

From the Chairman

by Donn P. McVeigh, CPCU, ARM



Our Annual Meeting and Seminars is right around the corner, October 23–26 in Los Angeles, CA. It's been quite awhile since the CPCU Society has met in California. The weather should be good, if not warm, in October. Our committee will be meeting on Saturday, October 23. If any of you plan to be in Los Angeles a day before the conference begins, you're welcome to attend.

As you can see from the bios included in this issue, we have two new members, **Nancy D. Adams, J.D., CPCU**, a practicing attorney in Boston, and **Richard V. Rupp, CPCU**, an EPL underwriting manager in San Francisco.

I look forward to seeing many of you in Los Angeles this coming October. ■

Editor's Corner

by Daniel C. Free, J.D., CPCU, ARM



I would like to be among the first to welcome **Nancy D. Adams, J.D., CPCU**, and **Richard V. Rupp, CPCU**, to the CLEW Section Committee. Their bios are included in this issue. We have such a talented group. At the same time, it saddens me that **Charles R. Shaddox, J.D., CPCU**, is moving on to the Senior Resource Section, because Charlie is just such a bright and colorful guy.

We have an abundance of great material in this issue, so I will not comment upon each of the articles. We recently found out that some of our members are not logging in to our web page because they simply do not know how. It is important that you all learn to make use of the CLEW Section web site. I direct your attention to the procedures for logging in to the site and hope that you will make use of it. As the site grows, there will be a lot of archived material to which you may refer. Many thanks to **Vincent "Chip" D. Boylan Jr., CPCU** for his efforts in making our web page available and interesting. ■

Attention CLEW Section Members: Here's How To Log In to the Web Site!

- Go to the CPCU Society Home Page:
www.cpcusociety.org.
- Click on "Members: Please Log In" on the left-hand side of the page.
- On the next page you'll need to enter the following:
 - Login: Your last name plus the last three digits of your Member I.D. #
 - Password: Your 4-digit year of designation, a forward slash, and then your 7-digit Member I.D. # (example: 1980/1234567)

To get to the CLEW Section web site, click on "Special Interest Sections" and click on "CLEW Section." Or go directly to <http://clews.cpcusociety.org>.

The Decline in Adjuster Training

by Jonathan Stein, J.D., CPCU

■ **Jonathan Stein, J.D., CPCU**, is a plaintiff's attorney in Sacramento, CA. Stein earned his B.A. in economics from California State University, Sacramento in 1995. Stein then began his adjusting career with Prudential Insurance. While at Prudential, he began the CPCU program and completed it in 1998. At that time, he was employed by CIGNA. Subsequently, Stein worked as an adjuster at Crawford & Company. In 2002, Stein earned his J.D. from McGeorge School of Law with distinction. Stein now is the principal of the Law Offices of Jonathan G. Stein where he also does expert witness work.

When I started as an adjuster after college, training was the most important aspect of the new hire phase. Sure, I went through human resources, tax forms, harassment policies, computer usage, etc. But, before I could adjust claims, I had training. And then more training. (This included a trip to beautiful Comiskey Park and the bad parts of Chicago!) And, finally more training.

Today, adjusters are hired with diverse backgrounds and are given claims files. No one explains to them the basics of adjusting: coverage, liability, damages, etc. The new hire is told to ask questions as he or she goes along. Then the complaints start to come and come and come.

As CPCUs, we have voluntarily taken on more training. Not only have we completed eight or 10 courses—depending on when we earned the designation—we have agreed to maintain and improve our knowledge and skills. However, this is what distinguishes CPCUs from others in the insurance field. This training is also essential to the adjuster.

Who Cares about This Topic?

A 2000 survey of adjusters by *Claims Magazine* revealed poor adjuster training was a key reason for an apparent recent decline in job satisfaction. United Policyholders, a pro-consumer organization, talks heavily about the lack of training. Claims managers care about training as well and consider it a good thing. Regulators are starting to care and are considering mandatory training. Finally, and most importantly, insureds care about training because training leads to better adjusters and, by extension, a more timely resolution to claims.

Why Training?

