

**On Wearing Two Hats: Exploring The Precarious Position Created By Public Adjusters Testifying As Expert Witnesses If Their Fees Are Percentage Based**

by Kellsy Wallace

## INTRODUCTION

It is a well-founded principle of insurance law that a disparity in bargaining power generally exists between insurance companies and policyholders.<sup>1</sup> The majority of courts across the United States have recognized that “a lay person lacks the necessary skills to read and understand insurance policies.”<sup>2</sup> Those seeking insurance predominately rely on others – typically, the insurance company and its agents – to provide appropriate coverage that will meet their needs in times of loss.<sup>3</sup> It is an unfortunate reality that insurance companies often take advantage of this inequity.<sup>4</sup> As a result, “consumers are becoming increasingly dissatisfied with the services and products that the insurance industry provides.”<sup>5</sup> The courts have consequently created a high standard of consumer protection in insurance litigation in order to ensure “conformity to public policy and principles of fairness.”<sup>6</sup>

Yet, the costly and sluggish judicial system is a last line of defense for policyholders seeking immediate indemnification for loss. Outside of the courts, many policyholders rely on public adjusters to affordably and efficiently protect their

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<sup>1</sup> Jeffrey W. Stempel et al., *Principles of Insurance Law* (4th ed. 2012).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> This trend is commonly referred to as “insurer opportunism.” See Tom Baker and Kyle D. Logue, *Insurance Law and Policy Cases and Materials*, p. 11 (3d ed. 2013)(“The money-for-promise structure of insurance gives the insurer a structural advantage”).

<sup>5</sup> Willy E. Rice, *Judicial Bias, The Insurance Industry and Consumer Protect: An Empirical Analysis of State Supreme Courts’ Bad-Faith, Breach-of-Contract, Breach-of-Covenant-of-Good-Faith and Excess-Judgment Decisions, 1900-1991*, 41 Cath. U. L. Rev. 325 (1991-1992).

<sup>6</sup> Stempel, *Supra* n. 1.

reasonable expectations of coverage for property loss. Public adjusters are professionals licensed in nearly every state<sup>7</sup> “to assist in preparing, filing and adjusting insurance claims.”<sup>8</sup> Like the insurance company’s agents, public adjusters have a comprehensive understanding of the many facets of insurance. Unlike the staff and independent adjusters employed by the insurance company, the public adjuster is employed solely by the policyholder and will work to further the policyholder’s best interests.<sup>9</sup>

In the event that an insurance company and public adjuster cannot agree upon a fair settlement, public adjusters may then advise their clients to resort to litigation. While only an attorney can represent the policyholder in court, the role of the public adjuster does not end once a lawsuit is initiated.<sup>10</sup> Public adjusters often work together with attorneys to help build the case, and can add value by testifying as fact and expert witnesses.<sup>11</sup>

However, recent court and regulatory rulings have barred public adjusters from testifying as expert witnesses if their fees are based on a percentage of the insurance claim payout.<sup>12</sup> Although these decisions seem to be in accordance with the general

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<sup>7</sup> With the exception of Alabama, Alaska, Arkansas, South Dakota, and Wisconsin.

<sup>8</sup> National Association of Public Insurance Adjusters, “What is a Public Adjuster,” NAPIA.com (February 17, 2015), <http://www.napia.com/content.asp?contentid=4>.

<sup>9</sup> Bobby M. Harges, *Disaster Mediation Programs – Ensuring Fairness and Quality for Minority Participants*, 39 Cap. U.L. Rev. 893 (2011)

<sup>10</sup> Mena Law Firm, *How an Insurance Attorney Can Help a Public Adjuster*, HG.org (March 15, 2015), <http://www.hg.org/article.asp?id=31635>

<sup>11</sup> *Id.*

<sup>12</sup> See *Everett Cash Mutual Ins. Co. v. Gible et al.*, 2004 WL 5149339 (Pa. Com. Pl. 2004); *Just In Case Bus. Lighthouse, LLC v. Murray*, cert. granted in part, 13SC722, 2014 WL 4402961 (Colo. 2014); *White v. State Farm Fire & Cas. Co.*, 293 Mich. App. 419 (2011); *Siegel v. Mercury Cas. Co.*, 2011 WL 11559691 (Cal. Super. 2011; PA. Eth. Op. 96-179 (Pa. Bar. Assn. Comm. Leg. Eth. Prof. Resp.), 1997 WL 889573

common law rule that distrusts expert testimony from those who have a financial interest in the outcome of the case, the application of the rule in this instance has serious implications that warrant reconsideration. Barring public adjusters from acting as expert witnesses because of their pre-existing fee agreements may unnecessarily deny policyholders the efficient and affordable relief they deserve, given that public adjusters are capable of providing reliable and relevant testimony without any additional cost to the policyholder.

