CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™
ADVANCING ETHICS, COOPERATION AND EDUCATION

2014 CLM Annual Conference

April 9, 2014 – April 11, 2014

Boca Raton Resort
501 E. Camino Real
Boca Raton, FL 33432

Roundtable 2: Thursday, April 10, 2014 (11:30 am – 12:30 pm)

Publish or Perish vs. Publish AND Perish: Should Insurance Carriers Have Written Claims and SIU Guidelines?

I. So… is it BETTER to Have PUBLISHED Manuals or NOTHING in Writing?

Scene I – Take I:

A courtroom scene, anywhere in America, where an insurance company is being sued for breach of contract and bad faith, and how the claim was handled. As the scene unfolds, Susan Jones, the Claim Manager is on the stand and is being cross-examined by the plaintiff/insured's attorney.

Q: Ms. Jones, you already admitted your company has not updated its Claims Procedures Manual in at least the last four years.

A: That is correct.

Q: Do you have any idea what the industry standard is for keeping a Claims Procedures Manual updated?

A: No I do not, and to the best of my knowledge there is no requirement to even have manuals or for a time period for updating.

Q: Now, this document refers to this being a "Claims Procedures Manual," but in truth can we agree these are the standards you expect all of your adjusters and investigators to follow?

A: I believe the term "manual" is more accurate and is what the document is titled. Our company writes policies in a number of states and different states have different

requirements and state standards for claim investigation and adjustment. We provide our claims and investigative team employees with this manual to let them know what our company expects them to do in the handling or investigation of an insured's claim.

Q: So then you admit the entire purpose of this manual is to protect the company and not to make sure your insureds are being benefited by the highest quality of claims standards and procedures?

A: That is not at all what I said. At all times our company tries to put the interest of our insureds first and make certain all of our insureds are treated fairly and in accordance with our claims and investigation procedures.

Q: Ms. Jones, I am so glad you said that because I want to turn your attention to items four, seven and nine of your company's own Claims Procedures Manual guidelines for the handling and investigation of claims, and after you read that I want you to admit to this jury your company failed to follow the procedures and requirements set out in these three specific sections.

The scene fades as the claim manager looks somewhat worried and begins reading through the exhibit.

Most of you in this room probably would not like to be the claim manager depicted in the fictional video sequence scripted above. The simple answer would be all of these questions could easily be avoided by the company not having published a manual for the aggressive plaintiff's attorney to use in cross-examination… right? Well, consider the following "sequel" and see if you like its plot any better:

Scene I – Take II:

A courtroom scene, anywhere in America, where an insurance company is being sued for breach of contract and bad faith, and how the claim was handled. As the scene unfolds, Mr. Evans, the Claim Manager is on the stand and is being cross-examined by the plaintiff/insured's attorney.

Q: Mr. Evans, let me get this straight. You help run a major insurance company, writing insurance policies for thousands of people, in a number of different states, correct?

A: Yes.

Q: You oversee a large team of people who are responsible for the adjustment and investigation of insurance claims; is that also correct?

A: Yes.

Q: I assume we can agree these people have differing levels of experience, education, and knowledge.

A: Obviously I have to agree with you on some level, however, we go to great lengths to train our people and make sure everyone has a good understanding of our policies and the proper way to adjust and investigate a claim.

Q: Well, it is interesting you would say that because are you aware when we requested your company to produce complete copies of any claims or investigation standards or manuals through your attorney, you responded "none exist?"

A: Not only is your statement correct, but the answer in the interrogatories is also correct. We do not have any claims manuals or written claims guidelines.

Q: So even the most junior or inexperienced claims adjuster has absolutely no written guidelines they can turn to, to assist them in knowing the right policies and procedures to follow in either adjusting or investigating an insurance claim, is that correct?

A: Partially. While they would not have a written manual or guideline to go to, each person goes through individualized training and everyone has multiple layers of supervisors they can turn to for advice and guidance.

