THE UNLICENSED PRACTICE OF LAW & HOW TO AVOID IT

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It may be a situation that you have encountered a hundred times before or a circumstance for which the resolution is obvious, but insurance claims adjusters should always take care that their actions or advice do not constitute the unauthorized practice of law, the consequence of which may be a fine, an injunction, and even imprisonment.[1] And this is not always an easy task. Many factors determine whether an action crosses the line between claims adjustment and the unauthorized practice of law, including state statutes and regulations defining or regulating adjustment of insurance claims, state law defining and regulating the unauthorized practice of law, whether an adjuster is working for an insurer or representing an insured, and whether a dispute has arisen.

What might constitute the unlicensed practice of law is an abstract inquiry without reference to a specific factual scenario. Indeed, courts have recognized that "the line between lay and legal judgments may be a fine one," and that "[e]ach given case must turn on a careful analysis of the particular judgment involved and the expertise that must be brought to bear on its exercise."[2] The Florida Supreme Court formulated the following test:

> It is generally understood that the performance of services in representing another before the courts is the practice of law. But the practice of law also includes the giving of legal advice and counsel to others as to their rights and obligations under the law and the preparation of legal instruments, including contracts, by which legal rights are either obtained, secured or given away, although such matters may not then or ever be the subject of proceedings in a court. We think that in determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal

[1] For example, Florida Statute section 454.23 (2016) makes the unlicensed and unauthorized practice of law a third-degree felony, punishable by a term of imprisonment not exceeding five years and a $5,000 fine. California Business and Professions Code section 6126(a) provides that a person who engages in the unauthorized practice of law is guilty of a misdemeanor punishable by up to one year in a county jail and by a fine of up to $1,000.

[2] *Dauphin Cty. Bar Ass'n v. Mazzacaro*, 351 A. 2d 229, 233 (Pa. 1976).

> skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.[3]

While it may appear that statutes prohibiting and criminalizing the unlicensed practice of law are protectionist measures by those admitted to state bar associations, "[t]he single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation."[4] The South Carolina Supreme Court explained:

> Our duty to regulate the legal profession is not for the purpose of creating a monopoly for lawyers, or for their economic protection; instead, it is to protect the public from the potentially severe economic and emotional consequences which may flow from the erroneous preparation of legal documents or the inaccurate legal advice given by persons untrained in the law."[5]

To further this purpose, state bar associations require that those admitted to practice law meet standards of education, competence, and character.

With the purpose of the statutes regulating the practice of law in mind, it is somewhat easier to discern what might constitute the unlicensed practice of law. As one Texas Court of Appeals noted, "[t]he practice of law embraces in general all advice to clients and all *action* taken for them in matters connected with the law."[6]

> When a person acts for himself or others and undertakes to advise prospective employers or clients by word *or course of conduct* concerning their legal rights and the prospects of settling personal injury, accident, or other legal claims, thereby encouraging the assertion or prosecution of claims or lawsuits, this person steps beyond the bounds of a legitimate investigation of the facts and engages in the unauthorized practice of law.[7]

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[3] *State ex rel. Florida Bar v. Sperry*, 140 So. 2d 587, 591 (Fla. 1962).
[4] *The Florida Bar v. Moses*, 380 So. 2d 412, 417 (Fla. 1980). *See also Shortz v. Farrell*, 193 A. 20, 24 (Pa. 1937) ("While, in order to acquire the education necessary to gain admission to the bar and thereby become eligible to practice law, one is obliged to 'scorn delights, and live laborious days,' the object of the legislation forbidding practice to laymen is not to secure to lawyers a monopoly, however deserved, but, by preventing the intrusion of inexpert and unlearned persons in the practice of law, to assure to the public adequate protection in the pursuit of justice, than which society knows no loftier aim.").
[5] *Linder v. Ins. Claims Consultants, Inc.*, 560 S.E. 2d 612, 617 (S.C. 2002).
[6] *Brown v. Unauthorized Practice of Law Comm.*, 742 S.W.2d 34, 41 (Tex. Ct. App. 1987).
[7] *Id*.