Part I of this paper will provide background information on the role of the public adjuster, and explore the concept of public adjusters testifying as expert witnesses in relation to expert witnesses in general. It will then discuss the general rule against contingency fees for expert witnesses, and identify the practical and legal ramifications of not allowing public adjusters to testify as expert witnesses if their fees for handling claims are percentage based. Part II will weigh the pros and cons of allowing public adjusters to provide expert testimony despite the undeniable fact that they do have a financial stake in the outcome, and suggest how the concerns of biased testimony can be reconciled with the need for the public adjuster's distinctive experience and expertise.

## **I. EXPLORATION OF THE PROBLEM**

### **a. The Role of Public Adjusters**

In general, there are three different kinds of insurance adjusters: (1) company adjusters, (2) independent adjusters, and (3) public adjusters.<sup>13</sup> All three perform

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(1997); The Mississippi Public Adjusters Act also specifically forbids public adjusters retained pursuant to contingency fees from testifying as expert witnesses.

<sup>13</sup> While the technical classification of an adjuster varies by jurisdiction, these broad categories cover the insurance adjusting framework in most states. See Nicole Vinson, *What's in a Title? Why Policyholders*

essentially the same tasks associated with adjusting insurance claims, such as assessing the “damage value” of a claimant’s loss and providing an estimate of the costs to clean, repair, and restore property.<sup>14</sup> However, they represent converse interests in the adjustment process. The key difference between a public adjuster and a company or independent adjuster is the employer. Public adjusters “do not work for insurance companies, have no ties to insurance companies, and are not getting assignments from insurance companies.”<sup>15</sup> Company adjusters are employed directly by the insurance company, and independent adjusters are similarly “paid by insurance companies to adjust the claim on their behalf.”<sup>16</sup> Whereas company or company-hired independent adjusters “can often be one-sided, biased, and nitpicky, scrutinizing the damages to avoid awarding proper payment, or denying legitimate claims all together,” the public adjuster has the policyholder’s best interests in mind.<sup>17</sup>

While the differences between insurance adjusters may seem insignificant, the services that public adjusters provide are invaluable to claimants that do not have experience dealing with property loss or the “hundreds of provisions and stipulations”

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*Need to Know the Difference Between an Independent Adjuster and a Public Adjuster, Part I*, Property Insurance Coverage Law Blog (March 15, 2015), <http://www.propertyinsurancecoveragelaw.com/2012/05/articles/insurance/whats-in-a-titleawhy-policyholders-need-to-know-the-difference-between-an-independent-adjuster-and-a-public-adjuster-part-i/>.

<sup>14</sup> *What Does a Homeowner’s Insurance Adjuster Do?*, The Law Dictionary (March 1, 2015), <http://thelawdictionary.org/article/what-does-a-homeowners-insurance-adjuster-do/>.

<sup>15</sup> NAPIA, *supra* n. 6.

<sup>16</sup> *Public Adjusters vs Independent Adjusters*, Adjusters International (February 17, 2015), <http://adjustersinternational.com/commercial-claims/hiring-a-public-adjuster/public-adjusters-vs-independent-adjusters/>.

<sup>17</sup> Noble Public Adjusting Group, *What is a Public Adjuster*, noblepagroup.com (March 15, 2015) <http://www.noblepagroup.com/what-is-a-public-adjuster/>.

contained in their insurance policies.<sup>18</sup> Ron Reitz, President of Quality Claims Management Corporation and a licensed public insurance adjuster in nearly every state, explained that “in reality, most people don’t go back and submit receipts because they’re so frustrated with the claim, they’re done with it. They’ll settle for less and close the claim and rebuild for less, and the insurance company knows this.”<sup>19</sup> When policyholders have public adjusters to help them work through the insurance claim process, they are more likely to get what they are entitled to under their insurance claims. Simply put, the role of the public adjuster is “to handle all aspects of a first party property claim, including but not limited to, inventory, estimates, appraisals, and negotiating a fair settlement with the insurance carrier for the insured client.”<sup>20</sup> Public adjusters thus use their knowledge of the insurance and construction industries to not only save claimants the headache of filing the claim, but also to protect policyholder rights, expedite claims resolution, and return the policyholder to pre-loss condition.

