DEPOSING INSURANCE COMPANY REPRESENTATIVES

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TABLE OF CONTENTS

I. CAN THESE DEPOSITIONS BE TAKEN AT ALL? 1

II. PREPARATION FOR THE DEPOSITION 2

A. WHO IS BEING DEPOSED AND WHO DOES THE REPRESENTATIVE WORK FOR 2

B. KNOWLEDGE OF THE FILE 3

C. DESIGNATED TOPICS 3

D. MENTAL STATUS 4

E. LEGAL CONTEXT 4

F. FACTUAL CONTEXT 5

G. REGULATORY CONTEXT 5

H. COMPANY POLICIES 6

I. RULES OF CONSTRUCTION 6

J. PRIOR POSITIONS OF THE COMPANY 7

K. THEME OF THE CASE 7

III. THE DEPOSITION ITSELF 7

A. AGREEMENTS AS TO TESTIFYING ENTITY 8

B. APPEARANCE 8

C. OBJECTIONS 8

D. DUCES TECUM 9

E. PRIVILEGES 9

IV. CONCLUSION 9

TABLE OF AUTHORITIES

Page

D.R. Horton-Texas, Ltd. v. Markel Int'l Ins. Co., 2009 *LEXIS*, 1042 (Tex. 2009) 1

Enserch Corp. v. Shand Morahan & Co., Inc., 952 F.2d 1485 (5th Cir. 1992) 2

Nat'l Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc., 939 S.W.2d 139, 141.1997) 1

National Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc., 907 S.W.2d 517 (Tex. 1995)....6

Republic Ins. Co. v. Stoker, 903 S.W.2d 338 (Tex. 1995)....2

State Farm Life Ins. Co. v. Beaston, 907 S.W.2d 430 (Tex. 1995)....7

Swicegood ex rel. Estate of Swicegood v. Medical Protective Co., 2003 WL 22234844 (N.D. Tex., September 29, 2003)....1

Texas Farm Bureau Mut. Ins. Co. v. Sturrock, 146 S.W.3d 123 (Tex. 2004)....1, 6

Trevino v. Ortega, 969 S.W.2d 950 (Tex. 1998)....9

Universe Life Ins. Co. v. Giles, 950 S.W.2d 48 (Tex. 1997)....4

MISCELLANEOUS

Fed. R. Civ. P. 30(b)(6)....3

28 TAC 21.203(3)....5

Tex. R. Civ. P. 199.2(b)(1) 3

In coverage and bad faith litigation, there generally is no greater watershed event than the deposition of insurance company representatives. "Representatives" can be the adjuster or a designated corporate representative; and sometimes the adjuster (or a supervising adjuster) *is* the corporate representative. A representative that is well-prepared and experienced can make great headway in personalizing the company, diffusing stereotypes that juries sometimes place on insurance companies, and telling the company's story. On the other hand, if the representative is inadequately prepared, cage, nervous or evasive, the theme of the plaintiff's case may take on a life of its own. If the deponent is a designated corporate representative, the impact is even more dramatic; the testimony is binding.

This article addresses the steps to be taken when preparing insurance company employees to testify in insurance coverage and bad faith litigation. Although it is intended to operate as a guideline for defending those depositions; it is also helpful when you are faced with taking those depositions. The article outlines areas of focus for coverage and bad faith related depositions, and identifies potential areas of strength and weakness. There is no source for the presentation of the materials in this paper. The observations do not come from a book or from extant case law (which is sparse in any event). It is rather the product of taking and defending adjuster and 30(b)(6) depositions over the span of many years and seeing what works and what does not work.

I. CAN THESE DEPOSITIONS BE TAKEN AT ALL?

The most fundamental question that must be asked in coverage and bad faith cases is whether the deposition is necessary or even proper. Is the adjuster's deposition relevant to any issue in the case? Does the company's "position" on any salient issue matter? If so, what? Is the issue to be tried before the court a question of fact or a question of law?

