



Ethics Fraud & Abuse In Claims Management

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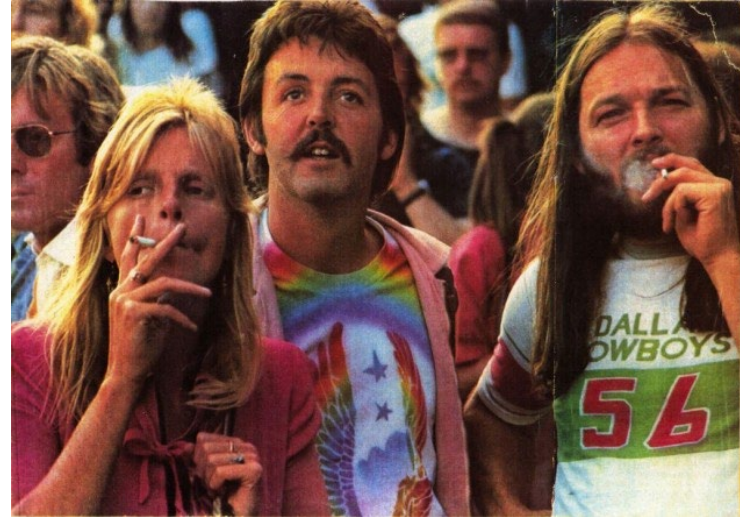


Led Zeppelin vs. The Beatles

- › Led Zeppelin lasted for 12 Years. The Beatles lasted for 10.
- › When performing live, Led Zeppelin's shows were longer. The Beatles usually just stood still and packed it in after an hour.
- › Led Zeppelin is never recalled for bad songs, but The Beatles are constantly insulted about songs like "Revolution 9" and "Ob-La-Di, Ob-La-Da."

Last Note on Zeppelin

- › Allegedly, Paul McCartney stated that the concert was too long. However, he was also reported to be smoking and not lucid.



The Reality

Who caused this?



You're both getting tickets.



Reality Continued

The police report is wrong! (Even though I worked a 15-hour shift.)



The police report is correct. I saw everything and just got on duty.





The Special States

- › California
- › Florida
- › Texas
- › Pennsylvania
- › Alabama
- › Mississippi
- › Louisiana

Contracts Are Never That Clear

What Did We Sign?

But Courts Strictly Construed in Favor of the Indemnitor

If you do not want to the indemnification clause construed in favor of the indemnitor, then states so in the contract.

For example, use the following language:

This provision should be construed fairly and reasonably and neither more strongly for nor against either party.





To Whom is Your Duty Owed?

- › The insured
- › The company and investors
- › The claimant
- › The court
- › Counsel (plaintiff & defense)
- › Innocent parties
- › You are not an attorney
- › You have been reminded ad nauseam that you are not an attorney
- › You are not an expert
- › You may or may not have a degree in engineering

You Are Better Than Those Things

- › You are a fiduciary
- › You are a licensed professional
- › You process claims
- › You verify an insurance policy exists for the insured person and/or property
- › You evaluate risk(s) of loss(es), or damages to property, culminating in the loss of property and or bodily injury
- › **Ensure resources are not wasted**
- › **Protect the insured**
- › Defend against fraud (many states have strict SIU requirements)



Go to Safety and Basics

The Unoriginal Originality of Led Zeppelin

- › Yes, they borrowed from uncopyrighted pieces
- › T.S. Eliot: the “good poet welds his theft into a whole of feeling which is unique.”
- › On June 23, 2016, a jury in Los Angeles returned a verdict that Led Zeppelin did not plagiarize the chords to “Stairway to Heaven.”
- › Yes, the case may go to the Supreme Court





The Initial Statement

This is the first line of defense / attack

- › You control the tempo.
- › You control the engagement.
- › You place all parties and insured on notice.
- › Act with speed. Florida Adm. Code Sect. 4(4)f: "An adjuster, upon undertaking the handling of a claim, shall act with dispatch and due diligence in achieving a proper disposition thereof."