The character of the service and its relation to the public interest determine whether services performed by a layman constitute the practice of law. As a general rule, "after a default, dispute or controversy has arisen, the independent lay adjuster must step aside, for then the law declares that the further adjustment or litigation must be handled by a regularly licensed lawyer."[8] Many courts draw a line at the point a claim is disputed.

> The qualifications which a lay insurance adjuster must possess before the State Superintendent of Insurance may issue him a license are sufficient protection both to the claimant and the insurance carrier until a default or controversy arises. Such an adjuster must be familiar with the insurance laws of this state, but not with the wide range of legal learning required of a lawyer necessary to handling any sort of claim or default which is controverted. Before that time arrives, the service of the lay insurance adjuster relates to inquiries of a factual sort alone; such as the causes of fires and accidents and the extent of the loss and negotiations and agreements concerning the same, including securing the execution of a written release. When a dispute arises, it may take a wide range in the realm of the law and be governed by legal principles of a general sort, or it may be easily solved. And so may any disputed controversy. But the law cannot separate and classify those which are disputed, controverted or defaulted into classes, some of which require the legal learning of a lawyer and some do not.[9]

While insurance claim adjusters are skilled at the objective valuation of damages, negotiations of disputed claims may hinge on whether the value of damages and the insurer's liability can be proven in court if negotiations fail. This assessment requires an understanding of contract law in the jurisdiction of the loss, the rules of evidence, and evaluation of the relative strengths and weaknesses of each party's position.

Public adjusters especially should be wary of activities beyond documenting and measuring damages, gathering relevant facts, determining repair or replacement costs, submitting a claim to an insurance company, and negotiating an uncontested settlement. Interpreting an insurance contract, advising a client of his or her liability under an insurance contract, and advising a client of his or her legal rights under and insurance contract are actions that typically constitute the practice of law.

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[8] *Wilkey v. State ex rel. Smith*, 14 So. 2d 536, 546 (Ala. 1943).
[9] *Id.* at 546.

But courts have held that under specific factual circumstances, activities of an adjuster working for an insurance company that might be considered the practice of law are permissible when authorized by the insurance company:

> We are of the opinion that lay persons, lay adjusters, regularly employed, or lay independent adjusters employed by an insurance company to adjust losses may properly ascertain the facts and negotiate settlements or adjustments on behalf of insurance companies. We perceive no impropriety in an insurance company authorizing its lay adjuster to settle small claims or claims generally regarded by insurance companies as uneconomical to contest, such as "nuisance claims," without the specific approval of the company's counsel or its local attorney. If an insurance company, in the interest of economical management or administration, sees fit to inaugurate and maintain such a policy with respect to small claims we do not consider that the practice of law is involved in such settlements.[10]

For example, in *Jones v. Allstate Ins. Co.*,[11] the Washington Supreme Court held that an insurance company's claims adjuster who developed a nonadversarial relationship with an unrepresented claimant practiced law when she completed claims forms, advised the claimants regarding the settlement process, and recommended that they sign a complete settlement and release without advising them of potential legal consequences or referring them to independent counsel. The court held that the insurance company and its adjusters could continue this practice *but that they will be held to the standard of care of practicing attorneys*. Allstate's claims adjuster fell below this standard because she advised the claimants to sign the release, she did not properly advise them that there were potential legal consequences to signing the release and settlement check or alternatively refer them to independent counsel, she did not disclose that she had an adversarial interest which conflicted with the claimants' interests, and she followed Allstate's policy of discouraging attorney involvement in the claims process.

