The Adjuster's Deposition

Trial Strategy from the Plaintiff's Perspective

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Professional Experience
Attorney, 1977 – *present* – practices in Austin and surrounding areas. Practice limited to the area of civil litigation with primary emphasis in personal injury and insurance disputes. B.A. in Psychology with from University of Texas in 1974 and his JD from the University of Texas School of Law in 1976. Board Certified in Personal Injury Trial Law since 1991 and admitted to practice law before the Fifth Circuit Court of Appeals, the Western & Eastern Federal District Court of Texas.

Professional Associations
State Bar of Texas, Austin Bar Association, Capital Area Trial Lawyers Association, Texas Trial Lawyers Association, sustaining member and director, American Association for Justice, American Board of Trial Advocates, associate member, Texas Super Lawyers 2011

Seminars and Publications
Texas Auto Policies, University of Texas School of Law, Car Wreck Seminar-June, 2007, August, 2008, & August, 2009

Interpreting Auto Policies, Texas Trial Lawyers Association, Car Wreck Seminar-November, 2007

Recent Developments in Insurance Law, Capital Area Trial Lawyers Association Luncheon- March, 2008

Pleading Damages Within Insurance Coverage, State Bar of Texas, Strategies for Damages and Attorney's Fees Seminar- February, 2010; Damages in Civil Litigation-February, 2011 & February, 2012

Summary of UM Benefits and Actions, Texas Trial Lawyers Association, Car Wrecks Seminar, June, 2010

Auto Insurance Coverage and *Summary of UM Benefits and Actions,* University of Texas School of Law, The Car Crash Seminar- August, 2010

Texas Auto Policies, Texas Trial Lawyers Association, Car Wrecks Seminar- September, 2010

Helping Clients with their Expectations, University of Texas School of Law, 2011 Car Crash Seminar- August, 2011

Texas Auto Coverage in a Nutshell, 11:2 J. Tex. Ins. L. 20 (Summer 2011)

Stowers-A Modest Proposal, 11:3 J. Tex. Ins. L. 8 (Winter 2011)

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I. INTRODUCTION

As plaintiff's counsel, we enjoy an advantage (besides being on the side of the Angels) - we get to pick our fights. If we don't like the case or the client, we do not have to accept it. We do not, however, benefit from the fight – we benefit from its conclusion. Until the fight is over, our deserving clients, and often their hard-working attorney, don't get paid. So everything we do in a case needs to be aimed at concluding the fight. This includes depositions.

In our office we have two cardinal rules about accepting a case or client. First, during our initial interview, if we do not hear a story that moves us—that compels us toward action, we decline the case. If we do not see the immediate injustice in the client's plight, we will not be able to persuade a jury. Secondly, we do not rely on discovery to make the case. If we cannot garner sufficient evidence prior to filing suit to make a compelling case, we will not file the lawsuit. Discovery is necessary, and will hopefully add to what we already have, but after many hard lessons, we have learned not to count on it.

When we accept a case, we immediately begin to prepare for trial. Everything that follows is aimed in that direction: What is our client's story? What evidence do we have to tell that story? What evidence will dispute it? What will the jury charge look like? Most cases will settle before trial, but a focus on trial preparation is essential. It's impossible to predict which case will only be resolved by a verdict.

Consequently, the adjuster's deposition, including the decision to take the deposition, must fit into the trial strategy.

A. Do We Sue the Adjuster?

Generally, we would rather not sue the adjuster. We hate to say this to our brothers and sisters on the defense side of the docket, but no one likes insurance companies. Most of the cases in our office involve auto or homeowner's claims, so we generally represent an individual who jurors will likely identify with. Given a choice, we would rather keep the fight between David and Goliath. We really do not want a David on the other side. Naturally, adjusters are "persons engaged in the business of insurance"[1] and can be sued if their misdeeds contributed to the problem. For those of us who avoid federal court, it may be necessary to invite the adjuster to the party. Otherwise, we would rather just have them as a witness. We have seen jurors sympathize with the adjuster. We have even been scolded by a juror after the trial for being too rough on the poor lady during cross examination. If the adjuster's testimony helps our case, and it usually does, it's because they are just following orders, doing things the way the company wants them to. If they are truly unsympathetic creatures, then their attitude carries over to the carrier. They are the face and voice of the Company.

B. Factual v. Legal Disputes

In many insurance disputes, the facts are not in issue. We all agree the house burned down, and that no one had lived in it for 45 days. We do not agree whether the policy's vacancy exclusion applies. This is a legal dispute, decided by the court and will likely resolve on summary judgment. If the legal dispute is truly unresolved in the main stream of our jurisprudence, there is no exposure to the carrier for "bad faith."[2] In this type of case, we can likely take the insurance company's corporate rep's deposition to discover their "legal contentions," but why bother? The carrier will tell us their legal contentions in their pleadings, their response to our Request for Disclosure, or ultimately in their motion for summary judgment. Whatever we are told in a deposition, can change later. Deposition answers are discovery responses[3], and discovery responses can be amended or supplemented.[4]

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[1] Tex. Ins. Code § 541.002, *Gasch v. Hartford Acc. & Indem. Co.*, 491 F.3d 278, 283 (5th Cir.2007).

[2] *Oram v. State Farm Lloyds*, 977 S.W.2d 163, 167 (Tex.App.–Austin 1998, no writ hist) and *U.S. Fire Ins. Co. v. Williams*, 955 S.W.2d 267 (Tex.,1997).

[3] See *Titus County Hosp. District/Titus County Memorial Hosp. v. Lucas*, 988 S.W.2d 740 (Tex.,1998). Unlike other discovery responses, deposition testimony need not be supplemented.

[4] *Concept General Contracting, Inc. v. Asbestos Maintenance Services, Inc.*, 346 S.W.3d 172, 180 (Tex.App.–Amarillo,2011, rev. denied)

Even if they were set in concrete, the only legal opinion that counts is the courts.[5]

On the other hand, if the legal issue has been largely resolved by statute or case law and the carrier is relying on a position that is clearly untenable, then it makes perfect sense to explore the legal issues with the corporate representative.

Factual disputes abound, however, in most first party claims. It is in these cases that the adjuster's deposition comes to the forefront. Most of our "bad faith" cases are filed simply as violations of the Insurance Code, primarily Tex. Ins. Code § 541.060 claims handling violations and/or delay of payment violations under Tex. Ins. Code § 542. These claims are based on decisions that the adjuster made in handling the claim. Naturally, there are rules that apply to adjusting claims, so the deposition is aimed at determining how well these rules were followed.

C. Preparing For the Deposition

By the time we are preparing for depositions, our case is much more focused. We will have done our initial investigation—gathered official reports (fire and police), reviewed the documents our client has brought us (policy, letters from the carrier, etc.), and obtained and thoroughly reviewed the claims file. We will have also checked with www.publicdata.com, or some similar service to see if our client has anything in their background we should be aware of. Hopefully, we will have a pretty good idea of what the court's charge will look like at the end of the case. Without this extensive review, we are not ready to depose anyone on the opposing side. Once this preliminary examination is complete, the next step is to decide whom to depose.

