QUALITY CLAIM FILE NOTES

BY

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I. INTRODUCTION

For many years the claims file was protected like a child's personal diary. It held the deepest and darkest secrets of the insurance carrier and its personnel. Handwritten notes would be jotted into the diary containing the claim representative or supervisor's own personal thoughts about the claim, uninhibited by any concern that these thoughts would see the light of day beyond the claim office. Supervisors would note their comments and critiques on the performance of the claims representative within the file. These comments and opinions were intended solely to improve the work of the adjuster, point out mistakes where necessary and provide guidance for future claims. Events during the last 25 years have broken the lock on the claim file and now expose these most personal thoughts to the world. The first portion of this paper discusses how the courts have exposed the claim file to discovery and the types of entries that they have considered to be indicative of bad faith.

In the normal course, the bad faith action is filed before the plaintiff's attorney has even seen the claim file. The prospect of bad faith damages (often including punitive damages) is only a glowing ember waiting to be fanned into a raging fire. The fan that the plaintiff's attorney will seek in a bad faith action is your claim file. As you will see, for the most part, it will have to

be produced in discovery. The plaintiff's attorney will then scour the claim file looking for mistakes, slip-ups, or signs of the evil corporate empire at work. How you maintain your claim file and the things you put in it will determine whether that file is your strongest shield against the bad faith claim, or the plaintiff's most piercing sword. The second portion of this paper, then, will give you some practical tips on the things that should and should not appear in your claim file.

II. DISCOVERY OF THE CLAIM FILE

The advent of bad faith litigation against insurance carriers has caused significant erosion in the protections once afforded to the claim file. Just as the internet has opened a wealth of information far beyond what could have only been imagined several years ago, more and more often the claim file is being opened to public scrutiny. Legal teams now dig through pages and pages of notes looking for the proverbial needle in the haystack to fund their retirement. In the hands of a skilled litigator, even the most innocent of notations can become the smoking gun upon which a bad faith claim is built. To understand the significance of claim file entries one must first have some knowledge of the standards utilized by the courts in evaluating bad faith claims, and the manner in which the court have applied the rules of discovery in these claims.

THE BAD FAITH CAUSE OF ACTION

The era of bad faith litigation began in California, and gained momentum with the California Supreme Court decision in Gruenberg v. Aetna Insurance Company, 9 Cal. 3d 566, 510 P.2d 1032 (1973). There the California Supreme Court recognized a tort bad faith cause of action where an insurance carrier fails to deal fairly and in good faith with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy. Other

courts followed the lead of California, some treating the new cause of action as a tort claim and others treating the new cause of action as part of the breach of contract claim. Some states enacted statutes defining bad faith. See e.g. 42 Pa.C.S.A. § 8371. The standard established in Pennsylvania to prove bad faith is as follows:

> Bad faith on part of insurer is any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e. good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith.

Polsein v. Nationwide Mutual Fire Insurance Company, 23 F.3d 747, 751 (3d Cir. 1994)

Other courts hold that where the insured has established the insurance carrier has refused, without proper cause, to compensate its insured for a loss covered by the policy, this is sufficient to constitute bad faith without a further finding of malice or ill-will. United States Fidelity & Guaranty Company v. Peterson, 91 Nev. 617, 540 P.2d 1070 (1975); Gruenberg v. Aetna Insurance Company, supra..

With the advent of bad faith it did not take long for insureds' attorneys to recognize that the wealth of information contained in the claim file was exactly what was needed to convince a jury that the insurance carrier had treated the insured poorly.

> Bad faith actions against an insurer, like actions by client against attorney, patient against doctor, can only be proved by showing exactly how the company processed the claim, how thoroughly it was considered and why the company took the action it did. The claims file is a unique, contemporaneously prepared history of the company's handling of the claim; in an action such as this the need for the information in the file is not only substantial, but overwhelming. APL Corporation v. AETNA Casualty & Surety Co., 91 F.R.D. 10, 13-14 (D.Md. 1980). The "substantial equivalent" of this material cannot be

> obtained through other means of discovery. The claims file "diary" is not only likely to lead to evidence, but to be very important evidence on the issue of whether [the insurance carrier] acted reasonably.

Brown v. Superior Court, 137 Ariz. 327, 336, 670 P.2d 725, 734 (1983).

DISCOVERY OF CLAIM FILES

Typically state and federal rules of civil procedure protect both attorney client communications and work product materials from discovery. These rules protect trial preparation and litigation preparation materials from discovery. Federal Rule of Civil Procedure 26(b) provides the following limits for discovery:

> (b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> > (1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii) and (iii).