The Basics

- › Get a statement/EUO
- › Make sure it's a covered claim
- › Get all the PD reports
- › Get the police reports
- › Get and read all the policies
- › Identify stacking issues
- › SIU review
- › Don't waive rights
- › Always set deadlines
- › Get everything
- › Confirm closure
- › Process the claim



Critical Notices 1 - 3

- › If at any point in my questioning you wish to stop, we will then agree to continue within a reasonable time to finish taking your statement.
- › Your carrier wishes to make a completely informed decision concerning your claim. Other than the questions I asked, documents we reviewed, is there any additional information/witnesses you believe should be interviewed, before the carrier makes a final decision on your claim?
- › As a person making this claim, are you satisfied you were provided every opportunity to share all the information / documentation you believe should be considered before making a final decision on the claim?



Why?

- › No court will find bad faith if you demonstrate in a recorded statement / writing the insured/insured's counsel failed to provide a statement or documents as they promised within the time they agreed/requested.
- › No court will find bad faith if you give every opportunity to the insured/insured's counsel to provide any information they think is relevant.
- › An affirmative answer to THE LAST QUESTION is the most effective "tool" in court to dispel any argument the claim was not investigated thoroughly /the insured was not afforded every opportunity to present relevant evidence.
- › Second chances during the investigation protect you.

Poll Question

The Lions in the Room



THE MEDICAL TEAM WERE WELL BEYOND ANY CONCERN
AS TO WHETHER THE LION SUFFERED FROM ALLERGIES!!



The Standard

- › The standard in deciding whether a claim should be accepted or denied is when all the evidence is considered does it leave you any reasonable alternative **other than** to deny the claim
- › This standard per 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
- › The standard is still **reasonable justification**. 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.



Unfair Claim Settlement Practices

A laundry list of things a company may NOT do when settling claims

- › Misrepresent coverage
- › Fail to attempt a prompt, fair, equitable settlement
- › Fail to settle one claim to influence settlement of another claim
- › Fail to provide reasonable explanation of claim denial



Fair Credit Reporting Act

- › Protects consumers subject to adverse action based on a credit report
- › Requires permission from consumer prior to obtaining credit information
- › Requires user of adverse credit information to provide
 - Written notice of adverse action
 - Name, address and phone of agency furnishing report
 - Information to obtain free copy of report



Non-Resident Licenses

- › Any agent who sells or services P&C insurance outside residence state must be licensed in other state(s) before company can legally pay commission
- › Each state has different laws, procedures, licenses, restrictions, continuing education requirements, etc.
- › Generally requires letter of good standing from “home” state
- › **BE AFRAID, BE VERY AFRAID**

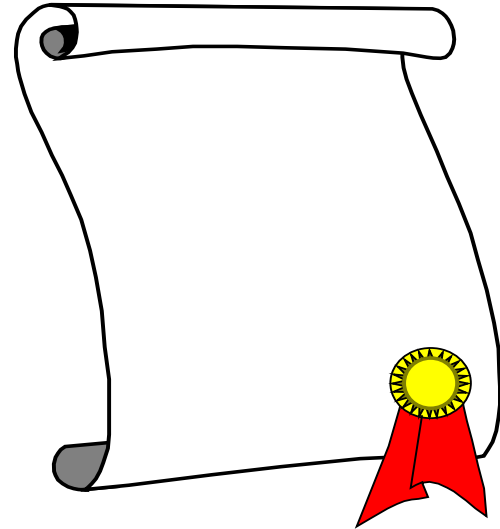


Ethical Decision Making

- › Decide if the problem has legal or ethical considerations
 - Is it only legal or ethical or does it have both components?
 - Is the decision necessary?
- › Gather all pertinent information
 - How did the problem occur?
 - Who has “rights” in this situation that should be protected?
 - Who has obligations in the situation?
- › Not a response to legal restrictions or threat of punishment
- › An internal, personal decision implying freedom & authority to make individual judgements

Code of Ethics

- › “Establishes minimum standards of expected behavior for those to whom the code applies.”
- › Insurance industry organizations each have own
- › Some codes are principles only with no penalties for non-adherence
- › Other codes hold members accountable and may expel or sanction those who do not meet standards



Unfair Practices

- › **Commission sharing** with ANY unlicensed person – including payment of “bonuses,” “finders fees,” “referral fees” or “incentives” (any valuable consideration).
Solicitor may not “broker” business to or accept commission from any LRA except the appointing agent
- › **False advertising** – printed or published literature intended for public distribution which is untruthful in fact or implication, includes:
 - Print or visual ads and billboards
 - Sales and form letters
 - Prepared sales presentations/proposals
 - Materials included with policy when delivered





