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Second Circuit Spies Possible Bad Faith in New York: *Pinto v. Allstate*

By John S. Torigian and William T. Barker*⁰

In *Pinto v. Allstate Insurance Co.*,¹ the Second Circuit reversed a summary judgment for Allstate in a bad faith case, albeit over a dissent. To bad faith lawyers in other jurisdictions, the primary mystery about the case is how the district court could have rendered such a summary judgment, given the facts described. The answer to that mystery requires examination of both New York's no-fault insurance law and its uniquely insurer-friendly bad faith standard. New York does not recognize any cause of action for bad faith or punitive damages on first-party claims.² Even damages in excess of policy limits for failure to settle a claim against the insured within those limits are regarded as "essentially punitive."³

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¹ 221 F.3d 294 (2d Cir. 2000).

² *New York Univ. v. Continental Ins. Co.*, 662 N.E.2d 763 (N.Y. 1995); *Rocanova v. Equitable Life Assur. Soc'y of U.S.*, 634 N.E.2d 940 (N.Y. 1994).

³ *Gordon v. Nationwide Mut. Ins. Co.*, 285 N.E.2d 849, 852 (N.Y. 1972), *cert. denied*, 410 U.S. 931 (1973).

Preparing for Adjuster Depositions in Bad Faith Cases: Anticipating the Plaintiff's Questions

Michael Sean Quinn and John D. Moyer*⁰

As we observed in a prior essay, "[t]he plaintiff's fundamental objective in every bad faith case is to show that the insurance company not only breached the insurance contract but also behaved badly."¹ Ideally (from the plaintiff's standpoint), this would involve a showing of malicious conduct, but usually the plaintiff must be satisfied to show some form of irrationality: obduracy, blockheadedness, or (most frequently) inattention. Whatever the form of bad behavior the plaintiff seeks to establish, the claims person handling the claim must be a central figure.² In trying to show bad behavior, a key source of evidence is the adjuster's deposition. If the case is tried, that deposition is likely to shape the trial. If the case is settled, the adjuster's deposition is usually vitally important to evaluating the strength and worth of a case. That means that a key event (often *the* key event) in establishing or defending a serious bad faith case is the deposition of the adjuster.

So, preparing for that deposition is very important. This short essay cannot treat all of the important aspects of preparation. After addressing the preparation process generally, it offers an unconventional view of how to handle one important aspect of adjuster depositions: dealing with norms and standards. While the deposition will also examine what happened in handling the claim, preparing on that issue is much like any

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¹ Michael Sean Quinn & John D. Moyer, *Preparing for Adjuster Depositions in Bad Faith Cases: The Plaintiff's Objectives*, 16 BAD FAITH L. REP. 183 (2000).

² Of course, there may be more than one such person in any given file. In fact, if an insurer uses too many adjusters, that may be used by a plaintiff as some evidence of insurer bad faith. Nevertheless, for simplicity's sake, we will develop our ideas as if there were only one adjuster for every case.

other type of witness preparation. But adjuster depositions often include extensive inquiry into applicable claim handling standards and the ways in which what happened did or did not conform to those standards. Preparing for this is unlike preparation of most other witnesses, though it has some aspects similar to preparation of experts. That will be our primary topic in this essay.

Phases of Preparation

In any consequential bad faith case there are four principal components that should be present in every significant deposition preparation. These are softening up the terrain at home, remembering things past, free-wheeling/open discussion, and deposition rehearsal.

Softening-Up. Most adjusters do not want to spend time preparing for depositions. They have much else to do, and preparing for a deposition is a drain on their time. Similarly, their supervisors do not want to release them for long. As a result, the first responsibility of any lawyer defending a bad faith case is to convince all relevant decision makers, including the adjuster and her supervisor, that sufficient time and money must be spent in preparing for the deposition.

Our rule of thumb is that a deponent should spend at least five times the amount of time preparing for a deposition as she spends in the deposition itself. Not all of that time needs to be in the lawyer's office. Much of it can be at the adjuster's desk or in her home. Nevertheless, it must be spent.

