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Consulting, Litigation & Expert Witness Interest Group

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Message from the Chair

by Vincent "Chip" Boylan Jr., CPCU, RPLU

Vincent "Chip" Boylan Jr., CPCU, RPLU, is senior vice president of Willis of Maryland Inc., a subsidiary of Willis HRH. He is past president and a former education director of the CPCU Society's District of Columbia Chapter. Boylan has been a member of the CLEW Interest Group Committee for more than nine years and has served as the CLEW webmaster. Currently, he is chairman of the Insurance Agents & Brokers of Maryland, that state's affiliate of the National Association of Professional Insurance Agents.

In his first or second year of elementary school, I came upon my son Kyle diligently completing his arithmetic homework. As the sage figure in his young life, I decided to review his work to ensure both his accuracy on the assignment and, of course, to encourage his overwhelming success in whatever field(s) he eventually chose in life. I quickly discovered that Kyle had come up with the wrong answer to each and every lower math problem. Scrutinizing his work carefully, I soon spotted the trouble. The inexperienced lad had made the identical procedural mistake in calculating the solutions for every problem.

The situation obviously called for my fatherly advice to guide the novice student toward academic triumph. I patiently and precisely explained the error of his method and the proper means of arriving at the accurate answers. On hearing my eloquent words of wisdom, my son paused for a moment, looked at me and announced: "Dad, my teacher told

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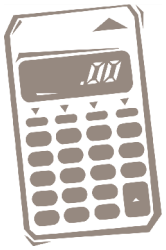
What's in This Issue

Message from the Chair

Continued from page 1

me to do it that way, and my teacher is smarter than you!"

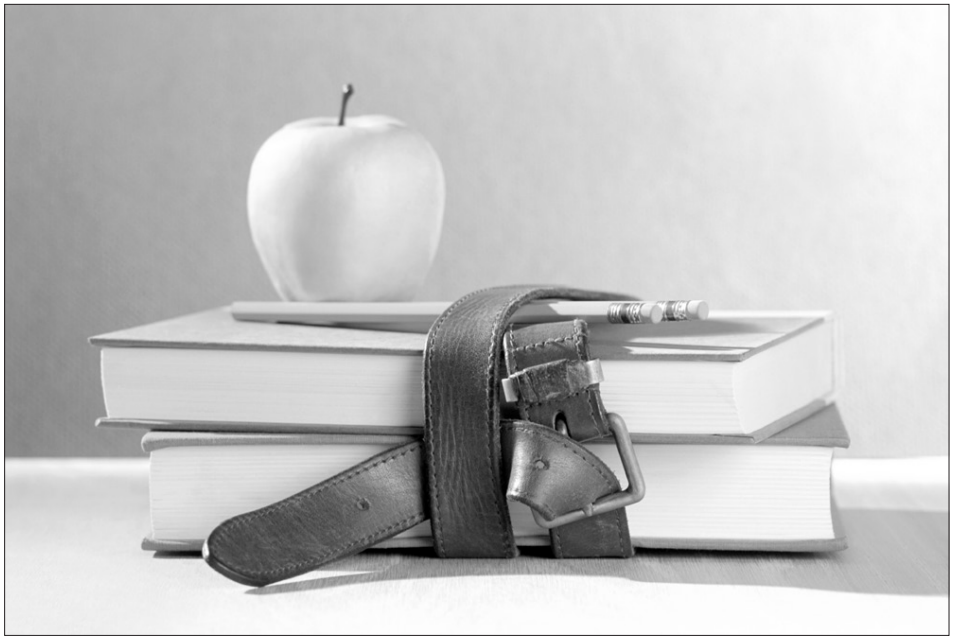
Just what every parent dreads, being usurped by another party when our offspring has barely been sprung into the world! I immediately concluded that I would have to use logic and skill to combat my son's mathematical shortcomings and his stubborn faith in the abilities of ~~my competitor~~ his instructor.



I believed I had seized the higher ground in this battle when I reviewed with my son the two calculation techniques in question and asked him to confirm the right answer to one of the problems by using a calculator. The child slowly entered the figures and signs into the calculator, and voilà, the device displayed my answer, not his. Kyle slowly moved his eyes up to meet mine and declared: "Dad, my teacher is smarter than the calculator!"

Thus, more than a decade ago I was introduced to the astounding power of a teacher to influence his or her students. Today, I am constantly reminded of this power through regular interaction with the consultants, attorneys and expert witnesses that make up our interest group. What are consultants if not advisors to, and educators of, their clients? Aren't attorneys often teaching and enlightening us about complex legal issues? And surely an expert witness, just like a teaching professor, is often tasked with offering and supporting opinions about controversial topics. (For the expert witness, at least, controversial would most likely apply to the litigants.)

As for the "calculators" that we consultants, attorneys and expert witnesses are smarter than? How about the insurance policies that even in their easy-to-read versions are unfathomable to many with whom we work? Or the insufferable contracts or other documents that somehow manage to combine



hieroglyphics, Old English and legal jive into every paragraph? Every day, clients, colleagues and others rely on CLEW members to translate these texts into understandable terms so that they can make important decisions for themselves and their organizations. Simply stated, your wisdom far surpasses the meager display of a calculator (that is, a policy or a contract).

Our individual power to help others as educators and advisors can only grow if we share our expertise and experience with each other. The authors of articles in this and past CLEW Interest Group newsletters are prime examples of those who have put in extra time and effort to share their knowledge (and power) with others. So, too, are CLEW members **Akos Swierkiewicz, CPCU; Donald O. Johnson, CPCU, J.D., LL.M.;** and Akos' colleague **Douglas Emerick** of Insurance Expert Network, who recently conducted two webinars — "So You Want to be an Expert Witness," Part I and Part II, sponsored by the CPCU Society and our interest group.

Ralph Waldo Emerson once wrote: "The man (or woman) who can make hard things easy is the educator."

How about you? Please make hard things easy for your fellow CLEW members by writing an article, conducting a webinar or taking other action, so we can "feel the power" of *your* wisdom! ■

Editor's Notes

by Jean E. Lucey, CPCU

Jean E. Lucey, CPCU, earned her undergraduate degree in English and graduate degree in library science through the State University of New York at Albany. After a brief stint as a public school librarian, she spent six years at an independent insurance agency outside of Albany, during which time she obtained her broker's license and learned that insurance could be interesting.

Serving as director of the Insurance Library Association of Boston since 1980, Lucey attained her CPCU designation in 1986. She is a member of the CLEW Interest Group Committee.

Welcome to this issue of the Consulting, Litigation & Expert Witness Interest Group newsletter. We hope that you enjoy reading its pages and are able to glean a useful idea or two from your colleagues.

