

Using Expert Witnesses in Bad Faith and Coverage Litigation

Overcoming Obstacles in Presenting Expert Opinion Testimony

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Today's faculty features:

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**OUTLINE OF WEBINAR: USING EXPERT WITNESSES IN INSURANCE
BAD FAITH AND COVERAGE LITIGATION**

Wednesday, August 5, 2015

1-2:30 p.m. EDT

A. Overview.

Expert witnesses play a critical role in coverage and bad faith litigation, both for policyholders and insurers. Insurance experts typically are underwriters, claims handlers, brokers, regulators and attorneys with knowledge of insurance industry customs.

Claims adjusters are typically used in bad faith litigation to opine as to the reasonableness of another claims adjuster's conduct. Underwriters are typically experts in coverage litigation providing an opinion on underwriting specific risks and the interpretation and intent of specific policy provisions.

Litigators must be careful to avoid pitfalls of using expert witnesses whose credibility might be easily attacked based on previous testimony or due to his or her relationship with a particular insurance company, or selecting a witness whose experience is very limited within the insurance industry.

We will provide counsel in insurance cases with a general overview of the evidentiary rules governing the admissibility of expert opinion testimony. We will discuss the use of expert testimony in coverage and bad faith suits, as well as the obstacles that a party may face in presenting expert testimony.

Topics:

- Which industry experts are best suited for bad faith claims and what are common challenges or objections to their testimony?

- Which industry experts are best suited for insurance coverage claims and what are common challenges or objections to their testimony?
- Under what circumstances may attorneys play a role in presenting expert witness opinions?

B. Essential Principles of First and Third Party Bad Faith Claims.

1. Types of Claims.

- Third Party Failure to Settle.
- Third Party Failure to Defend.
- First Party Failure to Pay or Delay in Paying Claim.

2. What is “Bad Faith”?¹

- California: Conduct which is unreasonable and without proper cause. *Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566 (1973).²
- Indiana: Unfounded failure to perform.³
- Illinois: Vexatious and unreasonable conduct.⁴

¹ For an early case dealing with the rationale behind allowing a tort claim for an insurance company’s wrongful handling of an insurance claim, see *White v. Unigard Mut. Ins. Co.*, 730 P.2d 1014 (Idaho 1986).

² See also Kornblum, “Insurance ‘Bad Faith’ Basics, Part I,” California Business Law Practitioner, California Continuing Education of the Bar (“CEB”), Summer 2009; “Insurance ‘Bad Faith’ Basics, Part II,” CEB, Fall 2009.

³ *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515 (Ind. 1993).

⁴ *Cramer v. Ins. Exch. Agency*, 675 N.E.2d 897 (Ill. 1996); *Scottsdale Indem. Co. v. Village of Crestwood*, 784 F. Supp. 2d 988 (N.D. Ill. 2011).

d. Other states.⁵

3. Standards for Determining “Good Faith” Claims Principles.

a. Thorough experts develop what good faith claims principles are and how they were violated or complied with in your clients’ case.

b. In *Reedy v. White Consolidated Industries, Inc.*,⁶ the Court considered the admissibility of two expert witnesses for an insured claiming that his employer acted in bad faith in denying worker’s compensation benefits. Defendant moved to exclude the two experts, but the Court denied the motion. The Court noted that the “claims adjusting procedure is . . . something about which the average juror is unlikely to have sufficient knowledge or experience to form an opinion without expert guidance, thus expert testimony would not be superfluous.” The defendant was still free to “pursue further challenges to these experts’ skill or knowledge in order to attack the weight to be accorded their expert testimony.”

⁵ See “50 State Survey of Bad Faith Laws and Remedies,” United Policyholders, October 23, 2014; “Punitive Damages Against An Insurer for the Bad Faith Handling of a First-Party Claim,” 18 Am. Jur. Proof of Facts 3d 323 (originally published in 1992). Both of these can be found at <http://uphelp.org/pubs/reports-insurance-issues-and-industry-practices>.

