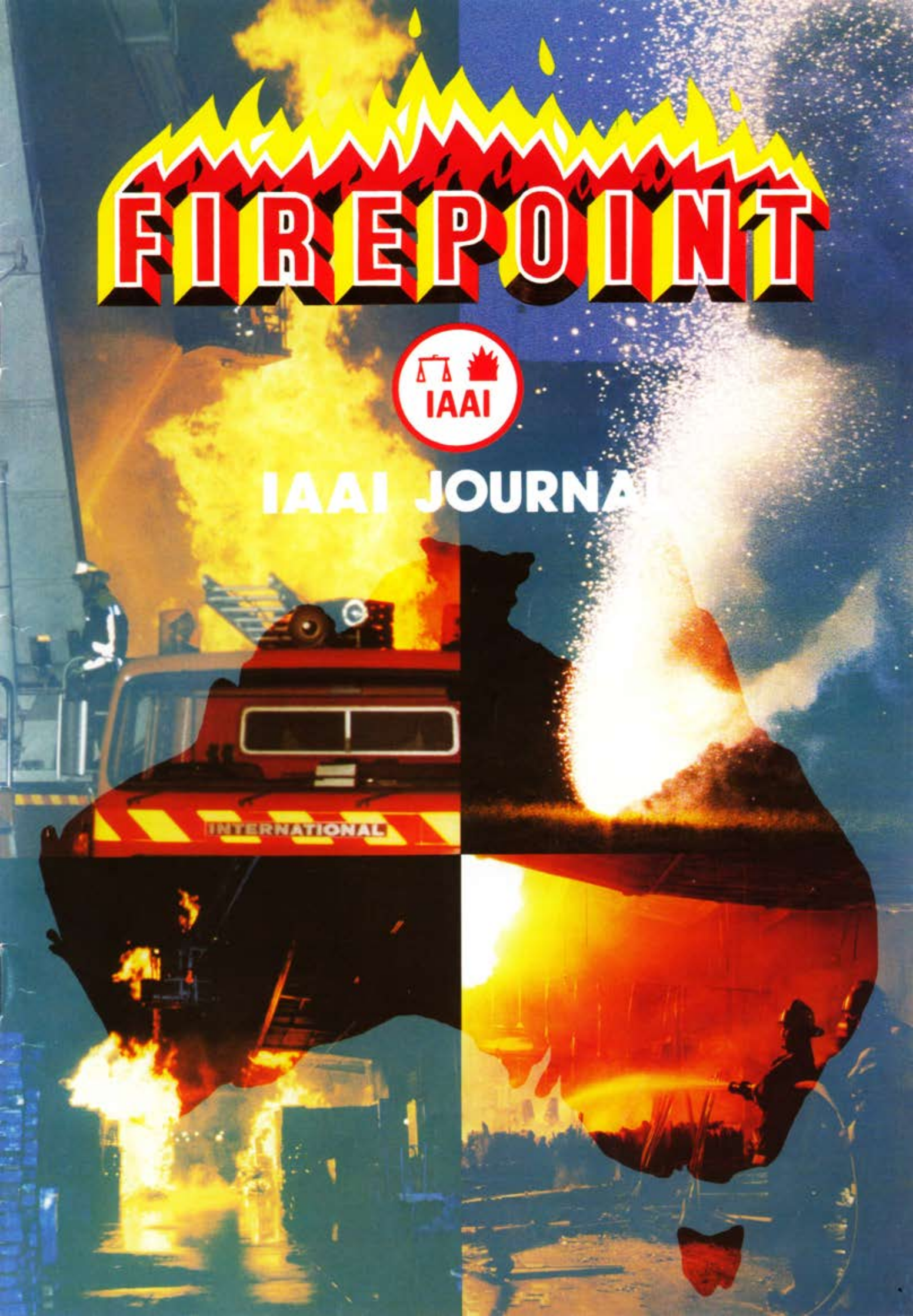
FIREPOINT

IAAI

IAAI JOURNA



June, 1999 Volume 10, No. 2

Firepoint

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EDITORIAL

We've sent the cheques, but we inadvertently forgot to announce the winners of our competition for articles. And the winners are (in alphabetical order): Tony Cafe (NSW) and Alex Conway (Victoria). Congratulations to them both. And congratulations also to Alex on his new position as President of the Victorian Chapter.

