



*Professionalism/Ethics
Series: Ethical Litigation: A
Ten-Step Litigation Plan for
the Ethical Defense of a Tort
Suit from the Claims
Adjuster Perspective*





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About the Presenter

Thorn McClellan Smith

Thorn McClellan Smith, Attorney at Law and Certified Fraud Examiner, is a graduate of Georgetown University School of Foreign Service and Northwestern University School of Law. Mr. Smith served as an assistant counsel for the Navy's Office of the General Counsel from 1987 to 1991, from the tail end of the Cold War through Desert Storm. Specifically, he practiced as a government contracts attorney for the Naval Facilities Engineering Command's (staff command for the Navy Seabees) then Western Division in San Bruno, California, and handled the negotiation, award, and claim litigation of multi-million-dollar military construction contracts across nine western states. In that endeavor Mr. Smith encountered and resolved numerous acts of procurement fraud perpetrated upon the Navy in coordination with the then Naval Investigative Service and the U.S. Attorney's Office.

His legal review led to the indictment and conviction of several individual sureties underwriting performance and payment bonds to millions of dollars in military construction, whose affidavits of net worth were determined to have been fabricated. After the Cold War, Mr. Smith became engaged in private practice in San Francisco through the '90s. His practice was comprised of conducting fraud investigations for corporations, insurance companies, and law firms coupled with a general practice in civil litigation. Mr. Smith thereafter became a troubleshooter for the property-casualty insurance industry resolving insurance claims in Iowa, Illinois, Indiana, Minnesota, Kentucky, Tennessee, Alabama, Georgia, North Carolina, and Virginia as a trial attorney, insurance adjuster, and fraud investigator. In 2011 he served as the Contract Law Attorney on temporary duty at the United States Military Academy at West Point, New York.

In the spring of 2015, Mr. Smith returned to Peoria, Illinois, where he was born and raised and where he now practices law. Mr. Smith is an active member of the Illinois, Iowa, and Virginia bars and retains inactive status in California, South Carolina, and Tennessee. He is a Chartered Property Casualty Underwriter, an Associate in Claims, a Certified Fraud Examiner, and a Certified Insurance Fraud Investigator.



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Course Description

This course begins with discussing Insurance Adjusting Over The Past 30 Years. The program explores the ethical defense of a tort claim using a ten step process. The presenter discusses determining insurance coverage and any necessary reservation of rights; good faith and fair dealing; contacting non-employee witnesses promptly and obtain statements and inspecting and photographing the scene of the tort.

Participants will learn how to proceed with ethically interviewing the claimant and obtaining a recorded statement; determining liability based upon the facts; deciding whether to deny or accept the claim; ethical settlement offers and working with the claimant's lawyer and ethical communications.

The course explores claims handler and defense counsel working as a team and reviewing how you handled the claim and preparing an after action analysis or report while adopting a proactive aggressive approach to investigation and defense.

Course Presentation

This course discusses ethical considerations during the defense of a tort claim.

This course provides a base of skills, knowledge and perspectives regarding personal injury and tort defense.

This course provides a fundamental analysis in the primary practice area of personal injury for any attorney.

Course Material

This material is intended to be a guide in general and is not legal advice. If you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.



Course Learning Objectives and Outcomes

Participant will understand the ethical duties, roles and responsibilities of counsel in situations involving deterrence and defense of spurious personal injury claims.

Participant will learn how to ethically determine insurance coverage and any necessary reservation of rights; good faith and fair dealing; contacting non-employee witnesses promptly and obtaining statements and inspecting and photographing the scene of the tort.

Participants will learn how to proceed with ethically interviewing the claimant and obtaining a recorded statement; determining liability based upon the facts; deciding whether to deny or accept the claim.

Participants will learn what are ethical settlement offers and working with the claimant's lawyer and ethical communications.

Participant will develop an understanding about the relationship among the claimant, the insurance carrier, and defense counsel and their respective motivations.

Participant will gain skills on how to handle the claimant, the insured, and his property-casualty carrier.

This course discusses The Model Rules of Professional Conduct and contains general ethics and professionalism content.

Upon completion of the course, participants should be able to apply the course material; improve their ability to research, plan, synthesize a variety of sources from authentic materials, draw conclusions; and demonstrate an understanding of the theme and concepts of the course by applying them in their professional lives.



