Any exhibits that will be used to summarize or support opinions
        4) Witnesses qualifications including publications authored in the previous 10 years
        5) List of other cases in which during the previous 4 years the witness has testified
        6) Statement of compensation to be paid for testimony in the case.

BE AWARE OF YOUR EXPERT REPORT AS IT BECOMES A PART OF THE PERMANENT RECORD.

Preparation of Experts for Deposition and Trial:

1. When you consider that 95% of all cases settle before trial and largely upon the testimony of experts, whenever possible it is advisable to meet the expert in person to assess their communication skills, personal appearance and their ability to testify in a clear and pleasant manner.
2. Review the expert report (the expert should list either at the end of the sentence or by a footnote the basis for each of opinion expressed. If the opinion is based on documents that are bates stamped numbered, the numbers should be included in the report. If the expert relies on an outside scientific journal or other source of authority, it should be footnoted in the report).
3. Allow adequate time to review all the potential areas of cross examination your expert may face. This allows the expert to be reassured in his opinion and more confident at the time of cross-examination.
4. Try to schedule your meeting with your expert at least 1 – 2 weeks before your expert's scheduled deposition. This allows sufficient time for any additional information or meetings before the deposition.
5. WORD OF CAUTION – Remember any document that the expert may review in your meeting prior to the deposition is possibly discoverable.

Expert Report:

1. It is imperative that the expert report should be easy to read and look professional. The report needs to be checked for spelling, grammar and overall clarity.
2. Your expert should use professional letterhead
3. 12 point font
4. Create topic headings in short and concise paragraphs
5. Number each page include tables and charts are exhibits
6. Expert report should have a cover page and table of contents
7. List of all documents, data and scientific evidence reviewed
8. Expert report should always state that the expert may have additional opinions or update/revised opinions as additional information is received

Additional Tips to Comply with Rule 26:

1. Put the title of the case and the cause number
2. Name and location of court
3. Date of testimony
4. Name of Judge
5. Attach a copy of expert's fee schedule and/or engagement letter

Expert Reports – Caution about using following type of Language:

1. Argumentative language
2. Comments concerning the credibility of other fact witnesses or expert witnesses
3. Informal or too friendly tone of language

4. Offering opinions or opining on issues outside the experts area expertise
5. Caution as to hedge words or phrases such as “sort of”, “I suppose”, or “somewhat”

Begin to Think of Your Expert as “Settlement Currency”:

A well-qualified expert who’s Curriculum Vitae will survive all “gate keeping” challenges, create “settlement currency”.

MACDONALD DEVIN

David M. Macdonald
214.651.3300
dmacdonald@macdonalddevin.com

September 26, 2018

John Smith, M.D.
1234 Logan Way
Dallas, TX 75201

Re: *Jane Doe v. ABC Corporation, et al.;* Cause No. 2017-56789

Dear Dr. Smith:

This letter will confirm that you have been retained as a consulting expert for the Defendant in the above-referenced matter.

As a consulting expert, please be advised that the communication between my office and your office should be considered "Attorney-Client Privilege" and documents that I may forward to you for your review should not be shared with any third-party. Also, any documents that I send concerning this case, should be kept in a secured location. This portion of the engagement letter is specifically directed towards the Plaintiff Jane Doe's medical records.

Sometime in the future I may designate you as a testifying expert in this case and as such, your file will be discoverable during the deposition process.

Should you have any questions, do not hesitate to contact me.

Sincerely,

David M. Macdonald

Documents Sent to John Smith, M.D.
Jane Doe v. ABC Corporation, et al.

Sent Via Email on 00.00.18 by (attorney sending documents)

1. Plaintiff's Original Petition

Sent Via Email on 00.00.18 by (attorney sending documents)

2. Engagement Letter

Sent Via Email on 00.00.18 by (attorney sending documents)

3. Docket Control Order
4. Plaintiff's Answers to Defendant ABC Corporation's Interrogatories
5. Plaintiff's Responses to Defendant ABC Corporation's RFP

Sent Via Email on 00.00.18 by (attorney sending documents)

6. Any hospital medical records of Plaintiff Jane Doe - Bates Stamped Numbered JND 000001 – JND 000421
7. Consulting opinion from Richard A. Jones, M.D. – Bates Stamped Numbered JND 000422 – JND 000579

Sent Via Email on 00.00.18 by (attorney sending documents)

8. Videotaped Deposition of Plaintiff