To determine "the line between lay and legal judgments"[12] in the claims adjustment process, adjusters should first look to the statutes that license adjusters in the state where the loss occurred. Florida, for instance, defines an adjuster's role depending on the nature of his or her employment. A public adjuster is one who "prepares, completes, or files an insurance claim form

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[10] *State ex rel. Junior Ass'n of Milwaukee Bar v. Rice*, 294 N.W. 550, 557 (Wis. 1940).
[11] *Jones v. Allstate Ins. Co.*, 45 P.3d 1068, 1070 (Wash. 2002).
[12] *Mazzacaro*, 351 A. 2d at 233.

for an insured or third-party claimant or who, for money, commission, or any other thing of value, acts on behalf of, or aids an insured or third-party claimant in negotiating for or effecting the settlement of a claim or claims for loss or damage covered by an insurance contract."[13] An independent adjuster is one who "is self-appointed or appointed and employed by an independent adjusting firm or other independent adjuster, and who undertakes on behalf of an insurer to ascertain and determine the amount of any claim, loss, or damage payable under an insurance contract or undertakes to effect settlement of such claim, loss, or damage."[14] A company employee adjuster is a person "licensed as an all-lines adjuster who is appointed and employed on an insurer's staff of adjusters or a wholly owned subsidiary of the insurer, and who undertakes on behalf of such insurer or other insurers under common control or ownership to ascertain and determine the amount of any claim, loss, or damage payable under a contract of insurance, or undertakes to effect settlement of such claim, loss, or damage."[15] Notably, the statutes authorize a public adjuster to file an insurance claim and aid a claimant in "negotiating for or effecting the settlement of a claim or claims for loss or damage covered by an insurance contract," but they authorize independent and insurance company adjusters to "to ascertain and determine the amount of any claim, loss, or damage payable under an insurance contract."

Adjusters can also look to rules drafted by state bar associations and notices or advisory opinions drafted by insurance regulators. The Virginia State Bar for example, has promulgated Unauthorized Practice of Law Rule 2,[16] which delineates the actions an adjuster may take on behalf of a client that do not constitute the unauthorized practice of law. Regarding negotiation of claims, which might be the easiest step of the claims process to inadvertently engage in the unauthorized practice of law, UPR 2-103 states:

> **Negotiation of a Settlement.**
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> (A) A non-lawyer shall not for compensation, direct or indirect, negotiate or settle a claim on behalf of another party not represented by a lawyer except:

[13] §626.584(1), Fla. Stat. (2016).
[14] §626.855, Fla. Stat. (2016).
[15] §626.856, Fla. Stat. (2016).
[16] UPR Rule is available at http://www.vsb.org/pro-guidelines/index.php/unauthorized-practice-rules/rule-2/.

(1) A lay adjuster may secure and convey factual data and information, transmit settlement offers made by either party, determine and express his opinion on the extent of damage or injury and its monetary value, deliver releases or other documents, and assist the lawyer for his principal in the efficient performance of ministerial acts arising out of the settlement negotiations.

(2) A lay adjuster may, in the course of negotiating a settlement for his principal, make statements to the claimant or others as to his principal's liability or as to the law governing the facts to the extent consistent with the principles enunciated in the Rules Governing Unfair Claim Settlement Practices as from time to time promulgated by the State Corporation Commission of Virginia, Section 38.2-510 of the Code of Virginia, provided that

(a) the lay adjuster has informed the claimant or other person that his principal may be adversarial to the claimant or other person;
(b) it is clear that the claimant or other person recognizes the lay adjuster as an adversary; and
(c) it is apparent that the claimant or other person is otherwise competent to manage his own affairs.

(B) A non-lawyer shall not for compensation, direct or indirect, conduct negotiations to settle a claim pending in court except with the approval of the lawyer for his principal.

And Florida's Department of Financial Services, Division of Insurance Agent and Agency Services, recently posted the following caution against the unauthorized practice of law for public adjusters who may contemplate filing a lien against their clients to recover payment for services rendered:

> The Florida Bar has recently made it clear that if a public adjuster files a claim of lien against a customer on their behalf or on behalf of their adjusting firm, which is a fictitious entity requiring representation by a lawyer, it would be considered engaging in the unlicensed practice of law. There is no statutory authority to authorize the conduct as section 713.03, F.S, creates liens rights in favor of numerous occupations and professions, but fails to include public insurance adjusters.

