

### Message from the Chair

by Barbara Wolf Levine, CPCU, J.D.



**Barbara Wolf Levine, CPCU, J.D.**, is CEO of Exam Coordinators Network, which provides nationwide medical evaluation services. She has held this position since 1999. Levine earned her CPCU in 1996. She previously worked as a claims attorney at State Farm from 1987 to 1998. She earned her B.S. in political science from Tufts University and her law degree from the University of Florida Levin College of Law. She is a practicing attorney licensed by the state of Florida and a member of the Florida Bar Association.

**A**s we begin a new year, I would like to express my gratitude to the Claims Interest Group (IG) for your vote of confidence in me to lead this dynamic team! I feel honored to work with all of you and look forward to creating many memorable events in the future.

As most of you know, our 2011 CPCU Society Annual Meeting and Seminars took place in Las Vegas on Oct. 22–25 at Caesar's Palace. The venue was fabulous, the seminars topical and fresh, bringing us new information to take back to our workplace. Our Claims IG Committee had an extremely productive meeting. As we bid adieu to **Tony D. Nix, CPCU, CIFI** (our previous chair, who has taken on a position as an interest group governor. Congratulations, Tony!), we welcome into the position of Vice-Incoming Chair **James W. Beckley, CPCU**. We wish those committee members who are moving on to other IGs, or have "rolled off" the committee, the best of luck and thank them for their service to claims. You will be missed!!

One of the hottest topics of discussion at the meetings involved the affiliation of the CPCU Society with The Institutes. The affiliation will allow the Society to continue to attract the best and the brightest in the insurance industry. It's an exciting partnership.

Just recently, an important initiative was announced regarding the Society's efforts to get its members quoted in the press. The initiative involves recruiting CPCUs to serve as experts for the press when news stories arise dealing with their respective areas of specialty. In order to accomplish this, Public Relations and Communications Director **Stephen Young** is compiling a list of these experts who would be willing to speak to the press on very short notice. Please let us know if you would be interested in undertaking this role. It would be an excellent opportunity to serve the Society while enhancing your professional development. If you are interested, please send a CV with your business contact information to [syoung@cpcusociety.org](mailto:syoung@cpcusociety.org).

As we move into the new year, please consider becoming more active with the Claims Interest Group. Both professionally and personally, it has been a wonderful experience for me. There is a place for everyone — whether it's on the Society or local level. Please look over our meeting minutes, consider where you'd like to be involved and reach out to one of the committee members.

Wishing you a happy and healthy New Year. ■

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# Editor's Notebook

by Charles W. Stoll Jr., CPCU, AIC, RPA, AINS



**Charles W. Stoll Jr., CPCU, AIC, RPA, AINS**, is a protégé of the ELA Division of Cunningham Lindsey in Lombard, Ill., and is the editor of the *Claims Quorum*. He has had a career in claim and risk management positions. Stoll received his CPCU designation in 1991 and is the immediate past president of the CPCU Society Chicago-Northwest Suburban Chapter.

Group grew and became a leader among other interest groups. Those will be tough shoes to fill, but Barbara is more than capable of doing so. She's been a member of the Claims Interest Group since 2001. Welcome aboard, Barbara. We look forward to great things from you.

In this *Claims Quorum* issue, **Amy O'Rorke, CPCU**, and **Anthony J. Morrone, J.D.**, have written on a very interesting topic that affects independent adjusters. The article is certainly intriguing to say the least. The issue of conflicts of interest comes up often when independent adjusters are handling claims. They sometimes must serve more than one master, and their work product is often subject to scrutiny by many people.

An article by **Stephen M. Pratt, CPCU, SCLA, AU, ARM**, entitled "Negotiation Challenges in the Claims Environment," points out that negotiations are an important part of the entire claims process. As claims adjusters, we need to be careful and aware that our words can set the tone for the entire negotiating process.

**Carl Van** has contributed an article on the right way to say "no" when it comes to handling claims. Those of us who handle claims for a living know that this is a challenge we face daily. He offers tips on how to say it with effectively and with some empathy.

**Donald O. Johnson, CPCU, J.D., LL.M.**, the assistant editor of *Claims Quorum*, has written a review of a new book authored by **John S. Pierce, J.D.; Harold Weston, CPCU, J.D., ARM; Robert G. Levy, J.D.; and Dawn Valentine, J.D.**, entitled *Defending the Insured*. The book raises many important issues that face most liability claim professionals, insureds and their defense counsel. The book makes for an interesting read.

**Andrew Zagrzewski, CPCU, CLU, ChFC, AIC**, a former member of the Claims Interest Group Committee,

wrote an article entitled, "We Need Your Help — Circle of Excellence," asking claims professionals to remember that their contributions are an important part of the Claims Interest Group's Circle of Excellence submission. He asks all claims professionals to become part of the effort to continue the group's "Gold with Distinction" Circle of Excellence submissions by either entering their accomplishments on the Claims Interest Group website, or emailing the information to the Claims Interest Group Committee, which will handle the entry of the information into the system.

If you have an article that you would like to publish, or if you know someone who has an article and would like to have it published, please feel free to forward the information to me at cstoll@cl-na.com or Don Johnson at donjohnson@dojlaw.com. We are always on the lookout for new articles or authors who want to publish. Also, remember that there are many other areas within the CPCU Society that encourage individuals to publish articles about areas where they have an expertise or a passion that translates to pen and paper. I look forward to working with all of you to keep this publication moving ahead and providing meaningful information to claims professionals everywhere.

On a personal note, I'd like to thank the members of the Claims Interest Group Committee for recognizing myself and Don as co-recipients of the Committee Member of the Year for 2010–2011. I really don't feel that I deserve the award, but I am privileged to be a member of a group of outstanding and hard-working professionals. Thank you again. I will work hard to live up to the accolade. ■

**W**e end the year with the introduction of the new Claims Interest Group Committee chair, **Barbara Wolf Levine, CPCU, J.D.** This issue contains her first "Message from the Chair." Many more will follow during the course of her three-year term. Please join me in welcoming Barbara as she succeeds **Tony D. Nix, CPCU, CIFI**, whose new Society assignment is interest group governor. We wish Tony nothing but the best. During his tenure as chair, the Claims Interest

# We Need Your Help — Circle of Excellence

by Andrew Zagrzejewski, CPCU, CLU, ChFC, AIC

**Editor's note:** Andrew Zagrzejewski recently retired from the insurance industry and CPCU Society service. His Claims Interest Group colleagues wish him a long and happy retirement!