⁶ 890 F. Supp. 1417, 1447 (N.D. Iowa 1995).

- c. But be prepared. Some courts may not welcome this testimony. In *Schifino v. GEICO General Ins. Co.*, No. 2:11-cv-1094, 2013 WL 2404115 (WD. Pa. May 31, 2013), the court granted a motion *in limine* as to plaintiff's expert on claims handling because "the concept of bad faith is within the ken of the average layperson such that expert testimony is not necessary in this matter. A reasonable juror certainly possesses the requisite knowledge to assess the bad faith allegation, which is equally neither complex nor scientific. Rather, the claim includes whether GEICO has a reasonable basis for the manner in which it handled Plaintiff's claim, an issue within the province of the jury as its role as factfinder. Accordingly, GEICO's motion is granted, and the Court hereby precludes any expert witness testimony from [the witness]."

Comment: If you read the opinion it appears that plaintiff's counsel did not properly structure the areas for the witness' testimony, offering him on legal issues and industry practice based on personal opinion rather than experience.

- d. In contrast, see the Ninth Circuit's opinion in *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F. 3d 998 (9th Circ. 2004), in which the court held that plaintiff's expert was qualified to testify, observing that the standards set out in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1997)

did not apply “to this kind of testimony, whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it.” 373 F.3d at 1017 (citation omitted). The Court held that the “minimal foundation of knowledge, skill and experience” was met to permit the expert to testify “on the practices and norms of insurance companies in the context of a bad faith claim.” *Id.* at 1016.⁷

4. Anticipate or Establish Defenses.

- a. Experts establish that conduct was reasonable, or met the “good faith” claims handling principles.
- b. Using or challenging the “Genuine Dispute” doctrine through experts. *See Wilson v. 21st Century Ins. Co.*, 171 P.3d 1082 (Cal. 2007).
- c. Support for your case for punitive damages: “extreme deviation” from custom and practice.”
 - 1) *See Walston v. Monumental Life Ins. Co.*, 923 P.2d 456 (Idaho 1996) (expert’s testimony that failure to correct problem in claims handling, or warn the public, was an “extreme deviation from the customary practice in the industry”).

⁷ *See also Hanson v. Mutual of Omaha Ins. Co.*, 2003 WL 26093254 (D.S.D. 4/29/03) (lawyer with 40 years of representing insurance companies and with knowledge of claims handling could testify on insurance claims issues because his experience demonstrated that his opinions were not based on speculation; some opinions not admissible because they could not be traced to his knowledge of industry standards).

C. Identifying Expert Issues.⁸

- 1. Claims investigation – diligent, thorough, fair, objective.**
- 2. Customary claims practices/Industry Standards.**
 - a. Fact of compliance does not mean “good faith.”
 - b. Custom and Practice may violate.
- 3. Use of Resources.**
- 4. Communication.**
- 5. Evaluation of Claim.**
 - a. Coverage issues.⁹
 - 1) Can an expert testify that policy language is ambiguous, i.e. subject to two reasonable interpretations?
 - 2) Can a party present testimony from an underwriter or someone experienced in policy drafting about the language of a policy?
 - a) What if the underwriter from the company testifies about how it was chosen and that research was done to make sure it was clear?

⁸ G. Kornblum, “Using the Claims Expert in Extra-Contract Actions Against Insurers,” 51 Ins. Counsel J. 185 (1984).

⁹ Byers and Shuchart, “Use of Experts in Coverage and Bad Faith Litigation,” 18th Annual Insurance Symposium, Dallas, Texas, April 1, 2011.

- b) Or can the policyholder present similar evidence from someone experienced in policy drafting that the language is not clear, and that there were better choices?
- c) Can a policyholder present expert testimony that the placement of an exclusion is not conspicuous, plain and clear (and thus not enforceable)?

b. On the merits.

- 1) Can an expert in claims testify about how a claims person would reasonably interpret and apply policy language?