Adjuster education serves several purposes. First, at its most basic, it's the core of how to perform the job functions. As with any profession, adjusters need to know how to do their job. And, unlike some professions, there are not many schools set up to teach you how to adjust claims. Face it, most of us do not have degrees in insurance. Most people do not grow up and say, "I want to be an adjuster." Adjusters can take as much as five years to develop a feel for people, if not longer. Some have commented on this, including a claims vice president who said, "I find that people know less and less of the basics about how to investigate and handle a claim." Thus, training teaches adjusters how to perform the job functions properly.

Second, training provides updated information. I started adjusting claims by writing property estimates on paper. Additional training provided updates on how to use the new software, how to

electronically transmit estimates, and how to attach photographs. While these may be fancy enhancements, they go to the core of adjusting—customer service.

Third, training provides a way of sharing information. Every situation can be handled in more than one way. Training provides an opportunity for adjusters, whether it's the student or teacher, to share information. Some of the best training I attended involved sharing "war stories," a favorite past time of adjusters. But out of these stories come the tips, tricks, and hints that stay with us and allow us to use these techniques on future claims.

Fourth, to be a professional, one must go through training. Training and education are at the top of the list for a profession. As one adjuster from Indiana said, "[Y]ou have an adjuster force that's well-informed and educated, so that would help elevate the professional aspect of the industry."

Fifth, training can help the employer. By taking responsibility for employees' education, companies can gain many positives. A Vermont vice president of claims said, "Those who are training the people and taking care of them will benefit because one, it's going to build loyalty, and two, they're going to have better employees; that's going to save them money in the long run." The third point—it may avoid bad-faith lawsuits, or assist in their defense when the lawsuits are filed.

Finally, training provides for advancement. Training is a tool to gain more knowledge. With this knowledge, advancement, both within an organization and outside of an organization, is possible. Without training, people stagnate in their jobs and do not grow.

The Downfall of Training

If training serves so many purposes, why is there a lack of training? An independent adjuster in South Dakota told *Claims Magazine*, "The adjuster's workload is so much that it is tough to find time to take

the classes.” This was also expressed by an adjuster from Indiana who told *Claims*, “. . . you’re saddled with some education processes that you don’t necessarily have time for.” An adjuster from Illinois said, “I will probably never take a course unless they give me time off to study for it. It seems like they give you enough work to keep you busy in excess of 50 hours a week and then expect you to do this on the side.” Have we seen a theme yet? Time is the biggest problem. An adjuster’s day is busy, and it is only getting busier. At my peak, I was handling more than 300 files. In a 200-hour month, that is less than one hour per file per month. Add even five hours of training a month, and the month becomes unbearable.

For many, it has been a long, slow decline of basic adjusting skills in the name of efficiency through increased computer automation. “The quality of claims [training and education] is not what it used to be,” said a 60-year-old claims department vice president. “Adjusters are now doing clerical work at the demand of top management’s feeling that this is a cost savings due to computerization. Good claims work doesn’t sell insurance like it once did.” For others, the lack of training has resulted in insurance companies piece-mealing out assignments, either to staff or independent adjusters. This has even led to complaints of not being able to handle claims correctly. Anecdotal evidence proves this point. One independent adjuster was sent out to appraise an insured’s vehicle 125 miles away. Three weeks later, the insurance company wanted the appraiser to go back to the same town and appraise the claimant’s vehicle. Another three weeks later? The adjuster was told to go get the police report from the same town.

Carriers are not using the adjusters’ knowledge, but rather giving them simple assignments and telling them to keep their opinions to themselves. One carrier hired me to adjust a watercraft claim. The claimant had numerous broken ribs, a broken bone in her back, and hematomas so severe, they covered 75 percent of her body. The medical bills amounted to

\$150,000 and she was bed-ridden for six months. She had another \$50,000 in estimated future medical bills. Her attorney was one of the top attorneys in the area. I recommended that they pay their \$300,000 policy limit. After three months, the carrier’s vice president of claims called to tell me to keep my opinions to myself. The carrier ended up paying more in settlement and defense costs because it did not want the adjuster’s opinion.

There is also the perception that training does not help. The owner of a Florida adjusting company said, “Any basic courses do not have much for the experienced adjuster.” This doesn’t just affect your everyday property and casualty adjusters. Catastrophe adjusters are also suffering from a lack of training. It has been postulated that if there is a major catastrophe, there are not enough adjusters to handle the claims. The most telling example was Hurricane Andrew in 1992. One claims vice president in Florida said, “There were 160,000 claims. If you took every storm adjuster in the United States, it would take them a year—they would all be there for a year. In reality they didn’t all go. I know people who were there for two years.”