In the NSW FIRU Report in this issue Ross Brogan reports that of 150 fires attended by the group this year, over one third have been determined as being of an incendiary nature. Yet at the NSW Conference last year Police Commissioner Ryan stated that, looking at the big picture, and comparing it with problems in drugs and child abuse, arson wasn't much of a worry for him.

It makes one wonder.

Wal Stern

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Vol. 10, No. 2, June, 1999

PRESIDENTS REPORT

Welcome to the Second edition of Firepoint for 1999. Our Annual General Meeting was held on the 22 March 1999 and our President, Tom Dawson has decided to step down due to increasing work commitments. On behalf of the new committee I would like to thank Tom for his hard work and dedication to the Association. Tom still remains on the committee as Immediate past President and his input will be invaluable.

The new committee members are listed further on, together with their portfolio. All members of the Association are welcome to contact committee members and participate in sub-committees that are formed.

During the AGM a three-minute promo video titled "The Witness" was previewed. The QAFI is in the process of completing a 20 minute training video on what is entailed in being a witness at a Coronial Inquiry beginning with a summons being served, through to being called as a witness in front of the Coroner. This video contains all information you need to be fully prepared and confident in giving evidence, together with court procedures and protocol that must be followed. This video will prove to be a valuable tool for all government agencies, private enterprise and the Insurance Industry in training their staff how to cope, should they be required to attend at a Coronial Inquiry.

Further information on the release date of the video will be advised.

MEMBERSHIP

The Committee welcomes the following new members to the Queensland Chapter;

- **Andrew Millmore**, Qld Police Service, Mundingburra.
- **Marty Denham**, Qld Electrical Compliance Services, Brisbane.
- **Minter Ellison** (Lawyers), Brisbane as Corporate Members.

Members should be aware that membership fees for 1999 are now overdue.

1999 QAFI MANAGEMENT COMMITTEE

The election of the 1999 QAFI Management Committee was conducted during the Annual General Meeting held on Monday 22nd March at The Brisbane Club.

The following Association members were elected to their positions on the Executive Committee unopposed.

President
Bernice Norman
(Wyatt Gallagher Bassett)

1st Vice President
Terry Casey
(Forensic Services Australia)

2nd Vice President
Greg Reynolds
(QFRA – FIU)

Secretary / Treasurer
Charles Foley
(Zurich Australia Insurance)

Major Project Co-Ordinator
Alan Faulks
(Dept. Mines & Energy – Electrical Safety)

Program Co-Ordinator
Det. Sgt. Stephen Hollands
(QPS – Arson Investigation Unit)

Membership Co-Ordinator
Gary Nash
(Forensic Services Australia)

Immediate Past President
Tom Dawson
(QFRA)

Honorary Solicitor
Quentin Lanyon-Owen
(Hunt & Hunt)

We thank them for volunteering their time to advance the QAFI.

RECORD LOW DEATH TOLL RECORDED IN 1998

Increased public safety awareness campaigns and a rise in the number of properties with smoke alarms are believed responsible for the lowest domestic fire death toll recorded in Queensland for many years.

During 1998, four people lost their lives in preventable domestic fires, the lowest figure in the 1990s and well below the State's average of about 20.

Prior to 1991, fire deaths were recorded by the State's local fire boards but were not recorded in annual reports. However anecdotal evidence shows that during the 1980s, an annual average of between 10 and 20 domestic fire deaths was recorded.

Since 1991, the QFRA has seen the following number of fire deaths; 1991 - 16, 1992 - 22, 1993 - 22, 1994 - 20, 1995 - 27, 1996 - 11, 1997 - 5, and 1998 - 4.

QFRA Commissioner Brisbane North Peter George said there could be a number of reasons why the number of domestic fire-related deaths had fallen during the past three years.

"In the period there has been a significant increase in the number of Queensland homes which have smoke alarms installed," said Peter.

"In fact most parts of the State have seen the percentage of homes with smoke alarms rise from less than 40 percent to around 60 percent. That means more than 500,000 more Queenslanders now have smoke alarm protection in their homes than three years ago."

Peter said increased fire awareness programs by firefighters were also making their mark. The Fire Ed program and other safety programs meant Queenslanders were more safety conscious than ever before.
"The recently-released *Fire Fatalities: Who's At Risk?* Report has also provided us with quantitative data about who, when, where and why people are dying in fires," said Peter. "That has enabled us to identify target groups and to develop programs for those people."