If the only question before the court involves the duty to defend, it is doubtful that any deposition testimony is relevant or admissible. The duty to defend is governed by the eight corners rule. *D.R. Horton-Texas, Ltd. v. Markel Int'l Ins. Co.,* 2009 LEXIS 1042 (Tex. 2009). There are two documents and two documents alone that are relevant to that duty – the live pleadings and the policy. *Nat'l Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc*., 939 S.W.2d 139, 141 (Tex.1997). As such, it is almost always a question of law for the court, and neither the adjuster's nor the company's testimony is admissible for the purpose of determining the duty to defend. That being said, most cases involve both the duty to defend and the duty to indemnify, and most savvy policy-holder lawyers create fact issues by asserting claims or allegations of breach of the duty to good faith and fair dealing, ambiguity in the interpretation of the policy, or the defense of estoppel.

If the insured has pled ambiguity, the testimony of the adjuster or a corporate representative may become relevant. However, just because ambiguity has been pled does not necessarily mean that a fact issue has been created. Rather, in such cases the court must first apply rules of policy interpretation, including the plain meaning rule. If, after the application of the plain meaning rule, the policy can be given a specific or definite legal meaning or interpretation, then the provision is *unambiguous* and the court will interpret it as a matter of law, and the inquiry ends. *Texas Farm Bureau Mut. Ins. Co. v. Sturrock,* 146 S.W.3d 123 (Tex. 2004). This of course, does not mean that the court will not allow a deposition to be taken; it just means that the testimony won't ultimately be useful, or necessarily admissible.

Further, cases that involve the duty to indemnify do not automatically entitle the insured to take or use the deposition of the adjuster or the corporate designee. Rather, Texas law is quite clear that the duty to indemnify is determined by the *actual facts*, and not the pleadings. *D.R. Horton-Texas, Ltd. v. Markel Int'l Ins. Co.,* 2009 LEXIS 1042 (Tex. 2009). Thus, if the underlying case has not been settled or tried, often times the coverage suit (whether filed by the insured or the insurer) will be abated, suspending everything. *Id.*

If the case is one that has been tried, the insured is generally limited to the evidence upon which the underlying jury made their decision. *Swicegood ex rel. Estate of Swicegood v.*

Medical Protective Co., 2003 WL 22234844 (N.D. Tex., September 29, 2003). On the other hand, if the case has been settled, the evidence is much broader and can include things such as pleadings, discovery, depositions and documents produced in the case. *Enserch Corp. v. Shand Morahan & Co., Inc*., 952 F.2d 1485 (5th Cir. 1992). In cases where the underlying facts are undisputed or are limited to the facts of the underlying case, it is doubtful that the adjuster's testimony would be relevant to any issue in the case. Anything he or she might say would be inadmissible under the rules governing the admission of evidence and should not be received into evidence.

On the other hand, the testimony of the adjuster or a corporate representative is relevant on the issue of bad faith and the manner in which the claim was handled. There is perhaps, no more relevant evidence than the testimony of the company representative. Again however, mere allegations of bad faith or violations of the insurance code do not necessarily mean that the adjuster's testimony should be taken. Under Texas law, there can be no bad faith or violations of the insurance code unless there is coverage. *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338 (Tex. 1995). Even if the claim was handled improperly, if there is no coverage then the conduct of the insurance company or the adjuster cannot be a proximate or producing cause of the insured's damages if there was no coverage initially.

In many bad faith cases, the court will order separate trials where one issue is dependent upon the finding of another part of the case and the evidence to be introduced in the second part of the case would be prejudicial. If a separate trial is appropriate, the question is raised as to whether discovery in the second phase should be stayed as well. In this situation, defense counsel may want to object to the deposition of the adjuster going forward on the issue of bad faith. If the court has refused to order separate trials or conduct discovery in phases, an expedient motion for summary judgment on the coverage issues – if the issues are only questions of law, may waylay the need for or the threat of deposing the adjuster or corporate designee.

