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Special Report

Insurance Law Practices Must Evolve

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Some changes in the law occur with little fanfare, while others are preceded by intense debate. Failing to understand the practical implications of these changes not only places the client at a disadvantage but could subject the attorney to a professional negligence claim. Attorneys representing insurers, policyholders and personal-injury claimants need to be sure they have adjusted their practices to comport with three changes or clarifications in the law.

1. Unsworn declaration: A recent nuts-and-bolts change in the law that received little fanfare when legislators made it is contained in Texas Civil Practice & Remedies Code §132.001. Although the change is unlikely to keep legal-malpractice attorneys up at night, it is one that applies broadly to all areas of practice.

As of Sept. 11, 2011, Texas jurisprudence permits unsworn declarations in lieu of a written sworn declaration, verification, certification, oath or affidavit. To comply with the statute, the declaration must be in writing and subscribed to by the person making the declaration as true under penalty of perjury and be in the jurat form set forth by statute.

The decision to remove the requirement that people swear to their testimony in front of a notary public has eliminated a nuisance that rarely served a real need, and it has aligned Texas practice with longstanding federal practice.

Section 132.001 applies broadly to eliminate the need to use notaries public. To further that goal, future harmonizing revisions to Texas Rules of Civil Evidence 803(6) and 902(10) and Texas Civil Practice & Remedies Code §18.001 are likely. For instance, §18.001 still contains mandatory language that the affidavit "must be taken before an officer with authority to administer oaths," language that is superfluous in light of §132.001. Texas lawmakers probably will replace the term "affidavit" with the term "certification" or "declaration," similar to federal statutes.

At a minimum, attorneys need to be prepared to educate records custodians concerning the change in the law — a change the records custodians certainly will be pleased to see. Until the use of unsworn declarations has become commonplace, lawyers should be prepared to educate their judges, as well.

2. Paid or incurred: In contrast to the lack of fanfare preceding the unsworn declaration enactment, the 2003 paid-or-incurred statute, as set forth in Texas Civil Practice & Remedies Code §41.0105, was the subject of intense debate before and after enactment. Although legislators originally enacted the law in 2003, its scope was not resolved until the Texas Supreme Court's 2011 decision in *Haygood v. de Escabedo*. The plaintiff bears the burden to prove the amount and reasonableness of the past medical expenses, and, under *Haygood*, the only relevant evidence regarding past medical expenses is the amount actually paid or incurred by or on behalf of the claimant.

All these years after the paid-or-incurred statute passed, it's now clear that best practices regarding this development mean a paperwork change and increased responsibilities during the proving-up phase.

When possible, attorneys should discard the old affidavit forms containing the total medical charges before write-offs and deductions and use affidavits that set forth only the amounts actually paid or incurred. The same admonition holds true for the medical invoices themselves that contain the original charges and the write-offs. At a minimum, lawyers carefully must redact irrelevant expenses before admitting the records into evidence.

Section 41.0105 also has an indirect impact on the conduct of defense counsel. Prior to §41.0105, defense attorneys almost exclusively relied on the plaintiff's attorney to obtain and prove up past medical expenses (as opposed to treatment). Defense counsel has no real need, other than for settlement purposes, to do the work of the plaintiff's attorney.

That old litigation strategy is no longer advisable. While the affidavits the plaintiff filed proving the amount of medical expenses may have been accurate when made, they may be inaccurate by the time the case proceeds to trial. That's why a defense attorney must conduct discovery to determine the accuracy of the medical expenses that the plaintiff claims were actually paid or incurred.

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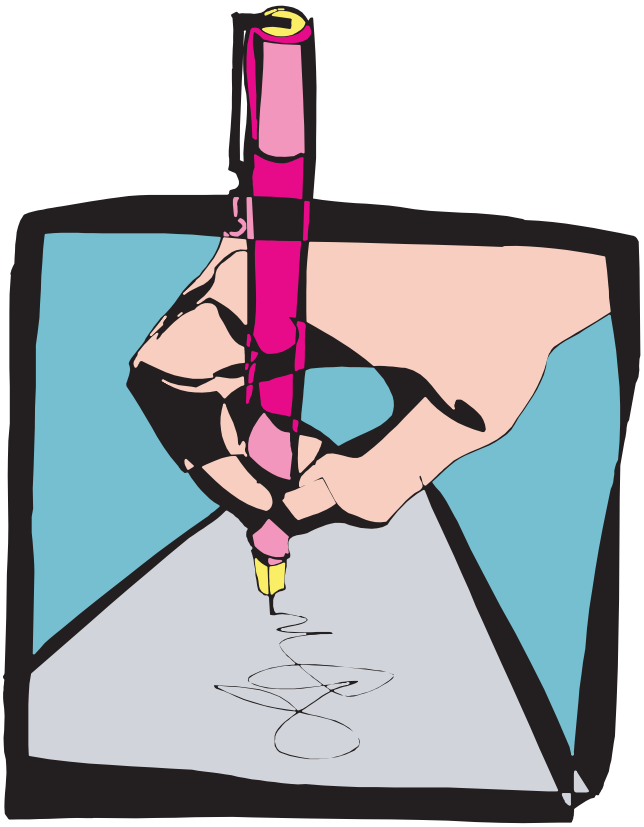

3. Duty to defend: The last development in the law — or, better stated, a reaffirmation — has significant real-world impact on attorneys representing insurers, policyholders and personal-injury claimants.

Although it had long been the law, the Texas Supreme Court in 2008 reaffirmed the "no duty to defend" rule in *National Union Fire Insurance Co. of Pittsburgh v. Crocker*. The court held that a liability insurer has no duty to inform an insured of available insurance coverage and no duty to defend an insured, even when the insurer has actual knowledge that suit has been filed and the insured has been served.

Before *Crocker*, it was not uncommon for the personal-injury claimant's lawyer to place the alleged tortfeasor's liability insurance carrier on notice of suit and, if an answer was not timely filed, obtain a default judgment, which could serve to pressure the insurance carrier to settle. On the other side of the coin, insurers' attorneys often filed an answer upon notice that the insured had been served.

Counsel for an insurer should advise the carrier to defend a liability suit against the insured/alleged tortfeasor only after the insured/alleged tortfeasor has forwarded suit papers indicating that it has been served and has requested a defense.

That same caution applies to insurance-defense counsel hired to represent the alleged tortfeasors. When the carrier asks defense counsel to monitor a particular suit to determine if the insured has been served, defense counsel should not assume that the carrier wants an answer filed upon confirmation of service.

For the personal-injury claimant, *Crocker* has a far-reaching impact. If a lawyer for a personal-injury claimant obtains a default judgment against a tortfeasor who potentially has insurance coverage — without first confirming that the tortfeasor requested a defense from the insurer — claimant's counsel may have unwittingly torpedoed the claimant's ability to collect insurance proceeds.

That's why, when suing and serving an alleged tortfeasor, claimant's counsel should repeatedly inform the tortfeasor through certified letters and phone calls of the dangers of a judgment not covered by insurance and the need for the tortfeasor to contact the insurer to request a defense. Claimant's counsel only should obtain a default judgment after confirming that the tortfeasor complied with the notice-of-suit provisions of the insurance policy. TNL

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