The work product doctrine has its origins in the United States Supreme Court case of Hickman v. Taylor, 336 U.S. 906, 69 S.Ct. 485, 91 L.Ed. 1071 (1949). There the United States Supreme Court held that work product information was not discoverable without a showing of substantial need and inability to obtain such information through other sources without undue

hardship. Work product means those materials prepared in anticipation of litigation or for trial. The doctrine was created out of the court's concern that one party could sit back while another party conducted investigation. The court was loathe to allow the party who merely sat back to obtain the benefit of the investigation done by the diligent party. The doctrine was also intended to protect from discovery the mental impressions and legal opinions of the attorney, the client and consultants.

In jurisdictions which permit a bad faith cause of action, the courts have found a number of ways to permit discovery of claim files. One theory holds that the bad faith allegations themselves create the substantial need without undue hardship to obtain the materials contained in the claim file, including mental impressions, conclusions, opinions or legal theories of a parties representative. Other courts hold that claim investigation is the business of an insurance company. Accordingly, all notations made in the claim file are made as part of the normal and routine business of an insurance carrier, and not in anticipation of litigation. Since these documents are not prepared in anticipation of litigation, they are not entitled to protection from discovery. Yet another line of cases conclude that once a bad faith claim has been asserted, information contained in a claim file reflecting the motivating factors behind the insurance carrier's decision to disclaim coverage become relevant. Reavis v. Metropolitan Property & Liability Insurance Company, 117 F.R.D. 160 (S.D. Ca. 1987).

There is no work product protection for documents prepared in the regular course of business rather than for the purposes of litigation. APL Corporation v. Aetna Casualty & Surety Company, 91 F.R.D. 10 (D.Md. 1980). Even where an insurance carrier has disclaimed coverage, that is not necessarily sufficient to cloak documents prepared thereafter with the work product protection since not all such documents are prepared in anticipation of litigation.

Westhemco Ltd. v. New Hampshire Insurance Company, 82 F.R.D. 702 (S.D.N.Y. 1979). (There is no hard and fast rule to determine when the insurance company's activities shift from the ordinary course of business to anticipation of litigation). Merely because litigation often results from an insurance company's denial of a claim does not mean that all documents prepared subsequent to a disclaimer are prepared in anticipation of litigation. Id.

The Ohio Supreme Court decision in the Boone v. Vanliner Insurance Company, 91 Ohio St. 3d 209, 2001 Ohio 27, 744 N.E. 2d 154 (2001), cert. denied 534 U.S. 1014, 122 S. Ct. 506, 151 L.Ed. 2d 415 (2001) was a major blow to continuing protection of the insurance carriers claim file. The Ohio Supreme Court ordered production of the claim records in the Vanliner case. What is significant from the Vanliner decision is not the order requiring production, but rather the reasoning expressed by the court. The Ohio Supreme Court concluded that the claim file materials were discoverable because of the court's "recognition that certain attorney-client communications and work-product materials were undeserving of protection, i.e., materials 'showing the lack of good faith effort to settle'." 744 N.E. 2d at 157. The court went on to in essence establish an almost blanket requirement for discovery of materials prior to the insurance carrier's determination of no coverage. 744 N.E. 2d at 158. Surprisingly the West Virginia courts concluded that the Ohio court had gone too far in permitting such discovery on a routine basis. State Ex. Rel. Allstate Insurance Company v. Madden, 601 S.E. 2d 25 (W.Va. 2004).

The prudent claim professional must assume that any entry made in the claim file will be scrutinized at a later date. No longer is there any privacy for the recorded thoughts and impressions which allow supervisors to understand how the facts and appearances of witnesses have impacted the claim representative's evaluation of the claim. Claim records should be considered permanent from the time an initial entry is made. Claims notes today typically are

maintained using an electronic data base rather than papers contained within the claim file. Communications within an organization are now done by e-mail rather than written memo. While striking the delete key may on its face appear to correct an erroneous data entry, each and every revision now becomes potentially subject to discovery. New attempts at discovery may prove extremely onerous for insurance carriers in the coming years.

ELECTRONIC DISCOVERY

The United States District Court for the District of New Jersey is at the forefront dealing with electronic discovery. On October 6, 2003, rules entitled "Discovery of Digital Information Including Computer-Based Information" were adopted by the district. New Jersey Law Journal 174 N.J.L.J. 142 (2003). The new rule requires that an attorney must review with the client files that "may be used to support claims or defenses, including current, historical, archival, back-up and 'legacy' computer files, whether in 'current or historic media formats'." At the initial Rule 26 conference the court will address how these documents are to be preserved and produced. Where documents have been deleted, restoration may be required. The court has the ability to shift the cost in any given case. It is anticipated that the courts may move towards allowing an insured's computer experts access to the insurance carrier's data banks to determine whether traces exist of e-mails, memorandum or deleted claim notes.