II. PREPARATION FOR THE DEPOSITION

Without question, the most important part of defending a deposition is preparation – even more so for a Rule 30(b)(6) or, in Texas, a Rule 199.2(b)(1) deposition. The performance of the deponent is proportionately related to the time and effort spent preparing him or her for the deposition. These depositions may be the only opportunity the company has of changing the theme of the plaintiff's case, or diluting the settlement value or verdict potential. The adjuster's deposition may, in fact, tell a completely different story. Bad faith cases are often won or lost at the deposition stage. There is a corollary to this rule and that is that the file will serve as a template for defending the deposition of the adjuster or the corporate designee. The better the file is documented, the easier the deposition is to defend. The poorer the file is documented, the more difficult the deposition is to defend.

A. WHO IS BEING DEPOSED AND WHO DOES THE REPRESENTATIVE WORK FOR

One of the most fundamental questions when deposing an insurance company representative is to identify who is being deposed and who does the deponent works for. Many times, suits filed against insurance companies name the adjuster personally, and include several different underwriting entities, or name a holding company as a party Defendant. Some suits name the trademarked company name (i.e. "State Farm") as a Defendants. Outside of filing pleas to the jurisdiction, motions to dismiss or other motions to deal with this issue, it is important that the client know who the proper parties are, and to know who signs the deponent's paycheck. It is embarrassing for the company and the lawyer alike for the representative to be asked: "Who do you work for" and the answer to be: "I'm not really sure."

Holding companies rarely retain salaried employees, and are typically not the deponent's employer. Likewise, the employee is not likely employed by "Travelers." Rather, there is a clearly defined entity that employs the person being deposed. The entity needs to be identified

early on in the litigation, and known to both the deponent and the lawyer.

Additionally, both adjusters and corporate representatives often perform their job for numerous underwriting entities. It is imperative that the adjuster or representative know name of the correct underwriter involved in the case. If one corporate representative is designated for multiple named corporate or underwriting entities, it is important that the deponent (and the lawyer) be clear about the distinctions between the companies, and the questions that may be asked of each.

B. KNOWLEDGE OF THE FILE

Another important step in preparing an adjuster or corporate representative for a deposition is knowledge of the file. The attorney preparing the adjuster must have not only a working knowledge of the documents, but an intimate knowledge. He or she must know where the problems are in the file, and should create a chronology to know exactly what took place and when the event occurred. Counsel must know if the adjuster takes inconsistent positions in the file, or in other cases. This must be fully explored prior to preparing or taking the deposition. The adjuster must also have an intimate knowledge of the file and the implications of everything that he or she has written in the file. There can and should be no surprises based upon what is contained in the file. There is no excuse for the adjuster to be caught off guard based upon what is contained in the claim file. In many circumstances, several hands may touch the file. The adjuster must also be familiar with what preceding claim handlers have done, and what actions they have taken in connection with the claim. If a supervisor or another adjuster has authored claim notes that are inconsistent, or taken a different position in the case, the adjuster must be prepared to address the inconsistencies that exist in the file.

C. DESIGNATED TOPICS

Under Fed. R. Civ. P. 30(b)(6) as well as Tex. R. Civ. P. 199.2(b)(1), a party to a lawsuit may notice the deposition of a corporation, and may require the company to designate the party to be deposed, provided that the noticing party describes with reasonable particularity the matters upon which the designated party will be deposed. There are numerous potential pit-falls to the targeted corporation. The opportunities, however, are equally rich.

One of the primary concerns the defending attorney under the Texas rules are "hybrid" notices. The Federal rules split notices directed to a specific deponent (Rule 30(b)(1)), from the corporate representative, while Rule 199 combines the two. Some attorneys seize the opportunity to force a company to name the adjuster *as* the corporate representative by issuing a notice that states that the plaintiff will depose "the following individual as Defendant's corporate representative." Such a notice should be immediately quashed.

