

ETHICAL CONSIDERATIONS IN THE CLAIMS INVESTIGATION PROCESS:

A GUIDE FOR ATTORNEYS AND SIU PERSONNEL

Matthew J. Smith, Esq.



CINCINNATI, OH

COLUMBUS, OH

DETROIT, MI

FT. MITCHELL, KY

ORLANDO, FL

SARASOTA, FL

www.smithrolfes.com

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I. INTRODUCTION

As the old saying goes, "time marches on," and I am no more reminded of that than by reflecting on the fact this year will mark twenty-five years of my involvement in the practice of law. For almost the entirety of that time my practice has focused exclusively on insurance law-related matters. Many times over those years I have faced the same ethical dilemmas as any other attorney engaged in insurance law practice. Often I have corrected not only opposing counsel but also judges who identify me as "the insurance company's attorney" by politely pointing out to them I am the attorney for the named defendant and that is to whom I owe my sole duty. I have also faced on more than one occasion issues where I have been asked my opinion on coverage by a carrier only to remind the adjuster separate counsel would need to be retained to address the issue of coverage since my job is to defend their insured in the pending litigation. At other times I have actually defended cases through settlement or trial knowing full well under the policy coverage was excluded and the issue was simply overlooked. These are the type of typical ethical issues insurance attorneys face on a regular basis.

When I began focusing my practice approximately fifteen years ago in the areas of insurance fraud investigation, I realized from the start an entirely new set of ethical circumstances would be presented. Although I am not certain of the actual statistics, literally there are tens of thousands of insurance defense attorneys across the country; in contrast, however, there are probably at most several hundred whose practice truly centers upon investigation of insurance fraud issues. In the years I have been engaged in this area of practice, almost without exception, the attorneys I have met representing

insurance companies on these types of issues have always attempted to maintain the highest of ethical standards in handling what are arguably the most difficult of all insurance law-related matters from an ethical standpoint. These attorneys have done so even though, based upon my research, there is little or nothing in the way of guidance directing the insurance law attorney who specializes in fraud investigation along the correct pathway of ethical considerations. Almost in the same way we ultimately determine there is enough evidence to deny a claim based upon misrepresentation, the attorney simply has to be guided by what his or her "gut feeling" says is the correct thing to do. And, like a claim denial, even then it does not mean the road ahead will be smooth. It is for this reason this paper and presentation have been prepared to assist attorneys in handling the daily ethical considerations arising from insurance fraud investigation.

II. TO WHOM IS YOUR DUTY OWED?

In most cases an attorney has very clear-cut direction in knowing who his client is and whose interest he or she has been hired to protect. Most insurance law matters deal with litigation and are generally of a third-party nature. In those cases it is very clear-cut the plaintiff is represented by their attorney and the defendant, whether an individual or the insurance company, is represented by the defense counsel.

Insurance fraud investigations, however, do not present nearly so neat a lineup.

The easy answer obviously is to say you have been hired by the insurance company and your duty is owed solely to the client who hired you. I would respectfully submit, however, adopting this type of approach to an insurance fraud investigation file

is fraught with peril, at least where first-party claims are involved. Let me explain further.

When handling a first-party claim investigation it is important the attorney remember at all times the claim arises out of a policy of insurance which, within the eyes of the law, is a contract. Your client, the insurance carrier, has entered into a contractual relationship with the claimant to provide insurance coverage in exchange for a premium which has been paid. Courts routinely look upon these policies, or contracts of insurance, as being inherently unfair since the insurance company already begins the process by having an advantage over the insured because the insured is truly not able to "bargain" for the terms and conditions of the policy outside of the basic parameters of amounts of coverage. For this reason a very special relationship exists between the insurance company and its insured whereby the insurance company owes its insured the utmost, or highest level, of duty under the contract to investigate the claim fairly and impartially and to pay the claim unless there is enough evidence to support a denial.

Almost from the start of law school attorneys are taught it is our job to represent the clients who retain us aggressively, to use the best of our abilities to make certain their interests are protected and they prevail in any type of proceeding. This is the underlying mindset which has created the adversarial system which defines the civil justice system in America. Because of this we attorneys often take the approach it is our job to "win" for our client and we assume we have been hired by the client to make certain their position prevails. In traditional litigation there actually is nothing wrong with this approach, however, if an attorney approaches an insurance fraud investigation with this same mindset, then he or she has already predetermined the claim. By doing so

the attorney is then going to be looking at all investigation activities and all of the evidence as a reason to "win" the claim for the insurance company by securing enough evidence for the claim to be denied. *Any attorney who is analyzing these types of cases on this basis is not only not serving their client's best interest but is also in all probability in violation of our profession's ethical standards.*

Although it is true the attorney has been retained to represent the insurance company, remember in these types of claims your job is to provide counsel to the insurance carrier regarding how to proceed forward with a fair and impartial investigation. It is not your job to adjust the claim, nor is it your job to do the investigation or even to make the final decision regarding acceptance or denial of the claim. The duty the attorney owes to the insurance carrier in many respects is to serve as an impartial "buffer" between the company and its insured, making certain a proper and thorough investigation is done so an informed and correct decision can be made concerning the claim.