For those of us who remember mimeograph machines (I always vied to hand out items reproduced that way in my school classes — elementary, of course — and those of you who did, too, know why), the technological progression to plain paper copiers and faxes seemed revolutionary. Now I don't go a day without making extensive use of the Internet. CLEW Committee member **Steven A. Stinson, CPCU, J.D., LL.M., CLU, AIC, AAI,** gives us an effective overview of the Uniform Electronic Transaction Act, with especial attention to the versions effective in Tennessee, Florida and California.

In addition to webinar presentations, such as those already mentioned by our chair, **Vincent "Chip" Boylan Jr., CPCU, RPLU,** in his column, printed materials are available to help people interested in entering the field of consulting and expert "witness-dom." The author and publishers of *The Expert Witness Marketing Book: How to Promote Your Forensic Practice in a Professional and Cost-Effective Manner* kindly authorized reproduction of some of its pages in this newsletter. I hope that you find the discussion of fee-setting to be as sensible as I do.

And just as fee-setting is most certainly a very real concern for practitioners, so is the likelihood that expert witnesses may be questioned by litigating attorneys relative to their advertising activities. **Kevin M. Quinley, CPCU, AIC, ARM, ARe,** provides excellent advice on how to parry adversarial innuendos in this context.

Fellow Society member **Charles W. Carrigan, CPCU, CPA, CFF, AIC,** works as a forensic accountant, and in that role he is frequently called on to assist in the settlement of time element claims. It is clear that his tenure in the field has been instructive, and we can all gain from his knowledge of, and experience in, this realm. Because he does such an excellent and in-depth job of discussing what he identifies as the three "S" words involved in such claims, his contribution has been divided into two parts. In this issue, please find Part One, wherein the "S" words Suspension (Period) and Sales (Trend) are addressed. The next issue will include Part Two of the article, Saved (Expenses).

A good dictionary is always an excellent addition to any library collection, and *Burnham's Insurance Dictionary* has the added benefit to those of us who work in insurance of being specific to our field. Compiled by **Raymond M. Burnham II, CPCU, CLU, CIC,** this large volume is replete with words and terms used in AICPCU study programs.

CLEW Committee member **Donald S. Malecki, CPCU,** can always be counted on to investigate and explicate policy terms and conditions that may seem arcane until they are applied to particular claims scenarios. He certainly doesn't disappoint when he turns his attention to the "Who Is An Insured" provision in the standard CGL policy, fitting it into the context of the entire policy. Perhaps the "fact situation" described in his Q&A piece will crop up in your practice soon, and certainly it's not hard to imagine similar events happening quite frequently.

Finally, and just for a little historical perspective, two selections taken from the Nov. 8, 1900, issue of *Rough Notes* magazine round out this issue. It's clear that investment "schemes" did not start with **Bernie Madoff** — or even **Charles Ponzi.** It's also clear that the benefits of keeping up with what's happening in your industry have long been touted, even if through apocryphal stories. ■

Very Brief History and Review of Electronic Commerce in the United States

by Steven A. Stinson, CPCU, J.D., LL.M., CLU, AIC, AAI

Steven A. Stinson, CPCU, J.D., LL.M., CLU, AIC, AAI, a member of the CPCU Society's Consulting, Litigation & Expert Witness Interest Group Committee, is the principal in both Stinson Forensic Insurance Consulting LLC and Stinson Alternative Dispute Resolution LLC, each with offices in Palm Beach Gardens, Fla., and Nashville, Tenn. He also practices law with James A. Freeman & Associates in Nashville, Tenn. Besides serving as an insurance expert for other attorneys, he is a Certified Circuit Civil Mediator in Florida and a Rule 31 General Civil Mediator in Tennessee; a Qualified Arbitrator in Florida; and listed in the WIND Network Umpire Directory.

Given the generally pervasive nature of the Internet, it is important that experts and consultants understand the basic requirements to form a contract electronically, whether such contracts are being used in the consulting business or as a consumer at home. Whether written, oral or electronic, in its simplest form a contract is the acceptance of an offer supported by consideration.

The United States Congress passed the Electronic Signatures in Global and National Commerce Act (or E-SIGN) in 15 U.S.C.S. § 7001 et. seq., which took effect on Oct. 30, 2000. This federal law does not preempt a state's law dealing with electronic commerce or electronic signatures. This was intended to fill the gap and provide guidance until the various states could adopt such a law.

In 1999, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Electronic Transactions Act, or U.E.T.A. Such proposed Uniform Laws then need to be adopted by individual state legislatures, and as of this date, all states have adopted U.E.T.A., except for Georgia, New York and Washington, and it is now being considered by the Georgia Legislature. Initially enacted in 2001, Tennessee's version of U.E.T.A. can be found at Tenn. Code Ann. § 47-10-106 et. seq.

Because of space constraints, I am going to briefly review the Tennessee version of U.E.T.A., with comments about Florida and California, as there are few differences between U.E.T.A. and E-SIGN.

There are four important definitions:

(4) "Contract" means the total legal obligation resulting from the parties' agreement as affected by this chapter and other applicable law.

(8) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

(12) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity.

(14) "Security procedure" means a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, callback or other acknowledgment procedures. Emphasis added. Tenn. Code Ann. §§ 47-10-102 (4), (8), (12) & (14).

The Act does not require the use of electronic signatures; it is only applicable if the parties to the transaction agree to it, and use of it once does not require subsequent usage. Tenn. Code Ann. §§ 47-10-105.

The Tennessee U.E.T.A. requires legal recognition of electronic records, electronic signatures and electronic contracts:

(a) A **record or signature** may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A **contract** may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) If a law requires a record to be in writing, an **electronic record satisfies the law.**

(d) If a law requires a signature, **an electronic signature satisfies the law.** Emphasis Added. Tenn. Code Ann. §§ 47-10-107.

This Act states that "evidence of a record or signature may not be excluded solely because it is in electronic form." Tenn. Code Ann. §§ 47-10-113. Also, if the law otherwise requires that a record be retained for a certain period of time, retention of the electronic record will satisfy the requirement. Tenn. Code Ann. §§ 47-10-112. Notarization and acknowledgement can be handled electronically. Tenn. Code Ann. §§ 47-10-111

U.E.T.A. **does not apply** to wills, codicils or testamentary trusts, Chapters 1-9 of the Uniform Commercial Code **except** as to sales governed by Chapter 2 and 2A of the Uniform Commercial Code-Sales and Leases. Tenn. Code Ann. §§ 47-10-103.

Florida, on the other hand has a single section, Fl. Stat. Ann. §668.50, that covers the entire topic of Uniform Electronic Transaction Act. Except for the formatting and the fact that it is found in one single section of Florida Statutes Annotated, it is identical to the Tennessee Code Annotated, which is to be expected.