But while the low 1998 fire death toll was a particularly pleasing result for the QFRA's fire prevention and fire safety programs, Peter said many lucky escapes that have left dozens of people suffering terrible burns and other injuries showed there was still some way to go.

"The Queensland Fire and Rescue Authority's goal is to achieve zero preventable fire deaths and injuries. To achieve that goal we need the support of the community," he said.

"We look forward to further reductions in fire deaths and injuries during 1999."

Article from Fire Life - Vol. 5

MEETING IN CHICAGO WITH FORMER I.A.A.I. PRESIDENT

Article by: David Muir

On Wednesday evening, 31 March 1999, I had a dinner meeting with Alan Clark, former president of the International Association of Arson Investigators (IAAI) in Chicago. Alan sends his greetings to all those he met "Down Under".

It is clear that Alan is still giving a lot of time to the IAAI. He is heavily involved in the IAAI Foundation that has recently purchased premises for the headquarters of the IAAI in St. Louis. So the big new is that the IAAI now has a permanent home in the USA.

He proudly wears the chunky IAAI ring of office that is evidently presented to each international president of the IAAI. Alan still gives many of his weekends to "teach". He hasn't had a holiday for quite a while. He has suffered from a ruptured disk in his back in the past 12 months.

Alan hopes to stay on the Grinnell Mutual Reinsurance Company to see out its 100th anniversary in about 9 years time. Alan works in the headquarters of his company that is located in an office block in a cornfield about 5 miles outside the town of Grinnell. It was a big effort for Alan to make the visit to Chicago to meet up with me for dinner. He doesn't often visit Chicago, preferring to go to other cities to the south and west. After experiencing the Chicago traffic, I can well understand his reluctance in going to Chicago. The freeways become so congested that it can sometimes take an hour to travel a couple of miles. Chicago is now vying to be the second largest city in the USA after New York.

Those who wish to contact Alan can do so on his email address at aclark@gmrc.com.

1999 INCOMING PRESIDENTS ADDRESS

Article by: Bernice Norman

Firstly I would like to thank Tom Dawson for his dedication in the past year to the QAFI and personally for his help and guidance. Also many thanks to our committee for 1998 and a big welcome to our new committee members.

A person who works so hard in the background keeping everything together and who most of you never hear about is Julianne Foley. I would like to express my thanks to Julianne for all her hard work.

1999 promises to be a big year for the QAFI, with the launch of our training video on being a witness in a Coronial Inquiry and our major project scheduled for October.

Each of our committee members has a specific title and you the members are encouraged to become part of the working parties that will be

developed under each title. In the next newsletter committee members and their portfolio will be listed. Please feel free to contact the person responsible for the area you are interested in.

In respect of the newsletter we now have a major sponsor being Dunhill Madden Butler and minor sponsors being Forensic Services Australia, Mullins Emergency & Restoration, Aust Pacific & Peter Thomas & Associates.

The newsletter is now issued every two months with information that is both relevant and hopefully informative to all members. Our association is unique in that our membership comprises of people from very diverse backgrounds, all coming together to support the awareness of the danger of fire within the community.

The QAFI website is up and running and if you have not visited this site please have a look. The website has links to various agencies such as The Department of Mines & Energy with information on electrical safety and product recalls and The Department of Equity and Fair Trading with very interesting articles on child safety, labeling of children's nightclothes in relation to fire risk and product safety.

The QAFI 1999 calendar will be put on the site soon, together with the newsletter. All in all it is quite an impressive website. Through the website we have had requests for the Operation Bright Spark video from Holland together with letters of welcome to the Internet from the United States.

I want to stress that the QAFI is for you the members and if any areas or topics are not covered and you would like them to be, or if you like to hear speakers talk on certain topics, please contact any one of the committee.

The committee for 1999 is a combination of people who are committed and dedicated to the promoting and awareness of fire investigation activities and to assist in the exchange of information.

Finally, I feel privileged and honored to be the 1999 President of the Queensland Association of Fire Investigators and hope that I can follow in the footsteps of my predecessors Tom Dawson and Terry Casey and carry out my duties well and be a contact point for you the members of the Queensland Association of Fire Investigators.