**T**he Claims Interest Group was awarded the Circle of Excellence Award "Gold with Distinction" for 2010–2011. All Claims Interest Group members should take great pride in this achievement. With the award comes a lot of pressure to repeat. We lead the way and will continue doing so with your help.

What you may not know is that every member, not just the formal committee, has the ability to contribute to this accomplishment. A lot of activity and submissions have been made by committee members, but so much more can be done to assure our superior achievement in future years if participation is broadened. So this is our plea and encouragement.

We have a committee that organizes and details member accomplishments toward the award. What we need is your

information to support this continuing effort. However, doing so at the end of the year is an overwhelming task, and we encourage the submission of information on an ongoing basis.

How can this be done? You can submit information about your activities online yourself, or you can send your information to the Claims Interest Group Committee, and we will enter the information for you.

If you prefer to enter your information yourself, follow these directions. Go to the newly redesigned website and log in with your personal ID. Then click on the "Interest Group" section at the top of the Web page. You will then find "Recognition (Circle of Excellence)" in the left column; click on that. You will notice we are one of only two interest groups with an asterisk, designating us as a "with distinction" recipient. We are proud of that. You will also be able to view the "Planning and Activity Detail form," which specifies the kinds of activities that count toward the achievement of the award. After reviewing it, go back to the "Interest Group" tab at the top, select the "Claims Interest Group," and then "Circle

of Excellence." Now you can fill out any of the activity forms for which your activity qualifies.

If you prefer a simpler method, submit your activities via email to [cpcuclaimscoe@earthlink.net](mailto:cpcuclaimscoe@earthlink.net), and the committee members will review and properly format your activity for submission at the end of the year. Doing this on an ongoing basis rather than at the end of the year will help us out and will also help you out while details of the activity are fresh in your mind. Have you ever tried to recall all of your efforts over the past year? I know I have, and I have not done well in remembering everything. Make sure you identify yourself and provide a date, time and place for every activity. If you have any problem with the effort, you can write to the same email address just noted and pose your question. We promise to answer you.

We look forward to hearing from all of you out there in the claims world. We will tell you how our combined effort is going as we near the end of our year. ■

## Save the Date

### 2012 CPCU Society Leadership Summit April 26-28 • The Doral • Miami, Fla.

Look to the future with renewed confidence and vision. The CPCU Society Leadership Summit will give you the tools you need to lead your team to greater success.

The Summit will focus on chapter matters, including operations. Society volunteer leaders will learn ways to improve the functioning of their chapters, giving members more value for membership. Additionally, attendees will have the opportunity to engage with industry experts on leadership development.

Online registration will be available soon. Check the Society's website, [www.cpcusociety.org](http://www.cpcusociety.org), and follow us on Facebook and Twitter (#cpcu12) for up-to-date information on the Summit.

Questions? Contact the Member Resource Center at (800) 932-CPCU (2728), or email us at [membercenter@cpcusociety.org](mailto:membercenter@cpcusociety.org).

**April 2012**

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# Independent Adjusters and Conflicts of Interest

by Amy O'Rorke, CPCU, and Anthony J. Morrone, J.D.



**Amy O'Rorke, CPCU**, is a national general adjuster with GAB Robins — A Division of Cunningham Lindsey. O'Rorke specializes in commercial property claims, primarily involving national and international accounts while acting as a liaison between insured parties, insurance companies, corporate risk managers, insurance brokers and agents. She may be reached at [ororke@gabrobins.com](mailto:ororke@gabrobins.com).

**Anthony J. Morrone, J.D.** is a member of the Subrogation and Recovery Department at Cozen O'Connor, ranked among the 100 largest law firms in the United States. Morrone has been involved in the investigation of hundreds of property-casualty losses, and interacts on a daily basis with independent adjusters handling large multi-party losses. He can be reached at [amorrone@cozen.com](mailto:amorrone@cozen.com). For information on emerging subrogation and recovery issues, visit <http://subrogationandrecoverylawblog.com/>.

**Editor's note:** This article was published in the May 2011 issue of *Claims* magazine and is reprinted with permission and the following acknowledgement: © Entire contents copyright 2011 by *Claims*, a publication of The National Underwriter Company. All rights reserved.

**A** phone call brings a new assignment: a large fire destroyed several local businesses in a strip mall. While initial reports suggested the fire was still under investigation, witnesses noted that they first saw fire from the grocery store, the anchor tenant, and it spread to the neighboring book store and salon. While the fire department contained the fire to those three stores, the remaining stores sustained varying degrees of smoke and water damage. Those stores fortunate to escape the direct physical damage nevertheless were going to shut down for a time while the fire was investigated and damages repaired.

This is how the morning started for Wayne, a general adjuster for a national independent adjuster (IA) firm. Shortly after taking the assignment, Wayne received the ACORD First Notice of Loss (FNOL) Form and the insurance policy for the grocery store, a national chain. The property coverage for this loss came through a manuscript policy where four separate carriers had taken on a percentage of the risk. One carrier had assumed half the risk and was designated as the lead, while the remaining carriers had divided up the remaining risk by varying amounts.

As Wayne began documenting and preserving the scene, another carrier approached him about acting as an independent adjuster for the book store's property claim. As Wayne pondered whether he could serve as the independent adjuster for this claim, the fire investigator he retained uncovered information regarding the cause of the fire. The investigation placed the fire origin close to a hot water heater, and the grocery store manager admitted that, prior to the fire, there were discarded cardboard boxes stacked up against the heater near the burner. However, the fire investigator also confirmed there was a sprinkler system in this area that could have put out the fire, but it had been shut-off by a painter working inside the store.

In this scenario, the IA has a host of issues that he needs to identify and address promptly to ensure that he serves his client, or potential clients, properly. He must not only recognize that his client's insured may have potential liability for causing the fire, but that his client may also have a viable right of subrogation.

This scenario creates multiple separate conflicts of interest that must be addressed. First, the liability carrier for the grocery store should be notified of the loss, if it has not been already. Second, it is likely that the property carriers subscribing to the risk may wish to explore subrogation more closely; however to do so will invariably highlight the grocery store's negligence. Moreover, Wayne also needs to determine whether he can act as the IA for the book store's carrier if there is a good chance the book store and the grocery store could ultimately be adverse to each other in future legal proceedings. What can Wayne do to protect his client and his client's insured's interest?

## Privileged Reporting

At the outset, an IA must recognize that all his activities may be fully discoverable by many different parties if the matter ultimately ends up in litigation. Often, the IA's work product is not protected under the attorney-client communication or work product privileges.

