Where Does Your Duty Rest? Insurance Carriers and Their Attorneys Often Have Little Guidance in Navigating Treacherous Waters,

by Brian P. Henry

Attorneys are bound to follow whatever code of ethics or rules of professional responsibility govern the jurisdiction in which they work. All lawyer jokes aside, most attorneys strive to represent their clients competently and within the parameters which they take an oath to uphold.

Many states follow the American Bar Association's *Model Code of Professional Responsibility*. Realizing clients are entitled to receive their lawyer's absolute best effort on their behalf, the ABA Code specifically states in its preamble: "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." While perhaps not commonly used in the English lexicon, the word "zealous" was not chosen randomly and places a very high standard of conduct upon lawyers. The *Merriam-Webster Dictionary* defines "zealous" as meaning: "*marked by fervent partisanship for a person, a cause or an ideal . . . .*"

Whether at a deposition, a pre-trial hearing or before a jury, a client has the absolute right to not only expect, but to demand, their attorney zealously represent and advocate on their behalf. Anything less is widely-considered to be improper or, in the worst-case scenario, evidence of malpractice. So, if this is true, then certainly there should be universal agreement that a lawyer owes an absolute duty to zealously represent their client and use every reasonable skill and argument available to make certain their client prevails. Alas, as is often said, for every rule there is an exception . . . and that exception is a trap in waiting for unwary insurance fraud attorneys and the insurance carriers they represent.

Let's analyze a typical claim which is under review by an insurer for *possible* insurance fraud. At some point in the claim process a "red-flag" or some other indicator removed the claim from the normal adjustment process. In addition to claims, the company's Special Investigation Unit (SIU) has hopefully become involved. Outside forensic experts – ranging from fire investigators to accountants – may also now be involved. If the insurer is acting properly, a "reservation of rights" letter either has or will soon be sent by retained legal counsel. Does the company simply deny the claim based on the "evidence" or provide the policyholder the opportunity to perhaps shed some additional "light" on the claim before a final decision is made?

Enter the first of many hurdles. Unless the policy specifically requires the giving of a recorded statement, an insured may have every right to refuse to give a statement to their insurer. Often, insurance carriers mistakenly assume they may compel a statement citing the "duty to cooperate" under the policy. This is risky business, since the insurance company has full control over the insurance contract. While courts may construe the duty to cooperate broadly, if the policy is silent on a recorded statement requirement then the more reasonable approach may well be to follow the policy's own language which does compel the giving of an Examination Under Oath. This is probably a better course for the insurer anyway, since the recorded statement is not under oath and may ultimately be inadmissible in court . . . at least as any evidence of "sworn" testimony.

So now the insurance carrier faces the second hurdle: one where today's "bean counter" leadership is far too often squeezing so tightly that any semblance of ethics has long since vanished. To save those precious dollars, many insurers are now demanding their SIU or even claims personnel take EUO's. Little regard is given for the potential of subjecting non-lawyer employees to potential state charges of engaging in the unauthorized practice of law, especially when the policyholder or claimant exercises their right to have legal counsel present. How does a non-lawyer insurance company employee respond to a simple question from the attorney who asks: "Is my client legally obligated to give you this EUO to have their claim considered under our state's laws?" Answering immediately places the non-attorney in an extremely perilous situation.

For those carriers who are not placing their claims and SIU employees in such tenuous positions, they next turn to the cost-saving tool of using "house counsel" to take the EUO. Never mind, of course, that when in-house programs were set up going back to the 1980's, their "approval" by state bar associations and courts rested upon insurers asserting that the attorney's role was to "represent solely the insured" and vigorously defend the policyholder's interest. Today's budget-cutters seem to have forgotten that justification, and now assert that their same staff counsel can do an dramatic ethics "turn on a dime" from representing a policyholder/insured in one case to walking into an EUO and solely representing the interest of the insurance carrier an hour later. No decent lawyer would ever claim with any semblance of ethics in their role as paid staff-counsel that their duty in the EUO is to make certain the policyholder's interest is protected. Their employer, while hopefully not already pre-judging the claim, has at least determined (we hope!) there is a reasonable basis to suspect the person being questioned has engaged in fraud and may not have coverage afforded for the claimed loss or damage.

