

# The Defense of a Civil Lawsuit “Through the Eyes of the Insured”

Jason Guy Moyers, Esquire  
2019 VADA Annual Meeting  
Norfolk, Virginia  
October 4, 2019

# Insurance Defense



Sophisticated insurers

Existing relationship

Regular source of business

Knowledgeable about the litigation process and the legal issues involved

To them, it's not personal

# The Insured



Most often, a lawsuit is a new experience for an insured

Most have never been involved in a lawsuit before

You might be the first attorney they've ever met

Unaware of how legal process works

Not familiar with legal terminology, *ad damnum* clauses, boilerplate averments, etc.

Unaware of how their insurance policy applies

They didn't pick you. Rather, it's an "arranged marriage."

# The Insured



“Remember that every step in their case is new and frightening to them. Try to see the process through their eyes. While you have done 1,000 depositions, they have never done one. ... Never forget how scary the entire process can be to someone going through it for the first time.”

Alexander Y. Benikov, *Four Types of Clients That All Lawyers Need to Understand*, ABA Law Practice Today (Oct. 13, 2016).

# We, as counsel, wear many hats.



- \* Counselor
- \* Advisor
- \* Therapist
- \* Hand holder
- \* Friend
- \* Confidante
- \* Set of ears

# We, as counsel, wear many hats.

“A lawyer can wear many hats in the course of one client representation: advisor, advocate, and counselor. It is, among many other things, the lawyer’s ability to wear these hats and to promptly recognize and switch roles according to the task at hand that sets lawyers apart from other professions.” Elliott I. Pinke, *DTCI: A Refresher on Insurance Defense Client and Company Reporting*, [theindianalawyer.com](http://theindianalawyer.com) (June 22, 2011).

# Stress of Litigation



# Stress of Litigation



*“I’m being sued? By whom? It must be a mistake!”*

*“I experienced emotions similar to the five stages of grief.”*

*“I felt tremendous, tremendous anxiety.”*

Medical Insurance Exchange of California (MIEC)



# Stress of Litigation



*“Depression crept into the picture.”*

*“My whole world was being threatened by something I thought could take it all away.”*

*“I had to face reality; it wasn’t going away.”*

Medical Insurance Exchange of California (MIEC)

# Stress of Litigation

## Common Symptoms



- \* Loss of control
- \* Financial worry
- \* Fear of the unknown
- \* Time commitment
- \* Embarrassment / Social Stigma
- \* Isolation
- \* Physical illness

# Stress of Litigation



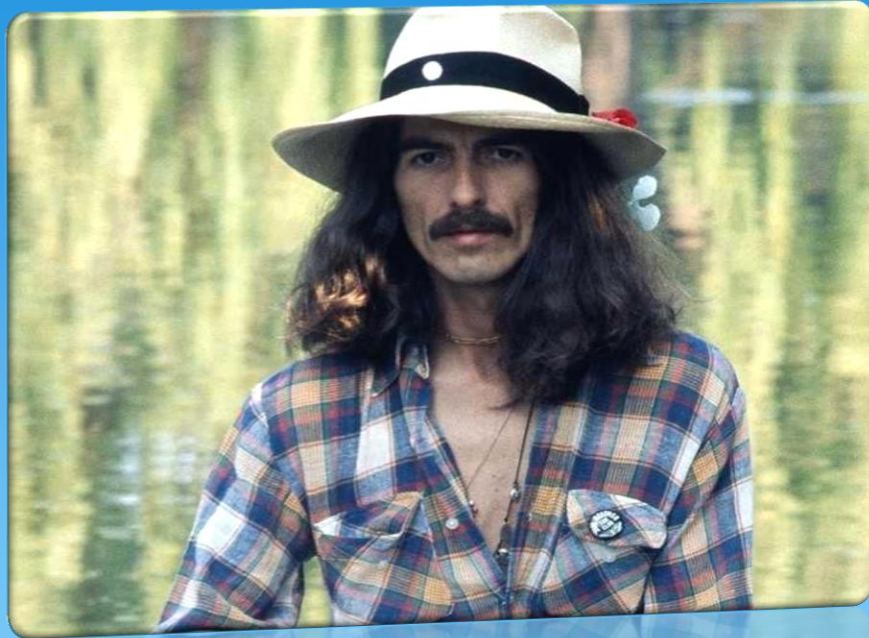
- \* Interference with insured's daily mental, emotional, and physical life
- \* Impaired decision making
- \* Strain on insured's support systems (personal relationships)
- \* Interference with counsel's efforts to advance the litigation
- \* Erosion of the attorney-client relationship