Although you may not owe a direct legal duty to the claimant, especially in situations where the claimant is not represented by a attorney you do clearly owe a duty to make certain the insured is provided every opportunity to document his or her claim, to make certain they clearly understand what their duties and responsibilities are to move the claim investigation forward promptly and ensure they are afforded every opportunity under the policy terms and conditions to present their claim fully and completely.

There probably is no attorney who would disagree with the foregoing paragraph. In practice, however, it is important to remember by virtue of your education, training

and experience you are automatically going to be viewed as possessing skills inherently unequal to the unrepresented claimant. This can be a serious issue later if a bad faith claim is filed analyzing whether you took advantage of the claimant by virtue of your increased education and knowledge of insurance or law issues so as to have prohibited the claimant from understanding fully what their rights were and what they needed to do to properly document their claim. Unless you have documentation in your file to clearly show otherwise, you will have no ability to protect yourself from such an allegation other than your word versus that of the claimant.

In the sections which follow we will address how to make certain at every juncture the attorney adheres to this standard, protecting not only himself or herself but, more importantly, protecting the insurance carrier from any claim of bad faith or improper handling of investigation of the claim.

III. DEALING WITH THE CLAIMANT

I always tell any insurance carrier I work with I much prefer when a claimant is represented by an attorney than when they are not. If the claimant is represented by legal counsel then obviously it is their attorney's duty to make certain their interests are fully and completely protected. Although you as an attorney still owe the same degree of impartiality to the insurance carrier client you represent, when claimants have their own attorney you need not worry nearly as much about making certain the claimants' interests are not overlooked in the course of the insurance claim investigation. In the vast majority of claims, however, the claimant is generally not represented by legal

counsel, at least at the early phases of the claim investigation. This is where the insurance attorney can get into problems either for themselves or for their client.

The initial dealing with the claimant will generally involve scheduling an examination under oath. In our firm's practice we prefer no contact be made by anyone from our firm with the claimant until a written letter has been forwarded via certified mail requesting the examination under oath to occur. We have adopted this policy for several reasons. First, it is our belief all dealings with claimants, wherever possible, should be done in writing and not via telephone. When telephone conversations occur the attorney should always assume he or she is being recorded by the claimant for possible use in a bad faith trial. Even though the attorney should never make any statement he or she would be embarrassed to hear played back later on a recording at a jury trial, we have found it is generally better to communicate in writing, where there can be no misunderstanding regarding what was said nor any inadvertent comment made because of mistake, anger or simply being rushed during a busy day.

A second reason we prefer to have all communication done in writing is to set forth very clearly to the claimant the request for the examination under oath under the policy, to advise them in writing they have the right to be represented at the examination under oath by an attorney and also to detail in the letter the information and documentation they are expected to produce in advance or bring with them to the examination under oath. If this information is set forth very clearly in writing there can be no later claim of lack of understanding regarding what was to be produced for a proper examination under oath.

One of the most important warnings contained in that letter is the right to be represented by legal counsel. It is imperative you state in the initial letter to the claimant they have the right to be represented by an attorney of their own selection and at their own expense. This sets forth at the onset the seriousness of the claim investigation and clearly states in no respect are you and your firm representing anyone's interests other than the insurance carrier.

Another important matter we include in our letters is telling each claimant their examination under oath will take at least two hours to complete. Although occasionally done in less time, this dispels any claim of misunderstanding where the claimant alleges they assumed the entire examination under oath would only be ten, fifteen or twenty minutes and did not make appropriate arrangements to be off work or for child care.

To make certain your client is fully protected, we also conclude each letter throughout the claim investigation by restating any prior reservation of rights issued by the carrier so in no respect may anyone claim any letter written by the attorney waived any prior reservation of rights set forth by the insurance carrier concerning the claim.

Even though the request for the examination under oath is made in writing, obviously there will be telephone discussions with the claimant to schedule the specifics of the examination under oath. In our firm we have an absolute policy prohibiting anyone except one of the attorneys skilled in handling insurance fraud investigations from speaking to the claimant to schedule the examination under oath or discuss the claim. I would never be so bold as to state someone is actually "lying," however, I have seen on more than one occasion where a very clear-cut conversation with a claimant has either been misunderstood or misinterpreted by somehow implying the claim was

going to be paid, the examination under oath was a "mere formality" or other similar erroneous statements being attributed about the claim investigation to the receptionist, secretaries, paralegals or other support staff. By having only an attorney speak to the claimants you do not prohibit these type of assertions, however, matters of this nature should be handled by the attorney solely. Remember, anything the attorney or a member of their firm states is arguably binding upon the insurance carrier. In like manner no attorney or law firm ever wants to be involved in a situation where they, or one of their employees, are being deposed. Should that unfortunately occur, however, then certainly it is better to have an attorney being deposed than a current or former member of your support staff.

Finally, we have found it is important to confirm in written detail any discussions which occur with the claimant. For that reason we will generally forward letters confirming all matters discussed in any telephone conversation and toward the end of the letter include a specific reference stating if anything contained in the letter does not accurately reflect what was discussed to notify us in writing immediately. This helps protect not only our insurance carrier client but also our law firm from any type of potential misunderstandings or miscommunication. Should any type of claim of misunderstanding later arise, it is extremely valuable to have letters confirming all conversations for filing with the court or, if necessary, for use as a jury trial exhibit.