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In the case of *Keodalah v. Allstate*, the Washington State Court of Appeals recently ruled an adjuster may be held personally liable for the tort of bad faith when not dealing with an insured fairly. The court rejected the idea an employee may not be personally responsible for financial damages simply because they were engaged in the course and scope of their employment and following corporate directives. It will certainly not be a far-stretch to see courts soon holding staff counsel liable for not only bad faith but ethical violations for not speaking out and stepping up when their employer fails to act properly.

So this brings us to the carriers who do play by the rules and still refer claims out to independent panel counsel for taking of EUO testimony and to provide the insurer with independent legal advice and direction. Far from being in the land of unicorns and rainbows, even taking this step is not without risk of peril. Let's return to our "typical" claim under investigation.

The panel counsel is retained and paid solely by the insurance carrier. In most states, some written documentation of the attorney-client relationship must exist. There is no question the insurer is the client and, returning to our ABA model, it is the carrier which is owed the attorney's duty of zealous representation. If the attorney is to be the insurance company's advocate, then what is she or he advocating for? Non-payment of the claim for fraud not only saves the carrier from paying the claim but equally affirms the initial indicators and decisions made by the insurer were not only in good faith but ultimately proved to be correct. So, can one safely assume the attorney's role should be to zealously look for the "evidence" needed to prove the insurance company was right in "red-flagging" the claim, referring the matter to SIU, and proceeding with an investigation? To do less after all would not be in keeping with the ABA *Model Code.*

But alas, what happens when the evidence of fraud may not be so "clear cut," when reasonable minds may come to differing conclusions based on the evidence collected during the investigation and the EUO? It would not take a multi-year degree and expensive legal education to deduce a requirement to be "zealous" would mean taking the position of your client and denying the claim. Right? But what about those pesky words "bad faith"? If the claim is in a jurisdiction where a jury holding the decision made was wrong may subject the carrier to not only paying the claim but also the policyholder or claimant's attorney's fees, along with unlimited damages for bad faith, what duty does the attorney owe to protect her or his client from such a risk? Protecting them while also somehow zealously representing them?

Therein lies the ethical quandary faced by insurance fraud attorneys from coast-to-coast. It is both a fine line and a delicate balancing act of aggressively seeking the truth, poking and prodding within the parameters of the law to secure all relevant evidence and making certain to uphold the duty of zealous representation, while ensuring the right decision is made. Consider the implications. If are you too weak, the "easy" way out may be to simply tell the carrier to pay the claim. Insurance fraud is estimated by the Coalition Against Insurance Fraud to cost American consumers $80 Billion every year . . . that equates to about $350.00 annually for each living American. No doubt weak-kneed attorneys and insurers who fail to stand-up and simply pay fraudulent claims contribute to a great deal of that economic drain each year. However, if the attorney is overly aggressive, they may not only expose the carrier to a high-damage award but have participating in denying innocent persons of coverage they were legally entitled to receive and desperately needed following a devastating loss.

It is a delicate balance. While there is no "silver bullet" answer, success rests in a very simple process. First, there must be the utmost of mutual trust, respect and honesty between insurers and their legal counsel. Second, both insurer and attorney must remain committed to seeking only the truth and in no way prejudging or trying to justify the claim decision until all the facts, evidence and testimony have been secured. And finally, the decision to pay or disclaim coverage must be viewed through the lens of seeking every REASONABLE basis under the policy to pay the claim. Insurance companies exist to pay claims. When, however, the claim is analyzed fairly and every door to justifying a *reasonable* basis to pay the claim is closed, the decision to disclaim coverage is both correct and proper.

Insurance fraud lawyers . . . we are a unique breed. We tread where few others dare to go. Are we zealous? Absolutely! But may our zealousness always derive from our desire to seek the truth, and nothing more.