Often there is more than one adjuster in a case. There may be an investigator as well. The correspondence with our client, the claims file and the carrier's response to our Request for Disclosure should identify the person or people we initially need to depose. The next step is to analyze what we need from the deposition. A look at our likely court charge is a good place to start. In the final analysis we want favorable answers to our jury questions. Our discovery should be focused on that result.

Whether the adjuster is a party to the lawsuit or simply a witness, the objective is the same. Ultimately, we want the finger pointed at the carrier—at Goliath, not David. These broad themes are the goal:

-The claim was handled in a manner consistent with the carrier's standards and policies,

-There is no criticism of the way the claim was handled either by the adjuster or anyone supervising him.

-If a similar claim were to come across their desk tomorrow, it would be handled in much the same manner.

-There are rules applicable to claims handling that everyone agrees must be followed.[6]

D. The Deposition

Have exhibits prepared to mark and identify during the deposition. Include relevant pages of the claims file, official reports from police and fire, letters, policy language—any document that will be referred to in the deposition. Arial photographs from Google Earth can be invaluable in some cases. Additionally, if the deposition is worth taking, it is probably worth videotaping. There are nuances in voice, timing and appearance that just won't show on a transcript.

Every attorney of any experience has their own style and method of taking depositions. Do you take a discovery deposition or a trial deposition? In other words, are your questions open ended or leading and challenging? How much biographical detail do you want? Some of the most experienced trial attorneys take the shortest depositions. It is beyond the scope of this paper, and a bit presumptuous as well, to offer advice on these matters. Do what you been doing that works well for you.

II. SUGGESTED OUTLINE

A. **General introduction and background information**
   1. Biography (family, education, job history)
   2. Material reviewed in preparation for the deposition (detailed)

B. **Professional**

[5] *Dickerson v. DeBarbieris*, 964 S.W.2d 680, 690 (Tex.App.–Houston [14 Dist.],1998, no writ hist.)

[6] Suggested reading: RULES OF THE ROAD, Rick Friedman and Patrick Malone (Trial Guides, 2007)

1. Length of time in the profession
2. Different positions held with different companies
3. Classes taken
4. Certifications held
5. Familiar with licensing requirements – detail
   a. Tex. Ins. Code § 4101.053
   b. Familiarity with Tex. Ins. Code § 541, Tex. Ins. Code § 547, Subchapter A, Tex. Ins. Code § 542, Subchapter E, Tex. Bus. & Com. Code, § 17 (required by Tex. Ins. Code § 4101.059)
   c. Place listed on the license where adjuster "conducts transactions under the license" Tex. Ins. Code § 4101.151
   d. List of insurance claims the adjuster is licensed to handle. Tex. Ins. Code § 4101.102
6. Rules that govern claims adjustment
   a. The adjuster must attempt in good faith to effectuate a prompt, fair, and equitable settlement once liability for the claim becomes reasonably clear;
   b. The adjuster must promptly provide a reasonable explanation if the claim is denied or compromised;
   c. The adjuster must promptly affirm or deny coverage, or in the alternative, submit a reservation of rights to the policyholder;
   d. The adjuster must **not** misrepresent to a claimant a material fact or policy provision;
   e. The adjuster must **not** refuse or delay a first party payment because of a potential third party claim;
   f. The adjuster must **not** attempt a full release for partial payment;
   g. The adjuster must **not** refuse a claim without a reasonable investigation;
   h. The adjuster must not, with narrow exceptions, require federal tax returns as a condition of settlement[7]
   i. The timing deadlines set out in Tex. Ins. Code § 542. (This section does not create individual liability on the adjuster as it is directed to "insurers." Still, carrier's act through their adjusters)
   j. Get agreement on each element, unless you are lucky enough to get disagreement)
7. Other documents relied upon in evaluating claims. (carrier's claims manual, industry guidelines, TDI publications, seminar material, etc.)

C. **The claim in issue**

1. Time line (date of loss, date of notice, denial letters, etc.)[8]
2. Identify the documents that relate to the testimony as it progresses (make sure they are marked and attached for later use).
3. Reasons for the delay or denial – identify the documents that support this position – be exhaustive – give pause and make sure the jury knows the adjuster is being given every opportunity to tell his side. In trial, if they come up with something new, it will lack credibility.
4. Review documents which contradict the adjuster's position. Identify each and ask if they were considered. How much or how little weight and the reasons.
5. Investigation of the plaintiff. What did they do? What did they learn? How did this information impact their decisions?
6. The claims file.
   a. How was it created? Identify everyone whose written input is in the file. Often there are initials or only one name. Get a full identity on everyone.
   b. What was the role each identified person played in the claim's process?
   c. Verify the timeline from the file and mark it as an exhibit. Get the adjuster to agree that it is accurate, or correct what they don't agree with.

[7] The requirements are all set out in Tex. Ins. Code § 541.060. If the case is later tried, these rules can be used to remind the jury that rules everyone agrees to were broken. Again reference is made to RULES OF THE ROAD, a very useful trial guide.

[8] Thanks to Mark Ticer for this excellent suggestion. See "*A Stake in the Heart of the Vampire*" Ticer, M. http://www.ticerlawfirm.com/

d. Explain any unfamiliar terms or abbreviations (the goal is to be able to use pages from the claims file as an exhibit).

7. Their own assessment of how the claim was handled. (These questions go to a lot of issues—"knowing" violations under Tex. Ins. Code § 541, company ratification of adjuster's actions, general arrogance, etc.)

a. Do they have any misgivings about the way they or their company handled the claim? If so (unlikely), what did they do to correct the problems?

b. Did any supervisor disapprove of anything they did? Approve? Did the way they handled this claim generally comport with the way the company wants claims handled?

c. If a similar claim came across their desk tomorrow, would they do things the same way?

d. Scope and course of the adjuster's employment is implied by all of the above, but we might as well nail it down. Was all of their work on this file within the scope and course of their employment?

D. **Concluding the Deposition**

1. Have you understood all of my questions?
2. Have I been courteous to you?
3. Are there any answers you have given that as you have thought about it more, you would like to change?
4. If there is a negative answer to any of the above, clean it up as best you can.

