

### Message From the Chair

by James W. Beckley, CPCU, AIC, ARe, AIM



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*“These months of town hall meetings were grueling for me and for my staff. But I am glad they took place. I believe that giving the 9/11 families direct access to me and my staff helped put a human face on the program.” – Kenneth R. Feinberg*

The above statement is from Kenneth R. Feinberg’s book, *What Is Life Worth? The Unprecedented Effort to Compensate the Victims of 9/11* (Public Affairs of Perseus Book Group 2005). The book is now eight years old, but the ideals illustrated within it are timeless.

On September 22, 2001, President Bush signed into law the Air Transportation Safety & Systems Stabilization Act, which included the 9/11 Fund. Mr. Feinberg was appointed special master by the Bush Administration to administer the Victim Compensation Fund of 2001 (“9/11 Fund”).

The Fund created tax-free compensation for families of victims killed or physically injured in the 9/11 attack. Participants had to forgo lawsuits. Eligibles included United States citizens, foreign citizens, and illegal aliens. Victims ranged from dishwashers to highly paid corporate executives. The fund had virtually an open checkbook to compensate the victims’ families.

Although well-intentioned, the law was written in haste and was an unprecedented program. The 9/11 Fund administrators had to navigate technical issues such as collateral sources and interpret wrongful death statutes from different states. There were gaps in the law.

In addition to the law, they applied the following principles in their decision making: consistency (not the same as uniformity), transparency, and narrowing the gap between high and low settlements. Ultimately, claims were paid to families of 2,880 victims killed and 2,680 individuals physically injured. Total payout was approximately \$7.049 billion.

Each reader can take away something different from this book. There was an economic basis for the act but the charity and compassion by the American government to create such a fund is noteworthy. I observed a common thread between the rich and poor as to matters of grieving, love, and faith.

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# The Ethical Investigation of Claims

## The Attorney Perspective

by Matthew J. Smith, Esq., and Frank T. Zeigon, RPA, CCLA, PLCS, CLCS, PCLA, FCLA

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In reality, there is very little material to guide an insurance law attorney specializing in fraud investigation along the correct pathway of ethical considerations. Though times have changed, insurance fraud law practitioners universally confront the same ethical dilemmas and with sparse guidance. These dilemmas manifest themselves in various contexts, including claim analysis, dealing with unrepresented parties, examinations under oath, and rendering opinions to insurance carriers. To protect the integrity and vitality of both the insurance and legal professions, it is increasingly necessary to ensure we adhere to a high standard of ethical conduct. Ethical guidelines not only promote a strong business model for our professions, but also provide crucial safeguards against liability in potential bad-faith claims.

Ethical considerations often arise in first-party claim investigations as a consequence of a lawyer's natural inclinations 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 under the policy 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 his or her profession's ethical standards.

Law firms handling insurance claim investigations must remember attorneys

## Get Exposed

We're always looking for quality article content for the Claims Interest Group newsletter. If you or someone you know has knowledge in a given insurance area that could be shared with other insurance professionals, we're interested in talking with you.

Don't worry about not being a journalism major. We have folks who can arrange and edit the content to publication-ready status. Here are some benefits of being a contributing writer to *Claims Quorum*:

- Sharing knowledge with other insurance professionals
- Gaining exposure as a thought leader or authority on a given subject
- Expanding your networking base
- Experiencing overall career development

To jump on this opportunity, please email either [James W. Beckley, CPCU, AIC, AR, AIM](mailto:jbeckley@aaic.com), at [jbeckley@aaic.com](mailto:jbeckley@aaic.com) or [Donald O. Johnson, CPCU, JD, LLM](mailto:donjohnson@dojlaw.com), at [donjohnson@dojlaw.com](mailto:donjohnson@dojlaw.com).

are ethically responsible for ensuring that a proper and thorough investigation occurs in a forthright manner and that 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 is made. This requires providing advice to the insurance carrier regarding how to proceed forward with a fair and impartial investigation. Generally, this requires an insured to be given every opportunity to document his or her claim and present that 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.

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. Often claimants are 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 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 during the EUO 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 EUO 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 EUO 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 EUO questioning. To protect both the insurer and the attorney it is vital to consider each word said in the EUO is potentially the basis for a bad faith claim against the insurance carrier.

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 which should cause the attorney to

change their 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 which 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 our professions in high regard and protecting against potential bad faith litigation. ■