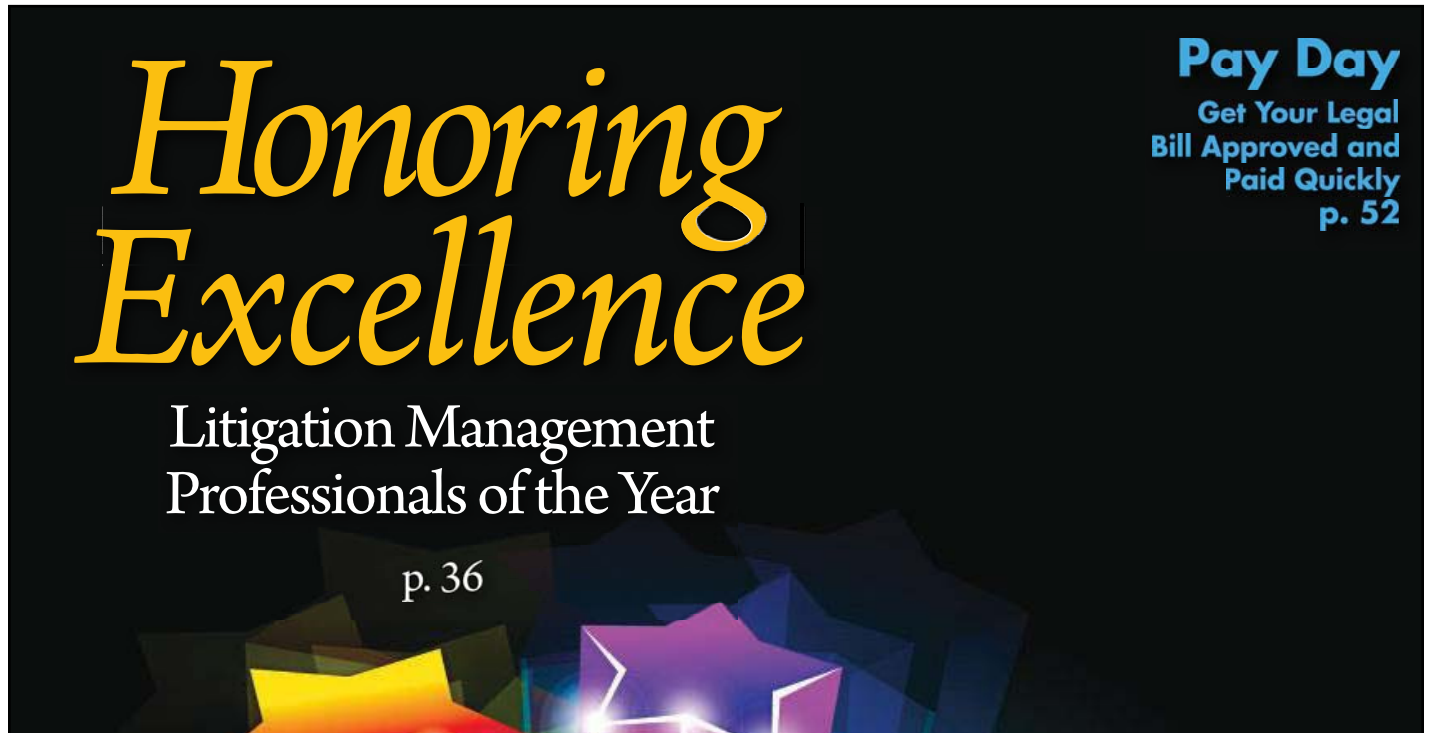


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to advance the insurer's interests. Though attorneys often take the approach it is their job to win for clients, victory cannot come at any cost. An insurance company owes a fiduciary duty to investigate the claim fairly and impartially and to pay 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](#)

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The Ethical Investigation of Claims

The Insurance Professional Perspective

By Frank T. Zeigon and Matthew J. Smith



In the summer 2012 issue of *Litigation Management*, we addressed the ethical considerations of an insurance lawyer. While the attorney's role is defined, the claims professional must be part lawyer, contractor, doctor, investigator and accountant to name just a few roles. A basic understanding of the law and state regulations and statutes will affect every claim. Preparing or reviewing structure damage estimates requires building and contractor expertise, and the same is true to properly analyze the medical aspects of a claimed injury.