III. LEGAL ISSUES SURROUNDING THE DEPOSITION

A. **Objections to discovery**

1. Work Product Privilege.

Work product is defined by Tex. R. Civ Proc. 192.5 as material prepared, mental impressions developed or communications made in anticipation of or during litigation. If any of the above is made prior to the anticipation of litigation, it is not work product, plain and simple. The rule further differentiates between "core" work product and "other" work product. Core work product comes from the attorney or her office. Other work product is everything else. Core work product is undiscoverable. Other work product can be discovered if the party really needs it and cannot get it anywhere else without undue hardship. Finally, a party cannot cloak otherwise discoverable material such as witnesses identities, statements, or photographs by claiming it was created as work product. Tex. R. Civ Proc. 192.5(e).

a. Broadly speaking, an insured has a right to the claims file in an action against its insurer. *Turbodyne Corp. v. Heard,* 720 S.W.2d 802, 803 (Tex.1987).See also, *In re General Agents Ins. Co. of America, Inc.* 224 S.W.3d 806, 817 (Tex.App.–Houston [14 Dist.],2007, no pet) distinguishing *General Insurance Co. v. Blackmon,* 639 S.W.2d 455 (Tex.1982).

b. Certain documents within the claims file may be subject to specific claims of privilege *In re Certain Underwriters at Lloyd's London* 294 S.W.3d 891 (Tex.App.–Beaumont, 2009, no pet). In this case the handwritten notes between the independent adjuster, the carrier's employees and the carrier's attorney were at issue. The court found that the carrier was anticipating litigation at the time, and the notes were privileged.

c. If litigation is not anticipated there is little protection for anything related to the claim. *In re Texas Farmers Insurance Exchange,* 990 S.W.2d 337, 341 (Tex.App.-Texarkana 1999, orig. proceeding). Here the attorney who took the EUO was not told that Farmers was anticipating litigation on the claim. The attorney's file was held to be discoverable.

d. The anticipation of litigation must meet both an objective and a subjective standard. *National Tank Co. v. Brotherton,* 851 S.W.2d 193 (Tex. 1993)

"…we conclude that the objective prong of *Flores* is satisfied whenever the circumstances surrounding the investigation would have indicated to a reasonable person that there was a substantial chance of litigation. The confidentiality necessary for the adversary process is not defeated because a party, reasonably anticipating future litigation, conducts an investigation prior to the time that litigation is "imminent."

"…we conclude that the subjective prong is properly satisfied if the party invoking the privilege believes in good faith that there is a substantial chance that litigation will ensue." at 204

e. The party resisting discovery has the evidentiary burden to establish the privilege. *In re Union Pacific Res.* 22 S.W.3d 338, 340 (Tex. 1999)

f. The work product privilege can extend to documents in possession of third parties. *In re Certain Underwriters at Lloyd's London*, 294 S.W.3d 891, (Tex.App.–Beaumont, 2009). In this case a subpoena was served on an independent adjusting company that was not a party to the lawsuit. Work product privilege was asserted by Underwriters who was a party. Court of Appeals found the documents privileged and allowed a "snap back" of the documents. This holding is in conflict on the "snap back" remedy with *In re Ortuno*, 2008 WL 2339800, (Tex.App.-Houston [14 Dist.],2008, *memorandum opinion*).

2. Attorney-Client Privilege.

The heart of the attorney-client privilege is defined in Tex. R. Evid. 503(b). "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client…" The privilege belongs to the client but may be asserted by others, including the attorney, but only on behalf of the client. Tex. R. Evid. 503(c).

a. **The privilege can be waived and assigned.** *In re General Agents Ins. Co. of America, Inc., supra* at 813. Here the defendant assigned attorney-client privileges to the judgment creditor. The court allowed this assignment and the waiver by the assignee that went with it. Incidentally, this case reads like a hornbook on discovery and privilege. Most such issues are covered somewhere in the opinion.

b. **The attorney-client privilege is independent of work product.** *Duncan v. Board of Disciplinary Appeals,* 898 S.W.2d 759, 762 (Tex.,1995)." Our rules recognize that our system of justice relies on a client's privilege to speak frankly and candidly with his or her attorney. *Fisher v. United States,* 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976)." If the documents or communications fall within this privilege, that is the end of the inquiry. Unless it comes within one of the rare exceptions enumerated in Tex. R. Evid. 503(d)[9], it's privileged.

[9] (d) Exceptions. There is no privilege under this rule:

(1) *Furtherance of crime or fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) *Claimants through same deceased client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transactions;

(3) *Breach of duty by a lawyer or client.* As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;

(4) *Document attested by a lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) *Joint clients.* As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

c. **Just because there is an attorney involved, doesn't mean there is a privilege.** *In re Texas Farmers Insurance Exchange, supra* at 341. Here, the court found that the attorney who conducted the examination under oath was acting as an investigator and not as an attorney. Consequently, Farmer's claim of attorney-client privilege was refused.

3. Overly broad, beyond the scope of discovery.

This scope is generally defined as "relevant to the subject matter of the pending action." Tex. R. Civ. Proc. 192.3(a).

a. "Discovery is a tool to make the trial process more focused, not a weapon to make it more expensive. Thus trial courts "must make an effort to impose reasonable discovery limits." *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex.2003)

b. The discovery must relate to a viable cause of action and be proportionate to the controversy. *In re Allstate County Mut. Ins. Co.*, 227 S.W.3d 667, 668 (Tex.,2007). In this case a third party plaintiff sued the carrier directly. The court held that with no viable cause of action, any discovery was improper. The court also offers an extensive discussion on the history of rulings dealing with overly broad discovery requests.

c. An adjuster's deposition is unavailable prejudgment in an anticipated *Stower's* action. *In re Hochheim Prairie Farm Mut. Ins. Ass'n* 115 S.W.3d 793 (Tex.App.–Beaumont,2003, no pet.). Here the plaintiff sought a pre-litigation deposition under Tex. R. Civ. Proc. 202. The court held no judgment, no *Stowers*, no deposition.

IV. CONDUCT DURING THE DEPOSITION.

In 1999, rules went into effect governing depositions in Texas State courts that substantially changed the way depositions are conducted. Some have referred to the new rules as the "houseplant" rules, since the lawyer's role is so restricted.

A. Tex. R. Civ. Proc. 199.5.

In state court the rules provide in part "(d) *Conduct During the Oral Deposition; Conferences.* The oral deposition must be conducted in the same manner as if the testimony were being obtained in court during trial. Counsel should cooperate with and be courteous to each other and to the witness. The witness should not be evasive and should not unduly delay the examination. Private conferences between the witness and the witness's attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during agreed recesses and adjournments. If the lawyers and witnesses do not comply with this rule, the court may allow in evidence at trial statements, objections, discussions, and other occurrences during the oral deposition that reflect upon the credibility of the witness or the testimony. (e) *Objections.* Objections to questions during the oral deposition are limited to "Objection, leading" and "Objection, form." Objections to testimony during the oral deposition are limited to "Objection, nonresponsive." These objections are waived if not stated as phrased during the oral deposition. All other objections need not be made or recorded during the oral deposition to be later raised with the court. The objecting party must give a clear and concise explanation of an objection if requested by the party taking the oral deposition, or the objection is waived.

Argumentative or suggestive objections or explanations waive objection and may be grounds for terminating the oral deposition or assessing costs or other sanctions. The officer taking the oral deposition will not rule on objections but must record them for ruling by the court. The officer taking the oral deposition must not fail to record testimony because an objection has been made."

B. Fed. R. Civ. Proc. 32(d)(3)A

The federal rule is similar with a caveat that relevancy objections should be made if the grounds for the objection could be corrected at the deposition.