In fact, the discoverability of the adjuster's reports or communications will be analyzed differently depending on who is requesting this information, when and why. For example, a substantive report, prepared by the IA analyzing both first-party property coverage and liability issues after the adjuster has spoken with the insured, will likely be discoverable in a subrogation action if a third-party makes such a request. A judge will ultimately decide whether the full report or a redacted report that omits the adjuster's liability analysis will suffice. This same information may also be fully discoverable

if the affected insured requests this information in a later coverage action.

However, if the loss ultimately ends up as a liability claim, many times the adjuster's report will be fully protected from disclosure by the work product protections if you can establish that it was made in anticipation of litigation. Moreover, some states recognize an insured-insurer privilege, but that protection is only for liability claims against an insured. Therefore, while the IA has an obligation to its client to gather factual information, the adjuster should not analyze the legal impact of those facts, which could later be discoverable, unless the clients make a specific request to do so.

## **Navigating Conflicts of Interest**

In large, multi-party losses where a potential conflict of interest exists, it is critical that the IA reacts quickly to protect the interests of both the policyholder and the carrier, even if it limits or prevents an IA's ability to work for additional clients stemming from the same occurrence.

While the adjuster may not have a fiduciary duty to the policyholder, the insurance company that retained him does. Therefore, the independent adjuster needs to keep its client — the insurance company — informed of all developments as they occur. If the decisions that an independent adjuster makes regarding these potential conflicts of interest negatively impact the insured, then the insurance company client may be exposed to additional liability and even potential bad faith, depending on the state.

This does not mean that an IA can never accept multiple assignments from multiple carriers involved in one occurrence. In many instances, a little leg work will reveal that the potential conflicts of interest are not conflicts at all. Whatever the adjuster decides, getting consent from

the insurers, even though it's not required, is the best and safest practice.

## **Working for Multiple Carriers with Multiple Insureds**

When an IA is faced with the prospect of working for multiple carriers who insure multiple parties on the same loss, the adjuster should first evaluate if there is any real conflict of interest.

First, the relationship between the parties affected by large losses often started well before the loss occurred, and are often contractual in nature. In many instances, these entities recognized the possible losses and created contractual provisions regarding potential liabilities. For example, the legal relationship between tenants and landlord, tenants and other tenants, will be governed by leases or other documents that they signed prior to the loss.

When an independent adjuster is first tasked with any multi-party loss, such as landlord-tenant, condominium, warehouse or shipping losses, the IA should request contracts and other documents between the affected parties to appropriately document the file. At that point, the adjuster will also have the opportunity to examine the potential conflicts of interest.

For example, in residential and commercial leases, the IA should look for subrogation waivers, limitations of liability and hold harmless agreements. Often, a lease will contain these provisions, but they will only cover the relationship between the landlord and the tenant. It is important to recognize whether the scope of these provisions, if present, covers the relationship between just the landlord and tenants or also extends to tenant-tenant relationships as well.

In any multi-party loss where the relationship between the parties is not covered by a written document, or if

the parties' agreement does not contain a limitation of liability, waiver of subrogation or hold harmless provision, then an IA is wise to decline any invitation to work for more than one party.

In multi-party losses where the potential liability between the parties is covered, the adjuster should still obtain express consent from each client in the order he was retained before working for multiple carriers.

However, it must be noted that some states will not allow these provisions to be enforced, particularly if there is an underlying public policy consideration at play. For example, Wisconsin has a statute that specifically prohibits enforcing any provision in a lease where a tenant or landlord is relieved of legal liability for damages caused by that party's own negligence. Therefore, while the IA may not be expected to perform a legal analysis of these documents, any discussion that the adjuster has with his client about a potential conflict of interest should also cover whether someone has performed a legal analysis of them.

## **Working for Multiple Insurers with One Insured**

Losses that an IA are assigned by way of a subscription policy are a slightly different animal, as conflicts of interest relate most often to the wishes of the individual carriers and potentially the insured as well.

Thankfully, many subscription policies provide some guidance to the adjuster on who ultimately decides coverage, expert retention or other claim-related issues. To the extent that the adjuster becomes involved in these issues, it can become an issue of merely keeping the respective clients content. This situation is driven more by the personalities of the parties involved than legal concerns.

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# Independent Adjusters and Conflicts of Interest

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However, many of these subscription policies are generated for large corporations and garner huge premiums for the carriers involved. Often, these policies dictate which IA firm shall be used for all losses, and the insured has some say regarding who will adjust its losses. Therefore, the IA has some interest as well in keeping the insured happy.

That said, the IA must recognize that the insured is not his client and that his fiduciary duty is to the carriers only. Often, the adjuster will be tempted to push the boundaries in these situations and provide guidance to the insured regarding coverage questions or will review issues outside the scope of the claim. The adjuster would be wise to avoid these temptations as they may constitute a violation of the IA's fiduciary obligation to the client and could also make the adjuster akin to a public adjuster, depending on the state where the loss took place.

Lastly, IA firms also face these same issues when they have two separate adjusters who are independently retained to work on the same loss for different carriers

insuring different insureds. Adjusting firms are wise to follow the same set of rules set forth above, but there may be some leeway as the conflict of interest is less direct.

It is nearly unheard of that two attorneys from the same firm would work for different clients affected by the same loss unless their interests are perfectly aligned. However, there are court decisions scattered throughout the country where experts from the same firm have been allowed to testify for parties adverse to each other. In those cases, the courts were most concerned with the experts' ability to protect against the improper sharing of information. In this regard, it is likely that an adjuster would be treated more akin to an expert than attorney, but the ultimate decision on any conflict issue rests with a judge and will be analyzed on a case-by-case basis. If the judge rules that there is a conflict that was not appropriately handled, the consequences can be drastic and will likely include barring the IA and others tainted by the IA's improper sharing of information. Therefore, taking on such an assignment without performing the appropriate due

diligence and obtaining the appropriate client approval is a risky proposition not worth taking.