Perhaps the most important thing in dealing at any phase of the claim investigation process is to remember to document all matters and conversations in writing to the claimant. This ensures not only the protection of the best interest of your client but also yourself and your law firm.

IV. INVESTIGATION OF THE CLAIM

There is a growing trend across the country among plaintiffs' attorneys to attempt to name the insurance defense attorney and his or her law firm as party defendants in the bad faith suit arising from denial of a claim. My personal opinion is this exhibits the very low level to which litigation in the United States has fallen; nevertheless it is a reality we must deal with.

Although there is nothing you can do to fully protect yourself or your firm from being unwittingly drawn in as a witness or party in a bad faith lawsuit, there are steps you can take throughout the handling of the claim investigation to ensure ethically you have handled all matters correctly. One of the areas where attorneys frequently find themselves in an ethical dilemma is when they become the actual claim investigator or adjuster rather than an independent attorney advising the insurance carrier concerning a questionable claim.

It is important to remember at all times your role is to serve as legal counsel to the insurance carrier by providing the proper legal guidance and direction to make certain the claim is investigated fairly and in accordance with the policy terms and prevailing state law. Although you may be asked to issue opinions and recommendations, under no circumstances should the attorney allow himself or herself to become the investigator handling the claim or the claim adjuster making decisions regarding issues such as coverage, denial or the amount to be paid under the various provisions of the policy. You must keep a very clear distinction not only in your mind but also in your file records and communications setting forth your role as the attorney is to advise and not serve as a claims adjuster or investigator.

One of the things we advise all of our clients is we are working together as a team to properly and completely investigate the claim. It is important to remember, although you are working together as a team, the same as on a sports field, the team is comprised of different players at different positions. Chaos would obviously ensue on the football field, baseball diamond or basketball court if each player did not stick to and play his or her assigned position. Your position must remain that of the attorney and none other.

To attempt to make sure this line of distinction is drawn clearly from the outset of the investigation of the claim, our firm attempts to set forth very clearly the distinction between our role as legal counsel and the actual adjustment and SIU investigation of the claim. For example, upon the initial receipt of the claim file records (and even before the examination under oath occurs) we will review the entirety of the claim file records and SIU investigation to date. Often in the initial letter we will then state to our client, based upon our review of the file, we believe the carrier does have reasonable justification to move forward with the investigation of the claim. If we feel there are areas of claim investigation which are necessary but have not been undertaken to date, we will then include a phrase such as: "Based upon my review of my file records I would offer the following recommendations for your consideration for further investigation of this claim...". By including this language we attempt to draw a clear distinction between what we may recommend as the attorney and the ultimate decision of the adjuster or SIU professional to determine what investigation activities to undertake.

In like manner I will generally send the same type of letter following completion of the examination under oath. In that letter I will summarize the testimony of the claimant and what additional records and documents have been requested of the claimant and then set forth a series of recommendations for consideration by the insurance carrier concerning issues it may wish to investigate further or additional documents it may wish secure as part of the ongoing investigation, based upon the examination under oath of the claimant. I will generally at every juncture avoid, however, undertaking this work directly unless we are specifically requested to do so by our client. In those situations where we do undertake this type work we make it very clear we have been requested to secure the documentation, review the documentation and analyze its impact upon the claim and then forward it to the claims adjuster or SIU personnel for final review and consideration as they deem appropriate.

If the issue has not already crossed your mind, then it obviously will at some point regarding the effect of the attorney giving an ultimate opinion concerning acceptance or denial of the claim. In most claims our firm is asked at the end of the investigation to provide a written legal opinion letter and proposed denial letter where sufficient evidence exists to deny the claim. I have no problem providing this type of information and legal analysis to our client as it is separate and distinct from the issues of claims adjustment and claims investigation. This distinction is an important one, in that the attorney is in the unique position of combining all of the data secured through the claims adjustment and SIU investigation process, comparing all of the information to the examination under oath of the claimant and the facts of the loss and then, most importantly, applying the legal analysis to recommend to the company a final opinion

concerning acceptance or denial of the claim. Far from interjecting himself or herself into the claims adjustment or investigation process, what the attorney is doing is making certain the interest of the insurance company is fully protected by conducting an independent review of the work done by the claims adjuster and the SIU investigation to provide the insurance carrier with an opinion and evaluation based upon the law as to whether a denial is appropriate or the claim should be paid.

The standard you want to abide by is if you are ever called upon to testify, either as a witness or a party, in a lawsuit alleging bad faith you can clearly demonstrate through your file records your role at all times was to serve as legal counsel to your client and at no point did you or your law firm take over the adjustment or investigation of the claim. If you adhere to these standards it will serve both your interest and the interests of your client as well.

V. CONDUCTING THE EXAMINATION UNDER OATH

This is the most important service the attorney provides in the claim investigation process. Having done examinations under oath for a number of years I have seen them run the gamut from a confession to criminal activity, resulting in a criminal conviction and jail time, to claims where the issues have been fully resolved through the testimony of the witness and an agreement to pay the claim was reached on the record during the course of the examination under oath. The skills of an experienced insurance law attorney can be used very effectively on behalf of his or her client in the examination under oath but equally may be fatal to the interests of the insurance carrier in a bad faith case if the attorney in any respect oversteps his or her bounds.