Training Regulation?

Some states, such as New Mexico, already require adjusters to be licensed. Now, there may be a push to regulate continued training for adjusters. And not everyone thinks it’s a bad idea. “It definitely should be mandatory,” an independent adjuster from North Carolina, where adjusters are required to complete six hours of continuing education credits, told *Claims Magazine*. “I feel it should be increased. I think it should be 12. If they’re good adjusters, they’ll take classes anyway.” The South Dakota adjuster also said that continuing education is something that should continue to be promoted.

The adjusting company owner from Florida, however, feels that continuing education should not be regulated by the state. “I’m not big on the government getting involved in anything,” he said. “It

seems when they do it only messes things up.” Government involvement in training may create more problems, including oversight, reporting, and certifying training providers.

Conclusion

Adjuster training is vital to the claims industry. Adjusters need proper training from the beginning. While heavier caseloads may make training more difficult, the insurance companies must recognize the benefits of training. Adjusters with proper training can also handle claims more efficiently, and with the proper authority levels, save money, in the long run. If the insurance companies do not do a better job of training, government regulation may be here soon. The decline of adjuster training must stop immediately. ■

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The Inevitable Question Posed To Testifying Experts:

How Much Are You Being Paid for Your Testimony?

by Donald S. Malecki, CPCU



■ **Donald S. Malecki, CPCU**, is chairman and CEO of Donald S. Malecki & Associates, Inc., an insurance and risk management consulting firm, and president of Malecki Communications Company, the publisher of a monthly newsletter entitled *Malecki on Insurance*. He has been in the insurance and risk management business for more than 44 years and authored 10 books, including three textbooks used in the CPCU curriculum. Malecki is currently serving on the examination committee of the American Institute for CPCU, is a past president of the CPCU Society's Cincinnati Chapter, and is an active member of the Society of Risk Management Consultants. He is a U.S. Air Force veteran of the Korean War.

Insurance experts who testify in court are likely to encounter the question on cross-examination of how much they are being paid for their testimony. This type of question should be anticipated, particularly when a jury is hearing the case, since the primary motive for the question is to paint the expert as a "hired gun."

A "hired gun" is an expression commonly used to connote a testifying expert who has a bias, such as a person who testifies solely for policyholders or solely for insurers, or someone whose fee for testimony is contingent on the outcome of the case.

Barring a few insurance consultants who base their fee on their clients' insurance recovery, the only insurance-related profession where the individuals or firms knowingly represent solely the policyholders and work for contingency fees is the public adjuster.

It is probably safe to say that testifying experts do not make fees contingent on the outcome of cases, and this includes public adjusters. However, an ancillary reason behind an attorney's question during a trial may be to make sure this is not the case. In fact, it would be foolhardy for an attorney who has retained the services of an expert to permit his or her

expert to testify subject to a contingency, since it could be the basis for losing an otherwise winnable case.

Defusing the Issue

What experts may want to do to avoid having to answer that almost inevitable question about how much they are being paid to testify is to address the matter on direct examination, rather than waiting for it to be raised on cross-examination. By doing so, the impact of the question generally is reduced.

Experts, however, need to counsel their attorneys to add that question to the direct, because there is a tendency among attorneys to forget about raising this subject.

If this approach is not taken, it is incumbent on experts to be prepared to explain to the jury what the answer to that inevitable question is: Assuming the expert's fee is not contingent on the outcome, one simplistic response is to divulge the expert's hourly fee with the additional comment that his or her fee is based on experience, education, knowledge of the subject, and his or her testimony time, regardless of the outcome of the case. Or, to say it another way, win or lose, the expert's fee remains the same. ■



CLEW Section Member Profile—Billy L. Akin, CPCU, ARM

Billy L. Akin, CPCU, ARM

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Position

President, Professional Consultants & Services, Inc., Hendersonville, TN (suburban Nashville); an insurance and reinsurance consulting firm specializing in litigation support and expert witness testimony, along with risk management services. Partially retired.