The second misconception is that the representative have "personal knowledge" of the designated topics. Neither the Federal nor the Texas rules require the deponent to have "personal knowledge." Rather, both require only that the company produce a witness to testify as to all that is known or reasonably available about the topic described. A notice that requires more than this should also be quashed. Since the corporate representative will not likely have personal knowledge about some of the topics described, it is imperative that counsel impart as much knowledge of the case, the file, and the underlying case to the representative, and require the representative to do some serious homework. The testimony of the corporate representative is binding. Answers like "I don't know" especially if repeated can not only subject the company to sanctions for failing to comply with the rules, the testimony can be devastating at trial. A lack of knowledge by the corporate representative, especially on basic issues, can deprive the company of the opportunity to tell its side of the story in a measured and logical way, and to fill in gaps where documented information may be inadequate or vague, it can make the company seen impersonal, cagey and evasive. Previously, I provided an example of how the simple question "who do you work for" can make a terrible first impression on the Court or a jury. Again, it is imperative that you know, and the deponent know, who signs his or her paycheck, and for the representative to know which corporate entity is testifying in the case. It is

likewise imperative that the representative know what positions the company (or related companies) have taken in other similar cases. If the representative does not know off hand, the corporate general counsel or legal department should be able to gather that information.

Additional traps can be set for the company when the topics described are vague. Topical descriptions like "your investigation of construction defect claims" or "every construction defect claim in which you have reserved your rights" are impermissible and do not satisfy the "reasonable particularity" requirement. Moreover, it would be impossible for the representative to be knowledgeable about the entire scope of the proposed topic and remember, knowledge is paramount to good preparation. Notices that contain language that does not satisfy the reasonable particularity requirement should also be quashed.

Finally, of prime importance in Rule 30(b)(6) and 199.2(b)(1) depositions is how to prepare the representative for questions outside of the topical outline. Because the designated representative may also be a fact witness, it is important that the representative have the same knowledge and be prepared as to all matters relevant to the particular file. In other words, prepare the representative as if he or she is the adjuster. Questions that are case specific, even if outside of the designated topics are likely permissible, and admissible, although the testimony will not bind the company. It is incumbent upon you, as counsel, however, to clarify during the deposition what "hat" the representative is wearing, and to lodge proper objections. If the questions go beyond the described topics and are not file specific, the testimony will not likely be admissible, much less relevant.

D. MENTAL STATUS

Part of the role of the attorney in preparing an adjuster or corporate representative for deposition is to play the role of psychiatrist. The defense attorney must have an accurate assessment of the mental status of the deponent. The relative psyches that defense counsel must deal with run the gamut. At one end of the spectrum is the representative who thinks he or she knows it all and is anxious to give his or her deposition. These are by far the most dangerous because they are unwilling to listen to advice, and it is very easy to lead them into a trap based upon their own vanity. Without question, insurance company representatives who are also lawyers are toughest in this area. And, while corporate representatives are generally more experienced and have been previously deposed, they may also be arrogant. The same qualities, in fact, that brought the selected person to the top of the organization may be the same qualities that will undercut the company when the representative is deposed.

How do you deal with them? Sometimes you cannot. The deponent may be so set in his or her ways they will not respond to any type of advice. Other, however, can benefit from "role playing," in which you, as defense counsel, lead them down the primrose path yourself. Hopefully, the light bulb will go on, and the representative will be receptive to direction. On the other end of the spectrum is the representative who is terrified of depositions and wants to be any place other than giving his or her deposition. This does not only include inexperienced adjusters -- who sometimes make the best witnesses because they are genuine, hard-working people who, even when mistaken, are often trying to do a good job), but corporate representatives, as well.

E. LEGAL CONTEXT

It is impossible to anticipate every question that may be asked. Therefore, in preparing an adjuster for deposition it is necessary that he or she be intimate with the legal context in which the case is going to be tried. For example, if the case is a first-party bad faith case for breach of the duty of good faith and fair dealing, the standard is failing to pay a claim in which an insurer's liability has become reasonably clear. *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48 (Tex. 1997). That is the question for the case. The insurer does not have to be correct in its determination. In fact it may be wrong. That does not result in liability. The focus of the adjuster and corporate designee in the preparation and in answering the questions is this—at the time the decision was made on the claim, was the insurer's liability reasonably clear? Was there information requested that had