Especially when the claimant is unrepresented, the insurance attorney has almost a superhuman task in conducting the examination under oath in a claim involving possible insurance fraud. The attorney must remember at all times every single word he or she is saying is being taken down by the court reporter and the examination under oath itself can be the basis for a bad faith claim. Accordingly, the attorney must make absolutely certain at no point is anything stated which cannot be fully supported as being accurate. The attorney must stay focused on fulfilling the purpose of the examination under oath by seeking to gather important data for the investigation of the claim and not jumping to the conclusion the insured is committing fraud.

As attorneys we are charged with the responsibility to do this while at the same time often having to push right to the acceptable limit of attempting to obtain a confession from the claimant, or a withdrawal of the claim where fraudulent activity has occurred. There will never be any magical formula to strike the right balance between forcefully investigating the claim through the examination under oath process and not in any respect allowing the transcript of the examination under oath be used to support an allegation of bad faith. This is why the skill and training of the attorney is crucial to the proper investigation of the claim and taking of examination under oath testimony.

Because of the severity of these issues, the attorney must remember at all times each and every word they are saying is potentially the basis for a bad faith claim against the insurance carrier. The attorney must be extremely cautious at all times in how questions are phrased and how crucial evidence, especially implicating the insured in insurance fraud, is presented during the course of the examination under oath process.

It is much easier to conduct an examination under oath when the claimant is represented by an attorney who has the sole responsibility to protect his or her own client's interests. Even though the insurance attorney is only representing the insurance carrier, when the claimant is unrepresented an even higher level of duty is owed to make certain the claimant is aware of their rights and the attorney does not appear by virtue of his or her specialized training and position to have taken advantage of the claimant in any way. As was stated earlier, we advise the claimant in writing prior to the examination under oath of their right to be represented by an attorney. At the onset of the examination under oath we have the claimant confirm on the record they received the letter, are aware of their right to be represented by a lawyer and have elected not to have an attorney represent them. Although it has cost my clients money over the years, my next caution, I believe, is absolutely crucial for any attorney practicing in this field. Specifically, I advise each claimant as follows:

Even though you have told me you wish to proceed today without the benefit of an attorney, if at any point in my questioning of you your opinion changes and you believe you do wish to invoke your right to be represented by an attorney, it will be your duty and responsibility to tell me you have changed your mind and wish to retain an attorney. If you do so, we will then agree on the record to a reasonable time for you to hire an attorney and reconvene your examination under oath. If, however, you do not tell me at any point today you wish to invoke your right to be represented by an attorney, then for all purposes I will assume fully you are continuing to waive your right to be represented by an attorney.

The reason this has cost my clients money over the years is sometimes even at this point the claimant will elect to recess the examination under oath and hire an attorney, notwithstanding your written letter telling them in advance of their right to have a lawyer. When this occurs the insurance carrier is really in a situation where they have no option other than to allow the claimant a reasonable time to retain an attorney and complete the examination under oath in a timely manner. This is still a much better way to proceed than failing to give such a cautionary instruction to the insured and forcing the insured to proceed against their will without an attorney. One of the risks you run if you fail to advise the person of their right to be represented by an attorney is a court may ultimately not permit you to use the examination under oath for purposes of cross-examination in a trial.

Another of the other things to explain at the very onset is the difference between an examination under oath and a deposition. Advise them and secure their agreement the examination under oath may be used for all purposes, including in a court of law. Further clearly advise the claimant at the very start examinations under oath are not ordinary or routine, are very serious and are done on claims where issues, problems or concerns have arisen. Once you have done this, then immediately also tell them the purpose of the examination under oath is not only to secure their sworn testimony concerning their claim but also to provide them the full opportunity to clarify and resolve the issues, problems and concerns which have arisen to date in the investigation of their claim.

The important thing in the examination under oath is for the attorney to test themselves at every turn. By that I mean, before you ask a question, make certain you

have analyzed that question fully and completely in your mind and the question is phrased correctly to elicit relevant information concerning the claim. Be sure you have phrased the question so it is fair, impartial and designed to elicit information and not to prejudge the claim or the claimant giving the testimony.

Before closing this section I want to make certain you understand I am not advocating the attorney be bashful or not aggressively pursue questioning of the claimant which is relevant to the investigation of the claim at issue. To do so is certainly not in the best interest of your client and will not lead to a complete and thorough investigation of the claim. There will be points in any examination under oath where very pointed crucial questions need to be asked concerning the insured's potential involvement in the loss. You should not shy away from these questions nor be apologetic in any respect. What is important is the questions are asked in such a way as to secure the relevant information you need for your client to make an informed decision concerning the claim.

Although you should not follow these verbatim, the following are several example questions of how to ask, and not ask, questions in an examination under oath:

Improper Questioning

1. Isn't it true you burned down the house?
2. You know this fire is an arson, don't you?

Proper Questioning

Did you in any respect play any role, directly or through anyone else, in causing this home to be burned?

Based upon the investigation done by the local fire department and the independent origin and cause investigator, they have reached the conclusion this fire is an arson.

Do you believe in any respect these conclusions are incorrect? Is there any

information you wish to provide to your insurance carrier for it to consider other than this fire appears to be an act of arson?

3. Who but you would have wanted the house to burn?

Based upon the investigation of this claim it appears you may have had the means, motive and opportunity to have been involved in this fire. Is there any other evidence you believe should be considered, or any other persons you believe may have reason to have been involved in this loss?