Remembering. In order to give a satisfactory deposition, an adjuster must remember what did and did not happen—what was and was not said. As a rule, this requires a lengthy and methodical review of the adjustment file and of other company documents which are not in the file. The latter might include such things as computer notes, the supervisor's file, underwriting documents, or other manuals and guidelines of various sorts.

Which documents will be included in the review depends upon what has or must be produced in the lawsuit and what the adjuster actually did or should have done. Sometimes the claims person should have done something and did not, but the omission did not make any difference. In such cases, the adjuster should be fully acquainted, before her deposition, with what she could have done but did not do and why it does not matter.

No lawyer should try to defend a bad faith case without a detailed chronology. We made this point in the first essay. Many times, a version of the lawyer's chronology should be shared with the deposed adjuster. This will help her schematize her recollection and will provide her with a handy reference source. She can function as a critic of the chronology if there are mistakes or failures of emphasis. (Frequently, however, the entire chronology should not be shared because notes concerning the lawyer's reflections and theories are often put in the chronology. The witness has no business seeing these before

she is deposed. This is especially true if everything the witness reviews in preparation for the deposition must be produced.)

It is no easy task for a lawyer to make sure that an adjuster spends sufficient time reviewing documents and remembering what has happened. Obviously, a lawyer cannot be a policeman here. Lawyers are servants. Nevertheless, servants can sometimes be cajoling coaches and can occasionally exhibit leadership.³ Regular telephone calls to the claims person are sometimes helpful. Asking for help from the adjuster can also be a stimulant. The request cannot be too phoney, however. Sometimes, a "Columbo Routine" works well.⁴ People love to be asked for help. That routine is a little phoney, but it is not over the top, and you may find it not only amusing but inviting. Lawyers must have enormous confidence in themselves to pursue this strategy, however. Most lawyers like to demonstrate that they know what they are talking about, and this desire is often inconsistent with asking for help.

Some of the most important materials a claims person can review are the rules and guidelines governing adjustment practice. These come from a variety of sources. Companies often have internal guidelines. These will often be in the manuals which either have been or will be produced somewhere along the way. Sometimes insurance companies have internal circulars, instruction sheets, "alerts," directive memos, occasional essays, e-mail reminders, and the like. If these are located and produced, any claims person who is deposed must review them in advance of the deposition.

Relevant rules and guidelines may also be in a variety of other places. Consider National Association of Insurance Commissioner documents. They may be found in adjuster association charters and rule books, and they may also be found in CPCU, or similar, materials. They may even be found in state statutes or in state insurance commission regulations.

Lawyers defending bad faith cases would be well advised to put together anthologies of these kinds of documents for adjusters to review. Naturally, they should only be done in cases that are well prosecuted by lawyers for policyholders. It

³ Lawyers preparing witnesses for depositions are clearly leaders, even if the context is a very small one involving only two people. For a superb introduction for the topic of leadership, see JOHN W. GARDNER, *ON LEADERSHIP* (1993). This book is a *must read* for every lawyer aspiring to anything more than mediocrity.

⁴ *Columbo* was a prime-time television show for some years. It was pretty much of a one trick pony. Peter Falk played Lt. Columbo, a homicide detective in Los Angeles. The formula for the show involved Columbo immediately realizing the identity of the murderer and then cornering him or her. This was done through a routine of disarming innocence, an outwardly disheveled appearance, a projected image of confusion, and simple questions. As he was leaving an interview, Columbo always thought of one last question. The key to the routine was that Columbo was not at all condescending. Indeed, he was genuinely humble. A genuinely devoted, preoccupied, focused professional. The show was ironic; Columbo himself was not.

makes little sense to put ideas into the heads of inferior lawyers. But in a well-conducted lawsuit, one can bet that the plaintiff will figure out authoritative sources for setting standards.

Norms and guidelines regarding adjustment from such sources as the NAIC and state insurance commissioners present a particularly interesting problem. If one of these sources has issued a relevant directive or suggestion and the insurer does not have it at all, the claimant's lawyer will argue that this looks suspicious. The insurance company has several choices—none of them good: perhaps the insurer was inattentive; perhaps the insurer was sloppy about locating and distributing important documents; perhaps the insurer is lying about what it has received. Often NAIC or state insurance commission documents come to insurers at the senior executive level but are not then distributed to staff adjusters. If this happens, the insurer looks cagey. Hence, adjusters should be made aware of these documents before their depositions, and they should be able to vindicate their work in terms of these norms and guidelines.