Education

B.S. in Business Administration,
David Lipscomb University—1955

Vanderbilt University Graduate School
of Management courses

CPCU Designation—1961

ARM Designation—1968

Family

Married to Shirley for 39 years. Son, David LaRue age 38; daughter, Dawn LaRose age 27. We have four grandchildren, ages eleven, 9, 8, and 4. Family native to Tennessee, always residing in the Nashville area.

Billy, what are your hobbies and interests, outside of the insurance industry?

For many years I have enjoyed photography and hiking, with regular trips on mountain trails, particularly in the Great Smoky Mountains National Park. Shirley and I regularly combine our photography hobby with travel. Our most significant trips within the last year have been to Switzerland, Bermuda, and the U.S. Gulf Coast. With grandchildren living in the area, we treasure time with them. For several years, I have enjoyed being involved in church work as an elder at the Riverside Drive Church of Christ in Nashville.

Would you give us a summary of your career background?

Fresh out of college, waiting for impending military draft, I went with Cherokee Insurance Company, then a regional (later to become national) property and casualty insurance company. After soon departing for a 21-month stint in the U.S. Navy, I returned to the company, and for approximately 30 years progressed through various positions in underwriting, agency management, reinsurance supervision, policy and form preparation, and regulatory supervision. Later, I become senior vice president, secretary, and member of the board of directors of the company.

Due primarily to failure of “off-shore” retrocessionaires for reinsurance assumed by the company, and subsequent financial abandonment by our parent corporation, we were forced to enter voluntary rehabilitation. It was the “sideline” of fronting assumed reinsurance business that caused the company’s downfall. As the company went into rehabilitation, some officers of the company formed a separate corporation and worked as consultants to the Tennessee Insurance Department and company rehabilitator. When this arrangement was concluded, I continued as consultant to the rehabilitator for approximately 14 years, collecting millions of reinsurance dollars from throughout the world, and helping fully settle some 5,000 outstanding policyholder claims. This we did without having to call upon the state insurance guaranty fund. During this period I also worked as corporate officer, producer, and underwriter at Tennessee Underwriters, Inc., an excess and surplus lines agency in Franklin, Tennessee.

So, how did you get involved in consulting and expert witness work?

This evolved from my extensive work with groups of attorneys, handling various aspects of the Cherokee Receivership. While acting as “fact witness” in several cases, and seeing the desire that many attorneys have for help with insurance

terminology and practices, I saw this opportunity. In regard to the abrupt end of my career with the insurance company, and working into consulting with the receiver and later into the consulting business, I was able to apply the adage: “When life gives you a lemon, make lemonade of it.”

What about your current job and desire for a future career?

I am presently involved with several cases as litigation consultant and expert witness. I also do some work as risk management consultant, assisting with insurance program analysis and preparation of proposals. At mentioned, I am integrating some retirement time into my schedule, some weeks more than others. However, I would like to continue to be active and involved in the great world of property and casualty insurance, and look forward to many future assignments.

Has your CPCU Society involvement been significant to you?

Most definitely. Being an active member of the CPCU Society’s Mid-Tennessee Chapter for more than four decades, I continue to enjoy attendance at most of the meetings. Programs, as well as networking among old and new friends, are interesting and valuable. Special CPCU Society involvement includes the following:

- Past president, board member, and twice program chairman for the Mid-Tennessee Chapter.
- Member and past committee member of the Senior Resource Section. Helped organize and present two section symposia.
- Member of the CLEW section.
- I have maintained my “continuing professional development” in the CPCU Society.
- Personal contact and work with the CPCU Society staff, at Malvern, have always been pleasant and encouraging.

Continued on page 6

CLEW Section Member Profile—Billy L. Akin, CPCU, ARM

Continued from page 5

Billy, who are some persons who have been an encouragement to you in the insurance business?

Four come to mind, all CPCUs. Throughout the years, independent agent, the late **Roger Smith, CPCU**, of Goodlettsville, TN; current associates, **Earl R. Lanning, CPCU**, of Hendersonville, TN, **James R. Mahurin, CPCU**, of Franklin, TN, and **Ed Overman, Ph.D., CPCU**, have all been significant sources of encouragement.

What is presently good and bad about the insurance industry?