Where does all of this leave Wayne? As it turns out, Wayne was able to get copies of the leases between the landlord and the tenants. The leases held harmless provisions between the landlord and all tenants. So, at the end of the day, all carriers involved agreed that Wayne could handle multiple assignments without conflict. Well, sort of. The painter's liability carrier has denied liability. Wayne has avoided discussing subrogation issues in his client reports other than to say that counsel has been retained and will report directly on those issues. Conflicts avoided for a job well done. ■

# Saying No the Right Way for Claims Handlers

by Carl Van



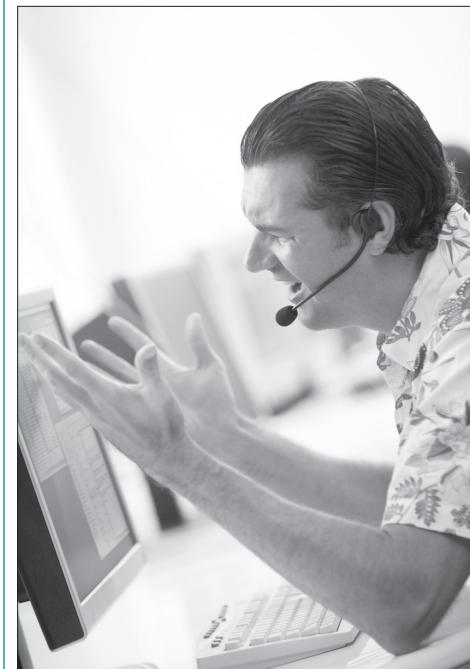
**Carl Van** is president and CEO of International Insurance Institute Inc. He trains and speaks to claims audiences all over the United States and Canada on soft skills such as customer service and branding, negotiations, time management and, of course, gaining cooperation. His new book, *Gaining Cooperation*, is available on Amazon.com and [www.ClaimsProfessionalBooks.com](http://www.ClaimsProfessionalBooks.com). Van can be reached at (504)393-4570, or [www.CarlVan.org](http://www.CarlVan.org) or [www.facebook.com/carlvanspeaker](http://www.facebook.com/carlvanspeaker).

In claims, we all have to say no at times. Some people find it easier than others. What is interesting is that almost all of us struggle with the right way to say no. Claims people who hate to say no find it hard to do, and sometimes do something much worse than hurt someone's feelings. They either don't say anything, which passively sends an incorrect message of "yes," or they say no in such a way that the customer doesn't really know what is being said, and this sends the message of "maybe." Claims people who don't mind saying no don't find it hard to do, but often can lack the skills to do it gracefully and very often instill hard feelings, even when that is not their intent. For those of you who have no problem saying no, but need a little guidance on how to say it a little more effectively, here are some tips.

- (1) "I'm sorry" doesn't mean you are really sorry. A little empathy can go a long way.
- (2) Repeat back to the other person his or her point of view. That will allow the person to listen to yours. Once you prove to someone you understand his or her point of view by repeating it back, the person can stop explaining it over and over again.
- (3) You don't have to prove to others that the situation is their fault. Most people just want empathy, not for you to assign blame to them. If possible, take their side as much as you can, but return to the situation at hand.
- (4) Show the other person you wish it could be different. Telling someone, "I wish I could do this for you ... but just can't" is much more powerful than, "I won't do this for you because I don't have to."
- (5) Help solve the problem in another way, if possible. Even if alternatives aren't the answer, the fact that you offered them shows

you care. Most people, when being told "no," can take it a little better if it is coming from someone who seems to genuinely care.

(6) Avoid the word "but" when empathizing. When you say, "I understand, but ..." what the other person hears is, "I don't understand."



Pat is a claims rep who is trying to help Mr. Donnelly. Mr. Donnelly wants to have his rental car extended past the 30-day policy maximum.

**Mr. Donnelly:** Look, I really need to have my rental extended. That shop my wife convinced me to use just let the car sit there for two weeks before even starting on it.

**Pat:** I'm sorry; there is a maximum of 30 days on your policy.

**Mr. Donnelly:** Please? I can't afford it on my own.

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# Saying No the Right Way for Claims

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**Pat:** I understand, but that doesn't change the fact that the limit is 30 days.

**Mr. Donnelly:** But the car isn't ready!

**Pat:** I understand, but how is that our fault? You should have picked a better shop or used one of ours.

**Mr. Donnelly:** Can't you do something for me?

**Pat:** I can suggest you keep tabs on your shop a little better next time!

Notice how Pat said she was sorry, but she didn't really convey that very well. She was also concerned with proving Mr. Donnelly was at fault. She offered no real solution and certainly did not appear that she wished it was different. Let's see how she does when she applies the tips above.

**Mr. Donnelly:** Look, I really need to have my rental extended. That shop my wife convinced me to use just let the car sit there for two weeks before even starting on it.

**Pat:** Oh, I'm very sorry; there is a maximum of 30 days on your policy.

**Mr. Donnelly:** Please? I can't afford it on my own.

**Pat:** Mr. Donnelly, I understand that your shop dropped the ball. I also understand that you can't afford the rental on your own. Believe me; if there was a way I could extend the rental past 30 days, I would love to do it for you. The situation is the policy does limit the time frame to 30 days. There is just no way to exceed that. I'd do it if I could, but just can't. Can I help you find some alternative rental options that might help lower expenses?

**Mr. Donnelly:** Ugh. Okay, yes, what do you suggest?

Did that come off a little better? Mr. Donnelly isn't thrilled, but he is ready to move on. Let's look at another

example. Debbie is a homeowner's claims representative. The policy excludes paying for data stored on any computer.

**Mr. Adam:** The amount you are suggesting for my computer is fine, but I want to get reimbursed for all of the data I lost. I was working on my MBA. Two years of data and homework assignments I lost when it was stolen.



**Debbie:** We can't pay for that, we only owe you for the computer.

**Mr. Adam:** The data was in the computer. It's part of the computer!

**Debbie:** I understand, but we can't pay you for it. Didn't you back up your computer?

**Mr. Adam:** My backup system wasn't working!

**Debbie:** I don't see how that is our fault.

**Mr. Adam:** Come on. This is important to me. I'm devastated.

**Debbie:** I understand, but it's not covered. Sorry. You're going to have to be reasonable about this.

**Mr. Adam:** (Now angry) I am being reasonable!

Notice how Debbie failed to empathize with the customer? She blamed the customer for not understanding the policy. She even went so far as to imply the customer is an unreasonable person. Let's allow Debbie to try it again keeping the tips in mind.

**Mr. Adam:** The amount you are suggesting for my computer is fine, but I want to get reimbursed for all of the data I lost. I was working on my MBA. Two years of data and homework assignments I lost when it was stolen.

**Debbie:** Mr. Adam, I'm sorry, the data on your computer is not covered. Only the computer itself is actually covered under your policy.

**Mr. Adam:** The data was in the computer. It's part of the computer!

**Debbie:** Mr. Adam, I really do understand. You worked hard on your MBA and now the information is lost. That would be very devastating, and I realize you are just trying to get what you feel you are entitled to. You are an important customer, and if there was any way to cover this under your policy, I would love to do it. The policy does restrict what we can and can't pay for. I'd pay it if I could — I just can't. Would you like me to go over that coverage exclusion with you?

