

Coverage

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The business of construction is a dangerous undertaking, from the single family home to the highly complex power plant. As a result, significant risks are sought to be transferred among the numerous parties on any construction project. Some risk transfer devices involve a single contract or agreement between two parties, such as an indemnity agreement. The majority of risks, even those transferred pursuant to an indemnification agreement, are usually supported by insurance, thus ultimately transferring the risk to a third party, an insurer more financially capable of bearing and spreading it.

The major means to insure property exposures on a construction site is through first party property insurance, that is, builders risk coverage. On the other hand, the major source of insurance protection for any business insured, including owners, developers and contractors, is the commercial general liability (CGL) policy.

In many instances, the line between builders risk and CGL coverage blurs, in that a CGL policy may provide coverage for a contractor, particularly for defective work, coverage which either coincides with, or exceeds coverage provided under the builders risk policy. The standard CGL policy, in Section IV, Commercial General Liability Conditions, provides that coverage provided by the CGL policy is excess over any other insurance which is fire, extended coverage, builders risk, installation risk or similar coverage for the named insured's work. *See*, ISO Form No. CG 00 01 10 93, page 8. Moreover, even in the event of a recovery under the builders risk policy, the carrier may seek recovery from the responsible contrac-

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Depositions of Claims People

by Michael Sean Quinn

When an adjuster is deposed, usually, the main focus is on what the adjuster did and why he did it. This is true in declaratory judgment actions, where coverage is the issue; it is true in breach of contract actions, where coverage is again the issue; and it is true in bad faith cases. Adjusters are also asked what they think the coverage is. This amounts to asking them what they think the contract means. Usually, lawyers do this when they are trying to develop a case for ambiguity. Sometimes they try to use it as a foundation for a bad faith case. As the law is developing, unless a court has indicated that at least *prima facie* there is an ambiguity, such questions may be improper, and a lawyer with the stomach for this sort of thing should refuse to answer. These questions can almost always be recast in terms of discussing what the adjuster did so if the examining attorney has any brains at all, the material will come in. As stated, the real focus of a well taken depositions of claims people is on what they did and why they did it.

Few events in insurance litigation are more important than the depositions of the adjusters who handled the case, the supervisors of the line adjusters, and of the members of the claims committee which either denied the claim or reviewed the adjuster's denial. (Of course, often more than one line adjuster handles a claim. Claims people move from company to company; and within a company, a claims person may move from one function to another. The same is true of supervisors and *a fortiori* claims committees.)

Because these events are so important, the depositions of claims people must be one of the key focal points for any attorney representing an insurer in insurance litigation. Interestingly, many lawyers do not attend closely enough to these events. They do not concentrate hard enough on them. They do not prepare for them well enough. And, they have the wrong theory about how deposition preparation should be done.

Bad faith cases, of course, are most serious. They divide into three types: common law bad faith, statutory bad faith, and excess judgment cases. In every case, the party aligned against the insurance company is trying to prove that the adjuster denied coverage,

computed the value of the claim, refused to settle the case, or delayed payment without a good reason. Of course, acting on the basis of a bad reason is a species of acting without good reason. Consequently, if the adjuster has conducted, supervised, or commissioned and then relied upon a defective investigation, the insurer may be liable for bad faith.

The best way to defend a bad faith case is to set out to prove that the insurance company was not negligent, because its adjusters were not negligent.


In general, bad faith is not identical to negligence. Usually, insureds face a higher standard in bad faith cases. Sometimes, courts say that the insured must prove that there was no *bona fide* dispute. Other times, courts say that the insured must prove that the insurer's reason for denying the claim was not *fairly debatable*. Juries do not draw these distinction neatly. Counsel suing an insurance company is usually delighted if she can prove that the company's employees were negligent in investigating, thinking about, or processing the claim. As a result, the best way to defend a bad faith case is to set out to prove that the insurance company was not negligent (*i.e.*, that it acted responsibly at all times), because its adjusters were not negligent (*i.e.*, that they acted reasonably). If the insurer can do this, it has nothing to fear from any rational jury as a general rule. (What an interesting world it is in which we live in! Everyone knows negligence is not the legal standard. Yet, the best tried cases of insurance bad faith are structured around and turn on negligence. Go figure!)

