

FAPIA Winter 2010 Conference

# TALES FROM THE DARK SIDE

*As presented by  
Merlin Law Group's Javier Delgado, Esq. and Michelle Claverol, Esq.*

## **Tales From the Dark Side**

Dark tales of the defense side are not told to create animosity or feed grudges, but to help professionals understand the flip side of the claims environment so as to foster and develop a good working relationship between both sides during the claims process.

It is said that “knowledge is power.” In the insurance claims environment, knowledge is a two-fold concept that can be used to establish a productive and symbiotic relationship with the insurance carrier, or it can also be used to crush one’s opponent when faced with adversity.

From day one, insurance claim professionals need to keep accurate records of all relevant events of the adjusting process to become a reliable claim’s historian who keeps all sides in perspective.

The following sections are simple guidelines to follow based on our prior claims defense experience and a book that has been referred to as the bible of insurance adjusting techniques, *The Claims Environment*.<sup>1</sup>

### **Meeting With the Insured**

It is sometimes believed that the insured will make or break an insurance claim. The insured will have the most knowledge of his/her own claim, and it is never wise to make assumptions about details.

- Go over detailed history to learn who reported the loss and what was reported (e.g. what rooms were reported, etc.)
- Always corroborate that visible damage is related to the loss at issue before writing it up.
- Has the insured already been paid for damages? If so, how much and what has the insured done with the money?
- Did an adjuster go to the property? If so, what did he do, what did he say, where all did he inspect? Who else was present during the inspection? (You will want to interview all that were present.)

### **Start Your Own Chronology of Events**

- When you take notes during your initial meeting with the insured and you keep a diary of who you spoke with and what they said (especially the adjuster), then you will achieve two things:
  - o You show that you are professional, diligent, and methodical

---

<sup>1</sup> James J. Markham, Kevin M. Quinley & Layne S. Thompson, *The Claims Environment*, 1<sup>st</sup> ed. (Insurance institute of America, 1993).

- You create an excellent record that will be a powerful weapon when negotiating a settlement in the claim and/or trial.

### **Letter of Representation to the Carrier**

Tell the carrier, you want to adjust the loss together. Insurance adjusters are also taught that they must share information and cooperate with you to adjust a property loss:

- “Property damage estimates may look very rigorous, systematic, and scientific, yet these estimates reflect assumptions about how much labor time and expense is required to do certain work and how much material will cost. These assumptions can be wrong or inappropriate in any given case.”<sup>2</sup>
- Ask for copy of estimates prepared, photographs, and all correspondence verbal or written between insured and carrier so you can help the carrier fill in the gaps, provide additional information to them so they will have all of the information necessary to conduct a complete and thorough investigation and reach an accurate conclusion.
- This information is also necessary so that you can adjust the loss together. The claims process should be a transparent process where both insured and carrier work together.

### **This is a \_\_\_\_\_ Claim. Re-open or Supplemental?**

What is a supplemental claim?

- Damage that was not obvious or present at the time of the original inspection. Adjuster got it right, but could not see it.

What is a re-open claim?

- Damage that could be observed and was present at the time the field adjuster wrote his/her estimate, but adjuster’s estimate is too low on value or is missing items on the scope.

Why don’t you want to call it a supplemental claim if it isn’t one?

- If the adjuster got the estimate wrong and you send a letter telling the carrier it is a supplemental claim, then you are giving the adjuster and the insurance company a free pass! You are now helping the carrier document in its file that it did the estimate correct the first time and this new claim is damage that was not present or could not be seen during the first inspection.

### **Tone and Content of Written Communication**

- Short, concise, respectful, accurate
- Give reasonable time limits for responses
- Offer another option to extend the time limit if needed, but set a limit.
- Give reasonable timelines.

---

<sup>2</sup> *Id.* at 176

## Telephone Conversations

- “This call may be recorded for quality purposes”- **You are being tape recorded.**
  - Do not admit your estimate is wrong
  - Do not speak negatively about the insured
  - Do not give opinions without truly knowing
  - Do not speak badly about women or men or other stereotypes
  - Do not say anything that you don’t want a jury to hear

## Estimating

### **You can’t just write what you see?**

- o You must check with insured and ask insured to be honest with you
- o Your estimate will be the poison you swallow during a re-inspection, deposition, or trial
- o You can be liberal as long as you can support your position. You can then back off a little if you need to negotiate a settlement. But, when you write double expecting to negotiate down to 50% and still be covered for all of the damages, you take a big chance that the carrier adjuster will not trust you, will not respect you, and if the case does not settle, you are stuck having to explain your unreasonable estimate!
- o Proper photographs, proper documentation, proper measurements, scope notes, etc.