The Standing Committee on Rules of Practice and Procedures of the Judicial Conference of the United States has held a series of meetings to discuss proposed changes to the Federal Rules of Civil Procedure to address electronic discovery. These proposals were approved by the Judicial Conference of Senior Circuit Judges in June, 2005 and are in the process of review by the United States Supreme Court. The proposed amendments would impact Federal Rules of

Civil Procedure 16, 26, 33, 34, 37 and 45. The proposed amendments are intended to address five primary areas:

a. Early attention to issues relating to electronic discovery, including the form of production, preservation of electronically stored information, and problems of reviewing electronically stored information for privilege;

b. Discovery of electronically stored information that is not reasonably accessible;

c. The assertion of privilege after production;

d. The application of Rules 33 and 34 to electronically stored information; and

e. A limit on sanctions under Rule 37 for the loss of electronically stored information as a result of the routine operation of computer systems.

Report of the Civil Rules Advisory Committee, Judicial Conference of the United States at pages 5-6 (2004).

In addition to the rules in effect in the District of New Jersey, several other judicial districts have also adopted rules of procedure for electronic discovery. The intent of the Committee on Rules of Practice and Procedures is to make sure that uniform rules apply throughout all federal courts. It is likely that the federal rules once adopted will form the basis for similar amendments in the state courts. The proposed amendments would permit the parties seeking discovery to specify the format in which the data is produced.

The newest uncharted area of discovery involves metadata contained in electronic documents. Metadata is the background information contained in many different types of electronic documents. All electronic documents contain some type of metadata which may include prior versions of the document, annotations which are not part of the printed document and underlying data from which final numbers contained in the document are calculated. See

Williams v. Sprint/United Management Company, 230 F.R.D. 640 (D.Kan. 2005); The Sedona Guidelines for Managing Information and Records in the Electronic Age (September, 2005 Version). Litigation during the upcoming years is expected to delineate when it is appropriate to remove metadata, and when such information must be produced. The one thing which appears clear from the earlier decisions is that any attempt to remove such information from the documents produced must be reflected on a privileged log. Failure to disclose that such information has been redacted may result in waiver of any objection or privilege to production of metadata.

SPECIFIC EXAMPLES

An examination of several cases below will help highlight the dangers which can lurk within a claim file. The Pennsylvania trial court in Hollock v. Erie Insurance Exchange, 54 Pa. D&C 4th 449 (2002) prepared an extensive opinion justifying an award of $2.8 million in punitive damages following a bench trial in a bad faith action. The court made one hundred sixty nine (169) separate findings of fact before reaching its conclusion that the insurance carrier had acted in bad faith. It should be kept in mind that the facts summarized herein are those found by the court, and not those asserted by the insurance carrier.

Hollock involved an underinsured motorist claim. The claim was initially reserved at $30,000.00. The award at arbitration was $850,000.00. The insurance carrier had written claim guidelines which had been in existence for many years. Some of the guidelines, including those requiring reevaluation of reserves on a 90 day basis, were unknown to either the claims representative or claim supervisors. Much of the courts opinion criticizes the failure of both the claim representative, claim supervisor and claim manager to explain why guidelines were either

ignored or disregarded. No explanations were provided in the claim notes indicating why deviations occurred from the guidelines.

In particular, the carrier's claim guidelines involved in the Hollock case required that the adjuster meet face-to-face with the insured within 24 hours of claim assignment. This did not occur either within 24 hours nor throughout the several years the claim was in existence. The court explained that "the documentation one would reasonably expect, based not only upon [insurer's] own guidelines but upon reasonable claims handling practices, was shoddy at best, and in many instances, simply non-existent. … [The] lack of documentation makes it impossible for any person or entity to consider or corroborate the reasoning, rationale or basis of a decision-making process".

The court was also critical of the insurance carrier's failure to respond promptly with respect to inquiries regarding the amount of coverage. The initial letter from the insured's attorney asked for confirmation that coverage was in the amount of $250,000.00. No response was made to this letter, and it was not until more than a year later that the insured's counsel was advised that coverage was available in the amount of $500,000.00. While the insurance carrier may have believed that there was no reason to respond at the time of the initial inquiry, there was nothing contained in the claim notes to explain the delay. Because of this the court described this conduct as "disingenuous claims handling practices which persisted throughout the Hollock claim".