Within their overall deposition strategies, parties aligned against insurers in bad faith cases usually try to accomplish 10 purposes in their depositions.

Purposes in Depositions

First, they want to get documents authenticated. Usually, this includes correspondence with the insured and with others (such as investigators), and the purely internal-to-the-company contents of the adjustment file, such as notes, reports, review comments, emails within the company and so forth.

Second, a deposing party wants to get straight about the facts. These may be the facts of an underlying case. They may be the facts of the adjustment.

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Third, the depositor wants to size up the adjuster. What kind of witness will she make? Is he articulate? Can she be pushed around, verbally speaking? How intelligent is he? What is her "Emotional IQ"?

Fourth, and this is a terribly important part of the enterprise, the depositor wants to try to establish standards by which to judge the adjustment. These include both legal standards and ethical norms of the profession. One question often put to adjusters is this:

Q₁. Do you agree that it is important for adjusters to *look for coverage*?

A₁. Yes.

A *No* answer to this question is the kiss of death.

Q₂. Did you look for coverage in this case? How? Describe all the ways.

Some of the questions which can be put in this context are quite loaded:

Q₃. Adjusters should be completely impartial in investigating losses, should they not?

A₃. Yes.

Imagine the insurer's problems if the claims person said *No*. There are many such questions. Here is another:

Q₄. Every investigation of every loss should be thorough, should it not?

My personal favorite is this one:

Q₅. No adjustment is ever perfect, is it?

A₅. Of course not.

Q₆. Tell me the ways in which the adjustment of this claim was imperfect?

The adjuster needs to be able to think of something to say at this point, but she'd best not concede too much, or the company will need to get out its checkbook.

There are many sources for adjuster norms: company manuals, CPCU textbooks, college-level textbooks, trade association codes of ethics, company advertising (for example, *Business Insurance*), and so forth.

Fifth, depositions frequently try to flesh out interrogatory answers. This works best when the deposition being taken is of the person who signed the interrogatory answers. Frequently the deposition will try to track down information about the company, which will have been introduced in the interrogatories. Such questions explore the management structure, the presence and use of in-house counsel and the contents of the adjustment department library (if any). One of the best sets of questions concerns how many cases people have. Whining about being overworked near the employee microwave is as American a past-time as drinking beer. The witness needs to watch out if the depositor tries to establish that the witness thinks

he might be overworked. On the other hand, if the depositor is taking depositions from several people, she may very well ask *A* whether he has ever heard *B* complain about being overworked. The general idea, of course, is that if an adjuster is overworked, then he may not have paid sufficient attention to the file in suit.

Sixth, of course, the party aligned against the insurer is always looking for admissions. If the adjuster admits he acted without a good reason (or, that he acted on the basis of a bad reason), the case is on its way to being lost. Fortunately, most adjusters do a reasonably good job most of the time. Even when they don't, they are inclined to think that they did, so direct admissions are not usually a problem, unless the adjuster gets hornswoggled or bullied. It's indirect admissions that are the problem: "Yes. I had storm duty for three straight months. I was so tired I was bleary eyed. It was just at that point I began working on Irene Goodnight's claim." Often, counsel attempt to get admissions about the meaning of the terms in the contract. This is a matter which needs to be handled very carefully. Often, rhetorically useful admissions come as a result of off-hand remarks, wise cracks, and the like. Flippancy, sly comments, irony, sarcasm, and most forms of humor should be avoided in depositions. Sometimes they constitute admissions. More frequently, they set-up traps, which lead to admissions. Furthermore, jest never comes across on a cold record; and it doesn't even look good on video tape. Alas, depositions must usually be humorless affairs.

Seventh, the depositor is always looking to impeach. The depositor can make the witness out to be a liar, to be mistaken, or to have the sort of bad character which leads to lying, the depositor has made progress. The same is true if the claims person can be made out to be a drinking alcoholic. There are some physical indicators of this and alert counsel are on the look-out for them.

Eighth, if possible, the depositor is likely to try to intimidate and undermine the confidence of the adjuster-witness. The theory is that the company will pick up on this fact and be more inclined to settle. The better prepared a witnesses are, the harder it is to intimidate them.