**\*\*\*\*Your credibility and the credibility of the entire case rests on the accuracy of your estimate\*\*\*\***

## Inspections

- You Must Control the inspections at all times.
- Know who is there: get business card from everyone; if no card, then write down name, title, company name, address, and phone number for all
- Set the ground rules (one team or two teams, who is in charge on their side and ours, no one goes in until I go first and speak with insured, no questions or comments to insured regarding the case, facts, or damages)
- You must prepare the insured
- You must prepare the property
- A bad inspection could void coverage.

### Over-reaching inspections:

- To avoid a problem during the inspection process, send a letter to the carrier, the carrier’s consultant, and anyone else that you expect will be attending the inspection with your

understanding of when the inspections will start, where to meet, who to contact in case of a problem, and what will take place during the inspections.

- There is a right way and a wrong way to remove adjuster off a roof. Engage a third party like a contractor that is already performing work on the property if adjuster is interfering with the work (to avoid potential failure-to-cooperate argument)
- Ask the adjuster to leave and tell him that he has no permission to perform destructive testing. If he does not leave or stop destructive testing, then he is now a trespasser (because they only have permission to inspect).

## **Negotiating**

“Settlement strategies are actually used by the claim representative from the beginning of the claim. From the beginning, good claims representatives let the other party know how the claim will be investigated, evaluated, and settled. By the time the settlement discussions begin, the claim representative has already “adjusted” the other party’s expectations.”<sup>3</sup>

**DID YOU KNOW THAT ADJUSTERS ARE NOT JUST ADJUSTING CLAIMS BUT ALSO ADJUSTING YOUR EXPECTATIONS? Think about that!**

“Another strategy the claim representative must employ from the beginning of the claim is convincing the insured or claimant to deal directly with the claim representative. Insured’s are often tempted to employ a public adjuster or an attorney. The claim representative should develop trust between the insured and claim representative.”<sup>4</sup> WHY? To avoid the hiring of a public adjuster or attorney.

## **Power and Negotiation**

- Power of money  
Because the claim representative controls the money, he/she is in a great position of power.
- Waiting power  
If the claim representative allows the opportunity for an early settlement to slip by, the claim representative loses power.
- Knowledge power  
Knowledge and information are valuable commodities that are directly traded in a negotiation and create the power of appearance.  
“All parties to negotiations want to know the track record of the other party in pursuing claims through litigation. Someone who knows this information about the other party is at an advantage. For example, bluffing would be discouraged if it was known that the opposing party had a strong record of litigation.”<sup>5</sup>
- Litigating Power

---

<sup>3</sup> *Id.* at 186.

<sup>4</sup> *Id.* at 186.

<sup>5</sup> *Id.* at 193.

On the surface, it might appear that a claim representative or insurance company would be much more powerful than an insured or claimant, because insurance companies are typically worth hundreds of millions. “Nevertheless, insurance companies and claim personnel are extremely sensitive to about litigation. Litigated cases are often regarded as failures. In addition, the expense of litigation is one of the most closely scrutinized of all insurer expenses.”<sup>6</sup>

- Power of Complaints  
“Insureds who are dissatisfied with the claim process or settlement offer have the power to complain. This is a very significant power. It can be exercised directly with the claim representative, with a supervisor, or with the department of insurance.”<sup>7</sup>

A person who frequently contacts the claim representative will motivate most claim representatives to move the claim.

### **Cooperative Vs. Confrontational Negotiation**

- Cooperative is the most widely practiced style in insurance claims. Win-Win Approach.
  - Advantages
    - Mutual advantage to settlement
    - Differences not taken personally
    - Friendly and respectful relationship-goodwill
    - Seek common ground with other party
    - Try to understand the other party’s position
    - When other party is being reasonable, make concessions in your position.
    - Least chance for failure, best chance for success, easiest on negotiators, compliance with good faith requirement
  - Disadvantages
    - Conceding too much
    - Sacrificing principle

### **Confrontational Negotiation**

- Unreasonableness, reluctance to make concessions; personal attacks
  - Advantages
    - Shattering an opponent’s confidence: Other person believes he may have caused the confrontational negotiator’s behavior and starts to re-examine his own position.
    - When it works, it yields good results.
    - Satisfies competitive urges.
  - Disadvantages
    - Great risk of breakdown: Usually causes negotiations to break down. Experienced claim representatives who have been exposed to this may regard confrontational negotiators as boring, comical, or absurd.
    - Stressful to the parties: Can be stressful and wear on both who practice it.

---

<sup>6</sup> *Id.* at 194.

<sup>7</sup> *Id.* at 196.

-Bad faith possibilities: More likely, a claim representative using confrontational negotiation repeatedly violates the bad faith laws.

**\*\*\*\* Claims adjusters are encouraged to negotiate using the cooperative method. If an adjuster engages in confrontational negotiations, then he/she is most likely violating Florida's bad faith insurance statutes and the industry good faith claims handling practices and guidelines.\*\*\*\***