Q: And at a minimum, wouldn't you have to agree, with no written standards in place, it is really up to each individual employee whether a front-line adjuster or investigator, or manager or supervisor to interpret what the correct procedure is? And more importantly, that in doing so, given the fact everybody has differing opinions and interpretations, insureds are being treated differently depending upon who handles or supervises the claim they have submitted?

A: I am really not willing to agree with that as we try to make sure we uniformly handle all claims appropriately and in accordance with the policy terms and conditions.

Q: Well, can you give this jury one logical or reasonable explanation as to why your company refuses to put any type of claims or investigation standards or guidelines into writing, so they are uniformly applied?

A: I really do not know. A decision was made before I was hired by the company.

Q: Do you know how many insurance companies, similar to your own, actually do publish standards and guidelines for their employees to use in the adjustment or investigation of claims?

A: No, I do not.

Q: So, what you are telling me is you do not know whether your company is the only one with such a policy and whether other companies are, in fact, providing such valuable written standards and guidelines to protect their insureds and their employees?

A: Well, I think you are somewhat twisting what I am saying. I know there is a debate within the insurance industry as to whether or not written manuals are a good idea.

Q: Well, are you aware that until shortly before you were hired apparently your company, from what I have seen on the internet and downloaded a copy of, did have a written claims manual, but it was abolished after your predecessor was cross-examined in a bad faith trial resulting in a multi-million dollar verdict against your company about why the policies were not being followed completely?

Defense Counsel: Objection Your Honor; that is irrelevant and I move to strike the question.

Fade to black before the judge rules.

Whether the judge sustains the objection or not, the damage is done and the jury has heard not only that the company has no written standards, but in all probability the standards were dropped after a substantial verdict in a similar case for bad faith. While maybe not winning an Academy Award for screenwriting, neither of the above scenes are ones any of us present in this room would want to see played out in an actual courtroom involving ourselves or our company. The reality is cross-examination, such as depicted here, occurs regularly in courtrooms across the United States.

It is also unfair to blame overly aggressive trial attorneys, as none of the questions portrayed above are unfair or beyond the realm of potentially admissible evidence in a breach of contract or bad faith trial, including the last question, unless a proper motion *in limine* was filed by the defense counsel before cross-examination occurred.

The Debate Rages On

For decades, the debate has raged within the insurance industry as to whether, or not, a company is better protected to have written policies and procedures in place and detailed in a claims guide or claims manual versus not publishing such information to avoid it from being used or, more importantly, misused when the company is sued over a claim decision.

Viable arguments may be made on both sides of this "insurance dichotomy equation." Some of the more common are as follows:

In Favor of Published Claims Guidelines	In Opposition to Published Claims Guidelines
Establishes uniformity for the handling and investigation of claims.	Almost as soon as any manual or guide is published, it is outdated and updating is cumbersome and time consuming.
If well written, provides the company with a great opportunity to have a document which promotes fairness and correct steps to be taken by all employees at all levels in handling and investigating claims.	For multi-state carriers especially, it is difficult to draft a single manual or guide which is applicable to all policies in all states.
Avoids the potential of employees or supervisors misinterpreting policy provisions or claim and investigation steps to be undertaken.	Not having written guidelines and standards allows for more flexibility as individual claim issues and concerns may arise.
Can be used as checklist to make certain in a thorough and complete claim investigation, all required steps are followed.	With no written guide or standards, an attorney cannot claim the company failed to follow its own written standards or procedures.
In some states the local DOI may require some form of written claim investigation handling procedures.	Written manuals and procedures, whether printed or available electronically, are generally ignored and not used by staff personnel anyway.

Taken individually, any of the above statements, whether on the "pro" or "con" side, may have merit and certainly a justifiable argument may be advanced as to why the statement is correct. The reality

of the courtroom is often quite different. In the world of trial litigation both the plaintiff and defendant use whatever evidence, testimony and documentation exists to advance their position and argument before the jury. If your company has a claims manual, then it will be combed through to find each and every incident where the company failed to follow the procedures outlined in the manual to the letter in the handling of the subject claim. If your company does not have any type of published standard or guide, then that will be used against you at the trial to demonstrate the company is either so lax it has no standards or is acting in such an improper and surreptitious way it refuses to put anything in writing out of fear of being sued.