Ninth, the depositor wants to influence the company's settlement posture. Frequently, this involves causing the company's attorney—as opposed to the witness—to lose confidence. Of course, this objective can be accomplished by setting up a thorough-going critique of the adjuster's performance, whether as claims person or as a witness. This purpose can also be achieved by a thorough exploration of the facts. No lawyer protecting the record at the deposition of a claims person should permit a depositor to require a witness to answer a question without looking at relevant documents.

Tenth, there is the most difficult strategy of all. A few lawyers have magnetic, compelling, profoundly attractive personalities, so that witnesses simply want to say what the lawyer wants them to say. I have seen only two or three lawyers like this, but they are particularly dangerous. Lawyers who have this personality and who can therefore gently and affably manipulate witnesses toward what they want them to say can add tremendous value to cases. Usually, witnesses have built-in resistance to opposing counsel. The lawyers I am talking about almost magically dissolve that resistance and are therefore extraordinarily effective. Often they are not the best rhetoricians. They are invariably warm and friendly, of course.

Practice, Practice, Practice

The key to witness success in any deposition is preparation. The adjuster-witness should have encyclopedic knowledge of the claims file at her fingertips. She should also know the insurance contract in detail, as well as any applicable statutes or administrative regulations. Adjusters must be encouraged to study these matters before they prepare with the lawyers.

If a claims person is inexperienced at being deposed, she should practice in various ways. There should be a "mock" deposition—at least over certain parts of the testimony. There should be a wide-ranging discussion with counsel. Possibly, there should be a videotaped "mock" deposition, which is viewed and discussed. Possibly, the adjuster-witness should watch a demonstration deposition staged by her lawyers. These video tapes are work-product, and unless there is a court order in place forbidding their destruction, I see no reason why they shouldn't be erased and used again for other purposes. After all, they are not evidence. Sometimes, lawyers deposing adjusters feign shock and dismay when they are told that most video tapes existed at one time, but no longer exist. These sorts of tantrums should be ignored. They are nothing more than immature theatrics.

There are several helpful books on how to be deposed. There are also videotapes available. Lawyers representing insurers should consider buying these books a dozen at a time and then handing them to witnesses a month or so in advance of the deposition. Distribution should be followed with telephone calls encouraging the witnesses to read the book. Obviously, the lawyer must have read it himself. Lawyers might consider sending witnesses bullet-point summaries of parts of the book, and so forth. Professor James Jeans' videotape from Matthew Bender fifteen years ago, is one of the best of the videotapes, although it is aging and does not concern any sort of insurance dispute. Still, it is memorable. Maybe it doesn't teach all the right lessons, however, as we shall see.

Points to Remember During a Deposition

During the deposition, there are three important things to remember. First, the witness must always listen carefully to the lawyer asking the questions. The witness needs to know what question is being asked. Most lawyers are terrible at asking questions. It is not a subject taught in law school. There is a good reason for this. Most law professors are worse at it than most litigation lawyers. In any case, quite frequently, the questions asked in depositions are so long and convoluted that it is difficult to answer them. If a question is long and convoluted, the witness should ask that it be broken down into its simples. In general, witnesses should refrain from answering long questions whose meaning might be misunderstood if the deposition were to be read at trial. If the witness does not ask that the question be broken down, the lawyer protecting the record should object to the question and ask that it be broken down. Sometimes, the deponent will object to this interference, other times deponents will cordially agree and start segmenting. Sometimes, a question is so convoluted and incoherent that it doesn't matter what the witness says. No jury will ever understand the question anyway. The realization of this last strategy is risky, however. A variation on this risky strategy is for the witness to say "I'm not sure I understand the question, but if I do, the answer is [say] 'Yes.'" Almost invariably, at this point, the deponent will ask the witness to elaborate.

Lawyers for insurance companies need to help train witnesses how to listen to questions. Simply telling the witness to pay attention and to listen carefully will not help. I have taken many depositions in which I wasted the first hour, or so, waiting for the lawyer-provided training to wear off. If the training was brief or otherwise superficial, it wore off relatively quickly. Lawyers for insurance companies should not view themselves as merely instructing witnesses. They should not even view themselves as training witnesses. Rather, they are involved in nurturing a new skill. How to do that with different sorts of people takes thought, attention, and possibly even some investment.