Moreover, public adjusters are the only professionals other than attorneys who can negotiate on behalf of the policyholder to settle an insurance claim. In order to make these vital services affordable for the claimants – many of whom are experiencing financially staggering property loss – most public adjusters work on a percentage fee

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<sup>18</sup> *Id.*

<sup>19</sup> Amy Danise, *Secrets of Public Insurance Adjusters: What They Know About Insurance Companies That You Don’t*, Insure.com (March 1, 2015), <http://www.insure.com/home-insurance/secrets-of-insurance-adjusters.html>.

<sup>20</sup> Chip Merlin, “Public Adjuster Fee Cap Controversy and Insurance Company Lobbyists,” Property Insurance Coverage Law Blog (March 15, 2015), [http://merlin228.rssing.com/chan-4576951/all\\_p5.html](http://merlin228.rssing.com/chan-4576951/all_p5.html) (quoting letter written by Brian Goodman on behalf of NAPIA).

basis. In 43 of the 45 states that license public adjusters, percentage fees are “the norm.”<sup>21</sup> According to the Insurance Information Institute, public adjusters charge on average 15% of the total value of the claim settlement.<sup>22</sup> While this necessarily increases costs of recovery for the policyholder, whom can be compensated no more than the full value of the property loss, it is a small price to pay for the results that public adjusters can potentially produce.<sup>23</sup> A study conducted by the Office of Program Policy Analysis and Government Accountability in Florida, concluded that public adjusters helped their client’s receive payments that were up to 747% higher than policyholders who were not represented by public adjusters following Hurricane Katrina.<sup>24</sup> Many policyholders are only able to hire public adjusters after facing significant property loss, like that caused by Hurricane Katrina, because public adjusters are willing to work for a percentage of the claim to be paid out upon settlement rather than demanding cash up front.

#### **b. Public Adjusters as Expert Witnesses**

In addition to advocating for their clients in settlement negotiations, public adjusters may also use their contracted-for skills to the policyholder’s advantage in court. This paper will focus specifically on public adjusters serving as expert witnesses for aggrieved policyholders. When it comes to insurance coverage litigation, “both sides seek

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<sup>21</sup> *Id.*

<sup>22</sup> Although 15% is the average, typical percentage fees range from 5% - 30%. See *How to Hire a Public Insurance Adjuster After a Disaster*, Insure.com (April 1, 2015), <http://www.insure.com/home-insurance/public-adjuster.html>.

<sup>23</sup> Jeanne Salvatore, spokesperson for the Insurance Information Institute, stated that policyholders must remember “a public adjuster can’t get you more than you are legally entitled to and they will charge you that fee.” *Id.*

<sup>24</sup> *Id.*

to freely use expert witnesses to convince the trier of fact that: (1) the loss was within or outside the scope of the insurance contract; (2) the insurer's particular conduct regarding the claim breached or conformed to the covenant of good faith and fair dealing; (3) and in appropriate cases to support or oppose a possible punitive damage award."<sup>25</sup>

In order for expert testimony to be admissible in court, it must be relevant and reliable.<sup>26</sup> Reliability of non-scientific expert testimony, which is what is typically presented in insurance litigation, is determined by the expert's qualifications in relation to the particular case at hand.<sup>27</sup> An expert witness is thus "one who by habits of life and business has peculiar skill in forming opinion on the subject in dispute."<sup>28</sup> Relevancy is also determined in relation to the scope of the question. "For example, a meteorologist may be an expert witness to tell the jury there was a hurricane on the night of the alleged date of loss. However, the expert witness cannot be used to tell the jury that the insurance company adjuster is a lunatic because there was obviously a hurricane that hit the property in question."<sup>29</sup> Essentially, "[i]f an expert opinion is so fundamentally

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<sup>25</sup> Robert J. Romero, et al., *The Admissibility of Expert Testimony in Insurance Coverage Litigation Since Daubert*, Insurance Coverage Litigation Committee CLE Seminar, ABA (2013).

<sup>26</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1997); See also Fed. R. Evid. 702 ("A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or otherwise specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.").

<sup>27</sup> *Romero, supra* n. 25 (discussing the impact of *Kumho Tire Co., Ltd. v. Carmichael*, 529 U.S. 137 (1990) on expert testimony in insurance coverage and bad faith cases).

<sup>28</sup> *Black's Law Dictionary* (9th ed. 2009), available at Westlaw BLACKS.