The court further criticized the failure to articulate any reasonable or rational basis for the reserve which had been set. The adjuster testified that the reserve had been based upon his "experience". The court concluded that the materials in the claim file indicated the reserve had no relationship to the potential value of the claim. Similarly, the court was critical of the

insurance carrier's decision to reject evidence and reports without documentation in the claim file refuting the information submitted by the insured. Since the rejection of these claims and reports was based solely upon the claims professional's own experience rather than reports from consultants, the court concluded the positions taken were frivolous and unfounded. There are other acts of alleged bad faith set forth in the opinion. By the time the court reached the later conduct it appears that almost any action by the carrier was sufficient to constitute bad faith. It is likely however that the early conduct by the carrier colored the court's view of the claim representative's actions later in the adjustment process.

The trial court's decision was upheld by the appellate court in Hollock v. Erie Insurance Exchange, 2004 Pa. Super. 13, 842 A.2d 409 (2004), appeal granted 878 A.2d 844 (2005). First, the appellate court found that bad faith conduct during the litigation can form the basis for a finding of bad faith against an insurer. Based upon the trial court's characterization of the insurance carrier's conduct during discovery and trial as "an intentional attempt to conceal, hide or otherwise cover-up the conduct of Erie employees", the court found this evidence sufficient to form the basis of a finding of bad faith. The court further held that conduct post-claim payment can be conduct upon which a bad faith claim is based. The court concluded that the only prerequisite to an award of punitive damages in Pennsylvania is a finding of bad faith. Once a finding of bad faith occurs, no other additional proofs are required to trigger an entitlement to punitive damages. Finally, after giving a cursory acknowledgement to the United States Supreme Court decision in State Farm v. Campbell, 538 U.S. 408, 123 S. Ct. 1513, 155 L.Ed. 2d 585 (2003), the court upheld the $2.8 million punitive damage award which in the court's terms only barely exceeded the single digit ratio referenced as a guideline by the United States Supreme Court.

Insurance professionals must be careful to approach claims from a neutral viewpoint. Cutting corners on the investigation or on experts may constitute bad faith. Where the claims notes suggest that the investigation focuses upon supporting a disclaimer rather than "an unbiased and thorough investigation", the insurance carrier is acting in bad faith. For example, in Dregne v. West Bend Mutual Insurance Company, 216 Wis. 2d 384, 576 N.W. 2d 89 (1998), the claims representative suspected wear and tear at the time of the initial claim report. The claims notes reflected that the supervisor spoke with an in-house appraiser who suggested three additional inspections to determine the cause of the damage. Later claim notes indicated that a call had been made to a specialist who was "too expensive to hire". The claim representative noted that the disclaimer letter was sent certified mail "because a good rapport had not been made with the insured". A later note indicated that the adjuster received a call from the insurance agent who felt it was a good denial letter and appreciated the carrier had stuck to their guns and denied the claim. The adjuster also noted that she felt she had built a good rapport with the agent. Based upon these notes the court found sufficient evidence to sustain a punitive damage award.

Claim professionals must be diligent in not reaching a determination regarding coverage when the claim is initially received. It is appropriate to raise potential coverage issues which suggest the need to retain consultants or perform further investigation. The claims professional must carefully phrase their recorded comments to be neutral lest the claim notes suggest a predisposition. In State Farm & Casualty Company v. Slade, 747 So. 2d 293 (Ala. 1999), the insured reported cracking of ceilings in the interior or exterior walls of the home purportedly caused by a lightning strike during a severe storm. A letter was written to one of the engineers asking the engineer to investigate the property "with the purpose being to ***defend*** the insurance

company against any claim of lightning-related, settlement, or structural damage". This was sufficient to create a jury question on the bad faith claim against the carrier.

Many decisions have criticized claim professionals for not being open and forthright with the insured during the investigation process. Where the claim notes reflect one thing and the insured is told another, this creates a recipe for disaster. The consequences emanating from a lack of candor with the insured can be enormous. The Texas case of Allison v. Fire Insurance Exchange, 98 S.W. 3d 227 (Tex. App. 2002) presents an extreme example. There, one of the allegations of bad faith involved the claim representative's letter to the insured advising that the carrier required additional time to evaluate the claim. This letter appears to have been sent to comply with applicable unfair claim practices regulations. The claim representative admitted at trial however that all of the information needed to evaluate the claim was already in the file at the time the letter was authored. The adjuster acknowledged that she needed additional time to obtain authority from a supervisor to pay the claim because the amount of the claim was above her authority. This and other conduct documented through the claim file resulted in a jury verdict awarding punitive damages of $8.9 million. While the appellate court reversed the punitive damage award, the appellate court upheld the compensatory damage award in excess of $4 million. To put this in perspective, the insurance policy on which the claim was made provided building limits of $750,000.00 and contents limits of $450,000.00.