SOMETHING UNUSUAL

Disorderly Conduct - Burning of flags in political protest –

In Watson and Another v Trenerry (1997) 141 FLR 67 the court considered whether the burning of flags, during a protest, outside the Indonesian Consulate in Darwin was intended to communicate a political idea or was disorderly behaviour.

Indonesian military flags were lifted and dropped by political demonstrators outside the Indonesian Consulate in Darwin. Some minor traffic disruption occurred. The flags were soaked in kerosene and set alight. The heat from the burning flags caused attending police to step away. People could have been burnt if they had not avoided the flags. As the fire was consuming the flags, the sticks to which they were attached were thrown together in a pile on the road and were burnt.

In giving his decision the Magistrate stated:
"There was no damage to property, although there was potential danger to people who might want to interfere with someone carrying a burning flag."

The Magistrate found Watson guilty of disorderly conduct. The decision was subsequently appealed by Watson.

In conclusion:

(i) No disturbance or interference need be proved, the tendency suffices, that is something which could lead to or conduce the breach or discomfort.

(ii) Waving burning flags in the vicinity of others and setting a fire on a public street in the circumstances proved, have required tendency and were acts sufficiently serious to justify the application of the criminal law.

(iii) Neither the protester's views as to the righteousness of their cause nor as to the appropriateness of their actions can make what is unlawful lawful.

(iv) Motive is irrelevant.

The appeal was dismissed.

By Peter McKeever

VICTORIAN NEWS

Committee News

Regrettably, due to work commitments and constraints, Gerry Nealon has had to tender his resignation as the President and from the Committee, as of the Committee Meeting of late February. The committee acknowledged his outstanding contribution as President and long serving Committee Member and hopes that Gerry continues to support the Chapter as a member.

This lead to the temporary vacancy as President and Alex Conway has accepted the position until the AGM. Congratulations to Alex.

There has also been some restructuring of the committee (just like all of our organizations). Bob Hetherington will manage the Membership files for renewals and new members. If you still haven't got a Chapter Certificate, he has it.

Trevor Pillinger has been appointed as Education Officer for the Chapter as he is currently involved in fire investigation training and will be advising the Chapter Committee on future developments in this area. This will also allow Trevor to represent the IAAI in this area.

Membership

A Membership list will be published and forwarded to all members in the near future.

The current membership of the Victorian Chapter now stands at 168 members, showing that we are increasing our membership through providing interesting and informative training sessions. During the last three months 19 new memberships were approved and this only makes your Chapter better and stronger.

For newer members, the committee is always looking for new ideas that will pass on information to other members and attract new members. Members can also produce articles or make comment on articles presented in "Firepoint" which can be sent directly to the Editor.

All current members should have received Membership Renewal Notices. In addition to the information required please include your Email address as this may be used in the future for mailing.

Renewals are required to be paid in full by the 30th September , as unfinancial members will be withdrawn from the register after that date. Any problems? Have no hesitation in contacting any of the committee members.

Presentations

The following presentations have been made to the Chapter::

Insurance Industry in Fire Investigation

On Friday the 23rd April in an afternoon session at the MFESB Training College two of our Committee members Terry McCabe and Adrian Edwards presented "Aspects of the Insurance Industry in Fire Investigation" showing the Insurance and the Loss Adjuster with regard to investigations into fires and the results. Adrian's presentation linking several fires after a lot of investigation showed that sometimes it's not all up hill. Thanks to Terry and Adrian for their effort and stepping in at the last minute due to the original presentors being in Sydney working on the storm damage. Thanks also to the MFESB Training College for their support.

Investigations of the Future

On Wednesday 28th April in a very early breakfast meeting at the RACV Club Melbourne, Fire Engineer Jarrod Edwards presented a session on Computer Modelling and its uses in the area of fire investigation. This area of computing and stastistical data may in the future put the fires out before they start. We can only hope! Thanks to Jarrod for his presentation and to the RACV Club for their hospitality.

Although both of the above presentations were not well attended , those who did attend, received well presented lectures on relevant information and afterwards mixed with other members of the Chapter. Networking with others in the Chapter has proven in the past to be well worth while.

Presentations to come are Victorian Coroner's Court with a presentation by State Coroner Graeme Johnstone. And members should have received a flyer for this.

Another date that members should book is Wednesday 21st July for the Victorian Chapter AGM when all members are welcome to join the committee at the AGM.