In my opinion, favorable aspects of the industry include the diversity of persons involved in the business, and the desire for professional preparation. Encouraging also is the recognition of the need for and advancement of ethical considerations by the Society. In an unfavorable light, it seems that many are yet in the insurance profession without proper training or concern for “doing a good job,” in the long run. Company and agency management err when they do not provide complete financial support to all who strive to obtain the CPCU designation and take part in Society activities.

What is good and bad about the legal industry?

In a word, “lawyers.” As in the insurance industry, in my opinion, the legal profession contains a wide spectrum of dedicated, trained individuals, and some not so qualified. Of course, the latter description does not apply to any of my clients or potential clients! I have observed the outcome of several situations, which seemed to have turned on the professionalism, sincerity, and talent of the attorneys involved.

Billy, finally, what mistakes do you see carriers, agents, and witnesses commonly make?

During the last several years, it seems to me, insurance carriers have been unduly concerned with finding ways to not pay claims rather than impartially evaluating whether or not coverage was provided. I must say, there are many exceptions to this negative observation. The lack of personal reception and the extensive use of telephone answering “menus” are frustrating to an “old timer.” I know. . . “Don’t fight efficient progress!”

To me that close personal relationship and cooperation between the agency producers and company underwriters that I enjoyed, seems to no longer be in vogue. The creative and judgmental nature that is inherent in the underwriting process seems to have been replaced by “this is what the book (or computer) says and so . . . that’s it!”

From my presently limited perspective, some agents make the mistake of not being more personally involved in the analysis of the insured’s needs. I can now understand fully the three primary rules of errors and omissions claim prevention: (1) document, (2) document, and (3) document. On a positive note, it has been a pleasure to work with many very dedicated, professional and affable agents. Many or most of these, I must say, proudly wear the CPCU designation.

We expert witnesses make few mistakes! Seriously, in this business, we must be careful not to be talked, or financially tempted, into a position that is not our sincere conviction. It is a mistake not to be fully prepared. As I was once told by a much-respected senior partner of a large law firm, “Preparation is the key to prevailing in any lawsuit.” ■

Welcome New CLEW Section Committee Members!



Richard V. Rupp, CPCU, vice president, Professional Indemnity Agency, is the manager of this firm's San Francisco Office and is the firm's employment practices liability insurance product manager. Since joining PIA in February 1999, he has grown the EPLI book of business from \$1.2 million annual premium to more than \$22 million in 2003. To date, more than \$60 million in premium has been written in the program.

Rupp is a nationally recognized author and lecturer on insurance and risk management. He began his insurance career in 1961 with the then Pacific Fire Rating Bureau, and joined Marsh & McLennan in 1963 where he spent 13 years assisting in the development of many of the risk management concepts currently in use today. Following Marsh, Rupp was a vice president with Continental Insurance Companies where he headed up the Western Operations of Continental Risk Services. He was also a principal consultant with the risk management consulting firm of Warren McVeigh & Griffin and was president of Rupp & Johnson, Inc., another risk management consulting firm. Prior to joining PIA, Rupp was vice president-risk management with Calco Insurance Brokers where he formed a managing general agency in October 1995 to underwrite one of the first EPLI products.

Rupp received his CPCU designation in 1976 and is a past national governor of the CPCU Society. He also served as the Society's chairman of the Research Activities Committee and as a member of a

number of other committees. He has been a speaker for the CPCU Society, Society of Insurance Research, Risk & Insurance Management Society (RIMS), Professional Insurance Agents of America, Self-Insurance Institute of America, and the Practicing Law Institute. He has taught classes for the Insurance Education Association, the Insurance School of the Pacific, and the CPCU Society.

Rupp's Insurance & Risk Management Glossary, published by NILS Publishing Company, a division of CCH has become a standard in the insurance, risk management, and legal communities. It is in its second edition and has also been formatted into an electronic edition. Rupp has also acted as the editor of the *New CGL Book*, published by the CPCU Society, co-authored *The Alternative Market*, published by the International Risk Management Institute, and the *Employment Related Liability Risk Management Guide*, published by the Employers Group. He wrote a chapter in *The Changing Face of Insurance Distribution Systems*, a book published by the CPCU Society.