C. Other allowances

The rules also allow for an attorney to instruct a witness not to answer a question in order to preserve a privilege or in response to an abusive question. Questions clearly outside of the scope of discovery may be deemed abusive, as may those that are repetitive, argumentative or harassing. Tex. R. Civ. P. 199.5(f), comment 4.[10]

V. USE OF THE DEPOSITION

A. Depositions are testimony and may be used at trial as such.

The party offering the deposition may present the testimony in any order provided it does not "convey a distinctly false impression". The rule of optional completeness is satisfied by allowing the opponent to offer their portion in reply. *Jones v. Colley*, 820 S.W.2d 863, 866 (Tex.App.–Texarkana 1991, writ denied).

B. Summary judgment.

Deposition excerpts may be used as summary judgment evidence without supporting affidavits or a court reporter certificate. *McConathy v. McConathy*, 869 S.W.2d 341, 342 (Tex.,1994). This opinion holds that the 1988 rule changes effectively overturned the contrary holding in *Deerfield Land Joint Venture v. Southern Union Realty Co.*, 758 S.W.2d 608 (Tex.App.—Dallas 1988, writ denied). Notice is satisfied by attaching the relevant portions to the summary judgment pleading.

C. Depositions must be filed in federal court.

In federal court, depositions must be filed with the court with notice to the parties before being used in trial or for a hearing. The rules are more restrictive and favor live testimony. Fed. R. Civ. Proc. 32.

VI. CONCLUSION

This is a brief overview of a complex issue. For a more detailed and an authoritative treatment of the deposition process, I recommend Paul Gold's articles on the subject available at his website. http://www.agtriallaw.com/.

I also recommend Mark Ticer's article on this same subject, *A Stake in the Heart of the Vampire*, available at Mark's website http://www.ticerlawfirm.com/.

[10] "The notes and comments to the amended discovery rules, some of which are quite extensive, are not merely advisory, but are intended to inform the construction and interpretation of the rules for both courts and practitioners. This continues and expands upon a practice, initiated by the Court in its promulgation of the new Rule 166a(i) and repeated in other recent rules enactments, which has proven to be very helpful to practitioners and lower courts." Hecht & Pemberton, *A Guide to the 1999 Texas Discovery Rules Revisions*, G–14 (Nov. 11, 1998)

Cases

Statutes

Rules

Federal Cases

APPENDIX

A. Deposition Flow Chart – prepared by Jayme Bomben with editorial assistance from Paul Gold

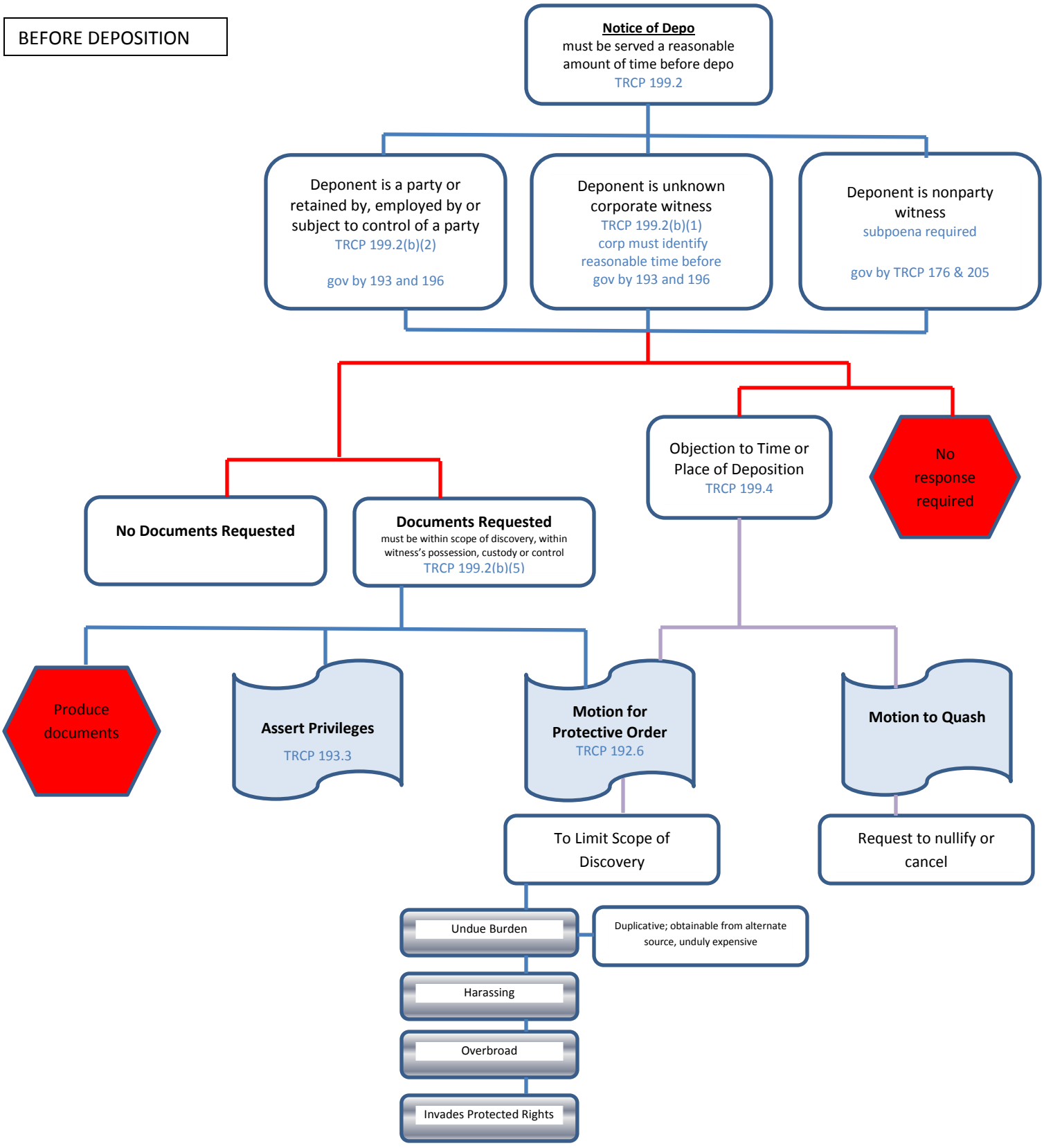
B. Tex. Ins. Code § 4101 – Insurance Adjusters Licensing