Overseas Grant

Greg McWilliam and Neil Lebb from the Arson Squad Victoria Police, have received the Overseas Education Grant from the IAAI to attend its Annual General Meeting in Las Vegas in May 99. They then leave for Nevada and each receive US $1,000.00. This has made their study trip to America easier, and we hope that both enjoy themselves and return with lots of information. An Article for "Firepoint" would be nice. Congratulations to both our members.

NEW SOUTH WALES NEWS

Our Annual Conference

Our conference topic this year of "Analysing Fire Investigation. Is It All That Confusing?" will bring together speakers from three continents. The major speakers at this year's conference are Mr. Jim Munday and Mr. Paul Zipper.

Jim Munday previously worked for the London Metropolitan Police, Fire Investigation Unit, Forensic Laboratory. He has now established his own fire investigation company in London.

His qualifications include member Institution of Fire Engineers, qualified fire investigator IFE, and he has written many articles on the subject of fire investigation published in the UK and USA. He has also lectured in the UK, USA and Australia.

Jim's presentations include: Pathways to Expertise, Fire Dynamics in the real world, Major scenes - have we learned the lessons yet? , Real fire research and What insurers DON'T want you to know.

Paul Zipper is a certified fire investigator and also holds a PhD in sociology. He is a member of the Massachusetts State Police Fire and Explosion Investigation Unit, having served in that unit since June 1992.

Paul has undertaken many training courses with the Bureau of Alcohol, Tobacco and Firearms as well as now conducting training with that organisation.

He is also responsible for the training and education of all fire investigators in the Massachusetts Police.

Paul's presentations include: Interviewing, Arson profiling, Case management and Case studies.

Local speakers will include Mr. Mark Pollard, South Australia, discussing investigation of heavy machinery fires, and Supt. Steve Smith, NSW Fire Brigades, on the role of the brigades in fire investigation and research.

Additionally, Audrey Balla, lawyer and relieving Judge will present a paper on

"Requirements in a Brief: what's needed to get a conviction", and Peter Hardham will discuss Insurance enquiries and complaints.

Mr. Bob Kramer, newly elected President of the IAAI will be in attendance and will chair a forum session. Bob will be able to answer any questions you have about the role of the IAAI.

The conference is on 29 & 30 July at the Gazebo Hotel, Elizabeth Bay Rd., Kings Cross.

Cost to members $395.00 includes Dinner, Thursday night. Non members. $450.00 Additional dinner guests $60.00

Special rates for accommodation are available at the Gazebo for attendees of $85 plus 10% bed tax for a double room.

FIRE INVESTIGATION UNIT REPORT

by Ross Brogan

The unit has had a name change to reflect changing work practices and a "value-added" method of investigation of fires and the effect they have on structures and human behaviour; the new name **Fire Investigation and Research Unit**.

For those who haven't been in contact with the unit for some time there have been some staff changes you may wish to note. Roger Bucholtz, one of the original staff within the unit, gained promotion to Superintendent late 1998 and now resides at Parramatta in the North West Region office.

Glen Jacobson was successful in gaining the Operations Officer position to replace Roger; he brings valued experience from the Fire Safety section into investigation and research. Garry Malpass has been successful in gaining a permanent position to replace the vacant spot left by the resignation of Jim Swaisland.

Bob Alexander filled the vacancy left by the retirement of Bruce Johnson, in August. Inspectors Ian Pentony and Chris Lewis are new additions in the Research section of the unit, and, along with OIC Steve Smith are pushing ahead with new ideas and research projects in the field of fire/human behaviour. (The experience lost by our colleagues leaving will be sorely felt by the unit and the industry)

It is good to see that retirement doesn't really mean retirement, for old fire investigators. It has been heard around the traps that Bruce Johnson and Alan Easy have been involved in some consultancy work since leaving our midst. They say it's been organised by their wives to get them out of the house.

Jim has had some offers but at this stage is busy building B&B accommodation at his property at Colo, which will offer a peaceful and tranquil retreat from the rigours of fire investigation work to anyone interested.

I had a pleasant experience recently when I met an old friend of the (IAAI) AFI in a court matter. Some of you will remember Peter Dare, from the DPP, who gave freely of his time to assist with education and involvement with seminars and lectures.