If the adjuster's personnel file has been produced in the case, the adjuster should review it. If it has not been produced, the attorney should review it, but it should not be shown to the adjuster. In either case, a lawyer defending a bad faith case needs to go over an adjuster's education, training, and work history with the adjuster at some length. There are a variety of reasons for this. These people receive an enormous amount of sporadic education which they cannot remember upon short notice. Sometimes this can make the insurance company look bad. It looks as if the insurance company has not trained its employees. Given enough warning and background information, over time claims people will remember a large segment of insurance education to which they have been exposed. A lawyer defending the bad faith case may wish to distill all this information in a bullet-point list so that the adjuster can access it quickly for the purpose of memorization before the deposition. The document might be produced at the deposition.

Discussion and Dialogue. Lawyers need to conduct lengthy discussions with adjusters about what has or has not happened in the litigated cases. These need to be planned, but they should not be so structured that they follow a script. In fact, they should be flexible, and lawyers should welcome tangents. After all, one function of such sessions is to bond. Another is to discuss the case from a variety of perspectives. This will increase the lawyer's knowledge, and it will increase the adjuster's comfort level. Does it come as any surprise that the lawyer defending the bad faith case needs to learn how to listen more and talk less?

The kind of listening the lawyer should be doing is sometimes called *active listening*. This means that the lawyer is engaged with the witness, trying to figure out what the witness is getting at. Usually, if a witness thinks he has a problem, he does. It is the job of the lawyer to identify the problem, not

cover it up. Often, problems can be dissolved, dispelled, and deconstructed in advance of any deposition. If it can be done, it should be done.

Naturally, there should be substantial discussion about how the adjuster either conformed or failed to conform to various guidelines which might apply. After the defense lawyer is satisfied that the adjuster has fully recalled the facts of the case, this may be the most important part of the discussion and dialogue component of deposition preparation. The goal should be to make it possible for a claims person rationally to defend her conduct in terms of rules, guidelines, industry customs, the principal values animating the adjustment process, and the ethical rules of adjusting.

There should also be substantial discussion, from a number of points of view, about the adjuster's life and work. There needs to be extensive discussion about education, training, and job experience. If there has been any sort of disciplinary history, there needs to be a discussion of that as well. People have a tendency not to remember very clearly what they studied ten years ago. Given some time and some discussion, however, ideas and events have a way of being recovered. That may or may not be a good idea, depending on the circumstances. If it is a good idea, it should be done, and that will require time.

Rehearsal. Every adjuster who is about to be deposed in a bad faith case should have her deposition taken several times in various ways. One rehearsal theme is the chief focus of this essay: the setting of standards.

Should Adjusters Volunteer?

Many lawyers say, with knee-jerk reflexivity, that deponents should never volunteer. Sometimes, this is called the "Younger Philosophy."⁵

Many lawyers who have reflected upon this rule are not sure that the late, great Professor Younger, for all of his insight, was right. Application of this rule is especially dubious for the well-trained, carefully tutored, fully informed, and disciplined witness of reasonable intelligence, who is speaking about his occupation, profession, livelihood, or the like. Although such a

witness should never appear to be pushing an agenda or to be pushy just for the sake of some personal issues (such as power, assertiveness, or aggression), a witness who is subject to critique and whose conduct is the focal point of litigation will naturally be interested in vindicating her conduct.

Does this not mean that such a witness should be prepared to portray herself as having done nothing—or at least very little—wrong? Should she not be prepared to give full explanations of how she handled the claim? Should she not be prepared to give arguments to the effect that she acted properly? Obviously, witnesses may need preparation before performing this activity. Indeed, is that not what lawyers are for?

Should not the well-trained witness sometimes volunteer? Often, lawyers say that they do not want their witnesses caught off-guard, and they are certainly right about this. On the other hand, the well-prepared witness will not likely be caught off guard. Other lawyers say that they are concerned that opposing counsel will trip even well-prepared witnesses. These lawyers are blatantly contemptuous of insurance adjusters. Secretly, they believe that all insurance adjusters are at least semi-stupid. Insurance companies need to consider very carefully whether those kinds of lawyers should be defending them.