C. Tex. Ins. Code § 541.060 – Unfair Settlement Practices

D. TEXAS PATTERN JURY CHARGE, State Bar of Texas, PJC 102.14 (2010 edition)
Question on Insurance Code Chapter 541

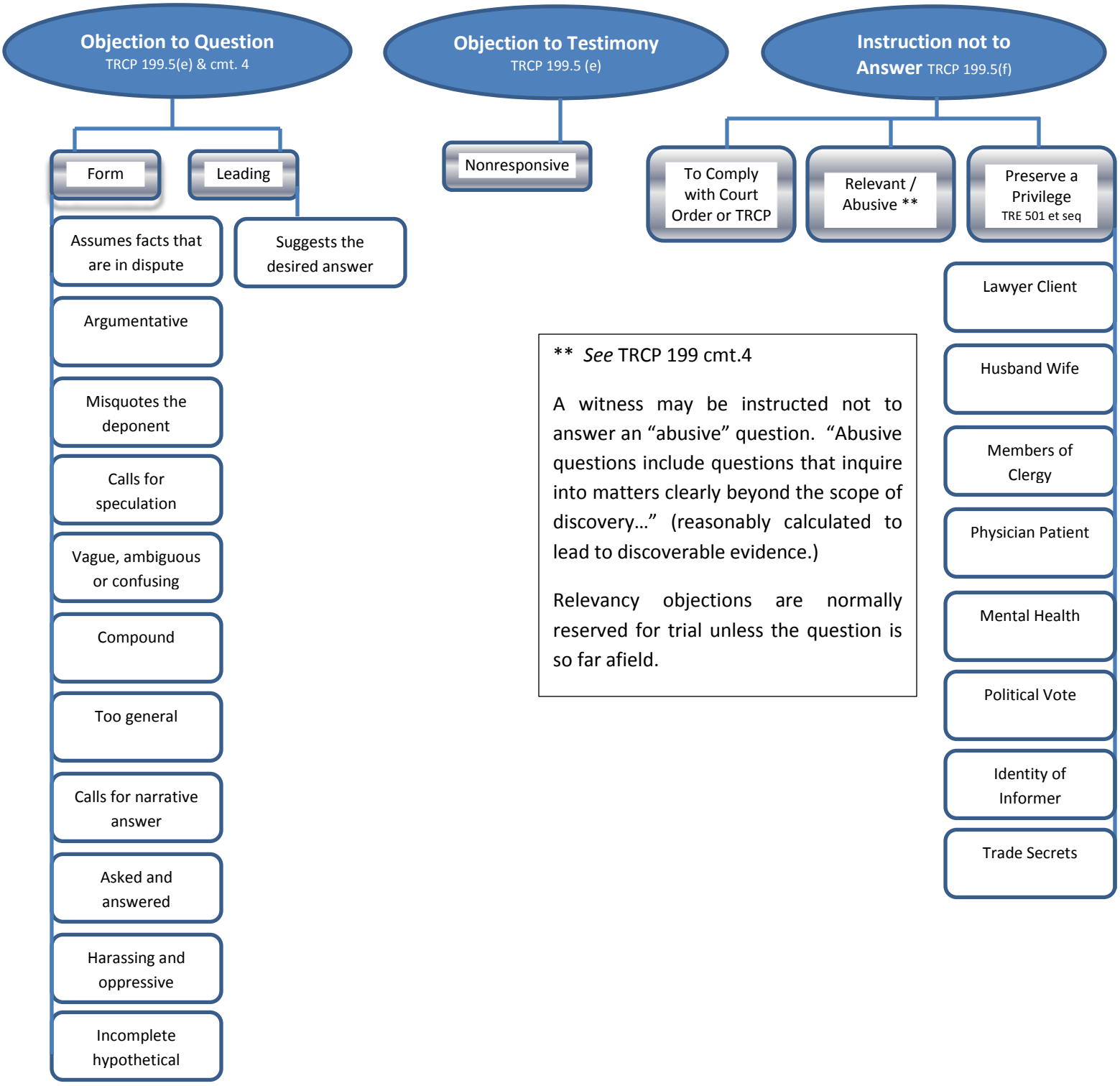
E. TEXAS PATTERN JURY CHARGE, State Bar of Texas, PJC 102.18 (2010 edition)
List of Unfair settlement practices

BEFORE DEPOSITION



Prepared by Jayme Bomben with editorial assistance from Paul Gold

DURING DEPOSITION



** *See* TRCP 199 cmt.4

A witness may be instructed not to answer an "abusive" question. "Abusive questions include questions that inquire into matters clearly beyond the scope of discovery…" (reasonably calculated to lead to discoverable evidence.)

Relevancy objections are normally reserved for trial unless the question is so far afield.

Vernon's Texas Statutes and Codes Annotated Currentness
Insurance Code
Title 13. Regulation of Professionals (Refs & Annos)
Subtitle C. Adjusters
Chapter 4101. Insurance Adjusters
Subchapter A. General Provisions

§ 4101.001. Definitions

(a) In this chapter:

(1) “Adjuster” means a person who:

(A) investigates or adjusts losses on behalf of an insurer as an independent contractor or as an employee of:

(i) an adjustment bureau;

(ii) an association;

(iii) a general property and casualty agent or personal lines property and casualty agent;

(iv) an independent contractor;

(v) an insurer; or

(vi) a managing general agent;

(B) supervises the handling of claims; or

(C) investigates, adjusts, supervises the handling of, or settles workers' compensation claims, including claims arising from services provided through a certified workers' compensation health care network as authorized under Chapter 1305, on behalf of an administrator, as defined by Chapter 4151, or on behalf of an insurance carrier, as defined by Section 401.011, Labor Code.

(2) “Automated claims adjudication system” means a computer program designed for the

collection, data entry, calculation, and final resolution of portable consumer electronic insurance claims that a licensed independent adjuster, a licensed agent, an officer of a business entity licensed under this chapter, or a supervised individual uses as described by this chapter.

(3) “Business entity” means a corporation, association, partnership, limited liability company, limited liability partnership, or other legal entity.

(4) “Home state,” with respect to an adjuster, means:

(A) the state in which the adjuster maintains the adjuster's principal place of residence or business and is licensed to act as a resident adjuster; or

(B) if the state of the adjuster's principal place of residence or business does not license adjusters for the line of authority sought, a state in which the adjuster is licensed and in good standing and that is designated by the adjuster as the adjuster's home state.

(5) “Person” means an individual or business entity.

(b) For purposes of this chapter, “insurer” includes a self-insured.

§ 4101.002. General Exemptions

(a) This chapter does not apply to:

(1) an attorney who:

(A) adjusts insurance losses periodically and incidentally to the practice of law; and

(B) does not represent that the attorney is an adjuster;

(2) a salaried employee of an insurer who is not regularly engaged in the adjustment, investigation, or supervision of insurance claims;

(3) a person employed only to furnish technical assistance to a licensed adjuster, including:

(A) an attorney;

(B) an engineer;

(C) an estimator;

(D) a handwriting expert;

(E) a photographer; and

(F) a private detective;

(4) an agent or general agent of an authorized insurer who processes an undisputed or uncontested loss for the insurer under a policy issued by the agent or general agent;

(5) a person who performs clerical duties and does not negotiate with parties to disputed or contested claims;

(6) a person who handles claims arising under life, accident, and health insurance policies;

(7) a person:

(A) who is employed principally as:

(i) a right-of-way agent; or

(ii) a right-of-way and claims agent;

(B) whose primary responsibility is the acquisition of easements, leases, permits, or other real property rights; and

(C) who handles only claims arising out of operations under those easements, leases, permits, or other contracts or contractual obligations;

(8) an individual who is employed to investigate suspected fraudulent insurance claims but who does not adjust losses or determine claims payments;

(9) a public insurance adjuster licensed under Chapter 4102; or

(10) an individual who:

(A) collects claim information from, or furnishes claim information to, an insured or claimant and enters data into an automated claims adjudication system; and

(B) is employed by a licensed independent adjuster or its affiliate under circumstances in which no more than 25 individuals performing duties described by Paragraph (A) are supervised by a single licensed independent adjuster or a single licensed agent.