The current trend is to broaden the discovery permitted for insurer claim files. Recent attempts to prove institutional bad faith bring both other claims and general corporate policies into consideration. Disagreements between a claims supervisor and claims representative must be tactfully handled before they blossom into the basis for a bad faith claim. From these various

cases, we are able to glean a few guidelines that the courts have identified to avoid acting in bad faith:

1. Avoid characterizations of individuals or information obtained.

2. Consultants should be requested to investigate the cause of loss, not whether a particular exclusion applies. As a corollary, where the insured alleges a specific cause, even when unsupported by an expert, the insurance carrier's expert should be asked to determine whether the insured is correct in its asserted cause of loss.

3. Be open and honest in communications with the insured.

4. Keep the insured informed throughout the process.

5. Know your company's claims handling guidelines and follow them.

6. When deviating from standard procedures, provide an explanation for the deviation.

7. Make sure all of the information you are relying upon to reach your coverage determination is contained within the claim file at the time the decision is communicated.

In addition to the guidelines that the courts have given us, there are some practical tips that we have seen in the real world of bad faith, but which have not ever appeared in published court decisions. Those are outlined for you in the next section.

III. THE CLAIM FILE ITSELF – A SWORD OR A SHIELD

In the normal course, the bad faith action is filed before the plaintiff's attorney has even seen the claim file. The prospect of bad faith damages (often including punitive damages) is only a glowing ember waiting to be fanned into a raging fire. The fan that the plaintiff's attorney will seek in a bad faith action is your claim file. For the most part, it will have to be produced in discovery. The plaintiff's attorney will then scour the claim file looking for mistakes, slip-ups,

or signs of the evil corporate empire at work. How you maintain your claim file and the entries you put in it will determine whether that file is your strongest shield against the bad faith claim, or the plaintiff's most piercing sword.

It is becoming more apparent that courts are willing to allow production of an insurer's claim file, in both its paper and electronic form. With that in mind, we should strive to create a claim file that is the insurer's best evidence that it acted in good faith, not a claim file that is the plaintiff's strongest proof of bad faith.

In a perfect world, we would all have the luxury of time to sit back and reflect upon what we've written in our claim files and whether it is appropriate or not. But ours is not a perfect world. And very, very few of us (if any) have that opportunity. The things that we put into our claim file, at the spur of the moment, often remain there permanently. And so it is only with experience, forethought and a little bit of paranoia, that we will become accustomed to choosing our words carefully. We alone determine -- by our entries – whether that claim file will be an impenetrable shield against the bad faith claim or a razor sharp sword for the bad faith plaintiff to wield at will.

FACTS WIN BAD FAITH CASES; OPINIONS LOSE THEM.

Most claim adjusters are fair, honest and reasonable people. They are not inclined to harm their insureds. They strive to do what is right in every situation. The goal is to create a claim file that accurately reflects those laudable goals. It sounds easy, but it is not always so. Particularly when the plaintiff's attorney is trying to twist and turn every word in your file to make you and your employer look selfish, greedy and insensitive.

The best way to diffuse opposing counsel's efforts is to document your claim file with facts -- stone-cold, indisputable, verifiable facts. Leave the opinions and conclusions to others

(for the most part). As “Joe Friday” - in the television show “Dragnet” - would say, “Just the facts, ma’am.”

What do we mean by just including the facts? Maybe an example will illustrate the point best. If you are handling a fire loss and believe that arson could be involved, there is one of two ways you can make note of it in your claim file. You could write, “We suspect the insured set the building on fire and are retaining a cause and origin expert to confirm this.” The first part of the entry is an opinion, and a dangerous one at that. It demonstrates that you are leaning towards a conclusion that the insured committed arson. That conclusion, plaintiff’s attorney will argue, guided your entire investigation. It will be said that you reached this conclusion without sufficient facts, as a means of justifying your non-payment on the claim. It could viewed as pre-judgment and improper motive. It may demonstrate that you are not putting your insured’s interests on par with the interests of the insurance company.

Alternatively, you could simply write that you have retained a cause and origin expert to investigate the cause of loss. This is a factual comment. It does not show pre-disposition or bias. It simply states a fact. You and your supervisor will understand that arson is being considered. But in keeping to the facts, you have avoided an accusation of criminal activity on behalf of your insured. Plaintiff’s attorney may well read between the lines too, and question you about why you hired a C&O expert. The response is simple: to determine the “cause and origin” of the loss. There is nothing untoward about that purpose.

Shortly after your claim file is produced in the bad faith suit, you can expect to be deposed. No one enjoys being deposed, especially in bad faith litigation. It is a multi-hour grilling designed with one simple purpose in mind: to make you look bad. You will be asked to explain and justify every opinion and conclusion that you put in your file. Since that deposition

will take place several years after you handled the claim, your ability to recall exactly how and why you reached the opinions that you did will be severely hampered. Facts, on the other hand, are far less difficult to explain. They are what they are. You do not have to offer your rationale as to why a fact is a fact. It simply is. If you have included the source of the information and an accurate description of the facts, your deposition will be short and uneventful. And the bad faith claim will be weak.

