

Litigation Management

summer 2012

MAGAZINE

Honoring Excellence

Litigation Management
Professionals of the Year

p. 36

Pay Day

Get Your Legal
Bill Approved and
Paid Quickly
p. 52

From Voir Dire to "Voir Google"

Using Social Media in Jury Selection
and Jury Monitoring
p. 42

CLM

to advance the insurer's interests. Though attorneys often take the approach it is their job to win for clients, victory cannot come at any cost. An insurance company owes a fiduciary duty to investigate the claim fairly and impartially and to pay the claim unless there is sufficient evidence to support a denial. This is especially true as courts routinely consider insurance policies inherently unfair to the insured because the consumer cannot truly bargain for the terms and conditions of the policy outside basic parameters. Attorneys who view an investigation as an opportunity to win for the insurance company and thus primarily pursue evidence for the claim's denial, violate professional ethics because such activity compromises the carrier's duty to its insured. An attorney who analyzes claims on this basis is not serving his or her client's best interests and is likely violating ethical standards.

Law firms handling insurance claim investigations must remember attorneys are ethically responsible for ensuring a proper and thorough investigation occurs in a forthright manner and all evidence is considered fairly and completely. The duty the attorney owes to the insurance carrier is to make certain a proper and thorough investigation is done so an informed and correct decision will be made. This requires providing advice to the insurance carrier regarding how to proceed with a fair and impartial investigation. Generally, this requires an insured be given every opportunity to document his or her claim and present their claim fully and completely under the policy terms. This practice will help avoid later allegations the attorney was not providing independent legal advice but was actually adjusting the claim as an agent of the insurer. Attorneys who are not careful in drawing this line may find themselves embroiled in a subsequent bad faith claim.

Unrepresented Claimants

Dealing with unrepresented parties frequently creates ethics concerns for an insurance attorney and firms should take care to properly apprise unrepresented parties of their right to counsel. Claimants are often not represented by legal counsel, especially during the early phases of the investigation. Under these circumstances, communication with the claimant presents perhaps the greatest cause for ethical concern. Attorneys should identify any duty they or the insurer has to provide the claimant status reports of the investigation process and what duties the unrepresented person may have to assist the investigation. Communication with the insured should be in writing and clearly notify the insured that the attorney represents only the insurance carrier's interests. There is no privilege associated with any communications between the attorney and the claimant and often poorly written or overly aggressive communications may be the subject of evidence of bad faith should the claim become litigated.

Ethical considerations arise from striking a balance between simply gathering factual data and the need to

confront the insured with key facts of the loss investigation. Unrepresented claimants are uniquely susceptible to later alleging they were mistreated or taken advantage of by the insurance company lawyer. The purpose of the Examination Under Oath is to gather all relevant data for the claim's investigation and secure the truth through relevant testimony. Every claims person and attorney should be cautious to avoid jumping to a conclusion of fraud. Such responsibility is balanced by the duty an attorney has to push questioning to the acceptable limit to obtain information or even a confession from the claimant when necessary.

When the Examination Under Oath is done properly, the court reporter's transcript is your best friend to combat ethical allegations provided the lawyer strikes the proper probative balance during questioning. To protect both the insurer and the attorney it is vital to consider each word said is potentially the basis for a bad faith claim against the insurance carrier.

Legal Opinions

Ethical considerations also arise when the insurer requests a final legal opinion regarding acceptance or denial of the claim. Attorneys must make certain to not allow their own thoughts and opinions regarding the claimant or the loss to cloud their ability to provide independent counsel to the carrier. Some questionable claims should be paid even when strong concern or doubt regarding the claimant or the loss remain.

One of the worst things an attorney can do from an ethical perspective is to continue to defend his or her opinion to the insurance carrier when existing or new evidence comes to light that should cause the attorney to change his or her opinion. Most states recognize an ongoing duty of good faith in both the claim and litigation process. The goal should be to make a proper decision regarding the claim at any phase. Sticking to a position that is wrong or incorrect will likely lead to a substantial bad faith punitive damage award, which is certainly no way to build a future attorney-client relationship.

Attorneys who handle insurance claim investigations are ethically responsible for making certain a proper and thorough investigation of the claim is conducted fairly and completely. Adhering to ethical principles is essential for keeping these professions in high regard and protecting against potential bad faith litigation. [LM](#)

Matthew J. Smith, Esq. is the founder and President of Smith, Rolfe & Skavdahl Company, L.P.A. an insurance services law firm based in Cincinnati. Frank T. Zeigon RPA CCLA PLCS CLCS PCLA FCLA, is Commercial Property Claim Manager for CNA Financial Corporation. Ian D. Mitchell is Editor-in-Chief of the Northern Kentucky Law Review, Salmon P. Chase College of Law and a law clerk for Smith, Rolfe & Skavdahl Company, L.P.A.