California's version of U.E.T.A. can be found at Cal. Civ. Code § 1633.2 et. seq. It has many of the identical provisions and definitions of the other two states cited here, but it appears to have additional sections dealing with applicability, etc.

Finally, it should be noted that there are **no real formalities** as to what actually constitutes an electronic signature; it must be some means of showing assent, whether checking an accept button, typing in your initials, or a password, or something more sophisticated. Tenn. Code Ann. §§ 47-10-109. See the National Conference of Commissioners on Uniform State Laws for a summary of the Uniform Electronic Transactions Act and other related information, which can be found at their Web site.

The reader may find additional analytical information pertaining to e-commerce and digital or electronic contracts in the following law review articles:

- Daniel, Juanda Lowder. "Article: Electronic Contracting Under the 2003 Revisions to Article 2 of the Uniform Commercial Code: Clarification or Chaos?" 20 *Santa Clara Computer & High Tech. L.J.* 319 (January, 2004).
- Earles, Mark D. "Clicking on the Dotted Line: Florida's Enactment of the Uniform Electronic Transaction Act as a Boost to E-commerce," 25 *Nova L. Rev.* 317 (Fall, 2000).
- Epstein, Julian. "Essay: Cleaning Up a Mess on the Web: A Comparison of Federal and State Digital Signature Law," 5 *N.Y.U. J. Legis. & Pub.* Pol'y. 491 (2001/2002).
- Hillman, Robert A. & Jeffrey J. Rachlinski. "Article: Standard-Form Contracting in the Electronic Age," *77 N.Y.U. L. Rev.* 429 (May, 2002).
- Mann, Ronald J. & Travis Siebeneicher. "Essay: Just One Click: The Reality of Internet Retail Contracting," 108 *Colum. L. Rev.* 984 (May, 2008).
- Wyrough, William E., Jr. & Ron Klein. "The Electronic Signature Act of 1996: Breaking Down Barriers to Widespread Electronic Commerce in Florida," 24 *Fl. State U. L. Rev.* 404 (1997).

To see the full text of the "E-SIGN" law, go to: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_public_laws&docid=f:publ229.106.pdf. ■

Lions and Tigers and FEES ... Oh, My

submitted by Jean E. Lucey, CPCU

Editor's note: The following excerpt from *The Expert Witness Marketing Book: How to Promote Your Forensic Practice in a Professional and Cost-Effective Manner,* by Rosalie Hamilton, is reprinted with permission. This book was published in 2003 by Expert Communications, 140 Island Way, #288, Clearwater, FL 33767; Company Web site: www.expertcommunications.com. 2009 annotations have been added by the author.

One of the most frequently asked questions at a meeting of fledgling expert witnesses is, "How do I determine how much to charge for my services?" **Rosalie Hamilton,** an expert witness marketing consultant, strategist and coach, provides some excellent guidelines in Chapter 3 of her book *The Expert Witness Marketing Book: How to Promote Your Forensic Practice in a Professional and Cost-Effective Manner.*

Chapter 3 — Fees: I Enjoy My Work, But I Don't Work for the Fun of It

Fee Setting

At the library, at the bookstore, and on the Internet you can find books offering general fee-setting formulas for the person going into business for himself. If a person is leaving a salaried position to become a consultant, the most logical formula is a calculation based on his salary translated into an hourly rate, multiplied by a factor of approximately 3.0*. The exponential factor is to cover overhead expenses; benefits customarily paid by an employer, such as insurance premiums and the employer's part of Social Security; and down-time. **Kate Kelly** points out in her book, *How to Set Your Fees and Get Them,* that a self-employed person should make the factor great enough for time to be spent on administrative matters and marketing, as well as for vacations, holidays, and possible sick leave.

If you are setting up your own practice after having worked for another person or company, make a detailed list of the services that have been provided to you at no cost. You **will** now have overhead expenses even if you work out of your house and do most of the administrative tasks yourself. Besides needing a telephone, office equipment, and supplies, you will have postage and delivery expenses, possibly require office help, and will probably pay more taxes and purchase additional insurance. You will need to invest in marketing and advertising as well.

Make certain that the final numbers comprising this formula produce a profit in addition to providing a living. Although the consultant can influence profit by varying his productivity and control of expenses, he may also need to increase the factor. ***Note: After additional years of working with self-employed consultants, the author reports that in 2009 the more comfortable factor is closer to 5.0.**

If a person entering the forensic field is already self-employed in a profession, he can calculate the hourly value of his time when working full-time in his profession and the corresponding loss when he is not on billable time, e.g., in his office or performing surgery.

Ultimately, your rates should be set by the rule of most businesses, which is what the market will bear. There are several considerations that you should take into account in determining your rate for forensic work.

Factors in Rate Settling

Find out what other experts in your forensic field charge. With certain exceptions, you do not want to have the lowest rate or the highest rate. The best position is usually between the middle and the highest.

Obtain rates from several people. Be especially cognizant of geographic difference in rates. One doctor discovered rates for similar IME services as low as $400 on the East Coast and $800–$1,500 in the West.

Do your credentials of education, experience, and accomplishment place you in the upper echelon of your profession?

Consider supply and demand — how many people work in your field of expertise?

Are you an effective communicator? Are you skilled in analysis and synthesis? Are you likeable? Will judges and juries deem you trustworthy from your appearance, demeanor and speech?

Another component of what the market will bear is the potential case awards. Plaintiff attorneys working on high-stakes cases expect to pay more than those in low-stakes cases. This is not to suggest that you vary your rates, as you should rarely do so. It is rather that an expert witness who typically testifies in high stakes cases will probably be able to set a high rate.

The expert witness rate for working with a government agency may be regulated. In such instances you may wish to decline the assignment or make an exception to accept a lower rate. Another exception might be a case in which you feel motivated, due to the nature of the case, to work for no fee or a reduced fee. An example is a case involving children or one in which the attorney is also working pro bono (free). If the court hires you, it will likely set the expert fees.

Examples of Fees

*The Guide to Experts' Fees***, published by the National Forensic Center, is listed in the Resources section. This survey, compiled from questionnaires sent to randomly selected experts listed in the Forensic Services Directory to ascertain their current charges and fees, will show you a range of rates for various services in many fields. ****Note: This publication is now (in 2009) out of print. Fee survey information is available from various expert witness organizations.**

Your Rate

Usually, an expert tends to charge too little rather than too much. Every time that the author has recommended to an expert that he raise his rate, the expert's business has increased. Lawyers perceive from a substantial rate that they are dealing with an important expert. A rate lower than your competition can seem cheaper, not better.