The matter involved an arson fire where an accelerant caused an explosion that blew one of the front doors sixty four metres away from the building, causing substantial destruction, collapse and injury to the offender. Peter was the Crown prosecutor and handled the prosecution in his own inimitable fashion, which resulted in a conviction and a four year sentence (a win!!) It was a pleasure to not only meet Peter again, but to work with him closely, knowing that he has the experience to confidently prosecute a fire matter.

It is interesting to ponder whether the petrol companies are making a great deal out of the fires that we all attend? Of the one hundred and fifty fires attended by FIRU this year, fifty one have been determined as being of an incendiary nature. That could keep your car running for a while.

(Ross Brogan is a foundation member of the NSW Fire Brigade FIU, now the FIRU. He was also the founding Editor of "Firepoint". It is a pleasure to welcome Ross back in this column.)

NEW SOUTH WALES NEWS

New South Wales Association of Fire Investigators Annual Conference, 1999

29 & 30 July 1999

Where: Gazebo Hotel
Elizabeth Bay Road
KINGS CROSS NSW 2011

Topics: Fire Investigation in the Next Century

Speakers: Two overseas speakers, supported by well known presenters fom the Insurance, Law and Investigation fields.

Cost: $395 members
$450 non-members
$ 60 dinner guests

The cost includes lunch on both days, dinner on the evening of 29 July, plus morning and afternoon teas for both days.

This conference has been planned to utilise the skills and knowledge of persons involved in establishing the cause of fire, through to those responsible for ensuring all relevant matters are placed before the Claims Manager and/or the Courts. What will be required in the future?

Ensure you set aside the above dates to enable attendance at our final conference before the Millenium.

INTERNATIONAL ASSOCIATION OF ARSON INVESTIGATORS

MEMBERSHIP APPLICATION

TO THE SECRETARY, _____ CHAPTER _____

ADDRESS _____

_____ STATE _____ POST CODE _____

(Refer to the list of State office bearers on page 3 for the appropriate address).

I hereby apply for membership of the _____ Chapter of the International Association of Arson Investigators Inc. in accordance with its constitution and By-laws and agree to be bound thereby. I attach the sum of A$ _____ in payment of Annual Dues ($_____) and Initiation Fee ($_____).

All information recorded in this application is hereby warranted to be true and correct.

1. NAME IN FULL _____ 2. DATE OF BIRTH _____
3. EMPLOYER _____ 4. POSITION _____
5. BUSINESS ADDRESS _____

   CITY/SUBURB _____ STATE _____ POST CODE _____
6. HOME ADDRESS _____

   CITY/SUBURB _____ STATE _____ POST CODE _____
7. PHONE (BUS) ( ) _____ FAX ( ) _____

   MOBILE ( ) _____ HOME ( ) _____
8. PLEASE LIST ANY FORMAL QUALIFICATIONS (DEGREES, DIPLOMAS, CERTIFICATES etc. WITH THE NAME OF THE ISSUING AUTHORITY AND THE YEAR OF QUALIFICATION.

   _____

   _____

   _____
9. MEMBERSHIP of OTHER ORGANISATIONS _____

   _____

   _____
10. HAVE YOU EVER BEEN CONVICTED of a CRIME? YES _____ NO _____
11. FULL CONVICTION DETAILS _____

    _____
12. ARE YOU A MEMBER OF THE INTERNATIONAL ASSOCIATION of the IAAI?

    _____ MEMBERSHIP No. _____
13. REFERENCES *(Name, address, phone number, occupation)*

    A _____

    _____

    B _____

    _____
14. RECOMMENDED by a MEMBER in GOOD STANDING

    SIGNATURE _____ DATE _____
15. APPLICANT'S SIGNATURE _____ DATE _____

Packaging of Fire Debris

by Donnell Christian

Laboratory examinations of fire debris are being determined more and more by clients and the courts to establish the presence of ignitable liquid residues in fires that are believed to be accelerated by their use.

The private fire investigator is operating with a handicap in regard to the collection of samples of fire debris for the analysis of the presence of ignitable liquid residue. If he is lucky, he is able to begin his cause and origin investigation within hours of the fire. However, it is far more common for the private fire investigator to get to the scene days, if not weeks, after the fire.

Delay in scene processing does not necessarily mean that there will be no ignitable liquid residues left at the point of origin. Forensic laboratories can detect extremely low levels of ignitable liquid residue. If the sample is packaged properly, the chances of the laboratory detecting ignitable liquid residues are greatly increased. Below are a few suggestions on packaging fire debris for ignitable liquid residue analysis.