(b) A nonresident adjuster is not required to hold a license under this chapter to:

(1) adjust a single loss in this state;

(2) adjust losses arising out of a catastrophe common to all those losses; or

(3) act as a temporary substitute for a licensed adjuster.

(c) For purposes of Subsection (a)(6), claims arising under workers' compensation insurance policies, including claims relating to services provided through a certified workers' compensation health care network authorized under Chapter 1305, do not constitute claims arising under life, accident, or health insurance policies.

(d) A licensed agent acting as a supervisor under Subsection (a)(10) is not required to be licensed as an adjuster.

§ 4101.003. Temporary Exemption

An individual who is undergoing training as an adjuster under the supervision of a licensed adjuster may act as an adjuster for a period not to exceed 12 months without having a license issued under this chapter if, at the beginning of the period, the individual has been registered with the commissioner as a trainee.

§ 4101.004. Reciprocity

The department may waive any license requirement imposed under this chapter for an applicant who holds a valid license from another state if the state has license requirements substantially equivalent to the requirements for a license issued under this chapter.

§ 4101.005. Rules

The commissioner may adopt rules necessary to implement this chapter and to meet the minimum requirements of federal law, including regulations.

§ 4101.006. Repealed by Acts 2011, 82nd Leg., ch. 1147 (H.B. 1951), § 2.008(10), eff. Sept. 1, 2011

Subchapter B. License Requirements

§ 4101.051. License Required

Except as otherwise provided by this chapter, a person may not act as or represent that the person is an adjuster in this state unless the person holds a license under this chapter.

§ 4101.052. Application

(a) An applicant for a license under this chapter must submit to the department an application on a form prescribed and provided by the department, and include as part of or in connection with the application any information that the department reasonably requires, including information about the applicant's:

(1) identity;

(2) personal history;

(3) experience; and

(4) business record.

(b) The application must be accompanied by the fee required by Section 4101.057.

§ 4101.053. Qualifications; Issuance

(a) To qualify for a license under this chapter, an individual must:

(1) comply with this chapter;

(2) present evidence satisfactory to the department that the applicant:

(A) is at least 18 years of age;

(B) resides in this state or a state or country that permits a resident of this state to act as an adjuster in that state or country;

(C) has complied with all federal laws relating to employment or the transaction of business in the United States, if the applicant does not reside in the United States;

(D) is trustworthy; and

(E) has had experience, special education, or training of sufficient duration and extent regarding the handling of loss claims under insurance contracts to make the applicant competent to fulfill the responsibilities of an adjuster; and

(3) pass an examination conducted under this subchapter or present evidence that the applicant has been exempted under Section 4101.056.

(b) The commissioner shall issue a license to an applicant who meets the qualifications prescribed by this section.

(c) To qualify for a license under this chapter, a business entity must:

(1) comply with this chapter; and

(2) present evidence satisfactory to the department that the applicant:

(A) is eligible to designate this state as its home state;

(B) is trustworthy;

(C) has designated a licensed adjuster responsible for the business entity's compliance with the insurance laws of this state;

(D) has not committed an act that is a ground for probation, suspension, revocation, or refusal of an adjuster's license under Section 4101.201; and

(E) has paid the fees prescribed under Section 4101.057.

(d) An individual who is a resident of Canada may not be licensed under this chapter or designate this state as the individual's home state unless the individual has successfully passed the adjuster examination and complied with the other applicable portions of this section, except that the individual is not required to comply with Subsection (a)(2)(B) or (C).

§ 4101.054. Examination Required

(a) To be eligible for a license under this chapter, an applicant must personally take and pass, to the satisfaction of the commissioner, a written examination of the applicant's qualifications and competency.

(b) The department may supplement a written examination under Subsection (a) with an oral examination.

(c) The commissioner shall prescribe each examination under this section. An examination must be of sufficient scope to reasonably test the applicant's knowledge relative to the kinds of insurance that may be dealt with under the license and of:

(1) the duties of a licensed adjuster; and

(2) the laws of this state that apply to a licensed adjuster.

(d) The commissioner may require a reasonable waiting period before an applicant who fails to pass an examination is eligible to be retested on a similar examination.

§ 4101.055. Examination Procedures

(a) The department shall prepare and make available to applicants instructions specifying in general terms the subjects that may be covered in an examination required under Section 4101.054.

(b) An examination under this subchapter shall be given at times and locations in this state necessary to reasonably serve the convenience of the department and applicants.

§ 4101.056. Exemption from Examination Requirement

(a) An applicant for a license under this chapter is not required to pass an examination under Section 4101.054 to receive the license if the applicant:

(1) had been principally engaged in the investigation, adjustment, or supervision of losses on August 27, 1973, and during the 90-day period preceding that date;

(2) is applying for a renewal license under this chapter;

(3) is licensed as an adjuster in another state with which a reciprocal agreement has been entered into by the commissioner; or

(4) has completed a course in adjusting losses as prescribed and approved by the commissioner and it is certified to the commissioner on completion of the course that the applicant has:

(A) completed the course; and

(B) passed an examination testing the applicant's knowledge and qualification, as prescribed by the commissioner.

(b) An applicant wishing to claim an exemption under Subsection (a)(4) is responsible for the scheduling and administration of the examination required under that subsection.

§ 4101.057. Fees

(a) Before issuing or renewing a license under this chapter, the department shall set and collect a nonrefundable license fee in an amount not to exceed $50.

(b) An applicant must remit the fee required by Subsection (a) biennially after the issuance of the original license. If the applicant's license has been expired for not more than 90 days, an applicant for a renewal license must remit, in addition to the fee assessed under Subsection (a), a fee equal to one-half of the original license fee.

(c) Before administering an examination under this subchapter, the department shall set and collect a nonrefundable examination fee in an amount not to exceed $50.

(d) Before issuing a duplicate license requested by an adjuster, the department shall set and collect a duplicate license fee.

(e) The department shall deposit a fee collected under this chapter to the credit of the Texas Department of Insurance operating account.

§ 4101.058. License Form

(a) The commissioner shall prescribe the form of a license issued under this chapter.

(b) A license must contain:

(1) the adjuster's name;

(2) the address of the adjuster's place of business;

(3) the date of issuance and the date of expiration of the license; and

(4) the name of the firm or insurer with whom the adjuster is employed at the time the license is issued.

§ 4101.059. Continuing Education: General Requirements

(a) To renew a license under this chapter a licensed adjuster must participate in a continuing education program relating to consumer protection. The program must include education relating to consumer protection laws, including:

(1) Chapter 541;

(2) Chapter 547;

(3) Subchapter A, Chapter 542; [FN1]

(4) Subchapter E, Chapter 17, Business & Commerce Code; [FN2] and

(5) any other similar laws specified by the department.

(b) The department may certify continuing education programs.

[FN1] V.T.C.A., Insurance Code § 542.001 et seq.