4. You cannot prove you owned any of these items, can you?

Do you understand under the terms and conditions of your policy you have the duty to document both proof of ownership and value of the items you are claiming? As I understand it, you have not provided to date any type of documentation to support either proof of ownership or value of the items you are claiming. What information or documentation have you provided, or can you provide, to your insurance carrier to document the items you are claiming?

Remembering the goal is secure all relevant information and make to make certain the insured is afforded every opportunity to document their claim, there is a question we have begun asking claimants with great success. Under the laws of most states, the insurance carrier can make a wrong decision concerning denial of the claim and still not act in bad faith. The legal standard is whether the insurance carrier had reasonable justification to proceed with denial of the claim based upon the evidence secured in the claim investigation process. In an attempt to cut off the bad faith claim at the examination under oath, toward the end of the examination under oath ask the following question:

Your insurance carrier wishes to make a completely informed decision concerning your claim. Other than the questions I have asked you today, and the documents we have reviewed, is there any other information or data you believe should be reviewed, or any additional witnesses you believe should be interviewed, before your insurance carrier makes a final decision regarding acceptance or denial of your claim?

The only risk you take by asking this question is the claimant may have more information the insurance carrier should consider. If that is the case then all information which the insured feels relevant should be considered before a final decision concerning the claim is made. My purpose in asking this question is to have the insured commit during the examination under oath all evidence concerning the claim, and all witnesses relevant to the claim, have been identified by the insurance carrier and been considered. My purpose is to cut off any later attempt to argue the insurance carrier failed to interview key witnesses or consider evidence before making the decision to deny the claim. To aid in that process, consider asking this additional “follow-up” question:

As an insured under the policy and as the person making this claim, are you satisfied you have been provided every opportunity to share with me and your insurance carrier today all of the information and documentation you believe your insurance carrier should consider before making a final decision to accept or deny your claim?

An affirmative answer to this question by the insured is perhaps the most effective “tool” you may later have to present to a court in support of a motion for partial summary judgment on a bad faith claim and dispel any argument the claim was not investigated thoroughly or the insured was not afforded every opportunity to present relevant evidence concerning the claim.

Taking of the examination under oath is one of the most challenging responsibilities any attorney can take on. You at all times must walk the fine line between investigating whether the claimant has engaged in illegal activity or whether this is a legitimate claim which should be paid by the insurance carrier. Getting to the truth in claims of this nature requires an extreme amount of legal skill, extensive advance preparation for the examination under oath and, perhaps most importantly, a keen sense of listening to the claimant during the course of the examination under oath to make certain all relevant information is considered, all appropriate follow-up questions are asked and all documentation necessary to make an informed decision concerning the claim is secured.

Just because you have years of experience handling insurance matters or even taking depositions in court cases does not mean you are qualified or trained for taking examination under oath testimony. Lawsuits by their very nature are adversarial, with each side represented by counsel charged with the responsibility to argue why their “side” should prevail. By contrast, in an examination under oath there should not be “sides” or a “battle” to see who can prevail. Unlike in litigation, it is the duty of the attorney in claims investigations to ensure all relevant facts and evidence come out and are considered in the claim evaluation process. An examination under oath should be viewed by the attorney as a non-adversarial proceeding where the goal is simply to secure the truth through relevant testimony and documentation. If your insurance carrier client is viewing the EUO process as anything other than for this purpose, ethically you have the duty as legal counsel to direct and guide your client to understand and value the examination under oath and claim investigation process from this

perspective. Doing so may well save your client millions of dollars by avoiding a future bad faith judgment.

VI. PAYMENT VERSUS DENIAL OF THE CLAIM

Although the ultimate decision must be made by the insurance carrier, this is an area of responsibility which may fall squarely upon the shoulders of the attorney. If you are asked by your client to render a final legal opinion regarding acceptance or denial of the claim, ethically you must first make certain you have not allowed yourself to progress to a point personally in the claim investigation process where your own thoughts and opinions regarding the claimant or their loss cloud your ability to give independent counsel to the insurance carrier. It may be extremely difficult to do so, but at times you may have to overcome your own personal feelings a particular insured committed arson or some other act if there is not a reasonable basis upon the evidence for your client to deny the claim.

The standard in deciding whether a claim should be accepted or denied is not whether the evidence can be construed in favor of a denial; rather, the standard should be when all of the evidence is considered does it leave you any reasonable alternative other than to deny the claim. This standard is in keeping with the guidelines set forth by courts that all matters of coverage should be resolved in favor of the insured where there is any reasonable doubt. Remember, though, the standard is still reasonable justification. You should never twist and turn the facts either to implicate or exonerate the insured. The test should be whether when the evidence is considered in its totality the insurance company has a reasonable basis for the denial. If the evidence, when

considered in the light most favorable to the claimant, still leads you to the conclusion a denial is proper, then you have reached an appropriate decision.

If you use these standards and clearly set forth the reasoning behind these standards in the written legal opinion letter to your client, you will be serving your client's interest well and avoiding any ethical problems for either you or your law firm. If you are called upon either as a witness or party to be able to justify why you reached the decision for the recommendation to proceed with denial of the claim, you should be able to fully identify in the body of the opinion letter the clear consideration of all of the relevant evidence and why the evidence led to the opinion denial of the claim was proper under your state law.