In 1999, Rupp was the April Standard Setter for the CPCU Society and in 1997 the Society's Golden Gate Chapter named him the Insurance Professional of the Year.

Rupp and his wife Coleen have residences in San Francisco, California, and Palm Desert, California. He has two sons, Matthew, and Brian, and a grandson Ryan. ■

Nancy D. Adams, J.D., CPCU, is an associate in the Litigation Section in the Boston office of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. and an active member of the firm's Insurance/Reinsurance Group.

Adams has extensive experience representing and advising primary and excess insurers on the business and legal implications of a variety of complex coverage issues involving personal and

commercial lines of insurance. Adams' experience includes representing insurers with respect to coverage disputes arising under directors and officers, managed health care, aviation, fiduciary, crime, automobile, homeowners, and general liability policies. Her practice has involved representing insurers in state, bankruptcy, and federal courts across the country.

In addition to coverage-related matters, Adams' practice includes representing clients in civil litigation, including class actions, principally in the areas of personal injury, professional liability, and products liability. Her breadth of experience includes defending insureds against disputes arising from various modes of transportation, including general and commercial aviation, watercraft, trains, and automobiles; construction; and legal malpractice.

Adams received her CPCU designation in 2002 and is an active member of the CPCU Society both nationally and locally. Since 2002, Adams has been a member of the national New Designee Task Force. Recently, Adams was appointed to a three-year term on the Board of Directors for the Boston Chapter and serves on the Chapter's Task Force for New Designees. She also teaches CPCU 530—The Legal Environment of Risk Management and Insurance through the Insurance Library Association of Boston.

Adams recently co-authored, with Mintz Levin colleague Kim Markand, an article titled "Avoiding the Pitfalls of Stipulated Settlements," which appeared in the July 2003 issue of the *Insurance Coverage Law Bulletin*.

Adams is a member of the Defense Research Institute, Professional Liability Underwriting Society (PLUS), the Aviation Insurance Association, and the Massachusetts, Women's and Boston Bar Associations. She received her bachelor of arts, cum laude, from Trinity University in San Antonio, Texas (1989) and her juris doctor from Boston College (1992). ■

Important Announcement for Members of the CPCU Society's Consulting, Litigation, and Expert Witness Section, and to Members of CPCU Society Board, Committees, and Task Forces!

CLEW Section Retreat

May 12–15, 2005
The Fairmont Hamilton Princess
Hamilton, Bermuda

Agenda

Thursday, May 12, 2005 (Arrival)

7:30 p.m.—Welcome Reception

Friday, May 13, 2005

8:30 a.m. – 12:30 p.m.—Education Program

Tort Reform—One of the major challenges facing the property and casualty insurance industry, and a problem for the U.S. economy, is the alleged abuse of the legal system by the trial bar. A facilitator will lead a discussion on whether tort reform is needed both at the federal and state level, and if so, how disputes might be resolved in the future.

Saturday, May 14, 2005

8:30 a.m. – 12:30 p.m.—Education Program

Forming an Offshore Captive—A facilitator will pose the questions: Absent any non-U.S. ownership, what are the advantages of forming an offshore captive versus one formed onshore? Is the policyholder in a protected cell rent-a-captive vulnerable to an IRS attack concerning the tax deductibility of its premium? Is there a transfer and distribution of risk (except for any portion that may be reinsured)? One of the advantages claimed for forming a captive is policyholder/owner control. What control does a policyholder/owner have with a rent-a-captive?

Friday and Saturday afternoons are free.

Enjoy exploring Hamilton and the rest of Bermuda.

7:30 p.m.—Farewell Dinner

Sunday, May 15, 2005 (Departure)

Retreat Registration Fees (payable only by check)

CPCU Society CLEW Section Members, members of the CPCU Society Board, Committees, and Task Forces—\$250
Spouse/Guest—\$230

The registration fee includes Welcome Reception and Final Night Dinner. It does not include the cost of a room.

Cancellation Policy for Retreat

Retreat registration fee less \$30 will be refunded if notification is received by the CPCU Society on or before April 28, 2005.

Hotel Registration

The CLEW Section has reserved a block of 25 rooms for Retreat registrants at the following special rates:

- Single or double room, \$319 per night—group rate
- Deluxe Room with harbor view and balcony, \$389 per night—group rate

Note: accommodations are European Plan (no meals) and are subject to tax and gratuities.