not been provided? Was the evidence conflicting? Were there other policy defenses that were still in play? All of these issues would prevent the insurer's liability from being reasonably clear. The representative does not have to establish that his or her decision was correct—only that he or she had a reasonable basis for taking the position that they did. If they can do this, there is no bad faith or breach of the duty of good faith and fair dealing. This is the legal context they must keep in their mind when answering the questions from counsel. The same is true for the coverage deposition. It is critical that the deponent (especially a corporate rep.) be intimate with the legal standard governing the coverage issue and how the evidence impacts it. They must be able to filter the questions that will be asked through the legal standard counsel has given them that will determine the coverage issue in order to appropriately answer the questions that will be presented. The questions to the adjuster must also be in the appropriate legal context. Counsel for the insured must be intimate with the appropriate legal standard.

F. FACTUAL CONTEXT

Just as the representative must be aware of the appropriate legal context when answering the questions, he or she must also be aware of the factual context in which they are answering the questions. They must be familiar with the prior testimony in the case—particularly with respect to prior testimony of the insurer. One of the worst things that can happen in a case is for two witnesses from the same company to testify inconsistently on their understanding of material facts in the case. It gives the appearance of incompetence and that the left hand does not know what the right hand is doing. If the appearance can be created for a jury that one part of the company is unaware of what is happening in another part of the company, it is not a far reach for the jury to conclude that the company does not have in place proper policies and procedures in place for the handling of claims and that bad faith has been committed. Sometimes it is impossible to avoid inconsistencies in testimony. However, they should be few and far between. Also if the witness is aware that he or she will be testifying inconsistently with another witness, it will not come as a surprise during the deposition and a logical and cogent explanation can be prepared for the inconsistency.

G. REGULATORY CONTEXT

It is assumed by jurors that anyone working at a job should be aware of the laws and regulations that govern the performance of their job. If they are not, then it is not a far leap for the jury to conclude that the person probably is not properly prepared for his or her job. The same is true for insurance company employees. It is critical that the attorney preparing the adjuster or representative for his or her deposition make sure that they are aware of the regulatory context in which they operate, even if those regulations are not involve in the case. Often, when a representative is presented with the question: "What standards does your company have to insure the prompt investigation of claims under your policies", many will respond that there is no claims handling manual and that each claim is adjusted on its own facts. 28 TAC 21.203(3) defines "unfair claims settlement practice" to include "failing to adopt and implement reasonable standards for prompt investigation of claims arising under its policies." The deponent has just admitted to an unfair claims settlement practices act. Imagine the impact if that testimony is provided a corporate representative. Similarly, the deponent may be asked to produce a complete record of all complaints received during the past three years. Those who do not want to spend the time looking for the complaints or even ask if they are maintained (and who do not understand the importance of the question) will not do it. Once again they have admitted to an unfair claims settlement practice. 28 TAC 21.203(6) makes it an unfair claims settlement practice to fail to maintain "a complete record of all complaints. . . which it has received during the preceding three years or since the date of its most recent financial examination by the commissioner of insurance, whichever time is shorter." While the lack of standards in and of itself may not be case dispositive in that particular case, if there are enough violations of the regulations, the jury will think "where there is smoke, there is fire." The scope of regulatory

context in Texas is broad. Texas has greater regulation of its insurers than any other state in the United States. To cover the waterfront, one must look at the Insurance Code, the Administrative Code, board orders, board bulletins and any other positions taken by the TDI.