Accordingly, in the final analysis, if you signed up for this course in hope there would be a definitive answer on the question of publish or perish versus publish and perish, there is no simple answer. Advantages and disadvantages continue to exist for both options. The important thing is for your company to make an informed decision based upon all of the information available. Perhaps more importantly, your company must be prepared in advance of a deposition or trial testimony to defend the decision made by the company, effectively be able to explain why the decision was made, and have a ready and available counter-argument as to why the opposing position was considered by your company, but a different avenue was selected. This will not ensure you win every case in front of a jury, but it will certainly ensure your management and employees are prepared to address these issues in advance, and not trying to respond on the eve of a deposition or trial or, worse yet, while being questioned on the stand.

In California, at least one case, citing a treatise, has held that claims manuals may be required:

> By statute (*Ins. Code, ß 790.03, subd. (h)(3)*), insurers are required to maintain guidelines for the prompt processing of claims. By practice, these guidelines are maintained in claims manuals that "generally provide the criteria for processing claims and the procedure for reporting claims to regional or home office claims supervisors." (Croskey et al., Cal. Practice Guide: Insurance Litigation 3, *supra, P 15*:455, p. 15-98.)

Glenfed Development Corp. v. Superior Court, 53 Cal. App. 4th 1113, 1118 (1997). It is important to check your state's laws as to whether a written manual is required.

II. Are Claims Manuals (Including Computer Versions) Discoverable Evidence?

Because allowable discovery is so broad, there is little question that claims manuals will be discoverable. Among the issues that may arise, however, are how much of the claims manual is discoverable and versions for how many years back or forward must be produced when requested.

The basic discovery standard is whether the documents sought are reasonably calculated to lead to the discovery of admissible evidence. Where the claims manuals contain information as to how the claim involved in the lawsuit should be handled, this is reasonably calculated to lead to the discovery of admissible evidence regarding whether the claim was handled properly. It does not mean the manual will be admissible, but it could be. Courts regularly hold that documents, including claims manuals, relating to the handling of insurance claims, in general, or which relate to the handling of the particular claim at issue, are relevant and discoverable.

Among the issues that may arise in considering this issue are whether the attorney/client privilege protects portions of the claims manuals and whether the manuals are entitled to trade secret protection. Portions of claims manuals that are instructions regarding handling of litigation may be

protected from production, depending on whether they are deemed to be necessary communications from attorneys to the insurance company client. As to trade secrets, at most this objection is likely to allow the insurer to obtain a protective order limiting the dissemination of the information. It is unlikely to be sufficient to protect the manual against production to the plaintiff.

If the request is for many years of claims manuals to see, for example, what changes have been made over the years, the court will look at whether the request is overly broad or too burdensome to comply in addition to relevance.

The Huge Difference Between What Is Discoverable And What Is Admissible

Insurance defense attorneys are frequently asked whether, and to what extent, something is discoverable. These questions range from personal background information through financial information of the insurance company and frequently, questions about manuals and training materials.

When questions like this are asked it is never in the context of the insurance company wanting or desiring to turn over this information. The goal is always the same of trying to find out whether the plaintiff is over-reaching in requesting this type of information or data.

Most insurance defense attorneys dread being asked these questions for two reasons. First, knowledge of the broad rules of discovery and two, knowing the client really does not want this information to be discoverable. The real battle, however, will be whether the evidence is, in all probability, admissible in the pending case.

While individual state, and Federal, rules may vary slightly, written discovery, such as Interrogatories, Requests for Admissions and Requests for Production of Documents, as well as oral testimony taken by way of depositions, is subject to an extremely broad standard. Most states and the Federal courts will allow discovery to occur on any matter or legal issue which **may** lead to discoverable evidence. Courts normally interpret this clause as being extremely broad, as early on the case it is virtually impossible to know whether something **may** lead to other evidence which is discoverable.