**Mr. Adam:** No, never mind. I'll just hope the computer turns up someday.

Hopefully that sounds a little better as well. Remember, saying no doesn't have to create bad feelings if you show a little empathy. Follow these simple tips, and you might just get a little less resistance from people. ■

# Negotiation Challenges in the Claims Environment

by Stephen M. Pratt, CPCU, SCLA, AU, ARM

**Stephen M. Pratt, CPCU, SCLA, AU, ARM**, has a compellingly insightful insurance claims leadership background that has been developed by working with strong insurance carriers and third-party administrators. Pratt is presently the workers compensation executive for Reckitt Benckiser Pharmaceuticals, an international pharmaceutical company. Prior to his work at Reckitt Benckiser, he held various leadership roles at QBE the Americas, The Hartford, The Zenith and Broadspire. He holds an undergraduate degree in business from Johnson State College and a master's of organizational management from the University of Phoenix.

Claims professionals often enjoy negotiating claims. As professionals, what we sometimes forget is that negotiations do not only occur at the end of a claim; we also negotiate claims during the case flow or as we are laying the foundation for a final settlement. Today, we will examine both building blocks for a final claim resolution and some challenges that we encounter along our journey.

Negotiations are not an event, but a process to reach an end. We encounter negotiations many times each day, but at different levels. When we first speak with a claimant or his or her attorney, we are starting to build relationship rapport. Often, the final outcome of a claim is determined by that first contact point.

One of the best ways you can build a rapport is to discuss the claim events (investigation) and to explain the claim process. The claimant often feels heard, which makes him feel valued. Further, by explaining the claim process, we can clarify a complex process that may be unclear to the untrained party and build a strong relationship of trust.

Each contact with the claimant is a building block to the final resolution of the claim. Therefore, each contact needs to be thought out, and we need to

listen during that contact. This is a real challenge for claims professionals who have a large claim pending and who are time challenged. This is also a reason to return calls promptly as the claimant needs to feel that you understand his or her concerns.

## Initial Contact

Let's see how this first contact plays out with an example of a typical claims professional named Bill.

Bill comes into the office and finds three claims assigned the night before. He carries a caseload of 175 pending liability claims. He notes that he has 35 diary items, new mail and his phone is flashing with messages.

Bill opens the new claim, Taylor vs. Smith, and starts his contacts since he needs to make 24 contacts for quality purposes. He speaks with Tom Smith, the insured, and gathers the details on this complex claim. He next contacts Sam Taylor, who is the third party. Since Bill has so much on his plate, he rushes through the conversation, but he gets a lot of good information. He tells Sam that he will investigate the claim and he will get a letter with all of Bill's contact information. Bill liked the old days when he had more time to really investigate claims and build a rapport with everyone, but the push for quality contact scores and his volume doesn't allow him the time he thinks he needs to make quality contacts.

From Bill's vantage point, he is moving well on this claim and should have the investigation done when he gets the police report. All is well with this claim, or so Bill thinks.

Sam has a different view of the relationship. Sam has never had a claim with an insurance company, doesn't understand some of the terminology Bill used and in general feels very uncomfortable. Sam talks to his neighbors, and they recommend that he get an attorney. Sam does get an attorney,

which is a total surprise to Bill.

This situation is very similar to many situations that claim professionals see every day. Bill had some options to mitigate Sam's sense that he needed an attorney including:

- Bill could have taken the time to listen by spending some time answering Sam's questions and seeking out additional questions Sam might have.
- Bill could have built stronger rapport if he had set a time with Sam for a return call or laid out time frames and expectations for Sam. Of course, Bill would need to keep his word on a return call to maintain the rapport.

Bill might have started to learn Sam's concerns and provided ways to alleviate those concerns. For example, if Sam had concerns with paying a mortgage or putting food on the table, Bill might have considered an advance payment based on this small piece of the special damages.

While Sam might have obtained an attorney anyway, Bill may have been able to maintain control of the claim. In the end, Bill may be negotiating with Sam and not an attorney.

## Agreement Areas

In addition to the critical first contact point, another negotiation strategy is finding areas of agreement. It is always easier to see where people differ as opposed to where they agree, making areas of agreement a critical component in any negotiation.

Bill has received a demand package from Sam's attorney, Will I. Win, a well-known litigator. Bill reviews the package with the demand that appears well out of line. As Bill reads over the package, he highlights all of the areas that he disagrees with in yellow marker. As Bill contacts Attorney Win, he starts the conversation by noting that the special damages are very high, and he lists each item that he feels is out

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# Negotiation Challenges in the Claims Environment

Continued from page 9

of line for the medical bills, the lost time, childcare and other issues.

Attorney Win responds by noting that he has supported each item and there should be no conversation on those items. A confrontational environment now exists, and two adversaries are ready for war.

Let me suggest if Bill had started by noting that there was treatment and validated the damages that he agreed with, he could have started the conversation with some agreement. The agreement could have changed the tenor of the discussion. Bill didn't have to agree with everything, but surely, there were some points of agreement. By focusing on the agreement points, there is always a reference point of something positive to go back to for discussion.

## Anchor

Another strategy for negotiations is anchoring. If you have ever negotiated to purchase a house or a car, you may note that a price is stated in writing and the negotiations start at this number, which is called the anchor point. This number is very influential, and everything starts and is focused around this number. The anchor number can increase the payout on the claim if not managed appropriately.

Bill noted the demand and realized it was five times above the top of his settlement range. Bill spent some time thinking through his evaluation and countered the demand with a number in the mid-range of his settlement value. Of course, plaintiff's counsel Win responded with a number just below his original demand, and the two parties were not much closer to agreement.

Bill had fallen into the anchor mindset and negotiated from the sticker price. If you have seen the sticker on a car at the dealership, you will note that they have set an anchor and start their negotiation from that number. Bill had a lot of options on how to respond, and he chose the easiest for the moment. This creates an environment where he now feels that he needs to counter again though he is simply moving closer to the top of his range.

Let me suggest a few options for Bill in this situation. Bill could have used some of the following techniques:

- Spent time breaking down the numbers and offering small pieces of the claim and not approaching the full value early. He could have broken out the related medical bills and offered that value first. He then could have approached the lost time and presented

that value. He could have walked through each area of the specials until there was agreement and then discussed the general damages.