Timed Agenda:

Presenter Name: Thorn McClellan Smith

CLE Course Title: Professionalism/Ethics Series: Ethical Litigation: A Ten-Step Litigation Plan for the Ethical Defense of a Tort Suit from the Claims Adjuster Perspective

Time Format (00:00:00 - Hours:Minutes:Seconds)	Description
00:00:00	ApexCLE Company Credit Introduction
00:00:20	CLE Presentation Title: Ten-Step Litigation Plan for the Ethical Defense of a Tort Suit from the Claims Adjuster Perspective
00:00:32	CLE Presenter Introduction
00:00:50	CLE Substantive Material Presentation Introduction
00:01:38	Examination of the Ten Steps
00:03:48	Insurance Adjusting Over The Past 30 Years
00:04:57	Step 1 Determine Insurance Coverage and Issue Any Necessary Reservation of Rights
00:08:24	Step 1 Ethical Considerations
00:08:55	Good Faith and Fair Dealing
00:10:12	Step Two Contact Non-Employee Witnesses Promptly and Obtain Statements
00:12:27	Step Two Ethical Considerations
00:13:37	Step Three Inspect and Photograph the Scene of the Tort
00:17:32	Step Three Ethical Considerations
00:18:20	Step Four Interview the Claimant and Obtain a Recorded Statement
00:22:31	Step Four Ethical Considerations
00:22:35	Step Five Determine Liability Based Upon the Facts
00:26:00	Step Five Ethical Considerations
00:28:02	Step Six Decide Whether to Deny or Accept the Claim
00:30:06	Ethical Settlement Offers
00:31:31	Step Six Ethical Considerations
00:32:24	Step Seven Working with the Claimant's Lawyer and Ethical Communications



00:40:39	Step Seven Ethical Considerations
00:41:15	Step Eight The Claims Handler and Defense Counsel are a Team and should Work Closely
00:45:09	Step Eight Ethical Considerations
00:50:05	Step Nine Review How You Handled the Claim and Prepare an After Action Analysis or Report
00:51:44	Step Nine Ethical Considerations
00:52:25	Step Ten Adopt a Proactive Aggressive Approach to Investigation and Defense
01:00:40	Step Ten Ethical Considerations
01:01:58	Presenter Closing
01:02:01	ApexCLE Company Closing Credits
01:02:07	End of Video



Course Material

10 Step Approach to Defense of a Tort Claim for Insurance Adjusters and Defense Counsel

Step One – Determine coverage for the insured and issue the insured a reservation of rights if necessary.

Contact the claimant promptly and interview the insured shortly after receipt of the claim. Obtain any and all background on the claimant and any and all documentation pertinent to the claim, e.g. employer’s accident report and police report if done. Obtain any and all witnesses to the accident. If the witnesses are the insured’s employees, interview the employees then and there one at a time outside the presence of the employer if feasible. If non-employee witnesses, obtain as much contact information as possible:

- 1) phone numbers,
- 2) emails, and
- 3) work and home addresses.

Step Two – Contact any non-employee witnesses promptly upon receipt of contact information and arrange interviews.

If a federal or state official, e.g. police officer or fire marshal, contact and confer with that individual first, if possible. Seek to record the statement if consent given by the witness. If a crucial, favorable eyewitness to a catastrophic loss, consider obtaining an oral affidavit from the witness sworn before and transcribed by a court reporter.

Consider sending a transcript of the statement to the witness shortly after the interview, so as to “lock down” his testimony in the witness’ mind and thereby deter a plaintiff’s attorney from exaggerating or falsifying the witness’ testimony thereafter.



Step Three - Inspect and photograph the scene of the injury with insured's employee witnesses or non-employee witnesses if willing.

Otherwise interview any non-employee witnesses after your inspection and understanding of the accident scene.

Step Four – Interview the claimant, in-person if feasible.

Obtain a recorded statement or a transcribed affidavit if the claimant consents, the latter dependent upon the severity of the casualty claim. Provide him a copy of the transcription of the statement upon his request. Obtain any and all medical records the claimant provides you and seek to obtain medical and wage loss authorizations from him so that you can independently obtain and verify any records the claimant provides.

Step Five – Determine liability upon the facts and the law of that jurisdiction.

Determine the damages exposure based upon the medical and wage loss records along with consultation with the claims manager as well as with the defense attorney the insurer regularly uses in that jurisdiction and venue, so as to calibrate the probability of a jury finding liability and if so, the expected range of damages from a verdict for the plaintiff. Reduce this determination into a comprehensive yet concise report to the claims manager.

Step Six - Subject to authority, deny or honor the claim.

If a denial, issue the claimant a general, non-specific denial letter. If the claim is to be honored, make a good faith offer at a reasonable discount factoring the present cash value of the claim given litigation delay, the plaintiff attorney's contingency fee, and the expected expert witness costs. The tactic is to aim for the claimant's "sweet spot" by providing a good faith offer, sufficiently reasonable where it will be to the mutual advantage of both the insurer and the claimant to settle in lieu of litigation.

Set a ceiling to your authority prior to any negotiation. Set aside some cushion between your best and final offer and the limit of your authority in the



expectation the claimant will hire a lawyer should your attempt to negotiate a settlement fail.