To protect the insurance carrier, and to make sure our firm has not overlooked something either, we generally recommend to our insurance carrier clients the denial letter also include the following paragraph:

Although the purpose of this letter is to advise you your claim is being denied for all purposes, if you feel our company has failed to consider any relevant evidence or documentation concerning your claim we will grant you a period of an additional fourteen (14) days from the date of this letter to submit any additional evidence or documentation you wish for us to consider. If we do not receive any additional information from you, then we will assume we have considered all of the evidence and documentation you feel is relevant to the proper investigation of your claim.

There is certainly no down-side risk in giving the insured every opportunity to explain to the insurance carrier why the decision to deny the claim is not correct. Generally there will not be any additional evidence forthcoming other than the fact the insured simply disagrees with the denial. Once again, however, you have fulfilled your

ethical obligation of making certain the insured is given every benefit of the doubt and opportunity to present their claim fully.

Denials of claims should always be done in writing. Most carriers will require this and often you may be asked to author the denial letter. There is nothing wrong with doing so but you should make certain the facts of the investigation of the claim are fully set forth in clear, easy-to-understand language. Relevant portions of the policy should be quoted directly in the denial letter so the insured knows specifically under what provisions of the policy the claim denial is based. If the policy contains a statute of limitations for filing of suit, either cite the policy language stating the limitation period or, at a minimum, insert a sentence into the denial letter advising the insured to carefully review the terms and conditions of the policy as it may set time limitations and deadlines for filing of litigation.

Finally, the denial letter should set forth unequivocally the claim is being denied for all purposes so the insured cannot in any way claim they did not understand a denial was actually occurring or the reasons for the denial.

The denial letter can be one of the best exhibits in favor of the insurance company in a bad faith trial. When properly written, the denial letter will chronicle the extensive investigation undertaken by the insurance carrier, summarize the relevant evidence either presented by the claimant or secured by the insurance carrier during the course of the investigation, give the reader (including jurors) an understanding of the extent of the investigation conducted and cite the specific provisions under the policy supporting the decision to deny the claim. We instruct all attorneys within our firm each

and every letter they write on an insurance investigation file should be authored as if you are writing to the jurors who may ultimately decide this case.

VII. FILING OF SUIT

Generally if a suit is filed following denial of a claim you will no longer face the dilemma of having an unrepresented opposing party. Although often *pro se* claims are presented, generally an attorney will be retained by the claimant for purposes of filing suit against the insurance carrier after a denial takes place.

The mere fact suit is filed and an attorney is now representing the claimant, however, does not relieve you of your ethical duties and obligations.

One of the first issues you will need to address with your client is whether you will be serving as trial counsel or if new counsel is to be brought in to represent the company in light of filing of the lawsuit. There are two differing schools of thought on this issue, one being separate counsel must be brought in, as the prior attorney has already rendered an opinion on the claim and may be reluctant to change his or her opinion now that suit has been filed. In like manner, certain carriers automatically assume a new attorney is required, as the former attorney will now be a witness in the case. This is especially true if your state recognizes an “advice of counsel defense” which may be asserted by the insurance carrier in a breach of contract or bad faith lawsuit.

The second school of thought is an insurance carrier is better served generally to retain the same legal counsel representation in the lawsuit as in the pre-suit investigation of the claim. If the investigation has been conducted thoroughly and

properly there is no better attorney to fully understand the issues in the now-pending lawsuit nor to advocate to the court and jury the extensive investigation and consideration given to the claim prior to the decision to deny coverage. This attorney has also already met and questioned the claimant and should be able to use his or her prior interaction and experience as a tactical advantage in the now-filed litigation.

Another factor to consider is by changing counsel the insurance carrier may actually be setting up its prior attorney to be called as a witness by the plaintiff and for the claimant now turned plaintiff to argue to the court the attorney's file and communications with the insurer are now discoverable and not subject to attorney/client privilege based upon new counsel handling the litigation. In some situations the insurer may even want to waive any privilege and use the communications with the investigation phase attorney to demonstrate the extent and quality of the investigation undertaken.

Occasionally there seem to be a bizarre set of rules and standards which apply to insurance carriers but apply to no other types of businesses. Although the insurance industry is held to very high standards, if a dispute arose between two companies over their respective rights under a contract, and attorneys for both of the companies provided legal counsel to their respective clients, attempted to resolve the matter before suit was filed, but were unsuccessful in doing so, and one of them then filed suit, it would be highly unlikely the other attorney would be asked to step aside and no longer represent his or her client. In the general business world, on a routine basis corporate attorneys represent and advise their clients on a myriad of matters, and when suit is

filed the same lawyer or law firm defends the client almost without exception. There is generally little reason why the insurance industry need operate on any other basis.

There may well be cases, however, where it truly is in the best interest of the insurance carrier to have the attorney who handled the pre-suit investigation of the claim serve as a witness on behalf of the company. In those cases clearly the attorney cannot testify as a witness and also represent the insurance carrier. By automatically removing the attorney from the claim, however, an insurer is virtually inviting the opposing attorney to now depose your prior counsel. Even though the attorney client privilege may still remain in effect, the insurer may have lost a valuable argument in protecting even the deposition of the attorney from occurring based solely upon the fact a new attorney is serving as trial counsel.