It is a scandal how many lawyers hold insurance claims people in low regard. Of course, it is natural that plaintiffs' lawyers tend to believe the worst about insurance adjusters. What is astonishing is how many lawyers who represent insurance companies, or who represent insureds for insurance companies, have a low opinion of adjuster intelligence. (Fortunately, even those who look down on adjusters do not tend to believe that adjusters are dishonest.)

Some lawyers say that the interrogator always has the advantage. This is not our experience. Interrogating lawyers are frequently underprepared. Interrogating lawyers are often not Socrates reincarnated. Besides, if the witness is prepared, even Pseudo Socrates can be contained. This is particularly true when a case is not likely to be tried but settled along the way. It seems to us that an insurance company is in a weaker position if the company's best foot has not been put forward in a deposition. In terms of settlement conferences and mediation, if the best things an insurance company can say have already been said, and they are not subject to withering critique, the chances are the settlement will come out better.

Questions and Answers: Setting Standards

Quite frequently, lawyers for insureds in bad faith cases try to get the adjusters themselves to set the standards of what constitutes a good faith adjustment and therefore the standard for what constitutes a bad faith adjustment. Of course, in the discussion component of deposition preparation, applicable standards will have been reviewed. Nevertheless, there are a large

⁵ The late Professor Younger's philosophy is repeated *ad nauseam* in litigation manuals, whether they are designed for lawyers or witnesses. E.g., "Never, Never, Never Volunteer" in STEWART B. SHAPIRO, HOW TO SURVIVE A DEPOSITION, 103-08 (1994). There is something of an inconsistency between a witness swearing to tell the whole truth and a lawyer telling the witness never to volunteer. W. William Hodes, *The Professional Duty to Horseshed Witnesses—Zealotry, Within the Bounds of the Law*, 30 TEX. TECH L. REV. 1343, 1361 (1999) [hereinafter Hodes]. See Liisa Renée Salmi, *Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial*, 18 REV. LITIG. 136, 145 (1999) (collecting articles and cases).

number of innocent-sounding questions which can create difficulties.⁶ Consider the following:

Q₁. Should an adjuster be unfailingly reasonable in adjusting a claim?

Q₂. Do you agree with me that an adjuster should be reasonable at all times in adjusting a claim?

Q₃. Is it important always to be objective in adjusting a claim?

Q₄. Would it be bad faith for an adjuster ever to be either biased toward the insurer or prejudiced against the insured in adjusting a claim?

Q₅. Would it be bad faith for an adjuster to be anything but fair-minded in adjusting a claim?

Affirmative answers of some sort are required in response to each of these questions, if an insurer is to avoid liability. If an adjuster gives anything in the nature of a negative answer, the company will look terrible before the jury. However, there are affirmative answers, and then there are affirmative answers.

Consider alternative ways in which Q₁ could be answered:

Q₁. Should an adjuster be unfailingly reasonable in adjusting a claim?

A_{1a}. Yes.

Much better, it seems to us, is this answer:

A_{1b}. What counts as reasonable depends on the circumstances, upon how the claimant has treated the adjuster, or the way in which the claim is presented, and the facts of the case, and the personalities of the witnesses, and a variety of other factors some of which are unique to each case. Within those highly changeable parameters, adjusters should be reasonable. They should have good reasons for what they do and for what they refrain from doing. They should also be firm, oriented to the contract, focused on the evidence, and careful not to pay illegitimate claims.⁷

Notice how hard it would be for policyholder counsel to distort or otherwise misuse A_{1b} before a jury or anywhere else.

Let it be clearly understood, by the way, while this essay talks a little about "training" witnesses, at least indirectly, the recommended training extends only to helping a witness present himself and to helping a witness formulate answers he would himself give if he understood the dimensions and strategy of the litigation. It is no part of the attorney's job—in fact it is most definitely alien to his job—to persuade witnesses to say things they do not believe. Sometimes, the line between putting ideas in the witness's head and words in the witness's mouth and assisting the witness in preparing what is genuinely her testimony is difficult to draw. Nevertheless, it must be drawn in virtually every complex case.