H. COMPANY POLICIES

As indicated above, the insurer is required to maintain certain policies. If they do not, it is an unfair claims settlement practices act as defined by the regulations. Many companies will have their own claims handling manuals and procedures. First, it goes without saying that any insurer that has its own claims handling manual should have a disclaimer in the front in capital letters and bold print indicating that it is to serve only as guidelines and that the handling of an individual claim will vary depending upon the individual facts of the case and that the procedures and steps set forth in the manual cannot and do not apply to every single case. If, however, an insurer does have policies and procedures, the representative should be intimately familiar with them in order not to present testimony inconsistent with their own policies and procedures. Nothing is more damaging than to have a representative present testimony about the procedure he or she followed and then be impeached with the insurer's own policies and procedures. The question is "Why didn't you follow your own policies and procedures?" Usually the answer that follows is not one that the attorney for the insurer wants to play back to the jury. The focus should not be limited to merely written policies and procedures. Most every insurer now has a web site as part of their advertising. On the web site, there typically is a mixture of advertising and policy. Generally, the copy has not been written by one in the claims department but someone in the marketing department. This can lead to embarrassing questions. On many occasions the marketing department may have assumed duties or responsibilities that are not imposed by law. For example, the statement that "We put the interests of our insureds first" sounds great from a marketing standpoint but does not accurately reflect duties under Texas law. By placing the statement on the company website, an argument can be made that the company has assumed a duty not imposed by Texas law. Equally as damaging is that while a jury may not assume that an adjuster is responsible for what is maintained on a company website or in company marketing materials, they will assume that a corporate office or executive does.

I. RULES OF CONSTRUCTION

If the deposition concerns a coverage question, and the deposition of the representative is focused on the coverage issues, it is imperative that the deponent be aware and fully informed of the governing rules of policy construction and interpretation in Texas. Many lawyers and sometimes judges do not fully understand the steps and rules that govern policy interpretation under Texas law. (See "Algorithm for Construction of Insurance Policies under Texas Law" by Cooper, Sheffield and McClelland, 10th Annual Insurance Law Institute, University of Texas Continuing Legal Education, Austin, December 8-9, 2005.) However, the representative should have a basic primer on the rules of construction in order to prepare for the deposition. For example, the Texas Supreme Court has held that a policy is ambiguous if it is susceptible to two or more reasonable interpretations. *Texas Farm Bureau Mut. Ins. Co. v. Sturrock,* 146 S.W.3d 123 (Tex. 2004). Whether or not a policy provision is ambiguous is a question of law for the court. *National Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc*., 907 S.W.2d 517 (Tex. 1995). In many cases, resourceful attorneys will try through the deposition of the representative to create an ambiguity. For example, the adjuster may be asked "If another court has interpreted a policy in a certain manner, it must be reasonable, because otherwise you are saying that the court is unreasonable." Many may initially agree, even if unwittingly, that the other interpretation is reasonable and counsel for the insured will argue that, as a result, there are two or more reasonable interpretations. This is not the law. The fact that a court may interpret a policy differently does not create an ambiguity. *Sturrock*, 146 S.W.3d 123 (Tex. 2004). Courts misinterpret policies all the time. The number of times that trial courts and courts of appeals in

Texas have been reversed based upon their interpretation is innumerable. However, it does not make their interpretation reasonable. The representative needs to be prepared for this type of question from the creative insured's attorney. Likewise, the representative may be asked "If the policy is ambiguous, is it interpreted against the insurer?" Some will answer this question "yes". However, that is not the correct answer. The answer according to the Texas Supreme Court is that the rule of *contra proferentum* is a rule of last resort. *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430 (Tex. 1995). It is only resorted to after application of the rules of construction have been applied to resolve ambiguities and extrinsic evidence examined to determine the parties' intent. Further, the rule does apply to policy exclusions, as is commonly misconceived. Exclusions are no automatically construed against the insurance company. Exclusions are subject to the same rules of policy interpretation as are the rest of the policy terms. Adequate time needs to be spent with the representative insuring that he or she has a basic understanding of the rules of construction and will not be misled by opposing counsel's questions.