# Stress of Litigation



“Some individuals can tolerate the uncertainty of the legal process, while others find it overwhelming and maddening. For these individuals, litigation is a traumatic experience creating sleepless nights and agonizing days filled with obsessive thinking, panic attacks, and fear. Intrusive thoughts of the legal case can invade daily activities and disrupt evening dreams. It is as though time has stopped for everything else except the lawsuit.”

Larry J. Cohen and Joyce H. Vesper, *Forensic Stress Disorder*, 25 *Law & Psychol. Rev.* 1, 4-5 (2001).



“Give me hope  
Help me cope, with this heavy  
load”

George Harrison

*Give Me Love (Give Me Peace on Earth)*

Living in the Material World

1973

# Stress of Litigation



“With greater awareness” of the negative aspects of legal processes on the emotional and psychological functioning of clients, “lawyers can better prepare their clients for litigation stress, and, where appropriate, take preventative actions to minimize the negative aspects of the litigation experience.”

Michaela Keet, Heather Havin, and Shawna Sparrow, *Anticipating and Managing the Psychological Cost of Civil Litigation*, 34 Windsor Y. B. Access Just. 73, 75 (2017).

# Stress of Litigation



“Remember that every step in their case is new and frightening to them. Try to see the process through their eyes. While you have done 1,000 depositions, they have never done one. ... Never forget how scary the entire process can be to someone going through it for the first time.”  
Alexander Y. Benikov, *Four Types of Clients That All Lawyers Need to Understand*, ABA Law Practice Today (Oct. 13, 2016).

# Stress of Litigation

## “Psychological Soft Spots”

- \* Service of the Lawsuit
- \* Initial Meeting with Counsel
- \* Written Discovery
- \* Depositions
- \* Settlement Negotiations
- \* Trial
- \* Appeal



# Initial Meeting



- \* First impressions are key
- \* Interpreter? Guardian?
- \* Important, without rose-coloring it, to instill a feeling of empathy, relief, ability to help, etc., right out of the gate
- \* Give the insured an overview of the litigation process, including a heads up on the various “psychological soft spots” that will arise

# Initial Meeting



- \* Give the insured, as best you can, a realistic timeline of how long the lawsuit will take
- \* Employ active listening
- \* Speak in plain English
- \* Avoid a “seen one, seen them all” or “cut to the chase” mentality
- \* Set clear guidelines for communication, both method and schedule

# Initial Meeting



- \* Explain your role and that of the insurance company
- \* Explain contours of attorney-client privilege
- \* Reservation of rights?
- \* Excess exposure?
- \* Other potential sources of coverage?



“Like a bridge over troubled  
water,  
I will ease your mind”

Simon & Garfunkel

*Bridge Over Troubled Water*

Bridge Over Troubled Water

1970

# Keep the Insured Informed

- \* Insureds, for the most part, want to feel connected. Your keeping them in the loop helps reduce their anxiety.
- \* Communicate with the insured on a consistent basis
  - \* If you can't call, ask your assistant or paralegal to do so
- \* Return all telephone calls within 24 hours
- \* Call the insured from time to time to see how they're doing. If nothing else, be sure to ask them how they're doing when you contact them to give them an update on the case
- \* Don't ever leave the insured to feel as if:
  - \* They're wasting your time
  - \* What they want to know is stupid, doesn't matter, etc.
  - \* It's a hassle to get in touch with you

# Written Discovery



- \* In-depth and oftentimes personal nature of information or documents requested can come across as “invasive,” “demoralizing,” or “humiliating.”
- \* Insured can resent, or even feel victimized by, the imposition on her time, particularly with respect to matters she feels should be off limits or which she’d rather not reveal or discuss.
- \* Stress associated can be especially high when it comes to revealing information that undermines the insured’s defense(s) to the lawsuit.