6. Decision Making Process.

7. Supervision and Review.

8. Claims Training.

9. Claims Manuals and Written Procedures

D. Some Basics:

1. When Do I Need an Expert on Claims Handling?

- a. What types of cases/issues?
- b. Are they required? *See, e.g., Bergman v. USAA*, 742 A.2d 1101 (Pa. Super. 1999)(court refused to

adopt a blanket rule requiring expert testimony in all cases involving bad faith claims).¹⁰

2. Retain your expert early.

- a. Early file review; make sure he/she is comfortable with your client's position – no surprises.
- b. Early retention enhances credibility/reflects well on your client.
- c. Assistance in developing case theories; questions of claims personnel and preparation of witnesses (for insurer); questions for claims personnel or adverse experts (plaintiff).
- d. Preparation for testimony begins at retention.

3. Where do I find an expert?

- a. Make sure the expert can qualify.
 - 1) *Furr v. State Farm Mut. Auto. Ins. Co.*¹¹ was a case in which an expert attorney witness held a degree from Stanford and a law degree from U.C. Hastings College of Law. By the time of the trial, the witness had 17 years of experience of representing insurance companies. He further testified that he “continuously [had] been involved as

¹⁰ Wolfson and Bourhis, “Do You Need an Expert to Prove Bad Faith?,” www.dllawgroup.com/Do-You-Need-An-Expert-To-Prove-Bad-Faith.shtml

¹¹ 716 N.E.2d 250, 258 (Ohio App. 6th Dist. 1998).

far as teaching, instructing lawyers, claims people, different individuals in the area of insurance, [had] given numerous seminars” The Court found that the expert testimony was appropriate because it “relate[d] to matters beyond the knowledge or experience possessed by laypersons or dispels a misconception common among laypersons.”

- 2) In *California Shoppers, Inc. v. Royal Globe Ins. Co.*,¹² California Shoppers and its shareholders sued Royal Globe, its insurance carrier, for bad faith refusal to indemnify the insured for monetary loss arising from a judgment against it in one lawsuit and bad faith failure to defend another suit. The court determined that the insured’s bad faith expert, a lawyer who represented policyholders, did not qualify as an expert in bad faith coverage cases. According to the court, “no foundation whatsoever was laid to demonstrate that [expert] had any special knowledge, skill, experience, training or education such as would qualify him as an expert on insurance company practices. The expert had never been hired, nor ever retained as counsel, by an insurance company. The court applied *Kumho* to

¹² 175 Cal. App. 3d 1, 66, 221 Cal. Rptr. 171 (Cal. App. 4th Dist. 1985).

determine the admissibility of the expert's nonscientific evidence.¹³

- b. Internet cites.

Examples:

www.jurispro.com/badfaith

www.almexperts.com

www.seakexperts.com

[www.hgexperts.com listing/Expert-Witness-Insurance.asp](http://www.hgexperts.com/listing/Expert-Witness-Insurance.asp)

- c. Reported Cases.
- d. Industry Organizations.

4. Who Makes a Good Expert?

- a. Qualifications and Experience in the field.¹⁴
- b. Communication skills.
- c. Ability to educate -- simple, plain language.

¹³ Within the insurance context, nonscientific evidence includes subject matters such as bad faith, policy interpretation and claims-handling. Federal courts have increasingly applied the *Kumho* analysis of *Daubert* to nonscientific evidence. Thomas F. Segalla, Joseph M. Hanna, *Bad Faith: The Admissibility of Expert Testimony and the Challenges that Follow*, Goldberg Segalla LLP, available at: <http://www.thefederation.org/documents/3%20Bad%20Faith.pdf>.

(“For example, in *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir. 1998), the Fifth Circuit sitting *en banc* likely applied *Daubert* too rigidly when it held that the district court had discretion to exclude the causation testimony of the plaintiff’s clinical physician because there existed an “analytical gap between the causation opinion and the scientific knowledge and data that were cited in support.” “Courts that have applied *Daubert* broadly have demonstrated that, as a general framework, *Daubert* plays an important role in requiring experts to do more than ‘come to court with their credentials and a subjective opinion.’”)