According to marketing guru **Dan Kennedy,** price is the laziest and riskiest advantage with which to market. Obtaining and keeping business based purely on price is difficult, as it can imply less value or lower quality.

Certainly, if you have built a reputation among attorneys as an objective and credible witness who has effective communication skills, you should evaluate your rates periodically. You will probably do so after attending a seminar at which you network with your peers or a CLE class relating to expert witness work. Make a point to review your rates annually, perhaps at year-end along with other administrative tasks, such as tax work. If no prospect ever balks at your rate, it is probably not as high as it could be.

Billing Charges

You can charge an hourly rate, a half-day or full-day rate, or a combination. The half-day rate can be set at four or five hours, or even slightly less than four hours. The full-day rate is generally set equal to an eight- or ten-hour day.

Tasks such as telephone conferences are often conducted in small segments, and thus charges can be billed in quarter hours or even tenths of an hour.

Certain services, e.g., independent medical evaluation, can be billed as a flat fee. A tip from **Thomas H. Veitch, CPCU, J.D., CLU, CIC,** in *The Consultant's Guide to Litigation Services: How to Be an Expert Witness:* "If you do use the flat fee method, be very specific about the precise services that you will render, and have a clear understanding with the client that any work requested beyond the specified services will require additional fee payment."

Whether you charge different rates for record review, phone conferences, office conferences, or report writing is a matter of personal preference. Experts are divided in their opinions as to whether to differentiate or not.

Also a matter of personal choice is whether to charge one rate for preparation work, such as investigation or report writing, and a different rate for deposition and court testimony. Forensic firms may charge different rates for work performed by their associates with lesser credentials, such as research, just as attorneys usually charge a reduced rate for their paralegals' work.

For work done outside their offices, most experts charge for their time on a portal-to-portal basis, that is, from the time they leave their office or home until they return from the engagement. Others, on an overnight engagement, "turn off the meter" at the end of the business day and resume again in the morning. These travel fees are sometimes charged by the hour and sometimes by the day. A few people do not charge for travel time at all. This is a decision that should reflect the considerations outlined above, such as your competitors' rates and what income-producing activities you are missing by being away. Discuss overnight arrangements with the client well in advance.

Note: Reference to an appendix deleted here.

Within his home state, [expert witness] **Rodney Richmond** charges by the hour, but for testimony taken outside the state he offers a per diem rate. His viewpoint is that although he will be gone from home he will not be working 24 hours per day, so he feels that charging a daily rate is reasonable. For out-of-state testimony he is still adequately compensated, and attorneys appreciate the considerations.

Imitate attorneys in carefully billing for time spent talking on the telephone and in conducting research. Internet research, in particular, can be quite time-consuming and should be scrupulously recorded and billed.

Your initial conversation with the attorney and forwarding of your documents, e.g., curriculum vitae, fee schedule and contracting agreement, are not billable time, but a cost of marketing your services. Nonetheless, beware of giving too much of your expert opinion at no charge in that initial conversation. ■

Parrying the Deposition Question, 'Do You Advertise?'

by Kevin M. Quinley, CPCU, AIC, ARM, ARe

Kevin M. Quinley, CPCU, AIC, ARM, ARe, is vice president, risk services, at Berkley Life Sciences LLC, helping life science clients address liability risks. He is a leading authority on insurance issues, including risk management, claims, bad faith, coverages and litigation management. Quinley is also a business writer, speaker, trainer and expert witness. He is the author of more than 600 articles and 10 books. You can reach him at kquinley@cox.net.

As inevitable as death and taxes, you know that the question is coming during your deposition as an expert witness — "Do you advertise?"

How do you handle this question? For example, does having a Web site that mentions litigation support and expert witness services constitute "advertising"? If you don't pay for any site or publicity, is that still considered advertising? Is networking on LinkedIn with constituencies who may become aware of your expert witness expertise and services considered "advertising"?

Why do they ask?

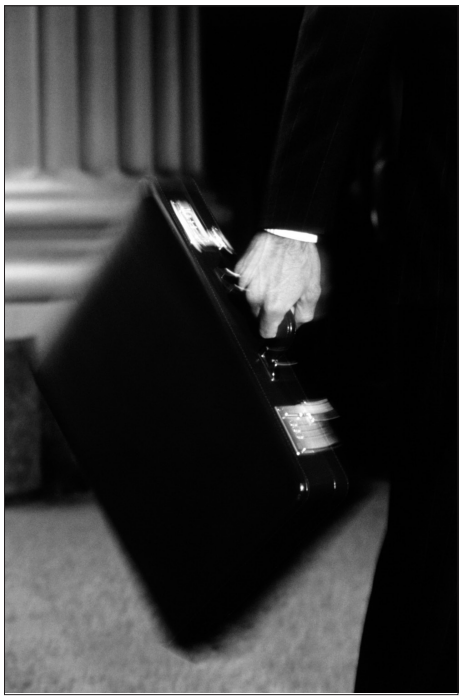
Various reasons and motives underlie this question. First, the attorney may already know whether or not you advertise and wants to see if you give a truthful answer. If you do, fine. If you don't, the attorney can impeach your credibility. Second, the attorney may have no idea whether you advertise or not and wants to see if you do and the extent of same. Third, the attorney may be able to convince a jury later that you're a "hired gun" and an opinion for sale. The innuendo is that there is something wrong, dark and nefarious about advertising. (Let's come back to this in a moment.) Finally, the attorney may pose this question just to see how you handle it, how you think on your feet, and how to gauge whether or not you become rattled.

David B. Adams, Ph.D., ABPP, FAAClinP, FAPM, clinical director of Atlanta Medical Psychology, thinks the question probes for bias. "If you advertise for specific types of cases," he says, "it could potentially show a jury that you are simply a hired gun for such cases." By contrast, he notes, vagueness suggests that you simply go in the direction of the referral/contract. It may be a weak argument, he concedes, because it is undone entirely by the expert's own comfort with having marketed his or her services.

California attorney and insurance expert **Barry Zalma** says, "It is a silly question that deserves no more than a one word answer. It is asked by a lawyer who probably has never tried a case and is using an outline given to him by another lawyer who never tried a case."

Various philosophies and approaches exist with regard to answering this question as an expert witness. Obviously, honesty rules. As an expert, if you do not advertise, say so. If you do advertise, simply answer, "Yes." Realistically, it is rare for an expert not to advertise in some way, shape or form. In a perfect world, experts might receive all assignments from word of mouth alone. In some cases, that may be the recurring scenario. It is likely, however, that this is the exception, not the rule.

In the real world, experts likely receive cases not only due to word-of-mouth referrals from satisfied clients, but also from marketing and getting their names out through directories, Web pages and advertisements.