[FN2] V.T.C.A., Business & Commerce Code § 17.41 et seq.

§ 4101.060. Continuing Education: Exemptions and Waivers

(a) On written request of a licensed adjuster and if the department determines that the adjuster is unable to comply with continuing education requirements under this subchapter because of illness, medical disability, or another extenuating circumstance beyond the control of the adjuster, the department may:

(1) extend the time for the adjuster to comply with the continuing education requirements; or

(2) exempt the adjuster from any of the requirements for a licensing period.

(b) The commissioner by rule shall establish the criteria for an extension or exemption under Subsection (a).

(c) The department may waive any continuing education requirement imposed under this chapter for a nonresident adjuster who holds a valid license from another state if the state has continuing education requirements substantially equivalent to the requirements for a license issued under this chapter.

§ 4101.061. Expiration; Renewal

Expiration and renewal of a license issued under this chapter are governed by rules adopted by the commissioner or any applicable provision of this code or another insurance law of this state.

Subchapter C. Special Licenses

§ 4101.101. Emergency License

(a) If a catastrophe or an emergency arises out of a disaster, act of God, riot, civil commotion, conflagration, or other similar occurrence, the commissioner shall, on application, issue an emergency license to a person if the application is certified to the commissioner not later than the fifth day after the date on which the person begins work as an adjuster by:

(1) a person who holds a license under this chapter; or

(2) an insurer that maintains an office in this state and holds a certificate of authority to en-

gage in the business of insurance in this state.

(b) The person or insurer that certifies an application under Subsection (a) is responsible for the loss or claims practices of the emergency license holder whom the person or insurer certifies.

(c) The commissioner may, after notice and hearing, revoke an emergency license on grounds specified by Section 4101.201.

(d) An emergency license is effective for a period not to exceed 90 days. The commissioner may extend the term of the emergency license for an additional period of 90 days.

(e) The commissioner shall establish a fee for an emergency license in an amount not to exceed $20. A person issued an emergency license shall remit the fee to the department not later than the 30th day after the date on which the department issues the license.

(f) The commissioner may issue an emergency license to an applicant who meets the requirements of Subsection (a) regardless of whether the applicant is:

(1) a resident of this state; or

(2) an otherwise licensed adjuster.

§ 4101.102. Limited License

(a) If considered necessary by the commissioner, the department may issue a limited license to an applicant in the manner otherwise provided for the issuance of a license under this chapter.

(b) The license shall specifically limit the kinds of insurance that may be handled by the person.

(c) The person may not adjust claims in a kind of insurance other than that for which the adjuster is specifically licensed.

Subchapter D. Powers and Duties of Adjuster

§ 4101.151. Place of Business

(a) A licensed adjuster shall maintain a place of business that is:

(1) located at the place at which the adjuster principally conducts transactions under the license; and

(2) accessible to the public.

(b) A licensed adjuster shall promptly notify the commissioner if the adjuster changes the location of the adjuster's place of business.

§ 4101.152. Referral by Insurer

(a) An insurer may not knowingly refer a claim or loss for adjustment in this state to a person purporting to be or acting as an adjuster unless the person holds a license under this chapter.

(b) Before referring a claim or loss for adjustment, an insurer must ascertain from the commissioner whether the person performing the adjustment holds a license under this chapter. Once the insurer has ascertained that the person holds a license, the insurer may refer the claim or loss to the person and may continue to refer claims or losses to the person until the insurer has knowledge or receives information from the commissioner that the person no longer holds a license.

Subchapter E. Enforcement

§ 4101.201. Grounds for Disciplinary Action

(a) The commissioner may discipline an adjuster or deny an application for a license under this chapter under a department rule or any applicable insurance law of this state.

(b) Department rules may specify grounds for discipline that are comparable to grounds for discipline of other license holders under this title.

§ 4101.202. Reinstatement or Reissuance of License

The commissioner may not reinstate or reissue the license of a license holder or former license holder whose license has been suspended, revoked, or refused renewal until the commissioner determines that the cause for a suspension, revocation, or refusal of a license issued under this chapter no longer exists.

§ 4101.203. Criminal Penalty

A person commits an offense if the person violates Section 4101.051 or 4101.102(c). An offense under this section is a misdemeanor punishable by:

(1) a fine of not more than $500;

(2) confinement in the county jail for not more than six months; or

(3) both the fine and the confinement.

END OF DOCUMENT

Effective: April 1, 2005

Vernon's Texas Statutes and Codes Annotated Currentness
Insurance Code
Title 5. Protection of Consumer Interests (Refs & Annos)
Subtitle C. Deceptive, Unfair, and Prohibited Practices
Chapter 541. Unfair Methods of Competition and Unfair or Deceptive Acts or Practices (Refs & Annos)
Subchapter B. Unfair Methods of Competition and Unfair or Deceptive Acts or Practices Defined
§ 541.060. Unfair Settlement Practices

(a) It is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to engage in the following unfair settlement practices with respect to a claim by an insured or beneficiary:

(1) misrepresenting to a claimant a material fact or policy provision relating to coverage at issue;

(2) failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of:

(A) a claim with respect to which the insurer's liability has become reasonably clear; or

(B) a claim under one portion of a policy with respect to which the insurer's liability has become reasonably clear to influence the claimant to settle another claim under another portion of the coverage unless payment under one portion of the coverage constitutes evidence of liability under another portion;

(3) failing to promptly provide to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or offer of a compromise settlement of a claim;

(4) failing within a reasonable time to:

(A) affirm or deny coverage of a claim to a policyholder; or

(B) submit a reservation of rights to a policyholder;

(5) refusing, failing, or unreasonably delaying a settlement offer under applicable first-party coverage on the basis that other coverage may be available or that third parties are responsible for the damages suffered, ex-

cept as may be specifically provided in the policy;

(6) undertaking to enforce a full and final release of a claim from a policyholder when only a partial payment has been made, unless the payment is a compromise settlement of a doubtful or disputed claim;

(7) refusing to pay a claim without conducting a reasonable investigation with respect to the claim;

(8) with respect to a Texas personal automobile insurance policy, delaying or refusing settlement of a claim solely because there is other insurance of a different kind available to satisfy all or part of the loss forming the basis of that claim; or

(9) requiring a claimant as a condition of settling a claim to produce the claimant's federal income tax returns for examination or investigation by the person unless:

(A) a court orders the claimant to produce those tax returns;

(B) the claim involves a fire loss; or

(C) the claim involves lost profits or income.

(b) Subsection (a) does not provide a cause of action to a third party asserting one or more claims against an insured covered under a liability insurance policy.

CREDIT(S)

Added by Acts 2003, 78th Leg., ch. 1274, § 2, eff. April 1, 2005.

Current through the end of the 2011 Regular Session and First Called Session of the 82nd Legislature

END OF DOCUMENT

PJC 102.14 Question on Insurance Code Chapter 541

QUESTION _____

Did *Don Davis* engage in any unfair or deceptive act or practice that caused damages to *Paul Payne*?