Second, lawyers frequently try to obtain agreements from witnesses. This is seldom a good idea, from the point of view of the witness. One such agreement is this:

Q₇ I ask you to agree that you will tell me if you don't understand the question.

A₇ Yes, I'll agree to do that.

Q₈ So, if you do not tell me that you don't understand a question, then the jury will be able to infer that you do understand it.

A₈ Yes certainly.

This is a terrible agreement from the point of view of the witness and any entity—say, an insured—for whom the witness is speaking. The problem, of course, is that witnesses seldom know when they don't understand a question. If a witness knows he doesn't understand a question, he will say so. This is almost an involuntary response. It is surely a response which comes forth almost invariably, when a person who is involved in a serious conversation realizes that he does not understand the question. When a lawyer who is taking a deposition asks for the above agreement, the lawyer is trying to be tricky.

Adjusters should not feel slighted by the contempt many lawyers secretly have for them. Litigators have contempt for all non-lawyers who don't make at least twice as much money as they do, for all non-litigators, and for many litigators as well.

Third, and most importantly, lawyers and their witnesses should be clear about the essence of the case before the deposition. The lawyer and the witness should then plan an agenda for the deposition. The agenda need not be written down. Indeed, generally speaking, it should not be written down. Then again, it should not have very many components—usually no more than three or four.

During the deposition, the adjuster-witness should try to make sure that each point on the agenda is mentioned prominently wherever appropriate. Amazingly enough, the elements of the agenda will almost always be appropriate more often than the witness thinks they will be. This is true even when the witness is not “pushing” the agenda. Usually, it is not a good idea to push an agenda too hard. (The agenda should be pushed, to some degree, of course. One way to make it difficult for a plaintiff to read a deposition at trial, or to play a videotape is for the deposition to be filled with true remarks and helpful observations which are inconsistent with the plaintiff's interest.)

This third point is exactly the opposite of what most lawyers tell their witnesses. Most lawyers tell their witnesses answer only the question asked, and never volunteer any information. Frequently, this is *not* good advice.

It is designed for stupid people, or for those who are idiotically addicted to wise cracks. Of course, most lawyers commit the sin of pride, right and left. They do this by thinking they are smarter and tougher than everybody else. As a consequence, they frequently underestimate the intelligence and strength of their witnesses. In addition, because of the sin of pride, law-

yers want to maintain control over the flow of information in their cases. Turning the presentation of information over to someone else is fundamentally offensive to the lawyer's sense of dignity. The sin of pride—in its many, many forms—discourages lawyers from working out an agenda with a witness before a deposition begins. Lawyers whisper to themselves, “Witnesses are not to be trusted with agendas. Case strategies are for lawyers. No non-lawyer, especially a mere adjuster, can ever understand the complexity and nuances the comprehensive litigation approach.” Yet without that understanding, it is impossible to create a joint agenda.

This last form of *hubris* is seldom even whispered comprehensively, and it is never said out loud. Displaying contempt for one's own client is generally regarded as boorish, as well as bad business. Reality is what it is, however, and—in the end—denial is nothing but a defense mechanism. (Adjusters should not feel slighted by the contempt many lawyers secretly have for them. Litigators have contempt for all non-lawyers who don't make at least twice as much money as they do, for all non-litigators, and for many litigators as well.) People often ask me about how to find business from insurance companies. Of course, availability and pursuit are two important factors. Another important factor is fundamental respect for the economic function of insurance. An even more important factor is to genuinely like and respect claims people. It is utterly amazing to me how often over the years I have seen lawyers who have deep disdain for claims executives of all types and for claims counsel, as well. (Fortunately, I haven't seen any of this at my present firm.)

The Sin of Sloth

There is another reason why lawyers do not create agendas with their clients and with their witnesses. This reason arises from the sin of sloth. Often, lawyers do not have a comprehensive vision of the case until late in the case—just before mediation, court mandated settlement conferences, or trial. Sometimes, the lawyer escorting the adjuster-witness to a deposition is a junior lawyer, and the senior lawyer has not thoroughly tutored the junior lawyer in his vision of the case, when he has one.