# Written Discovery



- \* Send the insured ahead of time a courtesy copy of any discovery requests, explaining what they are and what the insured needs to do
- \* Meet with the insured to prepare responses
- \* Brief the insured on information from the insurer's claim file that will be included in the responses

# Written Discovery



- \* Provide the insured with a final draft of the responses to review and approve
- \* Make sure the insured understands significance of her notarized signature on the responses
- \* Provide the insured with a courtesy copy of the signed responses



# Depositions



- \* This part of litigation can be especially “unnerving.”
- \* First time the insured faces interrogation by plaintiff’s counsel
- \* Also, likely the first time the insured has seen the plaintiff since the day of the accident
- \* Forced to sit and answer questions under oath
- \* Not allowed to ask questions
- \* Not allowed to speak unless spoken to
- \* Not allowed to challenge anything the plaintiff or other deponent says with which the insured disagrees

# Depositions



- \* Questions asked can be vague and confusing or specific and probing.
- \* The insured may resent being asked to speculate or for information that she deems to be personal or irrelevant.
- \* The insured also may resent questions that, directly or indirectly, challenge her honesty and integrity.
- \* Tension between honestly answering the questions asked and giving up information that may be damaging to the case
- \* Tension between not volunteering information and wanting to provide a meaningful narrative

# Depositions



- \* Duty to prepare insured for psychological aspects of deposition
- \* Explain the deposition process – Videotaped?
- \* Identify the players
- \* Give the insured a heads up on the types of things she will be asked
- \* Ask the insured to consider how she may react to certain evidence or testimony, thereby identifying areas that need to be approached in a more cautious manner
- \* Practice sample questions / role playing

# Depositions



- \* During the deposition:
  - \* Take charge
  - \* Objections
  - \* Always have the insured's back, especially in the face of aggressive questioning from plaintiff's counsel
  - \* During breaks, resist any tendency to "scold" the insured as to how she is answering questions. Rather, be as constructive, and as gentle, as you can.

# Depositions



- \* Post-deposition debriefing
- \* Helps minimize any lingering anxiety over what the insured just experienced
- \* Provide feedback both as to how the insured did and how the testimony elicited fits into the overall defense of the case
- \* Let the insured know what will happen next

# Trial



- \* Explain the trial process – Procedure, rules of evidence, etc.
- \* Identify the players
- \* Review the jury list
- \* Overview of insured's expected testimony
- \* Review of important documents – Deposition transcript, discovery responses, etc.
- \* Practice sample questions

# Trial



- \* Field trip to the courthouse
- \* Confirm start time, where to meet, what to wear, etc.
- \* Avoid having trial counsel “parachute in” just before trial, particularly if trial counsel and the insured have never met
- \* Always have the insured’s back.

# When mistakes occur ...

- \* Own up immediately to any service lapses
- \* Assure the insured that you are in control of the situation and that you know (or will figure out) what went wrong and will fix it.
- \* Avoid a “lawyer” approach when addressing mistakes (“let’s sort out the facts and allocate responsibility”). Instead, “take your client’s side in these situations, immediately and with empathy, regardless of what you think the ‘rational’ allocation of ‘blame’ should be.” Micah Solomon, *Transform Your Law Firm’s Client Service: Consultant Offers Five Steps for Starting Your Legal Industry Initiative* (Feb. 4, 2014).



# Follow Up/Exit Interview



- \* You might learn something you didn't know or realize
- \* You might learn something you can employ on a larger level to your relationship with the insurer, the product manufacturer, etc.

# At the end of the day ...



- \* Put yourself in the insured's place.
- \* If you wouldn't want it done to you, don't do it to them.
- \* Treat the insured the way you would like to be treated.