Unfair Practices Cont'd

- › **Redlining** – refusing to write insurance based on location
- › **Unfair discrimination** – refusing to write insurance based on other than underwriting decision
- › **Rebating** – providing ANY valuable consideration outside the insurance contract as an inducement to purchase
- › **Tie-in sales** – making availability of one policy conditional on purchase of another
- › **Sliding** – adding coverages to policy without insured's approval
- › **Twisting** – replacing insured's policy with yours when not in his/her best interest
- › **Churning** – replacing current policy with another in the same company when not in insured's best interest



Public Adjuster

- › A public adjuster is a representative of the policyholder who advises, manages, and submits a claim to the policyholder's insurance company
- › They charge fees
- › They are averse to the company and the insured



Pro Se

- › Pro se legal representation comes from Latin, translating to "for oneself" and literally meaning "on behalf of themselves," which basically means advocating on one's own behalf before a court or other tribunal, rather than being represented by a lawyer
- › In the insurance world it means trouble



Pro Se Cont'd

- › They do not know the law
- › They may have conflicts
- › They tend to be suspect
- › They may lie
- › They may think you are lying
- › They may think everyone is lying
- › They may think they think

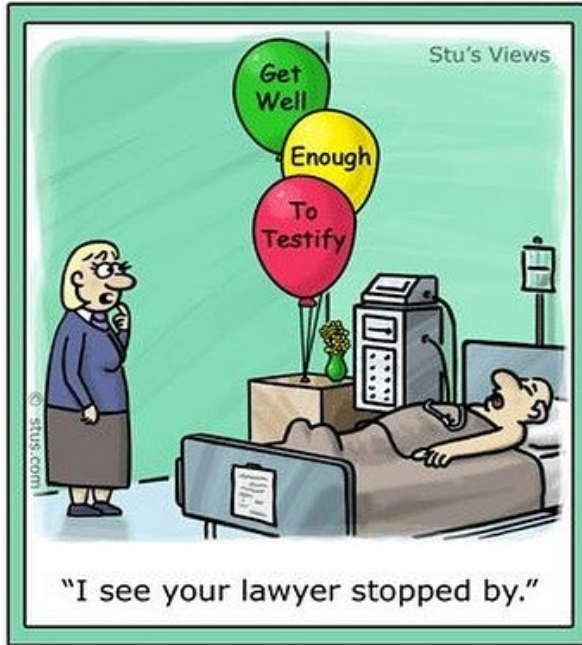
Pro Se Cont'd

› Don't lie you were thinking it



Poll Question

Some Comic Relief





The Nasty Attorney

- › Do not back down in the face of a disrespectful attorney
- › Hold your ground
- › Demand respect
- › You are not an attorney, use it to your advantage
- › Remember the "Safe Harbor"



Nasty Attorney Cont'd

Your Rights

The Rules of Professional Conduct

- › They are actual law
- › Attorneys are bound by them
- › They may work in concert with the court rules
- › They enhance laws on discrimination
- › Right to be treated fairly
- › To obtain accurate and fair answers
- › Obtain accurate information
- › Not to be threatened

Peter Grant

Was intimidating

- › Manager to the Yardbirds and Led Zeppelin
- › Had a hands-on approach
- › Protecting his band and their finances
- › Identified bootleggers or unauthorized photographers





Peter Grant Cont'd

Be Peter Grant

- › Understand that you too are a consumer, a member of the public and a professional. You can cut checks, you can make decisions, you can report fraud.
- › Was the shrewdest and most ruthless manager in history
- › Improved the conditions for musicians in dealing with promoters
- › Furthered financial and artistic control

The Nasty Attorney (Again)

- › Most will goad you
- › Most will push
- › Most will send rude letters
- › All will push the bounds of good taste
- › They will accuse you of bad faith



Identifying Ethical Dilemmas and the Peter Grant Counter

You are not doing these things; however, a plaintiff's attorney will pounce on every opportunity and door you leave open

- › An insurer may be acting in bad faith if the insurer delays, discounts or denies payment without a reasonable basis for its delay, discounting or denial
- › Failure of insurer to acknowledge and reply promptly upon notification of a covered claim
- › Failure of insurer to pay a covered claim as a result of failing to do a proper, prompt and thorough investigation as to reasonable liability and damages based upon all available information
- › Failure of insurer to affirm or deny coverage of claims within a reasonable time upon receipt of claim and/or proofs of loss
- › Insurer attempts to settle a claim for less than the amount to which a reasonable person would have believed was entitled or attempts to substantially diminish a claim requiring an insured to initiate litigation
- › Attempting to settle claims on the basis of an application and/or policy which were altered without notice, knowledge or consent of the insured