¹⁴ For a classic example of a lawyer who does not qualify to testify as an expert on insurance issues, see *California Shoppers, Inc. v. Royal Globe Ins. Co.*, *supra*.

- d. Lack of adversarial propensities.
- e. Demeanor: Likeable.

5. Stay away from “legal” testimony.

- a. The policy language in question is ambiguous.¹⁵
- b. Common interpretation of policy language.¹⁶
- c. The application of policy language.

- 1) *Coregis Insurance Co. v. City of Harrisburg*¹⁷: In this case, a Pennsylvania court was presented with an expert report which purportedly was submitted to assist with the “reconstruction” of alleged lost policies. However, the report went on to address the issue before the court: namely, whether the insurer was obligated to provide its insured with a defense and indemnity for the underlying claim. The district court found that the expert’s ultimate opinions represented inappropriate legal conclusions about the proper means of interpreting the insurance policies at issue and whether they provided coverage for the underlying claim.

¹⁵ *Green Machine Corp. v. Zurich Am. Ins. Group*, No. CIV. A. 99–3048, 2001 WL 1003217 (E.D. Pa. Aug. 21, 2001), aff’d. 313 F. 3d 837 (3d Cir. 2002).

¹⁶ *See Seneca Ins. Co. v. Wilcock*, No. 01 Civ. 7620(MHD), 2007 WL 415141 (S.D.N.Y. Feb. 25, 2007) (expert could testify to meaning of policy term that has a specialized meaning in industry).

¹⁷ 401. F. Supp. 2d 398 (M.D. Pa. 2005)

“[The expert’s] legal analysis reads as though it were stripped directly from [the insured’s] legal papers filed in this case in order to bolster the [insured’s] argument that Anthem somehow represents binding law on the proper scope of ‘bodily injury’ coverage.”

- d. How claims handlers are trained to apply policy language.
- e. The use of industry references.¹⁸

6. Concentrate on “good faith” claims principles formed by cases, statutes and regulations.

- a. The Northern District of Iowa, citing multiple Eight Circuit decisions, has held that the “claims adjusting procedure is also something about which the average juror is unlikely to have sufficient knowledge or experience to form an opinion without expert guidance, thus expert testimony would not be superfluous. Furthermore, such testimony does indeed relate to issues in the case.”¹⁹
- b. In *Kraeger v. Nationwide Mut. Ins. Co.*, the Court excluded the insured’s bad faith expert on a motion *in limine*.²⁰ The Court discussed the following factors: (1) testimony about the practice

¹⁸ C. Miller, “The Scope of Expert Testimony in Insurance Bad Faith Cases: Can the Expert Testify on the Meaning of the Insurance Policy?” 15 Connecticut Insurance Law Journal 1 (2008).

¹⁹ *Reedy v. White Consolidated Industries, Inc.*, 890 F.Supp. 1417, 1447 (N.D. Iowa 1995).

²⁰ No. 95-7550, 1997 WL 109582 (E.D. Pa. Mar. 7, 1997).

of insurance claim management and evaluation, along with statutory or regulatory standards to be met by insurance companies, can be helpful to the jury's evaluation of whether a claim was handled in bad faith; (2) the expert cannot derive legal conclusions that the insurer violated a statute or displayed bad faith; (3) the expert witness' testimony provides that, based on expert's expertise and experience, the insurer did not act reasonably.²¹

7. Use internal documents to establish standard.

8. Look at industry custom and practice.

- a. The Colorado Court of Appeals ruled that expert testimony can be taken into account to determine “whether an insurer had acted unreasonably in denying or delaying approval of a claim” based on the industry standards of conduct.²² In *South Park*, the insured presented expert testimony from a claim consultant with more than twenty years of experience in the industry. The witness testified that the reasonableness of an insurance adjuster's determination of coverage should be assessed based on “the things an adjuster ordinarily does

²¹ Thomas F. Segalla, Joseph M. Hanna, *Bad Faith: The Admissibility of Expert Testimony and the Challenges that Follow*, Goldberg Segalla LLP, available at: <http://www.thefederation.org/documents/3%20Bad%20Faith.pdf>.