On the other hand, a claim file that is replete with unsupported opinions, hunches, and gut feelings that are adverse to your insured will require a great deal of explanation. Without a strong array of well-documented facts, you will be hard-pressed to present yourself as unbiased and open-minded. You may have a difficult time recalling how and why you reached your conclusion. If the claim file presents an unsupported, negative opinion concerning the insured or their claim, for which you cannot offer an explanation in your deposition, the bad faith claim that was only a glowing ember may transform instantly into an inferno. Even if your "hunch" about the insured or the claim turn out to be right, the plaintiff's attorney will make much ado about the fact that you pre-determined the course of the investigation in an effort to avoid payment of the claim. Your claim file should demonstrate that the facts led you to a conclusion. Not vice-versa.

There is only one caveat to the rule about documenting your file with facts: The facts need to be relevant to some issue in the claim. If you are investigating and evaluating an insured's business interruption claim, the claim file should not contain irrelevant facts, such as the insured's marital infidelities or prior alcohol addiction. While his transgressions may be factual, they have no bearing on the value of his claim, and do not belong in the file. You will have a difficult time explaining your decision to document irrelevant facts that are embarrassing or hurtful towards the insured.

And there is one caveat for keeping opinions out of the claim file. Part of your job is to evaluate exposure, coverage, witness credibility, etc. You are expected to include these opinions in your evaluation of a claim. But keep the opinions basic ("the witness makes a good appearance" or "the policy exclusion appears to apply to this loss"), make sure they are relevant and be certain that you have all of the facts in place ***before*** you have reached your conclusion.

A claim file that contains relevant, objective facts and very little opinion is very difficult to attack in a bad faith suit. A claim file that reveals unsupported, negative opinions and conclusions is far easier to assail. Let the facts speak for themselves. Leave the opinions for others to reach. And quite often they will jump off of the pages without any explanation at all.

CHOOSE YOUR WORDS CAREFULLY

In life, everyone wishes, at some point, that they had chosen better words to express their point. Sometimes, a poor choice of words can simply be chalked up to an unfortunate error in judgment, and the ramifications are scant. But in the world of insurance claim handling, a poor choice of words will be portrayed as evidence of your disdain for your insured and your efforts to undermine his rightful recovery under the policy. Many jurors enter the courtroom already quite suspicious of corporate practices and motives. And so it may not be a difficult task for plaintiff's attorney to convince them that your poor choice of words *does* reflect your evil intent, and was not simply a momentary lapse in judgment.

Since the realities of our workload do not often permit us to reflect upon our choice of words and revise them as needed, it is critical that we exercise discretion and thought at the time that we first make entries into our claim file. Here's an example of how one simple word can create an unfavorable impression:

> Unfortunately, there was [originally] no endorsement [providing coverage] for this risk on the policy, but it was added later on, retro to the inception date.

For the most part, the entry is factual and concise, but it is not entirely so. This entry talks about an endorsement adding coverage for the insured. Look at the very first word. Surely, an endorsement adding coverage is not unfortunate for the insured. To the contrary, it is actually a good thing for the insured to have more coverage. So, why use the word "unfortunately"? Plaintiff's attorney will give you a very simple answer. The word "unfortunately" shows that the insurer would be harmed by the addition of the endorsement because it would have to pay the loss. There would now be coverage where there was no coverage originally. The use of the word "unfortunately" suggests that the claim handler was considering the interests of his employer – the insurance carrier – above those of the insured. If there were to be questionable decisions made later in the handling of that claim, the plaintiff's attorney will more easily be able to persuade a jury that those decisions were motivated by the claim handler's preference for the interests of the insurer, not the insured.

Here are a few more suggestions for choosing the words you use your claims files:

- Be clear. Your mindset should be this: Someday a plaintiff's attorney is going to be looking at your file. Is there anything ambiguous or unclear about what you've written? The clearer you are, the less chance that someone will be able to twist your words around.

- Be to the point. The more you write in a claim file, the better the chance that there will be something that can be used against you. You want to be sure to give complete and accurate information, but writing more than necessary increases the opportunity you may write something that could me misconstrued.

- Be unfunny. The world of insurance is a serious one. In our daily work, we sometimes seek out ways to lighten the mood and interject some levity . Save it for the water cooler chat, not

the claim file. You handle many claims and the impact of those claims probably does not affect you personally. The same may not be true of the insured. If your insured suffers a loss to their home, or their business, it may well cause them to lose sleep, to get depressed and to be very, very concerned about getting their claim resolved. Neither the insured, nor the jury, will appreciate light-hearted comments mocking the insured's claim, her appearance, her unusual name, her background or anything else. The claim process can be an ominous and intimidating experience for those who are not familiar with it. They will be more sensitive to your off-handed comments than others may be. And they will be more offended if you seem to be handling their very serious claim in a light-hearted fashion.