⁶ Some of the questions and answers recited and discussed below are drawn from Michael Sean Quinn, *The Ethical Habitat of Adjusters: Part One. Principles, Problems and Practicalities*, 10 ENVTL. CLAIMS J. 91 (1998).

⁷ Of course, no spoken answer ever resembles a written product. Nor should it.

Investigating. One of the most fertile fields for demonstrating bad faith is in the area of investigation. For this reason, counsel for the policyholder may try to use the defendant carrier's claims personnel to set the standard for what constitutes a reasonable investigation. Among the possible questions are variations upon the following:

Q₆. What constitutes a reasonable investigation?

Q₇. Investigations should be done in a timely manner, right?

Q₈. In an adequate investigation, all of the relevant witnesses must be interviewed, mustn't they?

Q₉. When investigating an X-type claim, it is important to ask each witness whether he noticed Y?⁸

Q₁₀. A claims person should always report the results of every investigation accurately, should they not?

Q₁₁. Indeed, an adjuster's notes should invariably be both accurate and complete, shouldn't they?⁹

Answering these questions is more complicated than it looks. The "trick" to many of the questions posed in this essay is using extremely general terms. The "trick" to answering those questions is to confess difficulty in dealing with extremely general terms and to try to narrow the scope of the question. Thus:

Q₆. What constitutes a reasonable investigation?

A₆. That is an extremely difficult question to answer because it is so abstract. What constitutes a reasonable investigation in one context may not constitute a reasonable investigation in another. What counts as an appropriate investigation in an intersection collision and what counts as an appropriate investigation in a pollution case are quite different things. Indeed, what counts as a reasonable investigation will vary substantially from one case to another. A reasonable investigation is one which is adequate under the circumstances, and the circumstances may be many and varied.

Q₇. Investigations should be done in a timely manner, should they not?

A₇. What counts as a timely manner depends heavily on the circumstances. If careful attention is paid to the circumstances, then the answer to your question is *Yes*. If attention is not paid to the circumstances, then I do not know how to answer your question. (Of course, I should mention that what counts as "timely," depends substantially on the attitude and helpfulness of the insured.)

Q₈. In any adequate investigation, all of the relevant witnesses must be interviewed, must they not?

A₈. Sometimes *Yes* and sometimes *No*. If five witnesses have all said the same thing, and you have a witness statement from the sixth witness who says roughly the same thing, then it may not be necessary to interview the sixth witness. This is particularly true if there are strong reasons against interviewing that witness: for example, if the witness were ill and interview-

⁸ Where Y is a salient causal feature of the type of situation that fact is either widely known or an expert will testify that it is true.

⁹ These two questions—Q₁₀ and Q₁₁ might be asked together. Of course, that is objectionable, but it's done all the time, and it's hard to stop when the two questions are really variations on a single theme.

ing him might injure his health, or, if the claim was a very small one, and the witness had moved to Antarctica, where he could not even be called on the telephone.

When answering very general questions, the content of the answer need not be determined by the exact contours of the case at hand.

Q₁₀. Claims people should report the results of an investigation accurately, should they not?

Q₁₁. Indeed, an adjuster's notes should be both accurate and complete, shouldn't they?

A₁₀₋₁₁. To be sure, notes a claims person takes should not contain anything the adjuster knows to be false. Further, if the adjuster realizes that something is important, she should try to record it in her notes. Adjusters should try to make their notes complete and accurate insofar as that which is relevant to the claim is concerned. If the claimant wore a brightly colored suit—chartreuse, for example—if that fact were not relevant to the claim, the adjuster should probably not record it, even if the adjuster is personally riveted on the fact.

It is not uncommon for attorneys to ask several questions at once. Ostensibly, each of the questions clarifies one of the others. Obviously, compounding questions is objectionable, but it is sometimes not worth the trouble to make the objection. When faced with a combination of questions, the witness should feel free to answer them in whatever order she sees fit.