Every adjuster is required to gather facts and information to make an informed decision. Each claim involves a monetary or economic loss requiring some accounting and financial knowledge. Being an insurance adjuster is a complex career. The insurance adjuster is the conductor of the various instruments comprising the claim investigation process. The adjuster sets the tempo of the claim process

and must hold everyone accountable to reach an informed and prompt coverage decision.

Throughout this process, the adjuster must keep an open mind, balance the interest of the claimant and the insurance carrier and make certain those involved in the claim process are moving the investigation forward promptly and fairly. An adjuster must put the interest of the insured above the insurance company, but do so while conducting a thorough and complete investigation. There is also a duty under most state laws to make certain the insured is kept advised of all aspects of the claim investigation.

The adjuster will be the gatekeeper in deciding how the claim is investigated. All reasonable leads should be explored, and especially those that may be favorable to the claimant's position. Failure to do so may be considered prejudicial to the investigation or show you were attempt-

ing to find a way to deny coverage. The adjuster also needs to document all significant activities throughout the investigation while refraining from putting personal animosities, derogatory or unsupported comments and snide or humorous notes into any file material.

As the old Dragnet saying goes, “just the facts” and nothing more. A well-trained adjuster controls the investigation while delegating appropriate tasks to persons specifically responsible for given aspects of the investigation or legal advice. An adjuster’s job is never easy, and files involving insurance fraud investigation make the role even harder. Every investigation must be thorough and ethical. Do not prejudge the claim or voice any opinion to public officials, agents, investigators or experts regarding the investigation or coverage decision until the investigation is concluded. Stating an opinion regarding coverage prior to the completion of the investigation is not a privileged comment and may be used to show you prejudged the claim before the investigation was complete.

In all communications and dealings with the insured or claimant, the adjuster and everyone involved in the investigation must try to maintain a cordial working relationship and treat the parties with the utmost of courtesy and respect. A proper claim investigation should not be adversarial. Even if the claimant baits the adjuster into trying to be confrontational, this should be avoided at all costs.

Every adjuster will face multiple ethical considerations. A brief checklist of issues adjusters commonly face includes:

- ◆ Place fair and honest treatment of the claimant above your own or the company’s interest.
- ◆ Be competent and knowledgeable as to the terms and conditions of the insurance contract, including all areas of coverage and duties of the insured.
- ◆ Adjust the claim in strict accordance with the insurance contract.
- ◆ Approach every investigation, adjustment and settlement fairly and in a manner that is not prejudicial to the claimant.
- ◆ Ensure all reports and communications are truthful, based only in fact and complete.
- ◆ Avoid delay and handle each claim with due diligence to achieve a proper disposition of the claim as promptly as reasonably possible.

- ◆ Use extraordinary care when dealing with elderly, disabled or claimants with any type of language or other deficit to make certain they are protected and not disadvantaged during the claim investigation process.
- ◆ Respect in some losses, whether involving bodily injury or property loss, there may be a period of shock or serious mental or emotional distress and trauma of which you need to be respectful while also trying to move the investigation forward as reasonably promptly as possible.
- ◆ Do not give legal advice.

While the above list is extensive, the key is quite simple: handle every claim as you would want a claim for one of your own family members handled by another insurance professional.

Every insurance adjuster should pride themselves on their choice of profession and the quality of work they perform.

Another reality is insurance adjusters may be tested when handling a claim in many ways including offers of cash payments or favors. Many claims involve a large amount of money at stake, but any type of offer of a favor or payment should be reported immediately to a supervisor and failure to do so will be grounds for termination, is clearly unethical and may be illegal.

Another ethical dilemma faced in insurance claims is receipt of an anonymous tip or a request from an informant for compensation. While such tips should not be ignored, they must be approached with caution. Anonymous information should be noted in the file, but without a witness to ultimately testify at trial, the information may not be admissible. Request for payment for claim investigation information should not be handled at the claim adjustment level, but referred to the appropriate claims or SIU supervisory personnel to be addressed in accordance with the company’s policies.

Every insurance adjuster should pride themselves on their choice of profession and the quality of work they perform. You have a difficult job and during your career will face many ethical and professional challenges. Each of us in the insurance industry have a great deal of trust placed upon us to do the right thing and on our shoulders rests the integrity of how others view our chosen profession. [LM](#)

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