> Any public adjuster that engages in this type of activity is subject to disciplinary action by the Florida Bar and the Florida Department of Financial Services if a violation of the Florida Insurance Code is committed.[17]

But as the following case summaries demonstrate, application of such statutes and rules is not always certain. Whether an action crosses the line between adjusting and the practice of law is a fact-specific inquiry, making general advice or observations unhelpful.

In *Brown v. Unauthorized Practice of Law Comm.*,[18] the Texas Court of Appeals rejected Brown's assertion that he did not engage in the unauthorized practice of law when he represented claimants in insurance claims for property damages and personal injuries resulting from automobile accidents. He asserted that the Insurance Code authorized him to advise claimants regarding their rights and the advisability of making claims for personal injuries and property damages, to advise claimants whether to accept an offer to settle claims, to contract with claimants to represent them in their personal injury or property damage claims for a contingent fee together and an attempted assignment of a portion of the claimants' causes of action, and to contract with third persons to select and retain legal counsel to represent the them in any legal proceeding. Although the Court of Appeals accepted Brown's assertion that no witness testified at the hearing that he advised them regarding their legal rights, it rejected his arguments. "A person may confer legal advice not only by word of mouth but also by a course of conduct that encourages litigation and the prosecution of claims."[19] The court also rejected Brown's argument that he did not engage in the unauthorized practice of law because he represented claimants only in undisputed and uncontested claims. The court explained that if the issue of liability is uncontested, it does not necessarily follow that the third party *claim* is undisputed and uncontested. "[A]s long as the damage issue is unresolved, the claim is a disputed and contested claim."[20]

Notably, the court also rejected Brown's contention that his acts and services are the same as adjusters' acts and services and authorized by the 1987 Insurance Code. "Because Brown handles claims himself on behalf of persons *asserting* claims and because he does not investigate

[17] This caution is available at http://www.myfloridacfo.com/Division/Agents/Compliance/Adjusters.htm.
[18] *Brown v. Unauthorized Practice of Law Comm.*, 742 S.W. 2d 34, 42 (Tex. Ct. App. 1987).
[19] *Id*. at 40.
[20] *Id*. at 42.

or adjust losses on behalf of someone who is *handling* claims, Brown does not meet the definition of an adjuster and is not, therefore, performing the same acts or services as an adjuster."[21]

However, in *Unauthorized Practice of Law Comm. v. Jansen*,[22] the court distinguished *Brown* when the Unauthorized Practice of Law Committee (UPLC) sought to curtail the business of a licensed public adjuster who adjusted only first party property insurance claims. The UPLC asked the Court of Appeals to reverse the trial court's finding that the following do not constitute the unauthorized practice of law:

> A. Advising clients to seek the services of a licensed attorney if they have questions relating to their legal rights, duties and privileges under policies of insurance;
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> B. Measuring and documenting first party claims under property insurance policies and presenting them to insurance companies on behalf of clients;
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> C. Discussing the measurement and documentation presented to the insurance company with representatives of insurance companies; and
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> D. Advising clients that valuations placed on first party property insurance claims by insurance companies is or is not accurate[.]

But the Court of Appeals agreed with the trial court, explaining:

> We cannot agree with UPLC's contention that providing an estimate of property damage and filling out the appropriate forms to present a claim constitutes the practice of law. In reality, this is the same procedure any insured is required to follow to collect on an insurance policy. The fact that appellee is paid for his services and expertise does not convert his actions into the practice of law. Our holding is not to be construed as authorizing discussions or "negotiations" with insurance companies into coverage matters. Nor do we mean to imply that "presenting" a claim to the insurance company by a public insurance adjuster is the same as negotiating a settlement. The former is, in essence, merely delivering necessary paperwork and data while the latter entails the practice of law. Interpretation of insurance contracts would also most likely cross the line into the practice of law. Appellee agrees that if the issue to be submitted to an insurance company involves a *coverage* dispute, then the services of an attorney are required. We find that the trial

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[21] *Id*. at 43.
[22] *Unauthorized Practice of Law Comm. V. Jansen*, 816 S.W. 2d 813 (Tex. Ct. App. 1991).