²² *South Park Aggregates, Inc. v. Nw. Nat. Ins. Co. of Milwaukee, Wis.*, 847 P.2d 218, 225 (Colo. App. 1992) (citing *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985)).

and reasonably does” according to industry standards.²³

- b. In applying Michigan law, the Sixth Circuit held in *North American Specialty Ins. Co. v. Myers* that “no case of which this court is aware, imposes a duty on an insurer to deliver the policy promptly where the policy is already in effect; *there is no general duty to comply with industry standards.*”²⁴

9. Communication with Expert (protections of Rule 26(b)).

E. Scope and Limitations of Opinions.

- 1. How far will your jurisdiction allow your expert to go?
- 2. Application of the “Ultimate Opinion Rule.”
 - a. Whether there is coverage?
 - 1) Claims handler’s interpretation of coverage.
 - b. What is “bad faith”?
 - c. State of mind of claims handlers?
 - d. Lack of reasonable claims handling?²⁵

²³ *Id.*

²⁴ 111 F.3d 1273, 1284 (6th Cir. 1997) (emphasis added).

²⁵ For a discussion of the basis for allowing a claims expert for the insured in a commercial coverage case, see *United States Fire Insurance Company v. Button Transportation, Inc.*, No. A108419, 2006 WL 1085782, (Cal. App. 1st Dist. April 26, 2006) (unpublished). See also Bailey and Kornblum, “Expert Witnesses in Insurance Litigation: Should I or Shouldn’t I, and If so, When and How,” *Trial Magazine*, 2000, available at <http://www.amazon.com/Using-insurance-experts-faith-cases/dp/B0008GVWFS>.

- 1) In *Bello v. Merrimack Mut. Fire Ins. Co.*, the insured introduced an expert witness to prove the insurer's bad faith in calculating damage borne from wall repairs.²⁶ The appellate court was faced with the issue of determining whether such expert testimony amounted to a 'net opinion.' The expert testimony attested to the unreasonableness of the depreciation discount used by the insurer in calculating the cash value of the alleged loss. During cross-examination, the expert witness admitted he had never done fixed-depreciation calculation, and the insurer argued that, because of this lack of experience, the witness testimony was nothing more than a net opinion. The court rejected this argument, however, and concluded that the trial court's exercise of discretion was appropriate because testimony was given only with regard to how the discount was not properly backed up with justification, rather than challenging the exact discount amount.
- 2) In *Lydon v. Chubb Grp. Of Ins. Cos.*, the plaintiff-insured filed a claim with his homeowner's insurer after his home was destroyed by fire.²⁷ The trial court partially

²⁶ No. A-4750-10T4, 2012 WL 2848642 (N.J. Super. App. Div. July 12, 2012) (per curiam).

²⁷ No. A-4344-09T1, 2012 WL 3731811 (N.J. Super. App. Div. Aug. 30, 2012 (per curiam) (unpublished).

dismissed the bad faith claims raised by the plaintiff and also rejected the expert testimony from a claims handling expert. The testimony stated that the insurer's claims handler violated the Insurance Trade Practices Act, among various allegations of bad faith coverage. The appellate division reversed, holding that the testimony's claim that the insurer violated the ITPA was clearly relevant to determining the insurer's bad faith. In so ruling, the court pointed out the trial judge's error in reasoning that admitting the expert would have "downgraded" bad faith requirements to mere negligence standards: while it was specifically the judge's duty to define bad faith, the admissibility of evidence was irrelevant to such a duty.

- 3) In *Jordan v. Allstate Insurance Company*,²⁸ the court admitted expert witness testimony offered by the insured regarding the insurer's violation of the Unfair Insurance Practices Act. Although the insurer argued that the Act "cannot provide the basis for a bad faith action," the court found that the insured's claim was actually for common law breach of the implied covenant of good faith and fair dealing, and the insured was

²⁸ 148 Cal. App. 4th 1062, 1077, 56 Cal. Rptr. 3d 312, 323 (Cal App. 2d Dist. 2007).

merely relying on the expert testimony about the insurer's violation of the Act "for the purpose of providing *evidence* supporting her contention that Allstate breached the implied covenant by its actions."