- Spent time breaking out the related injuries and damages, and presenting an offer on those components.
- Spent time asking the attorney how he arrived at his number by asking him to break out the pieces. This puts him in a situation of having to defend his position.
- Spent time asking Win to walk him through his thought process since Bill did not have the same view and wanted to understand the attorney's thought process. This forces the other side to defend their position, while not making a counter offer.

The key here is that Bill was not hindered by an anchor that could drive the claim payment. Claims professionals should pay what they owe, and we simply want to understand what is owed. By the way, simply throwing money at Win didn't get Bill closer to settlement and, in fact, it may have created a divide between the two parties.



## Have a Plan

While considering the initial contact as key, finding areas of agreement and anchoring the negotiation are all ways to successfully negotiate a claim. The bigger picture here is to have a plan in your negotiation process.

While Bill may have had a settlement plan, it doesn't appear that it was well thought out. Bill should set a plan for how he will approach the attorney even before he contacts him. Bill needs to think through how he will respond and what the issues might be in the claim. It is interesting that there are now two sets of interest in this case, which include Sam's and the attorney's. We may not know Sam's interests since he obtained an attorney early, and we lost contact. The attorney may have a few interests including his fee, his client's well-being and his history with your company.

The settlement plan includes all mitigation points (comparative negligence, prior injuries, body parts not related, etc.), the settlement range, how the discussions will take place and the alternatives if negotiations aren't successful (mediation, arbitration, trial, etc.).

By creating a settlement plan, you are ready for the attorney's presentations, and you know how you will respond. It is better to be prepared so that you can respond or know when you don't want to respond. One key settlement tool is silence or time. Just because you have a demand doesn't mean that you have to respond immediately. The "pause" is a great tool for controlling settlement negotiations.

Finally, in your plan, know the interests of everyone at the table. By knowing your audience, you will be better prepared to respond to the discussion.

## Separate the Personalities from the Interests

Up to this point, we've talked about strategies. One additional thing to keep in

mind through this process is separation of personal interests from the process itself.

As Bill starts his negotiations with Win, he believes that Win always comes in high and doesn't really negotiate until they reach the courthouse steps. He feels he has been burned by the attorney before and doesn't like dealing with him.

Whether any of these "feelings" are valid, they are only feelings, and Bill needs to keep focused on the interests of the case. Some parties put on a persona of being tough only to use that perception as a negotiation ploy. Bill needs to keep the interests of the case separate from the personality of the attorney.

Bill should focus on the plan that he has in place, and if the attorney pushes him, he should stick to his plan. Of course, you always need to be flexible and plan for different tactics from the other side, though you need to keep personalities out of the picture. By escalating the tensions and letting someone "get to you," you may find that you have lost control of the case and paid more than the case is worth.

There are times when you may even want someone else to step in to make the offer if things escalate. This keeps the other party off guard, and you can focus more on the facts and issues, and move away from the personalities.

## Other Thoughts

Finally, invent options to move the negotiation forward. You may need to look at new ways of putting your thoughts forward while better understanding the other party. This is a critical component, and the following are some examples of better understanding your audience while listening:

- Consider putting out annuity quotes to meet the perceived needs of the other party. If you put out three lump sum payments around the time that the plaintiff's children go to college, you will get a sense of the importance of this need from his perspective.

- Consider an annual payout annuity over the working life of the plaintiff to meet his income needs.
- Consider creating a trust to help the plaintiff manage the medical needs.
- Consider leaving medical open for one year with a maximum payout if medical is an issue.
- Consider an annuity for the attorney's fee.

There are many options that can be created, and if you roundtable the case with other claim professionals, structured settlement vendors, medical professionals, defense counsel and other stakeholders, you may create many other options.

It is easy to get caught up in the moment. You need to start each interaction with a reflection of what your case goal is. This will allow you to keep focused on your desired outcome.

Always try to conclude each conversation with a point of agreement and points that need more work. By asking for clarification on how the other party arrived at a piece of the value of the full claim, you can keep the conversation going while being in agreement, though not total agreement yet.

Identify and attack settlement barriers with tact and a plan. It has been said that a good outcome leaves you with the feeling that you paid a little more than you may have wanted and less than they wanted. In short, there is a balance in what the parties can agree to in a settlement. ■

# 2011 CPCU Society Student Program — ‘Ongoing Success’!

by Lamont D. Boyd, CPCU, AIM



**Lamont D. Boyd, CPCU, AIM**, director, insurance scoring solutions, with FICO® (Fair Isaac Corporation), is responsible for client and partnership opportunities that make use of FICO's credit-based insurance scoring and property risk scoring products and services. Speaking regularly to various groups on behalf of FICO for the past 18 years, he is recognized as a leading expert in predictive scoring technology. In addition to managing the CPCU Society Student Program, he is a member of the Underwriting Interest Group Committee and the 2012 Annual Meeting Task Force.

**D**ozens of notes from chapter and Society leaders, risk management/insurance students and professors, mentors and others involved in our CPCU Society Student Program for 2011 inspired me to express my own sincere appreciation for all who contributed time, effort and money to make this program another in a series of “ongoing successes”!

Here are just a few of the comments we've received about the 2011 Student Program:

**Tyler Cockrum**, Missouri State University, expressed appreciation very similar to so many others:

“I would like to begin by saying how grateful I am that I had the opportunity to participate in the CPCU Student Program. The Annual Meeting was a very successful trip for me. I had the opportunity to learn about several different career paths (the majority of which I had not even considered). I also was given countless opportunities to meet new people, and network with both students and professionals in the industry. This experience is something that has had a positive impact on me and will greatly help to advance me in my future career.”

**Brigid Tarpey**, University of Southern Maine, shared her thoughts and plans for the future:

“I just wanted to thank you for all you did to make the conference as successful and meaningful to me as you did. I can't imagine all the hard work and organization that goes into setting up something like this, and I want to thank you for making it possible for my fellow classmates and me to have attended such a fantastic conference. We all benefited greatly from attending and enjoyed all the networking we did. I look forward to graduating in the spring, and furthering my education and career in the insurance field.”

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**Erika Villavicencio**, University of North Texas, offered insight into her CPCU study plans:

“I just wanted to tell you how much I appreciated your time throughout this whole process and for getting the Student Program to be so successful. It was a great experience for me, and I fully enjoyed my time with the rest of the CPCU members. The whole week there made me excited to start my journey with CPCU and start studying for the exams. I'm hoping to get everything done by 2016!”