<sup>29</sup> Nyanza Moore, *Experts – They May Know What To Do and How To Do It – But Do They Know How To Deliver?*, Property Insurance Coverage Law Blog (March 1, 2015), <http://www.propertyinsurancecoveragelaw.com/2014/08/articles/insurance/experts-they-may-know-what-to-do-and-how-to-do-it-but-do-they-know-how-to-deliver/>.

unsupported that it can offer no assistance to the jury, then the testimony should not be admitted.”<sup>30</sup>

In insurance litigation, it is settled that “the average juror is unlikely to have sufficient knowledge or experience [about the claims adjusting procedure] to form an opinion without expert guidance.”<sup>31</sup> In terms of expert qualifications, the witness need only have knowledge of and experience with the insurance industry to satisfy the reliability prong.<sup>32</sup> Most public adjusters will not have a problem meeting this threshold, as they are often “veteran insurance company claims adjusters who know how insurance companies operate and have expertise in negotiating property claims to make sure you get the most out of your policy.”<sup>33</sup> To satisfy the relevancy requirement, that knowledge and experience must specifically relate to the matter under review. At times, public adjusters make excellent expert witnesses because they can use their extensive experience in the insurance industry in general and claims adjusting in particular to opine whether the loss was within the scope of coverage, testify as to the reasonableness of repair costs and loss estimates, and elucidate bad faith in insurance claim handling.<sup>34</sup> Nonetheless,

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<sup>30</sup> *Reedy v. White Consolidated Industries*, 890 F.Supp. 1417, 1446 (N.D. Iowa 1995).

<sup>31</sup> *Id.* at 1447.

<sup>32</sup> See *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998 (9th Cir. 2004).

<sup>33</sup> Terri Cullen, *Why Insurance Mediators Help When Disaster Strikes*, *The Wall St. J.*, Dec. 12, 2002, <http://www.wsj.com/articles/SB1039442112630223993>.

<sup>34</sup> See *Gustings v. Travelers & Standard Fire Ins. Co.*, No. CIV.A. 07-4443, 2008 WL 4948837, at \*6 (E.D. La. Nov. 18, 2008)(“The Court finds that Plaintiff has made a threshold showing of reliability [for public adjuster with experience as an adjustor and a contract], and that his testimony will be helpful to the trier of fact.”); See also *Page v. State Farm Lloyds*, 259 S.W.3d 257 (Tex. App. 2008) aff'd in part, rev'd in part, 315 S.W.3d 525 (Tex. 2010)(licensed public insurance adjuster was qualified as a damage assessment expert, and was sufficiently reliable to be admissible).

several courts across the country have found that public adjusters with percentage based fees do not fit with the severe restrictions that have been imposed on expert witnesses.

**c. The Rule Against Contingency Fees for Expert Witnesses in General**

Historically, expert witnesses have been heavily criticized as “intellectual prostitutes” that act as mere “stooges for the attorneys who have retained them.”<sup>35</sup> Today, the courts have recognized that “[a]ssistance of nonlegal experts is essential to effective litigation of many disputes,”<sup>36</sup> but also “continue to struggle with the problems of the nature and function of expert testimony.”<sup>37</sup> In particular, the way in which an opponent’s expert witness is paid is an important factor used to undermine credibility. The general rule of thumb that has developed under the common law in most states is that “an expert should neither lose nor gain financially as a result of the success of his testimony.”<sup>38</sup>

This prohibition has been interpreted against payment of contingency fees to expert witnesses in most jurisdictions. A contingency fee is “any form of financial incentive or reward conditioned on the outcome of litigation.”<sup>39</sup> This includes a fee that is based on a percentage of the settlement or recovery from a lawsuit, as well as fee

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<sup>35</sup> Frederick N. Egler, *Why Not Contingent Fees for Expert Witnesses?* 39 U. Pitt. L. Rev. 511, 512 (1977-1978).

<sup>36</sup> *Contingent Fees for Expert Witnesses in Civil Litigation*, 86 Yale L.J. 1680 (1977).

<sup>37</sup> *Id.* at 518.

<sup>38</sup> Jessica Peters Goodfellow, *Give Them a Run for Their Money: Challenging Expert Witness Credibility Using Fee Arrangements*, 6 South Carolina Young Lawyer 1, 2 (2014).