3. Standard or Customary Practice in the Industry.

- a. Some courts have held that opinions about standard practice in the industry are irrelevant because there is no duty to comply with standard industry practice. *See Dinner v. United Services Auto. Ass'n Cas. Ins. Co.*, 29 Fed. Appx. 823, 827 (3d Cir. 2002)(unpublished)(insurer's acts defined as 'unfair or deceptive acts or practices,' in violation of the Unfair Insurance Practices Act, are not necessarily 'bad faith' practices for purposes of bad faith insurance claims; therefore, bad faith expert testimony on insurer conduct, standard business practice or violation of regulatory law is irrelevant and prejudicial to the issue whether the claim was unreasonably denied.)
- b. Other courts have held that an expert can make reference to the law/regulations without running afoul of the rule that only the Court instructs the jury on the law.
 - 1) *Ford v. Allied Mut. Ins. Co.*, 72 F.3d 836, 841 (10th Cir.1996) (that "expert

witness for [the defendant] was permitted to testify” to “*the issue of bad faith*” by showing that the defendant relied on both “Iowa law” and “industry practice that before there is payment ..., one looks at the total coverage available at the time of the accident” (emphasis added)).

4. Opinions that are Speculative.

- a. Failure to settle where there was never a demand within limits, or the insured was not pressing to settle, or where the plaintiff was not interested in settlement.
 - 1) In *Brown v. Auto-Owners Ins. Co.*, the Fourth Circuit held that the district court did not abuse its discretion in refusing to admit a bad faith expert’s testimony that lacked scientific data or reasoning to support its findings.²⁹ The trial court “must determine whether the expert’s testimony is based on scientific knowledge that will assist the trier of fact in understanding or determining a fact in issue.” The court deemed this to “include assessing whether the methodology and reasoning underlying the testimony is scientifically valid and can be properly applied to the facts. The court found that, in

²⁹ No. 96-2613, 1997 WL 547975, 121 F.3d 697 (4th Cir. 1997) (unpublished).

this case, the expert testimony was based conclusively on subjective belief on the cause of the accident that triggered coverage. In determining that the testimony was wholly based on personal opinion without mathematical calculations or scientific methodology, testimony could not be admitted for a trier of fact to consider.

5. Contradictory Opinions.

- a. In *Hyde Athletic Indus., Inc. v. Cont'l Cas. Co.*, a bad faith expert's testimony was precluded due to the inconsistencies between the expert's deposition testimony and his affidavits.³⁰ It drew support from Third Circuit case precedent allowing the Court to "disregard [an] affidavit that contradicts sworn deposition testimony in determining existence of a genuine issue of fact."³¹ Moreover, the Court was "concerned that [expert]'s opinion would be inadmissible at trial under Federal Rule of Evidence 702 because it may not meet the standards outlined in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* . . ."³²

F. Themes for your expert to promote

1. Policyholder themes.

- a. Insurer's goal is to make money.

³⁰ 969 F. Supp. 289 (E.D. Pa. 1997).

³¹ *Id.* at 298.

³² *Id.*

- b. Policies designed to give insurer opportunities to deny claims; claims process has built-in impediments and delays; policy language is unnecessarily complex and confusing.
- c. The claims person made numerous errors; while one error might be an innocent mistake, repeated errors must be intentional/bad faith; insurance company admitting to mistakes now simply because it was caught red-handed.
- d. Adjusters are less than candid, doing the bidding of the company.
- e. David v. Goliath; the only way to send a message to the insurance company is through a large award.