J. PRIOR POSITIONS OF THE COMPANY

The advent of the internet is a blessing and a curse. For insurers and large corporations, it is generally a curse. Now it is possible for attorneys to research many of the cases that these large corporations have been involved in. For many companies, being sued is a normal part of their business and the number of cases that this happens every year is quite large. In all of these cases, these companies, through their attorneys, are taking positions reflecting the company's view on a particular subject. Most federal cases and pleadings can now be accessed through PACER. Many of the state court proceedings and pleadings can be accessed through subscriptions with West Publishing and LexisNexis. If the company is taking a position on a critical issue, it is incumbent upon the counsel to use his or her best efforts to determine if the company has previously taken a position on that particular subject. This is not possible in all cases. However, it is extremely damaging to a case for the representative to be asked: "And your company's position on this subject is 'x'?" Then the next question will be: "Well, didn't your company take the position of 'y' 6 months ago in this case?" The credibility of not only the deponent, but the company itself, can be tremendously impacted by this type of impeachment. Therefore, a critical part of the deposition preparation is to identify other positions taken by the company in other litigation. This can often be a very troublesome proposition. However, as stated previously, if the insurer has someone in the general counsel's role or has coordinating counsel, the job is much easier, and it is much easier for the company to maintain consistent positions in litigation throughout the nation.

K. THEME OF THE CASE

Every case should have a theme. It is critical for trial counsel to develop that theme as early in the case as possible, preferably before the key depositions of the adjusters. The manner in which deposition questions will be answered will in large part be determined by the theme. For example, if the theme of the case is that the insured knew of the loss or that a loss was likely to occur before the policy was issued, it is critical that this theme be supported by the deposition testimony. It does the trial strategy of the case no good if the representative is led to the point where he or she admits that there simply is no way that the insured could have known that this loss had occurred or was going to occur before the policy was issued. If this is the testimony of the adjuster or corporate representative, then the position and theme should never have been adopted to begin with. The deposition of the representative must snugly fit into the theme of the case. If it does not, then the insurer needs a new theme or new representative.

III. THE DEPOSITION ITSELF

Assuming the requisite preparation has taken place, the next step is the deposition. If the representative has been properly prepared, most of the hard work has been done and the deposition itself should not be strenuous. However, there still are a number of steps that

must be taken to insure that the testimony will be received as favorably as possible.

A. AGREEMENTS AS TO TESTIFYING ENTITY

Previously, I discussed the importance of knowing the name or names of the corporate entities involved, especially when a representative is testifying on behalf of more than one. It is important to get agreements on the record immediately as to which "hat" the deponent is wearing and that use of a trade name (i.e. "State Farm") is intended to still only apply as it relates to the entity being deposed. If you are not presenting the witness to testify on behalf of a party who is not properly named (i.e. a holding company), get a statement to that effect on the record. If a witness has been designated to testify as to some, but not all of specifically identified topics in a Rule 30(b)(6) or 199.2(b)(1) deposition, clarify exactly who the party is testifying for, and in what capacity, as often as needed.

B. APPEARANCE

Most depositions in large cases are videotaped. There are several reasons. First, most of our society is extremely visual. Studies show that juries pay more attention to videotaped depositions and retain more of the information than in depositions that are read from the witness stand. Second, the fact that the deposition is being videotaped puts additional pressure on the deponent because he or she knows that not only will the jury hear their answers, but will also be able to see how they answered the questions. Therefore, in the videotaped depositions, the representative must not only be prepared in the substance of their answers but also how they answer the questions. They must be prepared on how they should dress and appear on the videotape. (Wear no article of clothing or jewelry, including piercings that might be offensive to anyone on the jury, including the most conservative little old lady or most liberal 18 year old young man.) The representative must also be prepared on body language. In interviewing jurors, the most common comments are not on what the witnesses said, but on their body language. Were their arms crossed? Did their eyes go back and forth? Did they slump in the chair? Did their face get red with the hard questions? Did they perspire? The appearance of the adjuster cannot be overstated. He or she must be professional looking and know how to respond to questions in an open manner. He or she must not be argumentative and should always be polite in answering questions. If the representative is rude and overbearing in the deposition, the jury will assume that the company was rude and overbearing in the manner in which they dealt the insured. On the other hand, if the deponent is thoughtful and methodical in the way he or she responds to the questions, the jury will assume that the company was thoughtful and methodical in the manner in which he or she responded to the claim at issue.