One "trick" to many of the questions discussed here is their use of extremely general terms. Without some tutoring, the human mind is ill-equipped to discourse instantly upon general terms. Indeed, many people find questions about general categories intimidating. Many general questions in legal contexts are, to some extent, questions about definitions. Without antecedent training, people are not good at formulating even remotely reasonable definitions. Curiously, when people are asked to come up with definitions, they often experience anxiety. If there is a single characteristic of Socratic questions, it is this.¹⁰

Counsel for the insurer should tutor adjusters in how to deal with broad, general, almost philosophical questions. The general strategy is to relativize the question, to refuse to give an answer which applies to all circumstances, and, above all, not to give monosyllabic answers. Short answers can be distorted. They can be transported from legitimate contexts to illegitimate ones. They can be remembered easily, and they have lots of punch. However, they can be misused. Our general approach is to encourage comprehensively truthful, and therefore involved, qualified, and necessarily lengthy answers. It is extremely difficult to read a lengthy answer to a jury and accomplish anything dramatic and it is extremely difficult to impeach a witness with a lengthy answer. Perhaps the rhetori-

cal principle here is: *Never give a short answer when a long one will do.*

It is not clear that this principle works for videotaped depositions. Our conjecture is that the same philosophy will work for videotaped depositions when the witness has a sincere look about him and is reasonably articulate. We are sure that when read to juries such answers lack punch. Longer videotaped answers can still be effective, however, if they are truthful, sincere, and comprehensive. The jury will not be troubled.

Another "trick" to the question set forth above is the presence of a key word enhancing the vividness of the question, somehow. Here are some examples:

Q₁. "unfailingly"

Q₂. "at all times"

Q₃. "always"

Q₄. "ever"

Q₅. "anything but"

Q₈. "all"

Q₉. "invariably"

Q₁₀. "always" / "every"

Another, similar locution is "without fail." That one is Moyer's favorite. He also likes "at once." Quinn loves "promptly."

Q₁-Q₁₀ all involve a similar "trick." It is in the adverb or in the adverb phrase. In a way, these phrases universalize and reify what would otherwise be a rather innocuous question. The word "all" means *every single one of them, without exception*. These kinds of questions make people nervous. Universal questions, whether positive or negative, make one feel captured. One knows that almost nothing specific is true always, everywhere, and without exception—not even generalizations. On the other hand, insurers are always supposed to be reasonable. Very abstract claims which are also variable can be universally true.

Why these kinds of questions make people nervous and undermine their ability to think clearly is a mystery to us, but it seems to be true. Such questions can also be provocative. When surprised with a universal question—"isn't such and such *always* so and so?"—people can be provoked into saying things they do not really mean.

Possibly, questions phrased in this manner are argumentative. Even if that objection is well-taken, it is unlikely to change the deposition. Making repeated objections to questions like those set forth herein may unnerve the inexperienced deposition taker, but they will not deter the more experienced advocate. It is better to deal with the vivifying terms. Witnesses need to be prepared for these kinds of questions, at least as much as policyholder lawyers need to be ready to ask them.

There are a number of ways to do this. One is to point out that they serve no function. Consider the following:

¹⁰ Perhaps adjusters should be required to read Plato's early dialogues as a method of preparing for depositions. Quinn thinks not, but Moyer thinks so.

Q₁. Should an adjuster be unfailingly reasonable in adjusting a claim?

A₁. We'll see. I'm not sure why you've added the word "unfailingly" to your question. If an adjuster needs to be reasonable, he needs to be reasonable. I suppose there are outlandish circumstances under which it would be to the advantage of the insured for an adjuster to be unreasonable. I suspect, however, that you do not want to talk about fantasy land.

This same point could be put as an objection by the lawyer protecting the record at the deposition.

O₁. Objection. The presence of the term "unfailingly" makes the question argumentative, unless the word is redundant, in which case the question is objectionable upon that ground.

Probably, if counsel makes a series of such objections, and they can be read to the jury, the effect of the vivifying terms will be negated or diminished.

Our discussion could be called the Anti-Younger Philosophy. This philosophy applies in all sorts of other contexts, as well as in the context of setting standards. Lawyers for policyholders may ask adjusters and their supervisors to set the standard for what constitutes minimally adequate training. Here are some typical questions. Of course, there are variations on these questions, as well.

Q₁₂. Should adjusters always be well-trained?

Q₁₃. Would you agree with me that it is bad faith for an insurer to expect a claims person to adjust a claim with respect to which he has no (or insufficient) competence?