The Grant Counter

- › Get them to acknowledge that they have not given you everything you need
- › Advise of SOLs
- › Second chances are to protect you, the company, the insured & third parties
- › Remember there is some showmanship to the entire process
- › Be polite
- › Be direct
- › Focus your request
- › Remind others of the # of times you requested information



The Attorney's Legal Malpractice

- › The other guy is an attorney
- › He represents a client
- › He needs to give you information to process a claim
- › He is a porter
- › You are not an attorney
- › You represent many interests and the truth
- › You want information to process a claim
- › You are the gatekeeper



Ask the Right Questions

Improper questioning

- › Isn't it true you burned down the house?
- › You know this fire is an arson, don't you?
- › Who but you would have wanted the house to burn?

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 by the local fire department and independent origin and cause investigator, they have concluded 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?
- › Based upon the investigation 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?



Denials

- › 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 the evidence and documentation you feel is relevant to the proper investigation of your claim.



Denials Cont'd

- › Denials of claims should always be done in writing
- › 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
- › Denials 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 occurring or the reasons for the denial
- › There is no downside risk in giving the insured every opportunity to explain to the insurance carrier why the decision to deny the claim is not correct
- › 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



Denials Cont'd

- › The denial letter can be one of the best exhibits in favor of the insurance company in a bad faith trial
- › 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 carrier during 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

This About You

- **WHO ME?**



- **NO NOT YOU!**
- The attorney at the other end of the phone!





Simple Tips

- › Per our conversation on the 25th “You” will provide X to me in 15 days
- › Per our conversation on the 25th “You” agreed to provide X to me in 15 days
- › “You” failed to provide X to me in 15 days as agreed to during our conversation on the 25th

Poll Question

The Result of Boring



What is “Bad Faith”?

California

- › California Civil Jury Instructions (CACI)
2330. Implied Obligation of Good Faith and Fair Dealing Explained
- › To breach the implied obligation of good faith and fair dealing, an insurance company must, unreasonably or without proper cause, act or fail to act in a manner that deprives the insured of the benefits of the policy. It is not a mere failure to exercise reasonable care. However, it is not necessary for the insurer to intend to deprive the insured of the benefits of the policy.
- › Courts around the nation may or may not determine expert testimony is needed. Go case by case. Experts may be permitted to establish industry custom and practice or “good faith” claims handling principles.



Some Basics – When to Retain and Expert

When might I need an expert on claims handling?

- › Are they required?
- › See, e.g. Bergman v. USAA, 742 A.2d 1101 (Pa. Super. 1999)
(court refused to adopt a blanket rule requiring expert testimony in all cases involving bad faith claims)

Retain your expert early

- › Early file review; make sure he/she is comfortable with your client's position
- › They can assist in preparing for trial
- › No surprises

Coverage issues

- › Can expert testify about policy drafting, that policy language is ambiguous, that exclusions are inconspicuous, or how the policy language should be interpreted and applied to the facts?

POLICY INTERPRETATION

- › District of Colorado barred opinions of plaintiff's expert on interpretation of homeowner's policy language regarding replacement cost, and policy ambiguity
- › *Slavin v. Garrison Prop. & Cas. Ins. Co.*, 2017 WL 2928030 (D. Col. July 10, 2017).

LEGAL CONCLUSIONS

- › Northern District of Illinois barred certain opinions which were legal conclusions but allowed other opinions which were not
- › *Essex Ins. Co. v. The Structural Shop, Ltd.* 2017 WL 2224879 (N.D. Ill. May 22, 2017); see also *Fox v. Admiral Ins. Co.*, 2016 WL 6476461 (N.D. Ill. Nov. 2, 2016).



Some Basics

Industry custom and practice

- › The District of Colorado ruled expert testimony can be taken into account to determine “the standard of care, if the standard is not within the common knowledge of the ordinary juror”
- › O’Sullivan v. GEICO Cas. Co., 233 F.Supp.3d 917 (D. Col. 2017).
- › **Testimony on “good faith” claims principles in cases, statutes and regulations is O.K.**
- › **Expert testimony that the insurer acted in “bad faith”, violated particular statutes, are BARRED as legal conclusions.**
- › Kraeger v. Nationwide Mut. Ins. Co., 1997 WL 109582 (E.D. Pa. Mar. 7, 1997).