<sup>39</sup> John F. Kuppens and Jessica Peters Goodfellow, *Money Talks: Exposing Bias Using Expert Witness Fee Arrangements*, 79 Def. Couns. J. 222 (2012).

arrangements that were in place before an expert's involvement in a particular case.<sup>40</sup>

The rule can be traced back to English the English common law. Three justifications have traditionally been given: “(1) A contingent fee contract with a witness is champertous; (2) It is an inducement to commit fraud or perjury; (2) It is an agreement for payment in excess of the statutory witness fee and therefore unenforceable for lack of consideration.”<sup>41</sup>

Taking these rationales together, the modern day analysis against contingent fees for expert witnesses asserts that the fees are “against public policy.” This is not the case in every jurisdiction, but it is the majority viewpoint and almost all courts will approach such contingent arrangements with caution. In *Straughter v. Raymond IV*, a California court held that there is a *per se* rule of excluding expert testimony “whose compensation is contingent on the outcome of the case.”<sup>42</sup> The court reasoned that “a special contract to pay more than the regular witness fees in ordinary case is void for want of consideration as being against public policy.”<sup>43</sup> Other courts emphasize that contingency fees present a conflict of interest. These jurisdictions rely on research has shown that contingency fees for expert witnesses “naturally compromise the integrity of the testimony of the witness.”<sup>44</sup>

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<sup>40</sup> See *Everett Cash Mutual Ins. Co.*, 2004 WL 51449339 at \*2.

<sup>41</sup> Egler, *supra* n. 17 at 518.

<sup>42</sup> *Straughter v. Raymond IV*, 2011 WL 1789987, at \*3 (C.D. Cal. 2011).

<sup>43</sup> *Id.*

<sup>44</sup> *Supra* n. 30.

Regardless of the specific reasoning a court might apply, it is important for practitioners to note that it is the trial court decision to permit or exclude expert witnesses testimony. The burden of persuasion is on the party presenting the expert to establish reliability and relevancy.<sup>45</sup> The trial court's decision will be reviewed under an abuse of discretion standard, which gives court the court a wide degree of discretion to evaluate the expert's experience and qualifications in relation to the specific matter at issue. Additionally, "even in jurisdictions that do not expressly exclude testimony arising from contingency fees, the expert is still subject to impeachment through cross-examination at trial."<sup>46</sup> On cross-examination, "[c]onsiderable latitude is allowed in cross-examination to test a witness's bias, prejudice, or credibility."<sup>47</sup>

**d. The Practical & Legal Ramifications of Not Allowing Public Adjusters to Testify as Expert Witnesses If Their Fees Are Percentage Based**

As applied to public adjusters with percentage-based fees, the relevant concern is that public adjuster-expert witnesses may be "tempted to exaggerate the value of [the] claim in order to secure a larger chunk of money for themselves."<sup>48</sup> As will be discussed in the upcoming section, several courts have barred the expert testimony of public adjusters with percentage-based fees on this basis.<sup>49</sup> It is of note that public adjusters may

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<sup>45</sup> Romero, *supra* n. 23.

<sup>46</sup> *Supra* n. 15.

<sup>47</sup> *Id.*

<sup>48</sup> *How to Hire a Public Insurance Adjuster After a Disaster, supra* n. 21.

<sup>49</sup> See *Buckley Powder Co. v. State*, 70 P.3d 547, 559 (Colo.App.2002) ("An expert witness should not receive a contingent fee because the expert may thereby be improperly motivated to enhance his or her compensation and thus lose objectivity.").

still testify as fact witnesses under these decisions, and are only precluded from giving an opinion as experts. Nonetheless, the trend towards barring expert testimony under these circumstances has significant practical and legal consequences for public adjusters and insurance attorneys alike.

To stop negative consequences from arising, “[i]n coverage and bad faith litigation... [p]roper planning and communication will help ensure the lawyer has designated the proper and necessary experts and disclosed any necessary public adjuster opinions, while taking care to protect those opinions from exclusion.”<sup>50</sup> If a public adjuster is being paid on a contingency basis, regardless of the jurisdiction, the attorney needs to be aware of this fact. For example, in the case of *Siegel v. Mercury Cas. Co.*, the court found that ignorance of the law – there, of the fact that the plaintiff’s fee agreement disqualified him to serve as an expert – did not constitute surprise for purposes of granting a new trial.<sup>51</sup> Therefore, attorneys representing the policyholder should know a public adjuster’s payment structure from the onset of the case, and carefully evaluate the value that the public adjuster’s testimony can add before presenting him or her as expert witness if the public adjuster is being paid via a percentage-fee.

Should the attorney choose to utilize the public adjuster as an expert witness, the attorney should be ready for challenges to credibility and prepare the adjuster for cross-examination should the attorney choose to utilize the public adjuster as an expert witness.