Parrying the Question

Another approach is to parry the question by asking, "What do you mean by advertise? Define advertise." For example, is a Web page an advertisement? Although the answer is probably "Yes," different people might have different perspectives on this issue and question. It may help to ask the questioning attorney precisely what he or she means or defines as advertising. When I have had this question posed, I often mention that my Web site includes a reference to expert witness services, so if that constitutes advertising, then, yes, I advertise.

Another response is to say, "Like you, I have a Web site, and it lists my services. These services include expert witness assistance."

Obviously, honesty rules. As an expert, if you do not advertise, say so. If you do advertise, simply answer, "Yes."

A Double-Standard?

The undercurrent of the lawyer's question is that advertising is something that experts should not do or is somehow a questionable activity, notwithstanding the fact that attorneys are huge advertisers and have been so for years. Odds are that the lawyer taking your deposition or questioning you at trial has a Web page and advertises. (Tip: As part of your case preparation, look up the opposing attorney, see if he or she has a Web page, and read his/her biography to see if he or she advertises.) Are we to believe that advertising is something that is sleazy for expert witnesses but perfectly legitimate for attorneys? Have you ever sat home during the weekday and watched law firm advertisements on TV?

Some of these slick ads make "Sham-Wow" commercials look understated.

Some may find the question ironically humorous. It is likely that the lawyer posing this question has a Web site and advertises. The insinuation of the question is that there is something seamy about experts advertising but it is perfectly fine for ***lawyers*** to do so ... a double-standard?

Another school of thought is that the best answer to the question is simply, "Yes." If the expert admits to advertising, that may end this line of questioning. Alternatively, the lawyer may pursue the topic with follow-up inquiries. These might include the following:

- "Where do you advertise?"
- "How much money do you spend on advertising?"
- "How much of your business do you get from advertising?"

Answer honestly and forthrightly. Many people believe that problems with experts come — not from admitting to having advertised — but appearing defensive and hairsplitting in answering the question. Witnesses who hem and haw appear uneasy, defensive and contentious about advertising, and may draw more attention to the issue. This is why a simple "Yes" answer is preferred by many.

The expert witness preparing for a deposition or trial testimony must anticipate being quizzed on advertising. Honesty and forthrightness is the best policy here, as in other areas of giving depositions and trial testimony. Think through your response. Practice makes perfect. The more you plan your answer and practice it, the better chance you have in projecting yourself as a poised and confident witness. ■

Surprise! And the Other Three 'S' Words that Result in Time Element Disagreements — Part One

by Charles W. Carrigan, CPCU, CPA, CFF, AIC

Charles W. Carrigan, CPCU, CPA, CFF, AIC, is principal of Carrigan Accounting Associates LLC, a certified public accounting firm currently based in Portsmouth, N.H. With more than 30 years' service to the insurance industry providing forensic accounting services, he is responsible for developing the scope, staffing and audit program for evaluating insurance/reinsurance claim submissions relating to insured commercial insurance/reinsurance claims. Carrigan earned a bachelor's degree in accounting from Northeastern University. He is a member of the CPCU Society's Boston Chapter.

From the Adjuster's Perspective

You're sitting at your desk when you receive a copy of an Acord form or similar loss notice. After scrutinizing the insured's policy, coverage is verified, and you determine that the policy includes coverage for business interruption after a 72-hour waiting period, with a 30-day extended period of indemnity as well as coverage for extra expense.

If you're a claim department employee, depending on company policy, the magnitude of the loss and whether the claim is an isolated claim or the first of many to come following a "cat" loss, you will either adjust the claim within your own claim department or assign the claim to an independent adjusting firm.

In either situation, because of the dependence on a variety of accounting issues and analysis relating to the business interruption and extra expense claims, you may authorize engagement of an outside "forensic accounting" firm to assist in the evaluation of the insured's time element claim.

From the Forensic Accountant's Perspective

After recording the essential coverage and contact information provided by the adjuster, the accountant will usually request a copy of the policy "dec page" and pertinent sections of the policy. Then the accountant will ask the adjuster for his/her estimate of the suspension period.

Suspension Period

This essential piece of information is one of the three "S" words that may develop into a contentious issue later in the adjustment process. There are a number of reasons for this, including:

(1) The insured may not have acted "with due diligence and dispatch" as required by the policy. For example, citing the trauma associated with the loss, the insured may decide to take a vacation for two or three weeks, to just get away and organize his/her thoughts, thereby delaying the start of the reconstruction process. This would extend the suspension period, but may not be allowed by the adjuster.

(2) Often the insured is not aware that the suspension period ends "when the insured's business is returned to the condition that it was in prior to the loss" and is able to handle customers with the same quality of service that existed prior to the loss. Including the extended period of indemnity (usually 30 days — we will assume that it is applicable in this case), the suspension period ends when the 30-day extended period passes, even if the insured's sales have not returned to the level expected had no loss occurred. That the policy does not insure revenues occurring after the suspension period, including any extended period of indemnity, is a difficult concept for most insureds to understand.

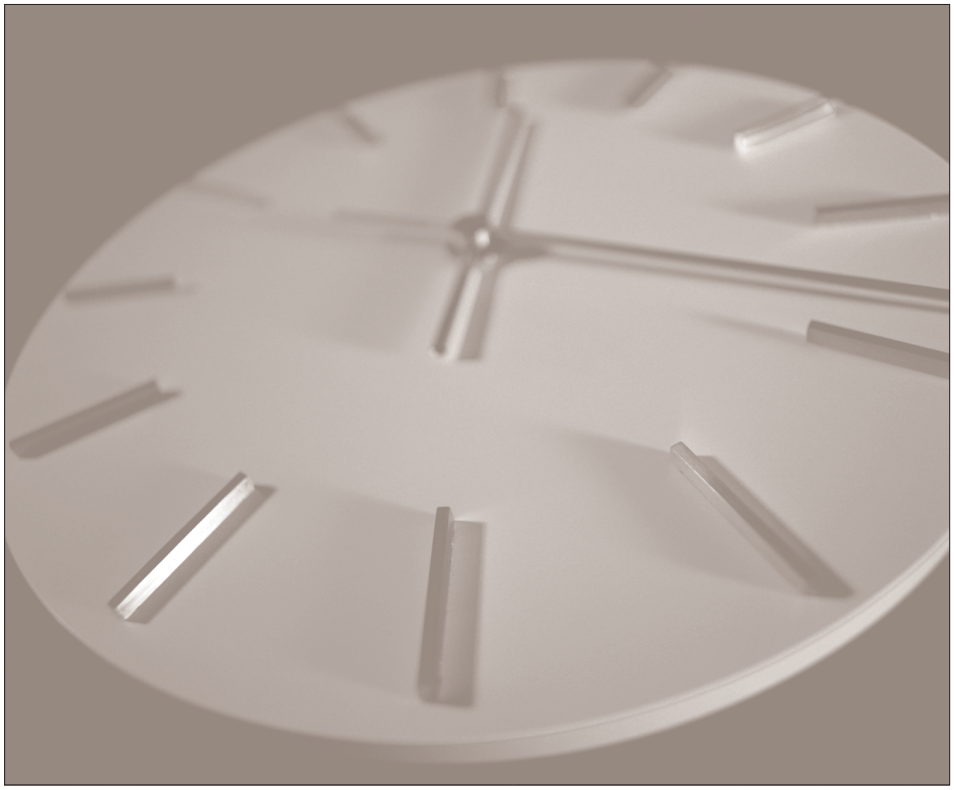
(3) During a prolonged suspension, such as six months or more, the insured may have access to alternative space and/or equipment. If, after the adjuster points that out and suggests that the insured make use of those facilities as required by the policy to mitigate the loss, and the insured fails to utilize that opportunity, it may result in a full suspension rather than a partial-suspension. Had the insured made use of the temporary space/equipment, the insured may have only experienced a limited, partial loss of revenue. If this occurs, the adjuster may make an adjustment