C. OBJECTIONS

Defense counsel must be on his toes when defending the adjuster's or corporate representative's deposition, particularly on the issue of objections to the questions. Many of the questions referred to above that are quite useful to the insured are quite objectionable. To make matters more complicated, insurance companies are in the business of applying the law to the facts when handling a claim – which begs for questions that call for legal conclusions. If the representative is asked whether he or she agrees that an insurance company has a duty to put the interests of the insured above their own interests, the question is clearly improper. Generally, the issue of the existence of a duty is a question of law for the court and is an improper question. On the other hand, the question: "Do you believe that you had a duty to defend the case" is more obscure. The question is irrelevant, of course, although an easy one to slip in. Questions involving pure issues of fact are not likely objectionable at all. For example, does the insurer have policies in place to insure the prompt investigation of claims? Likewise, questions like "what portion of the pleadings did you rely upon in asserting the intentional acts exclusion in your declination of January 1, 2012" are completely permissible. The more difficult area is the one involving mixed questions of fact and law. Was there a reasonable basis for failing to pay the claim or delay in payment of the claim? This question

clearly involves questions of fact but also involves questions of law as well.

D. DUCES TECUM

Nearly every notice of deposition of an adjuster will come with a duces tecum or prior request for production of documents. No doubt, counsel will assert objections to some and seek to withhold them. The extent of the privilege will turn on each case and in large part depend upon if the case is a third party liability case or is a first party case. Generally, in a third-party liability case, the scope of privilege is narrower. In a third-party liability case, such as *Stowers*, the insured is entitled to its attorneys' file and generally entitled to the claims file for the adjuster handling the liability portion of the case. Typically, little, if any can be withheld. One of the most common items withheld in third-party liability, such as *Stowers*, claims is the reserve information. Currently, there are cases going both ways on the discoverability of the reserve information. In withholding information and presenting a witness for deposition, the attorney needs to be careful that the testimony still remains consistent with the withheld documents. There have been several cases where an adjuster was presented for deposition while certain documents were withheld. The adjuster was asked very specific questions and answered them in a specific fashion under the mistaken belief that the documents would remain privileged. A motion to compel was filed and the court ordered the documents to be produced. The information in the documents directly related to what the adjuster had sworn to under oath. At the trial of the case, the credibility of the adjuster was totally demolished when it was shown he testified one way when the documents that had not been produced directly contradicted his testimony. Another area of critical importance is emails. Generally, there will be a request for relevant emails early in the case. Care should be taken when suit is filed or notice of a claim is given to see that all relevant emails are preserved for litigation. *Trevino v. Ortega*, 969 S.W.2d 950 (Tex. 1998). Once a party has notice of litigation or threatened litigation, a duty exists under Texas law to see that all relevant evidence is preserved. *Id.*

E. PRIVILEGES

No doubt the issue of privileges will arise during the deposition. As with the issue of documents, the issue of privilege will in large part depend upon if the case is a third-party liability case or a first-party liability case. In third-party cases, there will be few privileges until the time of anticipated litigation. If the case is a first-party case, then the anticipation of litigation may have occurred very early in the case if there were threats of litigation. When representing insureds, this is one reason to hold off threatening litigation. Once the threat has been made, the privilege attaches. The threat of litigation is probably not going to change the manner in which the claim is handled and should be withheld as long as possible if the insured wants to push the anticipation of litigation date back as far as possible.

IV. CONCLUSION

Defending the deposition of insurance company representatives may seem like a daunting task, but in reality, it's the best opportunity the company may have of turning the bend in a contentious coverage or bad faith suit. Savvy lawyers are adept at making broad sweeping allegations against insurance companies, relying upon stereotypes that are often imputed to large corporations. This puts the insurance company with the task of unraveling the story, and "explaining away" its conduct. Or does it? A well prepared witness, who is honest, straightforward, knowledgeable, and measured can change the dynamic of the case, change the theme of the case, and reduce the overall exposure to the company. Fortunately, the most well-prepared witnesses usually are accompanying by the most well-prepared lawyers. Assuming that you have a witness that is willing to take direction, this means that you have a significant degree of control over what happens during the deposition. Knowing the opportunities that a deposition presents to your client is as important as knowing the potential traps posed. With thoughtful preparation and a fundamental understanding of your opponent's burden of proof, you should be in the best place to prepare your client accordingly.