Q₁₄. Should an adjuster ever be asked to take care of a million dollar claim when the adjuster has neither training nor experience with respect to those kinds of claims.

There are various ways to answer these questions. Consider the following contrasts:

Q₁₂. Should adjusters invariably be well-trained?

A_{12a}. Yes.

Is not the following better?

A_{12b}. As long as we understand the concept of *being well-trained* in context, I have no trouble with this idea. Indeed, I endorse this complex, nuanced idea. Adjusters should understand the contract they are working with. They should understand how the facts of the case relate to broader patterns. They should have training in how to deal with claimants. They should have training in company procedures and the like. If this is what you're talking about, then I would agree. In the case I'm here to testify about, training in human relations was particularly important, because the claimant was angry from the first moment I met him, and he used to cuss me out on a daily and then a weekly basis. I am very proud of the fact that I never lost my temper, even with all the abuse the insured heaped on me.

Or consider the following:

Q₁₃. Would you agree with me that it is bad faith for an insurer to expect a claims person to adjust a claim with respect to which he has no competence?

A_{13a}. Yes.

Is not the following better?

A_{13b}. Competence is a flexible concept.¹¹ It does not imply perfection. Someone can have some competence without having true expertise. Your question supposes that when an insurance company sends an adjuster into the field who has no competence at all, that would probably be bad faith, although I must say I have never seen it. I do not think that every adjuster needs to be maximally competent on every single issue she works on. She can always turn to other, more expert, adjusters of higher expertise. Of necessity adjusters must be generalists, and a good thing too.

It will take plaintiff's counsel substantial exercise of will to refrain from asking the following:

Q₁₅. And why is it a good thing that adjusters must be generalists?

This is a terrible question to put to an experienced adjuster. Here is the kind of answer a lawyer may face from the well-prepared witness:

A₁₅. Adjusters handle a variety of cases, and they handle a variety of different kinds of people. Adjusters have to know a good deal about building materials, how things break, how losses are computed, how people wish to be treated, and how people try to cheat one another. Perhaps they have to be skeptical without being cynical. Adjusters have to know an enormous amount about the substance of what they do, and they must know a huge amount about insurance procedure. Surely that makes an adjuster a generalist, and being a generalist is a good thing from the point of view of the policyholder. Adjusting any particular claim is always comparative adjustment.

At this point, the policyholder lawyer will be tempted to ask the next question:

Q₁₆. What is comparative adjustment?

If he does, and the witness is well-prepared, the lawyer will regret asking the question. As they say in mathematics textbooks, the proof of this hypothesis is left to the reader.

The Ethics of Witness Preparation

Everyone agrees that there are some things lawyers should not do in trying to prepare witnesses to testify. In general, lawyers should do nothing to suborn perjury. On the other hand, lawyers may exercise leadership in trying to encourage witnesses to remember; they can prepare witnesses for dealing with the wily ways of opposing counsel; they can attempt "to ensure that . . . unsophisticated clients would later be able *confidently and effectively* to present their *truthful* testimony under pressure";¹² and they can coach witnesses on how to assert truthful propositions and how to act while making the assertions, so long as they do not encourage them to assert false propositions. Surely, this last kind of conduct is a form of coaching,¹³ so that the term "coaching" should not be equated to encouraging lies.¹⁴

¹¹ Remember! The actual verbiage is not the point. Adjusters should not be expected to talk like professors. Thank God.

¹² Hodes, *supra* note 5, at 1348.

¹³ *Id.* at 1349.

There are two polar opposite views of how lawyers should go about coaching witnesses. One of them is the *Cautious Approach*. This approach is advocated by Liisa Salmi in her very helpful student note. In that essay, she suggests that a lawyer should never do anything in preparing a witness he would not be happy to have the jury know all about. This opposing view is the *Aggressive Approach*. Professor Hodes advocates this approach:

Legal ethics is hard. You must *try* to find the line between what is permitted and what is not, and then get as *close* to the line as you can without crossing over to the bad side. Anything less is less than zealous representation—which *already* leaves you on the *bad* side of the line. Whatever distance is left to travel up to that elusive line is territory that belongs to the client and has been wrongfully ceded away.¹⁵

Professor Hodes is right, of course, legal ethics is hard. One doubts, however, that it is this hard.