- Keep HR issues out of the file. This goes for claim handlers and supervisors. Managers: if you think your claim handlers have misinterpreted the policy language, misapplied the terms of the policy, taken an incorrect position on damages, etc., don't air your criticisms in the claim file. Pull that employee into your office and have a discussion about the issue. Claim handlers: if you think your supervisor has absolutely lost his marbles, do not try to make your case through your claim file. The claim file should contain your plan of action and your efforts to carry your plan out. It is not a forum to debate issues. Frank and open discussions of difficult issues is a good thing and should be encouraged, but not in the claim file. If a claim handler and supervisor do not express a unified front in the claim file, plaintiff's attorney will argue that there was some doubt about how to resolve or pay the claim. And in the world of bad faith, nine times out of ten, doubt will be resolved in favor of the insured. And even if the adjuster and manager eventually come to agreement on how to handle the claim and it *is* favorable to the insured, an allegation of delay may be still come rolling down the pike. If the issue relates only to job performance, a manager's leadership skills or other

non-claim related matters, there is no place for these entries in a claim file. Not only do they demonstrate dissension among the ranks, they show that you are not focused on the merits of the claim.

- Be professional. You may occasionally find that the insureds with whom you are dealing may be mean, nasty, untruthful, conniving, and accusatory. Worse yet, you may have to deal with an insured's attorney. Do not stoop to their level. Do not engage in a war of the words. Do not use your file notes to vent your frustration. In a bad faith case, it is you who is on trial. Therefore, whether you were provoked or not, if the jury hears that you lashed out at the insured, it is you (not the insured) who will be called out. Instead, be professional at all times. Keep your emotions out of your claim file. If necessary, visit a co-worker or a supervisor and vent to them.

- Document your file – Right Away! If you have a conversation with your insured, or a contractor or a witness, write it down . . . immediately! If the insured claims the conversation never happened, you will have a record to prove that it did. After all, most companies have guidelines requiring you to documents activity on the file. In your deposition, you will likely testify that you normally do document activity in the file notes. Therefore, if you did not jot down a conversation, one may easily conclude that the conversation never happened. If the insured claims that you represented certain facts, your documentation will reveal whether that is true or not. If you do not document your file to reflect conversations you have had, it will be your word against the insured. And that battle will almost always be won by the insured. You have hundreds or thousands of claims to track. It's difficult to recall the finer points of each claim. The insured typically has one claim, and it is not nearly as difficult to expect the insured to recall exactly what transpired in

her one and only claim. Not to mention the fact that juries have a natural distrust of insurance companies, and anyone associated with them.

The demands of your job often prevent you from taking time to ponder the impact of your words in the claim file. But the extra few moments you spend making sure that you've documented your actions in a professional, courteous and sensitive way will save you hours of deposition preparation, sweat and worry in a bad faith case later.

E-MAIL – A WOLF IN SHEEP'S CLOTHING

E-mail has forever altered the landscape of communications. In the old days of "snail mail" (aka, first class, postage pre-paid letters), it was not uncommon to receive a response to a letter 10 days or 2 weeks after your letter went out. Response time was generally measured in "weeks." The fax machine changed that picture somewhat. But faxing letters was expensive, somewhat time consuming and not always reliable, and so it was generally reserved for "emergencies." Nevertheless, for important matters, the fax machine narrowed acceptable response times to "days."

E-mail has whittled acceptable response times even further to "hours" or "minutes." The speed with which we can communicate through the written word has accelerated beyond our dreams. In what is evolving into an "on-demand" society, the people with whom we deal in our business lives are growing increasingly impatient waiting for "snail mail" or faxes. If you take weeks or even days to respond to an e-mail, you'll be perceived as brushing off the person who sent you the initial e-mail. You had better be prepared to explain your tardiness. Because the expectation for a response is short, you should give some form of a response quickly. Even a quick note saying that you received the e-mail and will respond shortly is more courteous than no response at all.

E-mail is unique because it has all of the casual characteristics of a verbal conversation but all of the formal documentation of a business letter. In other words, an e-mail exchange may feel like a dialogue because of its back-and-forth nature, but it is documented like a letter. Unlike conversations, which are subject to miscommunication and subjective listening (some people hear what they want to hear), you can look back at an e-mail and see exactly what you wrote which, hopefully, will not be subject to much debate.