The practical result may be for attorneys to “designate the individual as an expert and

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<sup>50</sup> Erin Kristofco, *Public Adjusters May Need To Be Designated As Experts For Trial*, Property Insurance Coverage Law Blog (March 1, 2015), <http://www.propertyinsurancecoveragelaw.com/2011/09/articles/insurance/public-adjusters-may-need-to-be-designated-as-experts-for-trial/>.

<sup>51</sup> *Siegel v. Mercury Cas. Co.*, 2011 WL 11559691 (Cal. Super. 2011).

indicate in the disclosures that the witness may provide *both* lay opinion and expert opinion testimony.”<sup>52</sup> That way, at least some of the public adjuster’s valuable insight can be admitted. However, even this may seriously discredit the public adjuster’s fact testimony in the eyes of the jury if the expert testimony is deemed inadmissible.

## **II. DISCUSSION OF SOLUTION**

### **a. Carving Out An Exception for Public Adjusters**

In contrast to the recent rulings that prohibit public adjusters working for percentage-based fees from testifying as expert witnesses, an exception to the general rule may be workable. This is because the underlying policy goals are largely inapplicable in this context. No matter what role the public adjuster is playing, the effect is to balance the playing field between the insurance company and the insured. The rigorous licensing structure that is in place in most states ensures that the main goal of the public adjuster is not to gauge the carrier, but rather to fully indemnify the policyholder within policy limits. While the public adjuster may have a pecuniary interest in the outcome of the case, this interest is no greater than if the public adjuster were independently negotiating and settling the claim. Overall, fraud is not likely to be induced by a public adjuster’s percentage-based fee structure – either in the courtroom or outside of it.

As the courts that have determined that public adjusters working for percentage of the claim from testifying as expert witnesses have pointed out, it cannot be overlooked that public adjusters have a pecuniary interest in the outcome of the proceedings. Judge Dudley Anderson reasoned in the case of *Everett Cash Mutual Ins. Co. v. Gibble, et al.*:

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<sup>52</sup> Kristofco, *supra* n. 48 (emphasis in the original).

It is... of no consequence that the public adjuster contract was entered into prior to the commencement of litigation. What does matter is that the [public adjuster's] preparation of the expert report followed the commencement of litigation and, as Defendants admit, [public adjuster] will be entitled under the contingent fee agreement to a percentage of any damages awarded for their loss.<sup>53</sup>

Similarly, in *Just In Case Bus. Lighthouse, LLC v. Murray*, the Colorado Court of Appeals found that although contingent witness compensation did not render the public adjuster incompetent to testify, it was within the trial court's discretion to exclude the testimony as a "sanction for improperly agreeing to compensate the witness with a percentage of plaintiff's recovery."<sup>54</sup> The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility ruled in an advisory opinion that "if the public adjuster is not paid on a contingency basis and is paid a reasonable fee by the lawyer or the client for services rendered as an expert... such arrangement would probably not be a violation."<sup>55</sup> However, so long as the contingency fee for the public adjuster is in place, it would be a violation of the Pennsylvania Rules of Professional Conduct for a public adjuster to also serve as an expert witness.<sup>56</sup>

These ethical concerns are not unwarranted. Janis Rasmussen, representative of a non-profit organization to help fire victims, accurately articulated "public adjusters run the gamut. Just as attorneys or anyone else, you can get a really good one – very professional – who can really do a good job for you... and others who aren't so good. Who take a good chunk of what your insurance settlement is but really don't add any

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<sup>53</sup> 2004 WL 5149339 (Pa.Com.Pl.)(Trial Order).

<sup>54</sup> *Just In Case Bus. Lighthouse, LLC v. Murray*, 2013 COA 112 cert. granted in part, 13SC722, 2014 WL 4402961, at \*1 (Colo. 2014)

<sup>55</sup> PA. Eth. Op. 96-179 (Pa. Bar. Assn. Comm. Leg. Eth. Prof. Resp.), 1997 WL 889573 (1997).

<sup>56</sup> *Id.*

value.”<sup>57</sup> However, the image of public adjusters has been unfairly tainted by “storm chasers” who engage in the unauthorized practice of public adjusting. The risk of corruption is thus exaggerated in the public’s eye. As Ms. Rasmussen implied, all professions have bad apples. The non-licensed actors that “take advantage of the victims in their weakened state by offering to ‘work with the insurance company’ to obtain the highest insurance payment possible and to rebuild or repair the damaged property” are very different from the public adjusters who would qualify as experts for the purposes of presenting opinion testimony.<sup>58</sup>