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**Le'Yante Williams**, Florida State University, also expressed her appreciation:

“I would really like to thank you for extending the opportunity to attend the CPCU Society Annual Meeting. I had a fantastic time learning about the industry, listening to the fascinating stories of the speakers, and also being able to not only network with professionals, but make some friends along the way. I will definitely relay the awesome experience I had at the meeting to help increase awareness of the outstanding possibilities the meeting had to offer.”

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**Steve McElhiney, CPCU, MBA, ARe, AIAF**, 2011–2012 CPCU Society president and chairman, shared his thoughts for the future:

“The pipeline issue is the core strategic challenge faced by the insurance industry and the Society in the next 10 to 15 years as a generation of knowledge workers retire, and new talent needs to be identified, trained and developed to fill these technical roles. This program, going now into its third year, serves as a prototype for success for the industry as bright and eager insurance students from programs based around the country gain an opportunity to be immersed into a vibrant CPCU Society Annual Meeting and Seminars, and network with professionals at all levels and discover

various career options. At this point, I cannot imagine an Annual Meeting and Seminars where students are not present as an integral part of the meeting experience for all of us — this program has had this profound of an impact in such a short period."

**Warren L. Farrar, CPCU, CLU, ChFC,** 2011–2012 CPCU Society immediate past president and chairman, offered the following observations:

"I continue to be impressed with the level of excitement and commitment demonstrated by the students attending our annual event. They, too, benefit by gaining insight into our industry, having the opportunity to meet with leaders of the industry and developing new relationships that can enhance their careers as they develop. This is a small, but important, effort at attracting young professionals into our industry — a critical issue for the industry and the CPCU Society."

"A Look into the Future" — our very unique "student-focused" seminar in Las Vegas — was a rousing success, as well. The seminar highlighted the property-casualty insurance industry's need for the "best and brightest" now and in the future, and provided the unique perspective of students working toward risk management/insurance careers. The seminar was specifically designed to help risk management and insurance students understand more fully the variety of paths available to them in the property-casualty insurance industry. Students also gained a clear understanding of the value of the CPCU designation in helping them on their chosen path.

Many thanks to our seminar speakers: **Noelle Codispoti, ARM**, executive director of Gamma Iota Sigma, the international risk management, insurance and actuarial sciences collegiate fraternity; **Dale M. Halon, CPCU**,



*Forty students from some of the country's leading universities and colleges attended the 2011 CPCU Society Annual Meeting and Seminars in Las Vegas. Participating students, in alphabetical order: Alexander Abbott, St. John's University; Scott Adams, Illinois State University; Masmoudath Anjorin, Morgan State University; Matt Baber, University of Southern Maine; Ashleigh Buchanan, University of North Texas; Cheng Cheng, University of Illinois; Tyler Cockrum, Missouri State University; Erin Connell, University of Colorado-Denver; Danielle Corde, Boston College; Walter Filmore, University of North Texas; Brendan Francis, Howard University; Dan Fuld, Illinois State University; Kaitlin Graf, St. John's University; Weijing "Lilia" He, University of Illinois at Urbana-Champaign; Jocelyn Horton, University of Colorado-Denver; James Howe, UNC Charlotte; Jonathon Jaeger, University of Iowa; Christopher Juntura, University of Southern Maine.*

*Jennifer Medeiros, St. John's University; DeAndrai Mullen, Morgan State University; Jin Na, University of North Texas; Jacqueline Negrete, Southern Methodist University; Mason Novess, Olivet College; Christina Oda, University of Illinois; Kwesi Ofori-Atta, Georgia State University; Rachel Patterson, Appalachian State University; Linda Pollock, University of Southern Maine; Mary Rhodes, University of Louisiana at Lafayette; Ashley Rieger, Illinois State University; Benjamin Robbins, Appalachian State University; Sanae Russell, St. John's University; Catherine Sebolt, University of Iowa; Olena Shchukina, Georgia State University; Marcus Somerville, Georgia State University; Brigid Tarpey, University of Southern Maine; Ottonian "Toni" Tate, University of North Texas; Edward Van Strate, Olivet College; Erika Villavicencio, University of North Texas; Le'Yante Williams, Florida State University; and Dahao Zheng, University of Illinois at Urbana-Champaign.*

**CIC**, vice president of sales, ISO Innovative Analytics; **Connor M. Harrison, CPCU, ARe, AU**, director of custom products, The Institutes; and **James R. Jones, CPCU, ARM, AIC**, executive director of the Katie School of Insurance and Financial Services at Illinois State University.

Our hope is that all students, new designees and industry veterans walked away from this seminar with great ideas and a clear understanding of what is needed to grow our industry through the development of talented individuals. The CPCU Society is uniquely positioned

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# 2011 CPCU Society Student Program — ‘Ongoing Success’!

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— in large part due to the direction and support provided by chapter and interest group leaders — to offer a bridge between those who are seeking a rewarding future in the industry and those who are seeking people to contribute to a successful future.

## 2012 Student Program

As a direct result of the efforts of so many of you and your colleagues over the past two years, the Society has given our Student Program an enthusiastic “green light.” Our next stop will be in Washington, D.C., for the 2012 Annual Meeting and Seminars.

Being ever mindful of chapter interests, overall expense considerations and very complicated coordination efforts, the 2012 Student Program has been amended slightly:

- The Society will waive Annual Meeting and Seminars registration fees for 24 students. This will allow for greater, focused attention on each student. As in previous years, registrations will be taken in the order of contact with the Society’s Member Resource Center. The first 24 qualifying students will receive the waiver. A waiting list will be available in the event of student cancellations.
- Students must be juniors, seniors, or graduate students in risk management, insurance or actuarial sciences programs to qualify for the Student Program. This helps focus our attention on those students who have clearly chosen the insurance industry as their career path.
- All students must be individually recommended by their professor/advisor.
- Each participating university/college will be able to recommend up to two students.
- Qualifying students who do not receive direct chapter sponsorship will receive “out-of-pocket” expense reimbursement based on chapter contributions to the 2012 Student Program.

- A chapter directly sponsoring a qualifying student for 2012 can reserve one spot among the 24 students within the program. This student must be named prior to Aug. 1, 2012, or the spot will be opened to the next student on the waiting list.



**CPCU SOCIETY**  
*REFLECTIONS of PROGRESS*

At the request of some chapter leaders, there is an option available for students who would not otherwise qualify under the 2012 Student Program guidelines. A chapter can choose to fully sponsor (including any payment of full registration fees) a “non-qualifying” student (e.g., business major). This student will be included in all Student Program activities and, if possible, will be “paired” with another student to help mitigate hotel expenses.