In contrast, whether evidence is actually admissible in the case before the court or the jury is subject to a much more stringent standard of whether it is directly relevant to any issue in the pending case. The age old balancing between discovery (*i.e.*, may lead to discoverable evidence) and admissible (*i.e.*, directly relevant to a pending issue) is a legal seesaw where the judge acts as the final arbiter or fulcrum.

For these reasons, if your company does have any type of written manuals, guides or even training materials they are probably going to be discoverable. At a bare minimum, the opposing side is going to have access to those records and documents, arguing until the documents are produced and reviewed there is no way to know whether they may lead to admissible evidence in the pending lawsuit.

Often times, documents such as these may be produced first for an "in camera" inspection by the judge only. An in camera inspection simply means before the documents are turned over to the opposing counsel, the court will review them and make a decision as to whether or not the documents are themselves, or capable of leading to, potentially admissible evidence. The court may order production of all, none or some of the documents which are subject to dispute. The judge is still bound by the same standard, however, of allowing discovery of any documents which **may** lead to discoverable evidence.

Another common trend, if the court does order production of the documents, is for a confidentiality and nondisclosure agreement, and stipulated protective order, to be signed. Such agreements prohibit the plaintiff's attorney from using the documents for any purpose other than the pending case, and requires the attorney, witnesses (including experts) or anyone else associated with the case to not make any unauthorized copy of the documents, release the documents to any other party or person, and often times require the return of all of the documents at the end of the pending case. Various penalties may be assessed if the documents are improperly released, and with today's technology it is possible to produce printed copies of documents on paper which are not capable of being re-copied or scanned. It is valuable to turn these agreements into court orders for an extra layer of protection.

If your company does elect to publish, in a traditional manner or electronic format, any type of guidelines, standards or training materials, all such materials should be written with the full realization that in all probability the documents will be subject to discovery in future litigation.

For this reason, it is wise when preparing these documents to have them reviewed by not only corporate counsel and leadership, but by outside defense trial counsel who are experienced in handling bad faith cases and who can view the documents through the prism or lens of an attorney attempting to utilize information contained in the published information via cross-examination.

Keep in mind as well, documents which are extremely well written may actually be your best evidence to show a jury affirmatively the extensive steps taken by the insurance company to train its staff and employees properly and ensure every insured is treated equally, fairly and receives the highest level of claims and investigation handling. But the more detailed the written instructions are, the more likely some of them will not have been followed, either because the claim handler does not think they apply to the claim or through inadvertence. Each time that occurs, the handler or supervisor will be attacked for not following the company's own instructions. This is the constant balance.

In Today's Era, Are Documents Truly Ever Gone?

Insurance companies and many other businesses often have "knee jerk" reactions when something goes wrong. Many companies have abolished written claims manuals or guides once a senior officer goes through an unpleasant experience in a deposition or trial by having those documents used against him or her to show the company did not follow the guidelines and standards fully or correctly. Following such an experience, it is easy to go back to the company and, if high enough in the management structure, issue a decision whereby the company ceases using any type of published manuals or guides. The person making the decision is probably quite pleased thinking neither they nor anyone else on their team will ever have to undergo the unpleasant experience they went through in deposition or trial in the future.

The reality of the electronic era, however, is quite different. Many insurance companies have gone to great lengths to rid the company of copies of prior written manuals and documents they do not want used in discovery. For decades, plaintiff's attorneys have worked much more cooperatively than defense counsel in sharing information. It is amazing the number of claims manuals, which may even be five, ten or fifteen years old, which have been uploaded on the internet and are freely available to be downloaded and used for purposes of cross-examination. Your initial reaction may be if the documents are no longer being used by the company how in the world could they be relevant or admissible to a pending claim?