to the claim submitted to account for the effect of a temporary vs. full suspension of operations.

(4) There are a variety of other issues that may arise in disputes involving the suspension period, such as civil interruption, delay in obtaining permits and/or licensing (ordinance or law exclusion), and enhancements over and above the conditions that existed prior to the loss. The adjuster will respond to these according to the coverage provisions, but not always with the understanding and agreement of the insured.

(5) Often, for legitimate reasons such as extreme weather during the period of restoration, the suspension period will extend longer than the adjuster originally estimated through no fault of the insured. In such a case, the adjuster may advise the accountant to extend the loss calculation of the business interruption and extra expense claim for an additional few days, weeks or months depending on the circumstances. In most instances, this will satisfy the insured, but not always.

(6) Though less common, there are situations when the suspension period is not based on the passage of actual time. What if the insured decides not to rebuild? This presents a variety of problems relating to the building and personal property coverage and valuation, as well as spurring the question, "What is the hypothetical period of restoration of the insured's facility?" For the time element coverages (business interruption and extra expense), the accountant would again rely on the adjuster's instructions. The accountant may have to develop a loss calculation that incorporates a full suspension during the early post-loss period, followed by a "ramp-up" period that assumes a partial and increasing recovery toward the later part of the hypothetical suspension period. It is important to recognize that in instances when the insured elects not to rebuild, there is **no** extended period of indemnity!



As the suspension period may dictate the amount of pre-loss data necessary to estimate the lost business income and extra expense incurred, once this time period is provided by the adjuster, contact is made with the insured or the insured's designated representative. The accountant will then draft a "document request letter," outlining the pieces of financial and operating data needed, and for which time periods prior to the loss. Regardless of the format used and the specifics requested, which may vary depending on the circumstances of the loss and the type of business, the very first request should be: #1 — Please prepare and submit a copy of your Business Interruption and Extra Expense claims.

As time passes, and usually after several phone calls and/or e-mail inquiries from the insured's representative, the accountant will receive a package of documents from the insured, which may or may not include the claim. In most circumstances, unless the insured has a public adjuster or some other paid claim preparer, the insured will seek guidance from the accountant hired by the insurer, as the insured will avow unfamiliarity with the claim preparation process.

In these cases, it is appropriate to answer by suggesting that the insured contact an outside CPA, who hopefully prepares periodic, preferably monthly, financial statements in addition to preparing the annual income tax returns. It is normal, especially following a cat loss, for the

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Surprise! And the Other Three 'S' Words that Result in Time Element Disagreements — Part One

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accountant to receive the requested items piecemeal before a formal claim is submitted. This allows the accountant to combine basic information from the insured with information from the adjuster so that a preliminary claim estimate for reserve purposes may be tabulated.

Eventually, a claim is received and, along with the financial data provided in response to the accountant's document request, the accountant can prepare a preliminary business interruption and extra expense loss calculation for comparison to the insured's claim. **Surprise!** The insured's claim is substantially different from the accountant's loss calculation. Virtually every substantial difference between the claim and loss calculation is a component of one of the three "S" words: suspension period; sales trend; and saved expenses — also known as discontinued expenses. (Saved expenses will be discussed in Part Two of this article, which will appear in the next issue of this newsletter.)

Sales Trend

Depending on the period of restoration, the expected sales would be calculated by referencing the **actual** business results *immediately preceding the date of loss*. This "look-back" period will vary depending on the period of interruption, such as:

(1) For a very short interruption, such as less than a week, the look-back period would perhaps be the preceding four weeks, for which the accountant would analyze daily sales to determine the average daily sales amount. Consider a restaurant that experienced a kitchen fire on a Friday morning, resulting in an interruption for six days.

The analysis should be based on a review of pre-loss daily sales for the four weeks prior to the loss to obtain an average daily figure for the specific days of the week that the restaurant was closed due to the fire (Friday through Wednesday). Current business interruption coverage has a 72-hour waiting period, which in this instance would be the Friday of the fire, plus the two days after the fire (Saturday and Sunday).

So, the next step would be to determine the average daily sales for Monday, Tuesday and Wednesday, and then use this estimate as a guide to calculate lost revenue. Caution: If one were to end the analysis there, one might find a substantial difference from the insured's estimate of lost sales. Then the accountant would need to query the claim preparer as to how he or she calculated the estimated lost sales. One reason for the difference could be weather-related.

For example, if during one or more of the four weeks prior to the loss there was a substantial snow storm and/or severe cold, then the "daily average" could be distorted, which might result in an under estimation. (This should become apparent when performing an analysis of the four-week sales.) Of course, a review of weather conditions during the period of interruption would be advised to see if conditions warrant a reduction or increase in the sales estimation.

(2) For a short interruption, such as one spanning several weeks, the look-back period would be extended to several months. In an interruption that ranges from two to seven weeks, one may want to consider getting daily sales figures for the preceding two to six months, as well as obtaining sales figures for the same two- to six-month period for the previous two years prior to the loss period. This will enable the accountant to perform a "horizontal" analysis, which includes a comparison of weekly/monthly *total* sales to prior weeks/months as well as to develop a trend.