If the attorney who handled the investigation phase does stay involved in the case as litigation counsel, then it is imperative the attorney continue to keep an open mind should new evidence arise justifying a reversal of the decision to deny the claim. If the claim has been investigated thoroughly and properly, this generally should not occur. One of the worst things an attorney can do from an ethical perspective, however, is to feel obligated to continue to defend his or her opinion to the insurance carrier to deny the claim if, in fact, new evidence comes to light through the trial discovery process which should cause the attorney to change their opinion had that evidence been known earlier.

Unfortunately we are in an era now where some insurance companies view their insurance defense counsel as much as an adversary as the plaintiffs' attorneys. This is

a sad commentary but represents an increasing problem which has unfortunately arisen in insurance practice in the past decade.

For the insurance company and the attorney to truly have an excellent working relationship and attorney-client relationship, there must be complete and open candor on both sides. The attorney should make certain at all points the insurance carrier understands and knows the ethical standards which he or she must abide by and understands fully the legal analysis standard the attorney will use to determine, if asked, whether the claim should be accepted or denied. It is always helpful for the insurance company to remind the attorney what the company expects is a fair and impartial investigation and not for the attorney to feel compelled or pressured in any respect to reach a decision to deny the claim merely because it was referred to the lawyer for assistance in the investigation. The insurance carrier should also make it very clear to the attorney if at any point in the claim process (even after suit is filed) the attorney believes the insurance carrier has made a mistake concerning the claim, the attorney has the freedom to tell the company that opinion without fear of retribution. The carrier should also make it clear to the attorney if new evidence arises, causing the attorney to change his or her opinion regarding the denial of the claim, the attorney should be encouraged to share that change of opinion with the company at any time during the investigation or litigation phases. Remember the important thing is to make certain a proper decision is made regarding the claim, not to position you or your firm for the best possible future business relationship with the insurance carrier. Sticking to a position you know is wrong or incorrect may ultimately lead to a substantial bad faith punitive damage award, which is certainly no way to build a future attorney-client relationship.

The important factor to consider ethically for the attorney and the insurer is you do not want to address these issues when a subpoena or notice of deposition is served. Decisions regarding whether prior investigative counsel should also represent the company in subsequent litigation and what documents will be subject to a claim or privilege, as well as the role of investigation counsel as a possible witness, should be among the very first matters addressed upon notice of suit being instituted. As attorneys we must also remember the decision to assert or waive attorney/client privilege does not rest with us but with our clients. It is our duty to be guided by what the right thing is to do to protect our client's interest and not be blinded by other matters such as "giving up" additional legal fees or seeing a file we have handled turned over to a different law firm.

VIII. USE OF HOUSE COUNSEL IN CLAIM INVESTIGATIONS

Virtually my entire career as a lawyer has dealt with the representation of insurance carriers and their insureds. I have never been an employee of an insurance carrier nor served in a "staff" or "house" counsel role. I have, however, been asked both officially and unofficially for my opinion on the use of house counsel. My response has both surprised and angered many of my fellow private practice insurance lawyer colleagues. If you are in a state which permits use of in-house counsel by an insurer, I see no ethical problem whatsoever with staff attorneys representing and defending policyholders in most matters. The key question is always the competence and skills of the particular lawyer handling the assigned matter and not who signs your paycheck. A lawyer, plain and simple, owes his or her sole and only ethical obligation to the client

they are retained to represent. That is where the problem arises, however, with the use of house or staff counsel in the investigation of insurance claims. As the old saying goes: "You cannot serve two masters."

We must begin with the premise the insurance carrier owes a high fiduciary duty to its insured, especially when that individual is unrepresented. As attorneys we also know our duty is not only to advise our client but to make certain no action is taken other than to protect and act in the best interest of that client. If you are staff counsel in an insurance investigation your ethical and fiduciary duty *must* solely and exclusively be to your "client." So who *is* your client?

If you are questioned on the witness stand in a subsequent bad faith case and you say the insurance carrier, which pays your salary and benefits, then how can you ethically state at all times your *primary* focus was to make sure the clear fiduciary duty to the insured was protected? If the "evidence" in the claim investigation can be viewed *either* favorably to the insured or your employer insurance carrier, to whom do you ethically owe your duty? If you say the insurance carrier is your client...there, my friend, is your unfortunate answer to the jury which may be deciding the issue of bad faith damages.

In contrast most staff counsel program attorneys will argue correctly they can serve effectively in litigation matters as legal counsel to the company's insureds because ethically the insured *is* their client. Most insurance carriers with staff counsel programs argue this directly in support of staff counsel programs to state bar associations and courts. So if your company, or you as a staff counsel, take this position, how can you then ethically reject this same standard when you now answer on

the witness the stand your “client” during the claim investigation is the insurance carrier which employs you and your sole fiduciary and ethical duty was to the company and *not* the insured who paid for and secured a policy from your employer? Ethically, you simply cannot have it both ways.