2. Insurance Company Themes.

- a. An insurance policy is a contract, with limits to what is covered, but an insurance company always looks to find coverage within what is reasonably permitted by the insurance contract.
- b. Claims handling is really customer service, and without good customer service, the insurance company will not succeed; the insurance company went to great effort and expense to adjust the claim.
- c. The insurance policy places duties and obligations on both parties; the insurance company honored the contract more than the insured.

- d. Insurance companies are not perfect; they are human, can make mistakes or misunderstand without being unreasonable; trying to do their job honestly and properly; trying to help others; admit to mistakes/apologize/lessons learned.
- e. Large awards against insurance companies just cause everyone's premiums to go up.

G. Trial Preparation.

- 1. Order of Witnesses: Where Does the Expert fit in?**
- 2. Testimonial Presentation: be concise; the long-winded expert and/or the tedious presentation will lose the jury and possibly anger them.**
- 3. Prepare for the tough questions.**
- 4. Graphics, Timelines, Exhibits, Power Point and Visual Aids.**

H. Use of Experts in ADR

- 1. Talking directly to opposing counsel and the opposing party.**
- 2. Making a strong impression.**
- 3. Demonstrate you are prepared to take case to trial.**

I. What Do I say in Expert Disclosure?

- 1. What do I not say?**
- 2. Stick with admissible descriptions.**

3. Sample Disclosure:

Mr. Kornblum will provide expert testimony on the following: Whether CSAA in providing coverage to its insured followed the customary good faith claims practices in responding to the insured's claim under the policy issued, including the following: a) the insurer's response to the initial claim; b) the insurer's actions with respect to conducting a good faith investigation into the nature and extent of the loss, including the use of experts to assist in such; c) the insurer's actions taken to prevent further loss or damage occurring at the insured's home; d) whether the insurer met the requirement of Insurance Code §790.03(h)(3) regulating the investigation of a claim such as that made by its insured; e) the insurer's evaluation and coverage decisions and whether they met the good faith principles in assessing the claim of its insured; f) the insurer's communications with its insured, and whether such complied with the good faith claims principles; g) the insurer's processing, staffing and management of the claim of its insured as it relates to the good faith claim handling principles applicable to the claim at issue; h) whether the payments made by CSAA to its insureds were payments under the policy or

made as CSAA's response to a potential extra-contractual claim.

J. Some Final Points³³: What to Consider in Proffering or Opposing Expert Testimony:

- 1. The expert's experience in the insurance industry. Experience dealing with the specific issues involved in the bad faith action enhances the likelihood that the expert will be deemed qualified. The expert must articulate why his experience elevates his opinion on industry standards above and beyond speculation, subjective reaction, or a recitation facts and legal arguments, i.e. his opinion must be based on his education, training and experience, surpassing mere personal opinion.**
- 2. More than one expert is helpful, but cumulative expert testimony will normally not be allowed.³⁴ If more than one expert is used, they need to have different perspectives – claims handling vs. underwriting procedure for example.**
- 3. Stay away from anything that resembles a legal opinion. Couching the testimony in terms of good faith claims practices, or customary claims handling (which may or may not be consistent with good faith claims practices are or should be) is a preferred way to offer this testimony.**

³³ Adapted and modified from Cohen and Bittick, "The Use and Misuse of Expert Testimony in Bad Faith Actions," Insurance Coverage Litigation, Committee CLE Seminar, February 28-March 2, 2013, Tucson, Arizona, p. 16.

³⁴ Rule 403, Federal Rules of Evidence.

- 4. The expert may refer to “the law,” e.g., statutes or regulations if a) they serve as a background for the development of good faith or customary claims practices, or b) are the basis from which these good faith claims practices have evolved.**
- 5. The expert is likely not going to be able to testify about another’s state of mind, or motives. However, the expert may be able to testify that the claims handling by the insurer was a “substantial deviation” from customary good faith claims practices or industry standards, thus setting the stage for counsel to argue that this “substantial deviation” should establish a basis for the claim for conduct that rises to the level of the punitive standard.**
- 6. Claims experts are subject to impeachment on the same basis as any other witness – particularly if the party or party’s lawyer frequently uses the same expert.**