A final note: Once again, my sincere appreciation to all who contributed in so many ways to the success of our 2011 Student Program. Since “ongoing success” is fully expected again in 2012, please don’t hesitate to contact me ([lamontboyd@fico.com](mailto:lamontboyd@fico.com)) with any thoughts you may have, or assistance you’re willing to offer to help us attract bright, young minds to the insurance industry and the CPCU Society! ■

# Book Review: *Defending the Insured*

by Donald O. Johnson, CPCU, J.D., LL.M.



**Donald O. Johnson, CPCU, J.D., LL.M.**, is the founder of D. O. Johnson Law Office PC in Philadelphia, Pa. He has more than 15 years' experience in commercial litigation and counseling and has represented clients in state and federal courts. His practice includes insurance coverage and bad faith claims-handling litigation involving commercial property and commercial liability policies. He also is General Counsel of the National African-American Insurance Association.

**D**efending the Insured by **John S. Pierce, Harold Weston, Robert G. Levy and Dawn Valentine** (Wolters Kluwer Law & Business 2011 Supplement), 686 pp.

Liability claims professionals spend much of their time on complex coverage issues — evaluating whether submitted claims are potentially covered, which would create a duty to defend the insured, and evaluating whether there would be a duty to indemnify if the insured were found liable. When a duty to defend exists, and

the insurer undertakes the defense, equally complex defense issues arise because a third party — the insurer — injects itself into the sacrosanct relationship between the defendant and the defendant's attorney.

The insurer injects itself into the attorney-client relationship by obligating itself to retain defense counsel for the insured and to pay defense costs, and by reserving for itself the right to control the defense and the settlement of the claim. The issues become more complicated when, for instance, an insurer reserves its right to deny the claim or finds that some of the claims alleged are uncovered. Ever more complicated issues, such as allocation of defense costs and damages, may arise when multiple insurers are on the risk for a claim involving a continuing injury that spans more than one policy year.

In this loose-leaf, one-volume legal treatise, the authors of *Defending the Insured* address a wealth of substantive, ethical and cost issues arising from the tripartite relationship in insurance defense. As with any high-quality legal treatise, they identify the most significant issues, concisely analyze the various positions that the states have taken with respect to them, and provide pinpoint case law citations in accompanying footnotes. Above and beyond that, the authors provide in every chapter, except the first and the last chapters, an appendix that lists each state's position (if any) on the pertinent issue and a citation to legal authority in the state. In addition, they dedicate an entire chapter to a detailed state-by-state analysis regarding the law concerning the selection of independent counsel.

The authors of this treatise are **John S. Pierce, J.D.; Harold Weston, CPCU, J.D., ARM; Robert G. Levy, J.D.;** and **Dawn Valentine, J.D.** Pierce is a senior partner in the San Francisco office of Barger & Wolen LLP. He has litigated a broad range of insurance law issues, including legal audits, litigation management guidelines and insurers' use of staff counsel in some jurisdictions. He

is a frequent lecturer on legal ethics and legal management issues.

Weston is clinical assistant professor at Georgia State University, Robinson College of Business in the Department of Risk Management and Insurance. Weston also is a risk management and insurance consultant. Previously, he was senior counsel at Fireman's Fund Insurance Company. His practice included coverage and insurance defense advice and representation.

Levy and Valentine also are partners in the San Francisco office of Barger & Wolen LLP. Levy has extensive experience in insurance coverage and litigation, and he has handled a wide range of general business litigation cases. Valentine has represented insurers and insureds in a variety of complex coverage disputes and specializes in advising insurers on issues related to the tripartite relationship.

*Defending the Insured* contains chapters concerning:

- Duty to Defend.
- Nature of the Tripartite Relationship in Insurance Defense.
- Use of Staff Counsel.
- Billing Guidelines.
- Legal Audits.
- Conflicts of Interest and Use of "Independent Counsel."
- Jurisdictional Survey of Independent Counsel.
- Allocation Issues Between the Insurer and Insured.
- Horizontal and Vertical Exhaustion.
- Defining the Practice of Law.
- Duty to Fund Defense Costs.

Each chapter offers a detailed analysis of important issues that may come up in the defense of an insured. For example, the chapter on the "Nature of the Tripartite Relationship" discusses,

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# Claims Interest Group

Volume 29 • Number 4 • December 2011

## Claims Quorum

CPCU Society  
720 Providence Road  
Malvern, PA 19355  
[www.cpcusociety.org](http://www.cpcusociety.org)

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## Book Review: *Defending the Insured*

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among eight distinct topics, the ethical obligations that defense counsel has to the insured and the insurer, confidential and privileged communication within the tripartite relationship, and to whom defense counsel is liable for errors in the defense. Likewise, together the chapters on "Billing Guidelines" and "Legal Audits" address 23 topics, including the ethical permissibility of the implementation of billing guidelines, constraints on billing and the exercise of independent judgment, and whether the disclosure of billing information to outside auditors waives the attorney-client privilege, or the work product doctrine protections.

This work is a valuable reference book for insurance defense counsel, insureds, insurers and judges because it addresses most of the substantive and ethical issues that come up when dealing with a tripartite relationship. It is particularly

useful for those involved in cases in different states because the state-by-state appendices will greatly reduce legal research time.

More information about this treatise, including ordering information, can be found at <http://www.aspenpublishers.com/Product.asp?catalog%5Fname=Aspen&category%5Fname=Insurance+Law+105&product%5Fid=0735555362&Mode=BROWSE&ProductType=M>. ■

The Claims Interest Group newsletter is published by the CPCU Society's Claims Interest Group.

**Claims Interest Group**  
<http://claims.cpcusociety.org>

**Chair**  
Barbara Wolf Levine, CPCU, J.D.  
Exam Coordinators Network  
Email: [blevine@ecnime.com](mailto:blevine@ecnime.com)

**Editor**  
Charles W. Stoll Jr., CPCU, AIC, RPA, AINS Cunningham Lindsey  
Email: [cstoll@cl-na.com](mailto:cstoll@cl-na.com)

**Assistant Editor**  
Donald O. Johnson, CPCU, J.D., LL.M.  
D. O. Johnson Law Office PC  
Email: [donjohnson@dojlaw.com](mailto:donjohnson@dojlaw.com)

**CPCU Society**  
720 Providence Road  
Malvern, PA 19355  
(800) 932-CPCU (2728)  
[www.cpcusociety.org](http://www.cpcusociety.org)

**Director of Program Content and Interest Groups**  
John Kelly, CPCU

**Managing Editor**  
Mary Friedberg

**Design/Production Manager**  
Joan A. Satchell, PPPC

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