In order to formulate an agenda for a deposition, it is necessary to have comprehensive knowledge of at least your theory of the case, and that requires you to have a theory of the case. Having a theory of the case requires having thought about the case, and having thought about the case requires having reviewed it in some detail. These activities require time, concentration, and effort. All three are discouraged by the sin of sloth. They are also hampered in those who are overworked. (Curiously, some forms of overwork are spe-

cies of the sin of sloth. It is much easier to run around from meeting to meeting, to jump on airplanes and barnstorm the country, than it is to read material carefully and think about it.)

Often, lawyers say they don't wish to formulate an agenda of the case anytime soon, because they need to keep their client's options open. No doubt, this is occasionally true. It is not usually true, however. The applicable theory in most cases are relatively clear early on. From time-to-time, clever lawyers try to set up situations in which defendants are driven into admitting one cause of action, in order avoid another one. For the most part, these are mind-games played by plaintiff's lawyers to avoid hard work. In general, once a lawyer grasps the facts of a case, the applicable theories are pretty much self evident. Options don't need to be held open. They need to be hammered shut with facts.

Lawyer-adjuster interactions should include getting-comfortable-with-each-other sessions, informational sessions, instruction sessions, agenda planning sessions, practice, and more.

The usual rule of distrust concocted by lawyers for witnesses—*Never volunteer anything!*—is frequently counterproductive. The usual justification lawyers give for this rule is that they want to surprise the other side with information they may not have thought of. This is not so much as an explanation as another commission of the sin of pride. Those adhering to this explanation vastly under estimate the intelligence of their opponents, and they forget most cases are never tried. When an insurance company has good information which will defeat a bad faith case, frequently, it needs for the other side to have it sooner rather than later, so that the facts will soak in. Most cases are settled along the way sometime, and it is very difficult for opposing counsel to settle on the basis of information recently received. Counsel must be satisfied that he can't defeat or get around a piece of information; he must share it with his clients; and his clients must be similarly satisfied. Soaking-in time is important for rational settlement.

Therefore, often times, it is best to get good information out and not try to conceal it. Usually, if there is bad information, it is best to get it out and explain it away, or—at least—contextualize it. This process re-

quires that the lawyers, the clients, and perhaps the witnesses, join together and think through the essence of the insurance company's case and then see to it that information supporting that position gets presented at every appropriate opportunity. This approach to the presentation of a lawsuit, of course, is fundamentally inconsistent with the maxim *Never volunteer!*

This does not mean that everything should be volunteered. It does not mean that objections should not be interposed at appropriate points. It means that lawyers, clients, and witnesses need to plan cases and think them through, rather than relying on simplistic maxims. The formulation and the systematic presentation of an agenda, of course, does not imply that anyone should make up stories. Lying in depositions is unacceptable, and respectable lawyers should have nothing to do with it. At the same time, few empirical statements are unvarnished reports of brut facts. Characterization, editorialization, and perspective almost always creep in, especially when the transactions involved rise to a level of complexity somewhere above running a red light. If characterization almost invariably creeps into human descriptions, they should be thought about carefully and formulated persuasively.

Of course, time is money, almost more than money is money. If the strategy of investigation, theory-formation, and vision-construction, followed by controlled and advantageous disclosure is to be followed, insurance companies are going to have to be willing to pay bills which stretch out over the life of a lawsuit, rather than bunch up towards the end. Insurers are going to have to be willing to pay for all sorts of lawyer-witness interaction which up to now has been grudgingly accepted, at best. They are also going to have to change their corporate cultures a bit. They are going to have to enculturate claims people to the idea that they should be spending time with lawyers and should be spending time studying files which are under litigation.

Lawyer-adjuster interactions should include getting-comfortable-with-each-other sessions, informational sessions, instruction sessions, agenda planning sessions, practice, and more. Real problems arise when the lawyer and the witness are separated from each other by some distance. If the insurer does not want to pay for the lawyer to travel, it may have to send the adjuster to the lawyer. That too, of course, can be expensive. If lawyers are particularly exposed to the sins of pride and sloth, insurers—so it is often said—are exposed to the sin of false penury. Perhaps this charge is true. Perhaps not. It cannot be true, however, if witnesses are to be properly prepared for crucial depositions.