Furthermore, “the justification for the rule [against contingency fees for expert witnesses] rest largely on ideas repudiated long ago in other areas of American evidentiary law.”<sup>59</sup> The court in *Just In Case Bus. Lighthouse, LLC v. Murray* noted: “First, although the ‘common law at one time disqualified from testifying all parties and others with any pecuniary or proprietary interest in the outcome of a suit,’ the ‘assumption that interested witnesses necessarily lie or that disqualification is the best way to deal with the threat of perjury’ has been rejected.”<sup>60</sup> For instance, nothing in the Federal Rules of Evidence expressly bars a party to the case, someone related to the party, or someone who is merely interested in the outcome of the case without having a financial stake in it from qualifying as an expert witness. For example, cops often testify as experts in criminal cases. This means that the insurance company could conceivably

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<sup>57</sup> *Property Damage Claims: All About Public Insurance Adjusters*, Quality Claims Management Corp. (April 15, 2015), [https://www.youtube.com/watch?v=-D\\_rXcjUhHE](https://www.youtube.com/watch?v=-D_rXcjUhHE).

<sup>58</sup> William Bell, *Bucking the Trend: The Reyelts Case and the End to the Unauthorized Practice of Public Adjusting*, Rocky Mountain Association of Public Insurance Adjusters (April 1, 2015), <http://rmapia.org/news/news/102-unauthorized-practice-of-public-adjusting>.

<sup>59</sup> Egler, *supra* n. 17 at 514.

<sup>60</sup> 2013 COA 112, at \*4.

call its own agent paid on an hourly basis to provide expert testimony, whereas the public adjuster paid a percentage fee would be barred.

The mere fact that the insurance company's agents work on an hourly basis is a nonsensical basis for allowing their testimony while excluding that of otherwise qualified public adjusters. The company adjusters want to keep their jobs, and are therefore just as self-interested in obtaining a positive result for their employers. In light of this incongruity, courts should reconsider whether a percentage of a recognized contractual claim for public adjusting services necessarily equates to a contingent fee for expert testimony. The crux of the argument against contingency fees for expert witnesses is that experts should not be paid a larger sum than the legal fees provided for other witnesses, which is effectively seen as a form of "bribery."<sup>61</sup> This is not at issue here because the public adjuster is not being contingently compensated for his or her role as an expert witness. Rather, the percentage-based fee covers all of the public adjuster's services in advising and assisting in the adjustment of the insurance claim. Serving as an expert witness is but a small part of the public adjuster's role, which is usually not anticipated at the time the payment structure is put into place. Additionally, the percentage-based fee is specifically designed to allow low-to-moderate income policyholders to fight back against pervasive insurer opportunism rather than to increase payments to public adjusters. The long recognized inequality in bargaining power between insurer and insured and the vulnerable position of the insured at the time of loss provide an even greater incentive to view public adjusting percentage-based fee agreements in a new light.

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<sup>61</sup> Egler, *supra* n. 17 at 514.

In addition to the unique qualities of public adjustment payment structuring, the credibility of public adjusters is substantially bolstered by the fact that public adjusters are almost always licensed professionals who have been trained to evaluate insurance policies, prepare claims, and obtain compensation for the claimant. In the many states that do license adjusters, public adjusters are overseen by the State Insurance Department just as other insurance intermediaries. However, public adjusters are subject to heightened regulatory standards in relation to the typical requirements set forth for company or independent adjusters.<sup>62</sup> For instance, the National Association of Insurance Commissioners (“NAIC”) created the Public Adjuster Licensing Model Act to promote uniform standards for public adjusting, which has been adopted by a number of states. According to the Model Act, “a public adjuster is obligated, under his or her license, to serve with *objectivity* and complete loyalty the interest of his client alone.”<sup>63</sup> The Model Act additionally provides that a license will be revoked for “using fraudulent, coercive or dishonest practices; or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere,”<sup>64</sup> and most state legislation addressing public adjusters provides something to this effect. For a public adjuster to present biased or fraudulent testimony would not only break the testimonial

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<sup>62</sup> In most states, all insurance adjusters must be licensed. However, some states allow company adjusters to handle insurance claims without a license. Independent adjusters generally do have licensing requirements, but they may be less stringent than the standards created for public adjusters. For more information on the individual state requirements, see *Adjuster Licensing Rules, Requirements, & Reciprocity: Rules and Regulations for United States Insurance Claims Adjusters*, AdjusterPro (March 1, 2015), <http://www.adjusterpro.com/insurance-adjuster-career/states/>; See also

<sup>63</sup> National Association of Insurance Commissioners, Public Adjuster Licensing Model Act §18 A (2006)(emphasis added).