But there are definite pitfalls that accompany e-mail . . . and those pitfalls are quite dangerous. Extra care must be taken in what is said in an e-mail and how it is said – because once you hit that "send" button, you have essentially sent a letter that you cannot later retract. Therefore, you should pay particular attention to the previous section and "choose your words carefully."

There's a tendency, in our fast-paced world to type and immediately "send." The fast-paced nature of e-mail invites rapid responses, not necessarily ones that are well thought out and proofread. But the prudent claim professional will pause for a moment. Read over that e-mail before you send it. Before you "send" that e-mail, ask yourself some questions first:

- Are there any typos? You would not want to be thought of as sloppy.
- Does the e-mail convey a thought or position that is relevant to the claim investigation or evaluation?
- Does it convey that message in a clear, concise and professional manner?
- Is there any way that the plaintiff's attorney can twist what you've written?
- Is there anything that you would have to explain to a jury so that they do not misinterpret your e-mail?

Again, once you click "send," that e-mail is gone. You can't retract it. You can't go to the e-mailroom and snatch it before the e-postman picks it up.

Beyond reviewing your e-mail, you should ask yourself if you should be communicating by e-mail at all. There are three very common types of e-mail that prove to be troublesome in a bad faith case.

1. Humorous e-mails. Because of the conversational qualities of e-mail, we tend to write like we speak. But efforts to convey humor, sarcasm, a wink or a nod many times fail. The tone of your e-mail can easily be misconstrued by the reader. Be extremely cautious of sending funny e-mails to your insured or their attorney. Consider the possibility that they may misunderstand your humor for a serious comment, or that they'll be offended by your sense of humor. Keep it professional.
2. Don't manage by e-mail. This follows along with the previous section's admonition to keep HR issues out of the claim file. Managers should be careful about criticizing or reprimanding their adjusters through e-mail. Adjusters should be leery of challenging their managers through e-mail as well. Not all people enjoy confrontation, especially if it's going to be heated. E-mail offers an "out" for the non-confrontational personality. We can send e-mails that make our point, but without an uncomfortable face-to-face exchange. And so the temptation is strong to confront by e-mail, but that temptation must be resisted. The e-mail which challenges or criticizes a colleague may end up in the claim file or otherwise be discovered by the plaintiff's attorney in litigation. It can be very difficult to defend the bad faith suit when a supervisor himself has criticized the adjuster's handling of the claim.
3. Weed out the just-plain-stupid emails. If the e-mail does not advance some business purpose or goal, should it really be sent? If the e-mail contains inappropriate comments about the insured, or someone else involved in the claim, you will be

portrayed, in the bad faith suit, as unprofessional at best, and evil at worst. Do not disparage persons based upon their ethnicity, religion, country of origin or appearance. It is unprofessional and does not further the adjustment of that claim. Its effect can only be negative.

As a general rule, ask yourself whether you would be comfortable printing a copy of the e-mail in your claim file. Then ask yourself whether you would feel comfortable if that e-mail were enlarged and placed in front of a jury. If your answer to either question is "no," then you should probably not send that e-mail in the first place.

IV. A FINAL WORD

Most bad faith cases are built upon an adjuster's innocent mistakes, which a plaintiff's attorney will then portray to a jury as evidence of your ill will towards the policyholder. As professionals, we strive for perfection, but we must expect that, along the road, there will be potholes. We will make mistakes. Everyone does. It is our response to those mistakes which will determine whether the bad faith case is strong or weak. Do we conceal our error? Do we place blame on others (such us our policy holder) for our own mistakes? Do you become defensive and hostile when confronted with your errors? If you answered "yes," you have made the plaintiff's attorney's job much easier. On the other hand, when you've made an error in your adjustment of a claim, do you own up to it? Do you attempt to make things right as the adjustment process continues? Do you remain professional, courteous and friendly? If so, there will be no wind in the sails of the bad faith claim being made against you.

One of the best features of our civil justice system is that anyone can file a lawsuit, if they wish. That is also one of the interminable evils of the system. The courts have become increasingly willing, in such suits, to give plaintiffs almost unfettered access to your claim file.

But there are things that you can do to discourage bad faith suits. Fill your claim file with fact-based entries. Choose your words with care, forethought and sensitivity. And show discretion in your use of e-mails. You may still be brought into a bad faith suit for a claim you handled because the legal system allows it. But you can have a high level of confidence that there is little or no value to that bad faith claim if you have followed some of these tips. You may still be deposed. But that deposition will be short and perhaps even a bit gratifying, knowing that despite their best efforts, the plaintiff's attorney could come up with no "dirt" on you. Instead of providing plaintiff's attorney with deadly ammunition, a carefully documented claim file will suffocate that bad faith case before the fire ever rages.