(3) The longer the period of interruption, the more susceptible the claim and loss calculations are to differences and dispute. In the case of longer interruptions, such as four months or more, additional variables come into play, thereby making sales estimations subject to a wider range of interpretation. Because of the increased number of variables, there is a greater need to analyze pre-loss actual sales, while at the same time recognizing changes that may have impacted sales during the period of restoration. These changes can be specific to the insured's business, or can be economic conditions that impact all businesses. The look-back period should include all pre-loss months in the current (loss) year, plus monthly sales figures for at least the previous two (perhaps even three) years. Depending on the results of the analysis of the pre-loss period, a further clarification may be required from the insured before providing an estimate of post-loss sales. This requires the "horizontal" analysis mentioned above and also a "vertical" analysis, that is, an analysis of the monthly sales trend *within* each year.

(4) Consider a retail store, where one would expect to have a much higher volume of sales in the November/December period than in the January/February period. Yet, this "vertical" analysis must simultaneously be measured "horizontally" by comparing

two or three years for the same period as the loss, i.e., November/December of 2006 to 2008 for estimating 2009. In the current economic environment, it is likely that sales in 2006 were slightly better than 2007, and 2007 sales better than 2008, revealing a downward trend. If the loss period included the months of November through February, the analysis would have to consider the likely sales increase for November/December over the previous months within the loss year (vertical). However, it would also reveal that November/December *within* the loss year would probably be less than the previous year (horizontal).

To summarize the pitfalls leading to controversy over the pre-loss sales trend:

(1) The longer the period of interruption, the greater the potential for disagreement in interpretation of trends.

(2) Barring any unusual internal or external factors that would have normally impacted sales during the period of interruption, the best indicator of future sales is the actual sales immediately preceding the date of loss.

a. Think of a still pond, no wind or waves. Then drop of pebble into a spot in the pond, and ripples go out from the center of impact. The largest ripple is closest to the center of impact, and then others grow smaller as they move away from the center of impact. If the date of loss is the center of impact, the most pronounced and influential sales trends are the most recent sales, and then each sale becomes less significant as it moves away from the date of loss (the center of impact).

(3) Regardless of the loss period, the analysis of pre-loss sales cannot and should not be viewed in a vacuum. Often, when idiosyncrasies are observed during the sales analysis process, the claim evaluator can obtain clarification by contacting the insured's representative, which may avoid a dispute later on during finalization of the claim.

(4) While pre-loss sales evaluation is essential, an awareness of internal and external factors is required and could impact the estimation of loss-period sales, either favorably, as an extraordinarily large sales order received just prior to the loss, or unfavorably, as the loss of business from a major customer prior to the loss.

(5) Be aware of economic conditions before and after the date of loss, as these can have a major (external) impact on expected "normal" sales during the post-loss period.

a. Think of a real estate broker whose office was destroyed in May 2008, resulting in a six-month interruption. Envision the results if one were to analyze the pre-loss sales for the months of January-December for 2006 and 2007 and the January-April sales for 2008, the loss year. That should effectively demonstrate the need to consider general economic conditions.

Now that the suspension period has been determined, the insured's representative has been contacted, the document request(s) have been forwarded, some of the requested documents have been submitted and, perhaps, a claim has been received, the accountant can continue with the claim evaluation process. The accountant prepares a comparison of the insured's claim to the accountant's loss calculation (including revisions to reflect any necessary adjustments as more of the requested financial information is received from the insured's representative), revealing areas of major contention. **Surprise!** It appears that the claim has failed to account for some of the saved expenses (discontinued expenses) during the suspension period.

Stay tuned for Part Two. ■

Do You Have a Dictionary Handy?

by Jean E. Lucey, CPCU

Insurance educator **Raymond M. Burnham II, CPCU, CLU, CIC,** founder of The Burnham System, graciously donated a copy of his recently published 944-page dictionary to the Insurance Library Association of Boston's collection. *Burnham's Insurance Dictionary* is a most worthwhile addition, and I urge readers to consider its purchase for their own collections. (See the publisher's Web site, www.BurnhamSystem.com, for information.)

Thus, in the concepts identified by numbers (which are listed first), we go from **"10 percent rule"** *(requires the contractor to maintain working capital equal to at least 10% of its backlog)* to "**905(b) negligence action**" *(a suit that takes advantage of a shore worker's right to recover from the vessel owner for injuries sustained while working on the vessel and caused by the vessel's [or vessel owner's] negligence)*.

In the lettered section, we begin with "**A (annuity value)**" *(the amount of each annuity payment)* and end with "**zygomatic bones**" *(two facial bones that form the cheeks and part of the sides and floor of eye cavities)*.

In between we find a wealth of additional entries, including a cogent definition of my favorite insurance term:

"Lost or not lost clause" *(provides coverage even if the property has already been lost at the time the policy is negotiated, **if** the insured had no reason to know of the loss)*.

What better illustration of the "utmost good faith" concept can there be than this? Of course, **"utmost good faith"** has a definition of its own. ■

Some Things Never Change

submitted by Jean E. Lucey, CPCU

The following excerpts from *Rough Notes Magazine,* Vol. XXVII-No. 1, Nov. 8, 1900, are reprinted with permission.

From Page 1 — Sound Familiar?

According to "Insurance Topics," the endowment orders which robbed New Englanders of millions of dollars a few years ago, and which the late Commissioner Merrill so effectively exposed and suppressed, have begun another campaign of robbery under the name of "bond investment." These "bond investment" schemes have been a source of annoyance in the South and West for some years, and the government should suppress them the same as out and out lotteries.

CLEW Editor's note: "Annoyance" seems a relatively mild term for something that may have costs millions of circa-1900 dollars!

And from Page 10 of the Same Journal

Insurance Fables — The Two Methods

Two young men, at the completion of their college course, chose the insurance business as their life-work. They opened offices in the same building, on the same floor and the same day, getting an equal start. Each was able to secure some business, and therefore they were soon supplied with a number of companies, equally good.

The first difference between the two young men became evident one day, when a traveling representative of an insurance journal stopped at the town and visited the two new offices. At the first he was plainly told that the office had no money to spend on insurance papers, couldn't afford it. At the second he soon obtained a signature to a subscription blank, although the agent admitted that he was short of cash, but felt that he knew so little about the business, as yet, that he could not afford to be without some source of information.

The wisdom of the first agent was soon manifest, for with the arrival of each issue of the journal the second agent got new ideas as to how an insurance office should be run. These ideas were expensive, calling for filing cabinets, card systems, indexing schemes, bookcases and insurance books to fill the shelves. Of course, the office became very attractive to look upon and the customers were pleased with the dispatch with which their business was handled. But the first agent apparently received as much business and laughed at the folly of his friend in incurring so much needless expense.