Registration for the retreat is limited to 25 CLEW Section members, and to members of the CPCU Society Board, Committees, and Task Forces, and their spouses or guests.

Rooms are available only to persons who have registered for the Retreat, and will be sold on a first-come, first-served basis with a major credit card deposit of one night's stay.

On December 20, 2004, the second and third night's stay will be charged to the same credit card.

Cancellation Policy for Sleeping Rooms

Cancellations of the hotel reservation will be accepted on or before December 26, 2004, and deposit refunded. Cancellations received after December 26, 2004, will be refunded only if we are able to find a replacement.

Upon receipt of your retreat registration, the Society will send you the information necessary to make your hotel registration.

The CLEW Section Retreat has been produced by the CLEW Section Committee, led by

- **Donn P. McVeigh**, CPCU—CLEW section chairman
- **Norman F. Steinberg**, CPCU—Retreat chairman
- **George M. Gottheimer Jr., Ph.D.**, CPCU—Retreat education program director
- **John G. DiLiberto**, CPCU—Retreat assistant chairman

**For more information and to register please
call John Kelly, CPCU, (800) 932-2728, extension 2773.**

Insurance and Reinsurance Litigation Experts Negotiating Retainer Agreements

by Andrew Barile, CPCU



■ **Andrew Barile, CPCU,** is an insurance and reinsurance litigation expert to law firms for Andrew Barile Consulting Corporation, Inc.

What Should a Retainer Agreement Consist Of?

Many of the law firms have their own retainer agreements that they send experts to execute. The purpose of this article is to create a dialogue among interested insurance litigation experts, and come up with some type of ideal retainer agreement that covers all of the potential contingencies. This agreement does not have standardization and needs a good deal of discussion, and hopefully this article will stimulate that type of discussion, and experts will come forth with important clauses.

Standard Retainer Agreement Clauses

Scope of Services

Most retainer agreements should contain a "Scope of Services Clause" spelling out exactly what the scope of services should be performed by the expert. Sometimes attorneys have included the comment, "use your own independent professional judgment in the evaluation of issues."

A great deal of discussion should go into these clauses, and I have usually asked for item numbers for each service to be performed; always ends with "such other matters as will reasonably be agreed upon."

Timetable

This clause gets more important with each passing year, as the amount of both insurance litigation and reinsurance litigation has substantially increased, especially since the September 11 catastrophe. Insureds versus agents, agents versus carriers, and carriers versus reinsurers. This year I was involved with *MGA v Carrier v Reinsurance Broker v Reinsure Company*. The timetable was additionally complex.

Most timetables are centered around:

- a. designating date as an expert witness
- b. time frame for preparing expert report
- c. time frame for deposition

The ability to perform within the time frames makes it almost mandatory that insurance and/or reinsurance experts be available to work on Saturdays and Sundays.

What is a reasonable timetable is the important concept that should be discussed by us consultants. I look forward to your comments.

Compensation/Fees

This clause needs to be longer and more detailed. Some of the older reinsurance arbitrators only remember an hourly fee because that's all that was important. We need more discussion on such concepts as:

1. Who should get the invoice?
2. Who actually pays the bill/invoice, and within what time frame?
3. How much should the retainer be?
Is it non-refundable (i.e., some cases end before they start)?
4. What fees are travel times?
5. What fees for depositions?
6. What fees for research and interviews?
7. What are reimbursable expenses?
8. Air fares and non-refundable tickets.

Continued on page 10

Insurance and Reinsurance Litigation Experts Negotiating Retainer Agreements

Continued from page 9

Does the Arbitrator and/or Expert Get Paid for Lost Time?

"As I mentioned before, the client will not agree to pay you for 'lost time.'"

"There was never any agreement that the parties would pay for such time," said the attorney at invoice time."

How many of you experts have had a situation where the day before an arbitration panel was going to begin the parties settle the dispute, and thus you lose income for the week the panel was going to convene? What have you done about it?

Who Has Suggested Wording for the "Lost Time" Clause? What Does the English Version Look Like?