Themes for Your Expert Address

Insurance company themes

- › An insurance policy is a contract, with limits to what is covered, but an insurance company always looks to find coverage within what is reasonably permitted by the insurance contract
- › The greater good of insurance
- › Dispel the David vs. Goliath (perception);
- › The public thinks only way to send a message to the insurance company is through a large award



Themes for Your Expert to Promote

Insurance company themes

- › Insurance companies are not perfect; they are human, can make mistakes or misunderstand without being unreasonable;
- › The insurance policy places duties on both parties; the insurance company honored the contract more than the insured
- › The insurance company went to great effort and expense to adjust the claim
- › Admit to mistakes/apologize/lessons learned



Trial Preparation & ADR

Testimonial presentation key issues

- › Be concise; the long-winded expert and/or the tedious presentation will lose the jury and possibly anger them
- › Graphics, timelines, exhibits, PowerPoint and visual aids when possible

Preparation

This is prepared.



This is not prepared.

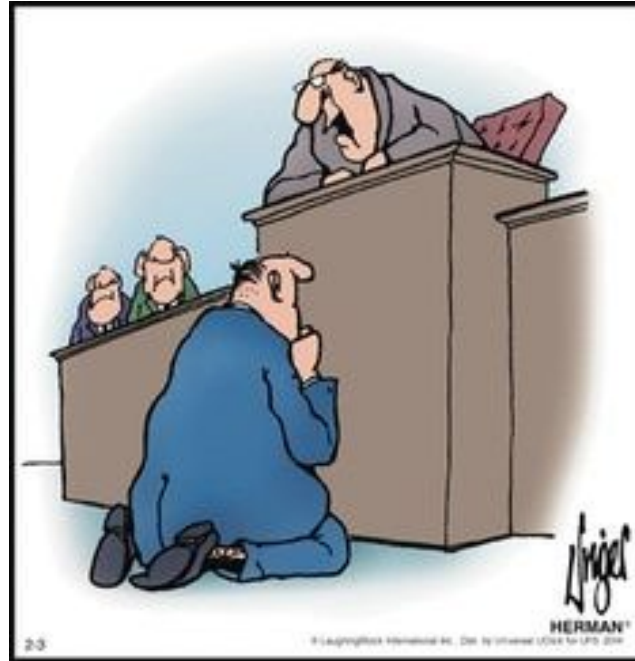




What Do I Say in Expert Disclosure

› What do I **not** say?

Self-Explanatory



“Get up, you idiot. When I say, ‘How do you plead?’ I wanna know if you’re ‘guilty’ or ‘not guilty.’”

What Do I Say in Expert Disclosure

- › Stick with admissible descriptions and use plain English
- › While you are a knight, please remember we are in the 21st Century!



- › We are going to take your sworn statement on the fire claim at your business loss regarding your possessions.
- NOT
- › We art going to taketh thy sw'rn statement on the fireth claimeth at thy business loss regarding thy livings





Some Final Points

What to consider in proffering or opposing expert testimony

- › Experience in the insurance industry
- › Experience dealing with the specific types of insurance and claims at issue in your case
- › Education and training
- › They can generate a good sample disclosure
- › They are clear
- › Open to feedback
- › They are confident
- › They are candid
- › Can they bring out your good faith claims practices.



Some Final Points

- › What to consider in proffering or opposing expert testimony
- › More than one expert is helpful, but cumulative expert testimony will normally not be allowed
- › If more than one expert is used, court may preclude one of them unless they offer different perspectives: For example, claims handling vs. underwriting
- › Rule 403, Federal Rules of Evidence
- › Refute the allegation there was a “substantial deviation” from the norm

Know Your Jury



"I DON'T LIKE THE LOOKS OF THAT JURY."

My First Jury



HAUPTMANN JURY JAN - FEB 1935

How it Looks Today





What Do I Say When Plaintiff's Counsel Calls

- › Use plain English.
- › Ask them if there are additional proofs and witnesses.
- › Ask them if there is anything that they feel you have not considered.
- › Set deadlines.
- › Remember your audience.
- › Always ask yourself, is this a set up for a bad faith claim?



Conclusion

- › Claims examiners are people with a very specific duty. They process claims, they do not write checks. You have the highest duty amongst all the persons who are involved in the claims process.

Questions