The answer to that question is much easier than you may assume. If a company had a published claims manual or guideline five or ten years ago, a good plaintiff's attorney may well use that document, even after the claims manager or claims or investigation staff member has been questioned and answered no such manuals or guidelines still exist. The questioning then turns to whether what **was** contained in the manual previously is still an accepted policy and practice of the company. Simply doing away with a written guideline or manual does not mean the company does not still have policies and procedures in place. Many states have claims requirements that clear claims handling standards be adopted. Eliminating a manual opens up management personnel especially to questioning as to whether what used to be contained in writing is still the policy and procedure the company expects to be followed, a fair and reasonable question in most breach of contract and bad faith litigation.

Equally fair questioning of more senior management would also include when the decision was made to move away from the written policies and procedures documents, and who authorized the decision and why. Simply saying the decision was made by someone "higher up" or "before I was hired" really does not put your company in the best possible position in terms of its credibility or integrity before the jury.

Accordingly, the analysis regarding whether to change from having a written manual, or written procedures, should be based on reasoning related to best insurance claims handling practices, not on the effect on litigation. If the decision to eliminate a written manual can be based on that reasoning, it will be easier to defend in litigation.

Similarly, there should be a good, well thought out explanation for any changes in the procedures so that, when a company representative is called on to explain the change, there will be a clear understanding of the reasons. As discussed above, vetting any changes with both inside and outside counsel can avoid unforeseen attacks in litigation and prepare for the expected.

III. Summary and Conclusion

Depending on your position with the company, you directly in conjunction with others, or the people you report to, may need to make an important decision regarding whether your company chooses to publish written guidelines and standards for the investigation and handling of claims, or take the position no such written materials should be distributed within the company. Unfortunately, there is no "right" or "wrong" answer to this question. We have attempted to explore for you fully the advantages and disadvantages to each approach.

The message we would like to leave you with, however, is the most important decision and action is not whether to publish and perish or not publish and perish, but to be prepared for either choice your company makes. Regardless of which decision your company makes concerning published guidelines and standards, you should also consider adopting a written rationale as to why the company has taken that position. The benefit of having a rationale statement is you have total control over how this document is written, and it should explain fully why the company has elected the procedure concerning manuals and guidelines it has selected. Keep in mind this document, as well, should be fully discoverable and if well written is a document the company should be very proud to have reviewed by any judge or jury. If you adopt a rationale statement, it should stress not trying to protect the company, but rather that the procedure adopted by the company and the collective management judgment provides the best way to ensure all policyholders are treated fairly and equally, and your claims and investigation teams are empowered to act appropriately or seek guidance in all situations.

Having such a rationale for the decision your company has made will also help ensure when a deposition or trial testimony takes place, the officer or employee testifying is not trying to make something up "on the fly" in answer to a question. Instead, the key people who may testify on behalf of your company should be aware of not only the corporate policy, but the rationale behind adopting the policy. This will also avoid the situation months or years later where key executives leave the company and no one truly has an understanding of the history, rationale or reasoning why the company has taken the position it has. Especially in bad faith litigation, juries become angry at insurance companies when no one can adequately explain why the corporation is doing what it is doing or how that policy was derived to ensure its purpose was to protect the insureds and not the corporation itself. These are important lessons to learn in advance, rather than when a jury returns a substantial bad faith or breach of contract verdict.

The goal of this program is to raise these issues to improve the quality of service we provide to all policyholders who entrust their insurance carrier to act in their best interest and provide appropriate coverage when it is due and owing. We also want to strengthen the position of the insurance industry when, in those appropriate cases, claims need to be adjusted and investigated leading to an appropriate denial of coverage for whatever reasons and provisions the policy may provide. In those situations, it is important that you are prepared fully when entering the courtroom for a judge and jury to understand each and every decision the insurance carrier made, and the decision was made on a rational and informed basis which can be fully and completely explained as need may arise.

We wish you the best in addressing the issue of whether to publish or not publish claims manuals and guidelines.