It was not long, however, before the fame of this friend's office spread abroad, because of its strictly up-to-date methods, and its proprietor began to have a reputation as an authority on questions relating to the business. This fame reached a manager's ears, and, after investigation, the young man was offered a good position with the company on a salary which made his former income look sick. He continued to study and to advance until he reached one of the highest official positions in the gift of his company.

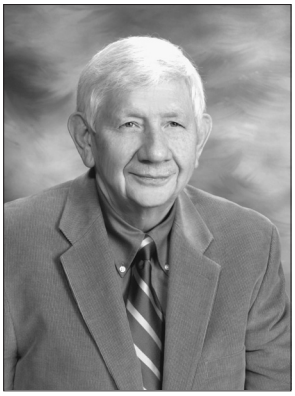
The other agent is still in his original office, following his original methods and complaining of the luck which exalted his friend and left him at the bottom of the ladder.

Moral — The insurance business is a profession, and one must study to succeed.

CLEW Editor's note: Didactic though it may be, the point is made — not, though, that the goal of all agents should be to be offered a career with a carrier! ■

Q&A with Donald S. Malecki, CPCU

by Donald S. Malecki, CPCU



Donald S. Malecki, CPCU, is a principal at Malecki Deimling Nielander & Associates LLC, based in Erlanger, Ky. During his 45-year career, he has worked as a broker, consultant, archivist-historian, teacher, underwriter, insurance company claims consultant, and as publisher of *Malecki on Insurance,* a highly regarded monthly newsletter.

One of our named insureds is a large excavator. While one of his employees was operating some mobile equipment, he accidentally backed into another employee's personal automobile, which was parked at the job site. The mobile equipment is not licensed for road use and is not required to be licensed. When a claim was submitted for damage to the personal auto, the insurer of the CGL policy issued to the excavator denied coverage.

The reason for the denial is based on the "Who Is An Insured" provision of the standard ISO CGL policy and because an insured cannot be liable to another insured. In querying other insurers about this scenario, the response has been that coverage applies. The specific reason for the insurer's denial of coverage under Section II — Who Is An Insured provision is with regard to paragraph 2, which reads in part:

> Each of the following is also an insured:
>
> a. ... your "employees" ... However, none of the these "employees" ... are insureds for: (2) "Property damage" to property (a) owned ... by ... any of your employees ... ."

So, what the insurer is saying is that if an insured (employee) causes property damage to another insured's (employee's) property, the insured (employee) causing the damage is not an insured. The insurer, therefore, has no obligation to pay for the damages caused to the innocent insured's personal property.

In conducting our own research, we discovered that the CPCU 552 textbook Commercial Liability Risk Management and Insurance *confirms that a negligent employee operating a forklift that damages another employee's auto is not covered if the employee who is damaged brings suit against the negligent employee. We simply do not believe that a negligent employee can get away with not having to pay for the resulting damage brought about by his or her negligence.*

Any assistance you can provide in explaining why coverage applies, assuming you feel it does, would be appreciated. If coverage does not apply, what would be the proper risk management approach in handling this kind of an exposure?

The idea that an insured cannot be liable to another insured is preposterous! Actually, whoever is denying coverage does not realize that there is a difference between liability and coverage. There is absolutely no reason why one insured cannot be liable to another insured. What really matters is whether coverage applies.

To determine whether coverage applies in the fact pattern given, one needs to look not only at the Who Is An Insured provision but also all other provisions of the CGL policy. In that vein, it is true that the negligent employee would not be considered an insured for purposes of this scenario because of the provision that you pointed out above.

It is unlikely, however, that the employee who sustained the damage will make a claim or suit against the negligent employee. It is a safe bet that, instead, a claim will be made against the employer (deep pocket). It, in fact, would be prudent to do so because an employer can be liable for torts of its employees under the concept known as "respondeat superior." (Many employers are likely to handle the claim even if an employee were to be sued). Liability can be found against the employer for any number of reasons, such as for having entrusted the mobile equipment to an inexperienced driver or for having failed to properly instruct the employee in the safe operation of the equipment.

Since the employer qualifies as an insured, the next step is to determine whether the insurer of the CGL policy will pay, on behalf of the employer, the damages it is legally obligated to pay for the property damage caused by the negligent operation of mobile equipment by one of its employees.

The fact that the negligent employee is not an insured does not preclude coverage for the employer because of the CGL policy's Separation of Insureds condition (Condition 7). This states that the policy applies separately against each insured against whom claim is made or suit is brought. With this in mind, one must refer to Exclusion J, referred to commonly as the Damage to Property Exclusion.

- Exclusion J (1) applies to property damage to property the named insured (you) owns, rents or occupies. This exclusion does not preclude coverage because the employer did not own, rent or occupy the employee's auto.
- Exclusion J (2) is not applicable because it deals with premises sold, given away or abandoned.

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CPCU Society
720 Providence Road
Malvern, PA 19355
www.cpcusociety.org

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Q&A with Donald S. Malecki, CPCU

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- Exclusion J (3) likewise is inapplicable because it applies to property loaned to the named insured, which also is not the case here.
- Exclusion J (4), which applies to personal property in the care, custody or control of the insured, also is inapplicable because the employee's auto was not in the care, custody or control of the employer.
- The remaining parts of Exclusion J also do not apply.

Assuming no policy conditions have been breached and no exclusions are otherwise applicable, the insurer would have the obligation to pay the damages for which it is liable.

The reference in the above CPCU 552 text is correct because it explains how the Who Is An Insured provision applies when one employee causes harm to another employee. What might help in the future is that this text also explain that absent the application of Exclusion J to the employee's auto, the employee's claim against the employer would be covered.

Finally, the comment of the person who is denying the claim that one insured cannot be liable to another insured is not true. Liability, as mentioned, can exist. It is whether coverage applies that matters. Where there may be a problem is when a liability policy is subject to a cross-insured exclusion. Barring fellow employee suits, there is no standard ISO cross-insured exclusion. Many other policies, however, can be modified with these endorsements. Depending on the endorsement wording, coverage could be precluded even for the employer. This, however, does not appear to be of concern based on the facts as they have been given. ■

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Consulting, Litigation & Expert Witness Interest Group
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Chair
Vincent "Chip" Boylan Jr., CPCU, RPLU
HRH of Metropolitan Washington
E-mail: vincent.boylan@hrh.com

Editor
Jean E. Lucey, CPCU
Insurance Library Association of Boston
E-mail: jlucey@insurancelibrary.org

CPCU Society
720 Providence Road
Malvern, PA 19355
(800) 932-CPCU
www.cpcusociety.org

Director of Program Content and Interest Groups
John Kelly, CPCU

Managing Editor
Mary Friedberg

Associate Editor
Carole Roinestad

Design/Production Manager
Joan A. Satchell

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