"Unfair or deceptive act or practice" means any of the following:

[Insert appropriate instructions.]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 102.14 is a basic question that should be appropriate in most cases brought under Tex. Ins. Code ch. 541 (formerly Tex. Ins. Code art. 21.21). Code section 541.003 also prohibits "unfair methods of competition," and in such a case PJC 102.14 should be modified as appropriate. Questions for causes of action based on the DTPA may be found at PJC 102.1 (false, misleading, or deceptive act), 102.7 (unconscionable action), and 102.8 (warranty). See also PJC 102.21 (knowing or intentional conduct).

Accompanying instructions. Instructions to accompany PJC 102.14, informing the jury what type of conduct should be considered under the question, are at PJC 102.16–.19. If more than one instruction is used, each must be separated by the word *or*, because a finding of any one of the acts or practices defined in the instructions would support recovery under the Insurance Code.

Broad-form submission. PJC 102.14 is a broad-form question designed to be accompanied with one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." *See also Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980) (approving broad question in deceptive trade practice case). If there is legal uncertainty on one or more theories of recovery, broad-form submission may not be feasible, and separate questions may be required. *See Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212, 215 (Tex. 2005); *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000) (broad-form submission combining valid and invalid theories was harmful error).

Knowing conduct. If the defendant is found to have knowingly engaged in an unfair or deceptive act or practice, the Insurance Code provides for additional damages.

Tex. Ins. Code § 541.152(b). See PJC 102.21 for a question on knowing conduct and PJC 115.11 for a question on additional damages.

Additional damages. An award of additional damages is discretionary with the trier of fact if the defendant acted knowingly. To seek additional damages, the plaintiff should submit the question on knowing conduct as in PJC 102.21 and then should ask the jury to determine the amount of additional damages as in PJC 115.11.

Causation. Unlike the DTPA questions (PJC 102.1, 102.7, and 102.8), PJC 102.14 does not contain the term "producing cause," because the Insurance Code does not refer to "producing cause" as an element. Instead, the Code grants a cause of action to a person who has sustained actual damages "caused by" another's engaging in a prohibited act. *See* Tex. Ins. Code § 541.151 (formerly Tex. Ins. Code art. 21.21, § 16(a)). The Committee believes that "producing cause" need not be submitted to obtain actual damages as long as the damages question inquires about damages that were caused by the prohibited conduct. The insurance damages question, PJC 115.13, contains such an inquiry. For a discussion of the special causation issues relating to recovery of policy benefits as damages, see the Comment to PJC 115.13.

Vicarious liability. If the issue is the vicarious liability of one for another's conduct, see *Celtic Life Insurance Co. v. Coats*, 885 S.W.2d 96, 98–99 (Tex. 1994); *Royal Globe Insurance Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688, 693–95 (Tex. 1979) (discussing principal's liability for acts of agent in DTPA and Insurance Code case); and *Southwestern Bell Telephone Co. v. Wilson*, 768 S.W.2d 755, 759 (Tex. App.—Corpus Christi 1988, writ denied) (company liable for unreasonable collection efforts of outside attorneys that ''were committed for the purpose of accomplishing the mission entrusted to the attorneys").

[PJC 102.15 is reserved for expansion.]

PJC 102.18 Unfair Insurance Settlement Practices (Tex. Ins. Code § 541.060)

Misrepresenting to a claimant a material fact or policy provision relating to the coverage at issue [*or*]

Failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when the insurer's liability has become reasonably clear [*or*]

Failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement under one part of a policy, when the insurer's liability has become reasonably clear, if the failure to settle was in order to influence *Paul Payne* to settle an additional claim under another part of the policy [*or*]

Failing to provide promptly to *Paul Payne* a reasonable explanation of the factual and legal basis in the policy for an insurer's denial of the claim [or the insurer's offer of a compromise settlement of the claim] [*or*]

Failing to affirm or deny coverage of a claim within a reasonable time [*or*]

Failing to submit a reservation of rights letter to *Paul Payne* within a reasonable time [*or*]

Refusing [failing to make or unreasonably delaying] a settlement offer under *Paul Payne*'s policy, because other coverage may have been available, [or because other parties may be responsible for the damages *Paul Payne* suffered] [*or*]

Trying to enforce a full and final release of a claim by *Paul Payne*, when only a partial payment had been made, unless the release was for a doubtful or disputed claim [*or*]

Refusing to pay a claim without conducting a reasonable investigation of the claim [*or*]

Delaying [or refusing] to settle *Paul Payne*'s claim solely because there was other insurance available to satisfy all or any part of the loss that formed the basis of *his* claim [*or*]

Requiring that *Paul Payne* produce *his* federal income tax returns for inspection or investigation, as a condition of settling *his* claim [*or*]

COMMENT

When to use. PJC 102.18 may be used with PJC 102.14 to submit a cause of action for unfair settlement practices under Tex. Ins. Code § 541.060 (formerly Tex. Ins. Code art. 21.21, § 4(10)). Use only the subpart(s) raised by the pleadings and the evidence.

Use of "or." If used with other instructions (see PJC 102.16–.17 and 102.19), or if more than one subpart is used, each subpart used from PJC 102.18 must be followed by the word *or*, because a finding of any one of the acts or practices defined in the instructions would support recovery.

Source of instruction. PJC 102.18 is based on Tex. Ins. Code § 541.060, which prohibits unfair settlement practices.

Use of statutory language. The supreme court has held that jury submission in this type of case should follow the statutory language as closely as possible but may be altered somewhat to conform to the evidence of the case. *Spencer v. Eagle Star Insurance Co. of America*, 876 S.W.2d 154, 157 (Tex. 1994); *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980). Material terms, however, should not be omitted or substituted. *See Transport Insurance Co. v. Faircloth*, 898 S.W.2d 269, 273 (Tex. 1995) (construing Texas Business and Commerce Code section 17.46(b)(23) (DTPA), renumbered in 2001 as DTPA § 17.46(b)(24)). Several of the subsections in Tex. Ins. Code § 541.060 contain additional terms that may be added to the instruction or that may preclude submission of a particular practice.

Liability insurance cases. In *Rocor International, Inc. v. National Union Fire Insurance Co.*, 77 S.W.3d 253, 260 (Tex. 2002), the supreme court held that a liability insurer may be liable to an insured under Tex. Ins. Code art. 21.21 (now codified as Tex. Ins. Code ch. 541) for failing to settle when the insurer's liability becomes reasonably clear. The court held that the insurer's liability becomes reasonably clear when "(1) the policy covers the claim, (2) the insured's liability is reasonably clear, (3) the claimant has made a proper settlement demand within policy limits, and (4) the demand's terms are such that an ordinarily prudent insurer would accept it." *Rocor International, Inc.*, 77 S.W.3d at 262. Element (1), in most cases, will be a question of law or will require resolution of a separate fact question. Element (3), in most cases, will involve a question of law. The following instruction would be appropriate to submit elements (2) and (4):

> You are instructed that an "insurer's liability has become reasonably clear" when the insured's liability to the claimant in the underlying case is reasonably clear and the claimant's settlement demand to the insured is such that an ordinarily prudent insurer would accept it.