The Cautious Approach and the (maximally) Aggressive Approach are both wrong, but Hodes is closer to right than is Salmi. The Cautious Approach is too restrained. It exercises insufficient leadership.¹⁶ It is not possible to exercise cognitive leadership without modifying memory to some extent. If a lawyer prepares a witness correctly, changes inevitably result, although they should never be an intended result.

One of the late stages of witness preparation should be the deconstruction of these modifications. Of course, not everything will be sorted out in preparation. That is what cross-examination is for.¹⁷

It should not be thought that our longish answers are non-responsive. Sometimes, cautious policyholder counsel objects upon these grounds, but such objections are seldom sustained. Besides, it does not matter. The point of the enterprise is to

destroy the possibility of an unfair use of these answers at trial and to destroy derivative settlement rhetoric.

Conclusion

Preparation for an adjuster deposition is work, both for the adjuster and for the lawyer. They must take it seriously and devote adequate time to the process. One of the most important parts of that process is preparing the adjuster to address the standards applicable to the adjustment process and the application of those standards to the way in which the claim was handled.

Claim Handling Corner

Do not ignore a case you have agreed to defend, even if another insurer is defending. *Signature Development Cos. v. Royal Ins. Co. of Am.*

Once the case against the insured has gone to judgment, be careful how you treat the judgment creditor. *Rowlands v. PHICO Ins. Co.*

Do not wait for suit to be filed before considering settlement; do not rely on the claimant to keep a settlement offer open. *Haddick v. Valor Ins. Co.*

Do not be afraid to settle when the policy permits this, even if the insured objects. *Haddick v. Valor Ins. Co.; Liberty Mut. Ins. Co. v. Thalle Constr. Co.*

Be careful what the agent says (or said). *County Forest Prods. v. Green Mountain Agency.*

Do not procrastinate about an insured's claim. *State Farm Lloyds v. Fitzgerald.*

¹⁴ But see Charles Silver, *Preliminary Thoughts on the Economics of Witness Preparation*, 30 TEX. TECH L. REV. 1333 (1999). (The first sentence of Professor Silver's essay is this: "What is the difference between witness preparation, which is permissible, and witness coaching, which is not?" Although Silver's stipulation as to the meaning of the word "coaching" may be in error, that fact, if it is one, detracts not one iota from this otherwise deep, informative, and provocative essay.) See MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 149 (1990), for a more realistic and multi-faceted explication of the ambiguous term "coaching."

¹⁵ Hodes, *supra* note 5, at 1366.

¹⁶ Mrs. Salmi was a student of Quinn's and a good one. Our next comment should therefore not be construed as critical of either her performance or her abilities. It seems to us that law students and inexperienced lawyers overemphasize the need for caution. Legal academics also overemphasize that need. This is partly because they teach law students, partly because professors tend to be a timid lot anyway—seeing mine fields everywhere, and partly because, if they have any practice at all, it often involves libel cases, about which there is considerable novelty and difficulty. For an illustration of this general point, see DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 96–99.

¹⁷ The academic Hodes suggests that given an adversary system, the advocating lawyer is suppose to distort the truth in favor of his client. She is suppose to do this without actually herself lying and without suborning perjury from others: "[L]awyers are *supposed* to distort the truth—if they need to in order to win so long as they can do so without lying or facilitating the known falsehoods of others." Hodes, *supra* note 5, at 1356. For Hodes, litigation is a search for truth, but the search is adversarial; it results from cross-examination; and if a lawyer does not reach as far as he can, he is failing his client. Professor Rhode has a very different conception: "If American lawyers truly consider the adversary system a search for truth, they would have quite different practices concerning witnesses." DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 96. They would not stretch the truth in any direction. They would not shape memories. For Professor Rhode, a search for truth is to be found in the individual and in self-restraint. Professor Hodes view might be called a systemic search for truth, while Professor Rhodes might be called an individualistic search for truth. We think that Professor Rhode would suggest that a systemic search does not work. Our experience is that the individual's approach does not work either and that much is to be said for the systemic approach.