Step Seven – If the claimant “lawyers up” in response to your denial or in rejection of your best and final offer, consider negotiating a settlement with the attorney prior to his filing suit.

But if and when the plaintiff’s attorney files suit, promptly forward a court date stamped copy of the complaint to your defense attorney. Don’t “sit on the complaint,” lest the time to file and serve an answer (30 days in Illinois, 21 days in federal court) expires and you suffer an order of default and possibly a default judgment. Don’t yourself seek an extension of time to answer the plaintiff attorney’s complaint. Such a step is far better left to the legal expertise and monitoring of your defense lawyer. On the other hand, maintain an open line of communication with the plaintiff’s attorney.

First, if your defense counsel is with an outside law firm, he has an incentive to bill the file by litigating the lawsuit more than necessary. Secondly, regardless of whether your defense counsel is staff or private, his duty is to his client, your insured. Your insured will be inclined to pay whatever avoids his time spent and money lost in appearing at trial. Such a settlement may well exceed the value of the claim. Defer to your defense counsel in litigating and trying the case on behalf of his client, your insured. But continue to hold the purse strings for settlement and be in charge of the negotiation.

At judicial settlement conferences, arbitrations, and mediations, let your defense lawyer do the talking, especially with the judge, arbitrator or mediator, who will be seeking to uncloak your authority. In that regard, appear with a predetermined ceiling to your authority and don’t be afraid to walk away from the negotiation if the plaintiff lawyer’s best and final demand exceeds the limit of your authority.

Step Eight – As you proceed to trial, support your defense lawyer with prompt responses to any and all reasonable requests for information or for justified increases in authority.

Defer to your lawyer’s judgment as to the value of the claim, i.e. what your lawyer predicts in probability and amount of a jury verdict. As an insurance



adjuster, you may handle and settle claims well on a national scale. But once suit is filed, the practice of law is local, i.e. the value of the claim is subject to the jurisdiction and venue from which that jury is drawn. On the other hand, whether your defense counsel is staff or private, insist on a litigation budget from the onset and monthly updates of that budget through trial to verdict. The prospective cost of litigation is critical to any settlement determination.

Step Nine – Upon conclusion of the claim via denial, settlement or verdict, prepare an “after action report”

Upon conclusion of the claim via denial, settlement or verdict, prepare an “after action report” for your claims manager, wherein you discuss current and recommended loss controls for your insured, success or failure in negotiation or trial, and what steps can be taken to mitigate similar, future losses.

Step Ten – Adopt an aggressive, proactive mindset.

My mindset on fraud prevention is metaphorically the renowned Chicago Bears 46 defense of the 1980s, i.e. blitz the opponent on the facts and nip the fraud in the bud. I surely did not learn this skill from Uncle Sam, who simply prints more money to cover each loss, but rather I learned and developed this skill from the property-casualty insurance industry after I got out of the Navy and began adjusting insurance claims:

- 1) The underwriters and insurance agents are your defensive line. They screen the risk via the premium and acceptance of the insured’s application for insurance.
- 2) The claims adjusters and managers are your middle linebackers. They “quick tackle” any claim asserted via denial or settlement.
- 3) The SIU (Special Investigation Unit) investigators your cornerbacks. If you have an articulable suspicion of fraud, i.e. you suspect the claim arises not from the insured’s or claimant’s mindlessness or negligence, but rather from the insured’s collusion or the claimant’s mendacity, relay the claim to your fraud investigator for additional, intensive investigation.
- 4) And if all else fails, your defense counsel are your free safeties. Once the claimant files suit, he’s running through your backfield, and only your defense lawyer can tackle him prior to the claimant’s touchdown, i.e. an excessive verdict.



Program Transcript

The following is a computer generated voice recognition transcript of the video presentation. This is an automatically generated transcript and not a verbatim transcript of the program. This is provided only for general reference and there may be portions that have not been accurately computer generated. If there are any inconsistencies, please refer to the video for clarification.

Resources

Resources Specific to this Course

In addition, please see the resources cited within the material.

Resources for the Legal Professional

ABA Center for Professional Responsibility - www.abanet.org/cpr

Chicago Bar Association - www.chicagobar.org

Commission on Professionalism - www.2civility.org

Judicial Inquiry Board - <http://www.illinois.gov/jib>

Illinois Board of Admissions to the Bar - www.ilbaradmissions.org

Illinois Department of Financial and Professional Regulation - www.idfpr.com/default.asp

Illinois Lawyers' Assistance Program, Inc - www.illinoislap.org

Illinois State Bar Association - www.isba.org

Illinois Supreme Court - www.state.il.us/court

Lawyers Trust Fund of Illinois - www.ltf.org

MCLE Program - www.mcleboard.org