A recent umpire in a case said, "We are now getting close to the hearing date and I wish to warn you that some arbitrators in the United States have taken up the English program of billing for a late cancellation of hearing dates because of their inability to get work for the reserved dates when notified of the cancellation of a hearing so close to the reserved dates."

When Are Significant Expenses to Be Approved?

At what level is a significant expense?

What is the number, \$1,000, \$5,000?

Please let me hear your thoughts.

Conflicts of Interest

Many of the reinsurance arbitrators are now in a position that because they have been involved in so many arbitrations, they are beginning to have conflicts.

Are umpires neutral? How do we handle the conflicts? A recent statement by a CEO of a publicly held insurer said, "We are going to court because we feel the umpire is not neutral."

Are you aware of conflicts of interest? I previously had worked for Swiss Re; that rules out being a reinsurance expert for the World Trade Center Trial, for either side. I owned a reinsurance intermediary. Does that rule out all reinsurance litigation for reinsurance intermediaries, or does that make you a better expert since you actually practiced being a reinsurance broker?

Should the Retainer Agreement Go into Your CV?

How long should the CV be?

Finally, Confidentiality

Introducing a time frame on confidentiality is a concept for discussion. Many of the great expert opinions are buried in files, and closed to the researcher because of the confidentiality issue. We don't even know who the reinsurance experts were in the World Trade Center Trial.

How do the lawyers feel, that after 15 years, these cases are open to the public? Would this be useful to the new experts?

Conclusion

Retainer agreements used by insurance experts do need further clarification to let our legal system work with efficiency.

I hope I have stirred some interest, and as always, welcome your suggestions, comments, etc. ■

2004-2005 CPCU Society Chapter-Sponsored Workshops Off to a Fast Start!

If you're looking for the latest technical and leadership information, be sure to check out the CPCU Society web site at <http://www.cpcusociety.org/?p=16012>.

The September schedule is the most robust we have ever offered, so look for a workshop in your area. Here's the 2004-2005 schedule as of early August; by the time you read this newsletter, it's likely there will be even more opportunities to acquire the knowledge and skills you need to succeed! ■

Date	Location	Title	Cosponsor
9/8/04 (a.m.)	Philadelphia	2004 CGL	Philadelphia Chapter
9/8/04 (p.m.)	Philadelphia	Contractual Risk Transfer	Philadelphia Chapter
9/9/04 (a.m.)	Albany, NY	2004 CGL	Northeastern New York Chapter
9/9/04 (p.m.)	Albany, NY	Contractual Risk Transfer	Northeastern New York Chapter
9/16/04 (a.m.)	Harleysville, PA	Hidden Coverages	Greater Valley Forge Chapter
9/16/04 (p.m.)	Harleysville, PA	Insurance Valuation Problems	Greater Valley Forge Chapter
9/21/04	Houston, TX	2004 CGL	Houston Chapter
9/28/04 (a.m.)	Uniondale, NY	2004 CGL	Long Island Chapter
9/28/04 (p.m.)	Uniondale, NY	Insuring Defective Construction	Long Island Chapter
9/29/04 (a.m.)	Boston	2004 CGL	Boston Chapter
9/29/04 (p.m.)	Boston	Umbrella and Excess Liability	Boston Chapter
9/30/04 (a.m.)	St. Paul, MN	Hidden Coverages	Minnesota Chapter
9/30/04 (p.m.)	St. Paul, MN	Insuring the eCommerce Account	Minnesota Chapter
11/18/04	Worcester, MA	Executive Liability	Central Massachusetts Chapter
4/21/05 (a.m.)	Worcester, MA	2004 CGL	Central Massachusetts Chapter
4/21/05 (p.m.)	Worcester, MA	Umbrella and Excess Liability	Central Massachusetts Chapter

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What's in this Issue?

From the Chairman	1
Editor's Corner	1
Web Site Log In Instructions.	1
The Decline in Adjuster Training	2
The Inevitable Question Posed To Testifying Experts:	4
CLEW Section Member Profile— Billy L. Akin, CPCU, ARM	5
Welcome New CLEW Section Committee Members!	7
Important Announcement: CLEW Section Retreat.	8
Insurance and Reinsurance Litigation Experts Negotiating Retainer Agreements.	9
2004-2005 CPCU Society Chapter-Sponsored Workshops Off to a Fast Start!	11

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