<sup>64</sup> *Id.* at §11(8).

oath, it would also violate the standard of conduct of public adjusters and jeopardize his or her career by subjecting the public adjusting license to revocation.

The Model Act also specifically contemplates regulation of public adjuster fees. Compensation provisions must be set in the original contract, and cannot be redacted.<sup>65</sup> If the insurer pays out the claim within 72 hours of the date of loss, then the public adjuster cannot charge a percentage of the total amount paid and is “entitled only to reasonable compensation from the insured for services provided by the public adjuster on behalf of the insured.”<sup>66</sup> Some states go above and beyond the regulations set out in the Model Act, and have implemented fee caps for public adjusters.<sup>67</sup> For example, in the state of Florida, public adjusters “must not only finish an insurance course and pass a state administered bar, but comply with fingerprinting and background checks, be bonded for \$50,000, and then apprentice under another licensed public adjusters for an entire year.”<sup>68</sup> Additionally, Florida law mandates that public adjusters can be paid no more than 20% of the insurance claim payments or 10% when the damage is incurred during a state of emergency. This demonstrates that contingency fees are not in fact an inducement to commit fraud, but rather a reasonable form of payment for the plethora of services public adjusters provide.

To say that percentage-based fees do not produce fraud in this context is also not unprecedented. Michigan, Florida, and Indiana courts have all allowed public adjusters to

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<sup>65</sup> *Id.* at §15.

<sup>66</sup> *Id.*

<sup>67</sup> 14 states that license public adjusters have a statutory fee cap. Merlin, *supra* n. 20.

<sup>68</sup> Fla. Stat. Ann. § 626.865 (West).

serve as both adjusters and appraisers. In *White v. State Farm*, the Michigan Court of Appeals found that a contingency fee agreement did not prevent an adjuster-appraiser from being “competent” and “independent” within the meaning of the state’s fire insurance policy statute.<sup>69</sup> In *Wilcox v. State Farm*, the Indiana Superior Court further concluded that a public adjuster was not disqualified to serve as a “competent and disinterested” appraiser by virtue of the fact that he was to be paid on a contingency fee basis.<sup>70</sup> In reaching this decision, the Indiana court relied on the reasoning of the District Court of Appeal of Florida in the case of *Rios v. Tri-State Insurance Company*, where it was observed that insurance policies must be read in a manner favorable to the insured and thus a contingency fee appraiser appointed by an insured was fully qualified under the “competent and disinterested” standard.<sup>71</sup> Overall, this case law speaks to the point that to suggest working on a percentage fee induces fraud unfairly undermines the public adjuster profession as a whole. By definition, public adjusters are objective experts in the field of property insurance claims. Public adjusters are essential to the insurance system, in that they protect the interests of vulnerable policyholders. It follows that they can appraise, adjust, and testify with competency and fairness, regardless of their reasonable percentage-based fees.

### III. CONCLUSION

Essentially, public adjusters are wearing two hats when they step up onto the witness stand as experts. First, they are tireless advocates for their clients. Second, they

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<sup>69</sup> *White v. State Farm Fire & Cas. Co.*, 293 Mich. App. 419 (2011).

<sup>70</sup> *Wilcox v. State Farm*, 2009 WL 7199668 (Ind. Super. 2009).

<sup>71</sup> *Id.*

are qualified professionals with relevant and reliable information about the insurance system in general and their clients' claims in particular. While it may at first glance appear to be a conflict of interest for public adjusters paid a percentage of the claim recovery to also provide expert opinions, a closer look reveals that these two hats match. A public adjuster is employed to use his or her expertise to produce objectively fair insurance payouts. When justice requires the policyholder to turn to the courtroom, the public adjuster is merely fulfilling a legal duty to put his or her skills and knowledge to use on behalf of the policyholder. This does not result in the public adjuster being compensated in excess of the ordinary witness fees. To the contrary, it saves the client time and money by capitalizing on the extensive investigation the public adjuster has already done. Therefore, public adjusters should be able to testify as expert witnesses even when charging a percentage-based fee, subject to the trial court's ordinary discretion,<sup>72</sup> in order to provide efficient and affordable relief for their clients.

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<sup>72</sup> See *Runnels v. Tex. Children's Hosp. Select Plan*, 167 Fed.Appx. 377, 381 (5th Cir.2006) (“[A] trial judge has ‘considerable leeway’ in determining ‘how to test an expert's reliability.’” (citing *Kumho Tire Co., Ltd. V. Carmichael*, 529 U.S. at 152)).