> court arrived at a suitable accommodation that will not totally eliminate the profession of public insurance adjusting in the State.

The court also rejected the UPLC's argument that the trial court erred in holding the public adjuster was not engaged in the unauthorized practice of law when he advised clients whether insurance companies accurately valued their claims. UPLC contended that advising a client of the value of damaged property requires legal skill and knowledge and is analogous to advising a client to accept a sum of money in settlement of a claim, which the Court of Appeals held was the practice of law in *Brown*. But the Court of Appeals distinguished the facts of *Brown* because that case involved personal injury claims.

> We would be inclined to agree with UPLC if appellee were presenting personal injury claims, as the defendant did in *Brow*n, that entailed a determination of damages such as future medical expenses or other intangibles such as pain and suffering. However, we decline to make such a broad holding here. The judgment permanently enjoined appellee from advising clients to settle or from executing settlement releases. The stipulated facts merely allow appellee to advise clients on property damage valuations. An opinion concerning the valuation, whether it be repair cost or replacement cost, of a damaged piece of property hardly equates to counseling a client to settle a claim. There is testimony in the record by appellee stating that it is up to the client whether or not to accept the valuation determined.

In *Linder v. Ins. Claims Consultants, Inc.*,[23] the South Carolina Supreme Court held that a public adjuster engaged in the unauthorized practice of law when he advised his clients on the extent of coverage for a gun collection and then discussed the coverage for this collection with the insurance company adjuster. "While this 'advice' may simply have been pointing out the policy language," it constituted advice on the clients' rights under the policy, and the public adjuster knew at the time that he gave the advice that the insurer interpreted the insurance contract to limit its liability. The court explained, "[i]t matters not that the insurance company was mistaken," the public adjuster's "involvement went beyond an evaluation on the vital question of 'how much' the gun collection was worth, and transgressed into an evaluation of whether, and to what extent, the guns should be covered pursuant to the policy language."

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[23] *Linder*, 560 S.E. 2d at 622.

In *State ex rel. Stovall v. Martinez*, a former insurance adjuster and claims examiner for State Farm established his own business as an "insurance claims consultant." He advertised his services as an alternative to representation by an attorney and provided his services under a contingency fee contract that gave him the right to a lien on his claimants' recoveries. As part of his representation, he compiled a settlement packet of information, made written demand upon the insurance company, advised claimants regarding the reasonableness of settlements, and negotiated with insurance companies. The Kansas Attorney General filed suit against the insurance claims consultant, and the trial court enjoined him from the unauthorized practice of law and the business practices that gave rise to the penalties. The Kansas Court of Appeals affirme

> Purporting to be an expert, defendant offered a service, the performance of which clearly required knowledge of legal principles. Defendant induced his clients to place their trust in his judgment and skill in framing their claims. Defendant's financial interest in settlement without litigation conflicted with the client's interest in getting a fair settlement. That relationship to the client distinguishes the service defendant offered from the work he did while employed by an insurance company. Defendant's business is distinguished from the service offered by, for instance, ombudsmen and union representatives by his profit motive and potential conflict of interest. The court does not concern itself with the results of the service. Unquestionably, the trial court did not err in finding defendant's consulting services involved the practice of law.[24]

The line between adjusting and the practice of law may, in certain circumstances, be very thin. Experienced adjusters are familiar with standard contract terms and the results of similar claims, and many continuing education courses discuss how courts interpret and apply insurance contract provisions. It may be tempting to point out that another adjuster has misinterpreted a contract provision or to tell clients that an insurer has wrongly undervalued or denied a covered claim. But the consequences of even a well-intentioned transgression into the unauthorized practice can expose an adjuster to imprisonment, fines, the possible loss of professional licensure, and damages for any financial loss that a claimant may incur as a result. Because the stakes are this high, adjusters should be cognizant that their actions and advice do not cross this line.

[24] *State ex rel. Stovall v. Martinez*, 996 P. 2d 371, 374 (Kan. Ct. App. 2000).