A strong argument can also be made the American Bar Association *Model Rules of Professional Conduct* either directly prohibits or strongly discourages the use of staff counsel to investigate and provide an opinion on denial of coverage involving a claim where the insured is suspected of possible fraudulent activity. The Center for Professional Responsibility of the American Bar Association has drafted what has become the foundation or guide for lawyer ethics in many states. Even if you are in state which has not fully adopted the *Model Rules of Professional Conduct*, this is still an excellent standard to follow to assure adherence to all ethical standards. Further even if not mandatory in your state, there is a high probability you, or your client, may well be asked in cross examination in the bad faith litigation why you, or the insurance carrier, failed to adhere to the widely accepted American Bar Association *Model Rules*. An answer of “we didn’t have to” is probably not going to enamor a judge or jury to your client or law firm’s strong adherence to ethical standards! So what guidance do the ABA *Model Rules* provide?

Mode Rule 1.7 addresses the Client-Lawyer Relationship and specifically issues of conflict of Interest. Specifically this rule states:

(a) ...[A] lawyer shall not represent a client if the representation involves a conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

It is hard to believe few legal issues could present a more clear “appearance” of impropriety or a higher risk of “conflict” than an insurance company investigating an insured who paid for a policy for possible fraud and denial of coverage under that policy (including possible criminal charges depending upon the state), while doing so with an attorney on its own payroll and whose sole future income and employment rest in the hands of the insurer.

As is noted in the Model Rule, a lawyer must avoid even the appearance of impropriety in representing clients where the representation of one is adverse to the interest of another. While the “in house” lawyer may have never represented the individual insured being investigated, the appearance of the insurer using its own controlled legal staff to investigate the insured certainly creates, at a minimum, the appearance of impropriety. Additionally under subsection (2) there is clearly a substantial risk the lawyer’s representation of the insurance company as a “client” may significantly be impacted by his or her own “personal interest” or the interest of the “third person” in this case being the insured who purchased the policy of insurance, paid a premium and is now seeking recovery from the lawyer’s employer.

Additionally, *Model Rule 1.13* specifically addresses the client-lawyer relationship where an organization such as an insurance company is the client. This rule provides:

(a) A lawyer employed by an organization represents the organization acting through its duly authorized constituents....

(f) In dealing with an organization's directors, officers, employees, members, shareholders and other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Whether serving as in-house or independent counsel, the attorney, especially with an unrepresented person, has the duty to clearly advise the claimant the attorney is representing solely the insurer. However, there exists an almost insurmountable duty on the in-house attorney to not only disclose this to the insured, but also explain he or she is an employee of the company insuring the unrepresented claimant and to also advise the policyholder (constituent) the interest of the insurance company which employs the attorney is adverse to the insured in taking the EUO. The question then becomes, as soon as the house counsel does this, are not you stating you as the attorney or the insurance carrier have now prejudged the claim and your role is as an adversary to the policyholder?

These issues have *nothing* to do with, nor am I in *any* way critical of the education, quality of legal practice or work ethic of attorneys who serve as staff counsel. The issue, as we will see in a moment, is simply how will this appearance of conflict and impropriety be viewed by a jury of lay persons who are asked to decide whether the

“billion dollar” insurance company was truly acting properly and ethically in denying coverage to the “poor innocent” insured?

Regardless of the ethical issues raised, there is a more practical consideration which insurers should also be concerned with, and that is how juries perceive your company, the investigation you undertook and the final decision to deny coverage to an insured who sustained some type of major loss. Insurance carriers are in the business of asking persons to pay money (premiums) in exchange for protection from a subsequent risk. Few insurance company executives would tell you there is any higher risk than a bad faith judgment in a case with unlimited punitive damages! So if this is true, why would any insurer place a higher value on saving legal fees between independent outside counsel and use of their in-house counsel where a risk of bad faith damages is highly probable as it is on every claim investigation and denial? There is great defense value and protection for any insurer when your trial counsel can stand before the jury and unequivocally state: *“The decision to deny this claim was based not only upon a thorough and complete investigation done by the insurance company, but also in conjunction with and based upon the advice of a completely independent law firm and attorney who handles these type of legal matters for many insurance carriers. We took the additional step of making sure our investigation and final decision were done based upon respected and independent legal advice and assistance.”*

Remember the use of staff versus independent outside counsel is not one necessarily of the *quality* of the legal skills of the attorney; either can be better, depending on the expertise of the individual attorney handling the matter. What an insurer totally gives up in a jury trial where house counsel was used to investigate the

claim is any ability to argue to the jury the decision for denial was based on an investigation not only conducted by the company's claims and SIU staff but also based upon independent, outside counsel which in many states may be an affirmative defense to an allegation of bad faith.

IX. CONCLUSION

Handling of insurance claim investigation work can be extremely rewarding and challenging for any attorney. It can also be an area fraught with substantial peril from an ethical standpoint. An attorney practicing in this field should at all times remain very cognizant of the ethical considerations he or she faces every time they pick up one of these files in analyzing the claim, dealing frequently with unrepresented individuals in a very serious setting of insurance claim investigation, and in ultimately rendering opinions to insurance carriers which can literally affect the personal lives and financial well-being of individuals and families who have sustained a loss.

Like our insurance carrier clients, we as attorneys are not obligated to always make the right decision on each and every insurance claim assigned to our firm for assistance in investigation; ethically we are responsible, however, for making certain a proper and thorough investigation of the claim is conducted in a forthright manner and the evidence is considered fairly and completely. If at the end of that analysis you truly do believe the insurance carrier client has the basis to deny the claim, then document those reasons and know you have reached your decision only after providing your client the highest quality of legal analysis in a professional and ethical manner.