Use clean, air tight containers. These will keep the ignitable liquid residues in, and possibilities of cross contamination out.

Ignitable liquids are volatile by nature. The longer the debris with suspected ignitable liquid residues is uncontained, the more the residues will evaporate into the atmosphere. Eventually, what residues were there are gone. Package the evidence as soon as possible. The residues you are looking for are very volatile. If possible place the samples into air tight containers at the scene. The investigator should not wait until he returns to the office to package his evidence. During that time what residues were there might have evaporated.

Air tight containers do more than keep the volatile ignitable liquid residues in the sample. These containers also keep the sample from possibly being cross contaminated.

The charcoal in fire debris has the potential to absorb trace amounts of volatile and ignitable liquids. Therefore, the uncontained fire debris that is placed in your trunk to take back to the office for packaging, has the potential to absorb detectable amounts of gasoline fumes from the gas tank that the evidence is sitting on.

Package items individually. The volatile nature of ignitable liquids will cross contaminate individual samples that are packaged in the same air tight container. If a sample from the bedroom is packaged with the sample from the living room, the laboratory is forced to analyzed the samples as one.

If ignitable liquid residues are detected in the above example, the origin of the residues is in question. Did the residues come from the bedroom sample, the living room sample or both?

Even if the samples are analyzed separately, the possibility of cross contamination is present. This potential brings into question the meaning of laboratory results, or their exclusion due to cross contamination.

Examples of air tight containers are paint cans, glass canning jars and nylon bags that can be heat sealed. Each type of container has its pros and cons. The fire investigator should contact the forensic laboratory he uses to see whether they have a preference regarding the type of container.

Ignitable liquid residue analysis is a powerful tool for the fire investigator. Proper packaging of fire debris at the scene greatly increases the forensic laboratory's chance of getting significant results.

Donnell Christian is owner of a forensic laboratory that specializes in ignitable liquid residue analysis.

" KEEPING THE FAITH"

by William S. Daniel

"Good faith and fair dealing" is the law's equivalent of : The Golden Rule". If you handle each claim the way you would like that claim handled if you were the insured and it was your claim, then your handling of others' claim will be in good faith. When you are acting in good faith, you cannot be in bad faith. It is that clear and basic. Therefore, the theme of this article for insurance claim professionals and fire and origin investigators who work for insurance companies is staying in "good faith', "keeping the faith", and thereby avoiding "bad faith". Accordingly, our focus will not be on just barely getting by, merely meeting minimal standards for good faith claims handling, or how to skate over the fine ice of "bad faith". Our purpose is to suggest a professional approach for always maintaining good faith in investigating, evaluating, adjusting, deciding, paying and denying fire insurance claims.

Defining Our Terms

The statutory equivalent of common law "bad faith" is "vexatious and unreasonable" delay or refusal to pay by the insurer in Illinois (215 ILCS 51155) and delay or refusal to pay the loss "without reasonable cause or excuse" in Missouri (R.S.Mo. §375.420). According to *Black's Law Dictio*nary, "vexatious" means without reasonable or probable cause or excuse; willful and without reasonable cause; maliciously and without probable cause; not bona fide; merely to annoy or embarrass; or frivolous, while "unreasonable" means irrational; foolish; absurd; silly, preposterous, senseless, stupid, exorbitant, capricious, arbitrary, or without reasonable cause.

Under Illinois case law decisions, mere refusal to settle for the amount claimed by the insured is not vexatious per se as a matter of law. An insurer's assertion of legitimate insurance policy contract defenses, supported by case law authority, cannot be considered to be "vexatious and unreasonable." Statutory penalties awarding damages, attorney fees and litigation expenses are not to be applied merely because an insurer has been unsuccessful in sustaining its position at trial where there is a bona fide dispute between the insurer and the insured. Where an insurer's denial of coverage for its insured's claim is based upon the express language of the insurance policy provisions, together with the court construction and interpretation of that language in prior cases, such a claim denial is made in good faith and refusal to pay on the basis of such a claim denial is not "vexatious and unreasonable."

Under Missouri case law decisions, an insured cannot recover statutory penalty damages plus a reasonable attorney's fee where the insured seeks more than that to which he is entitled. Penalty provisions for "without reasonable cause or excuse" delay or denial are to be strictly construed, being penal in nature. To be penalized, it must be because the insurer was willful and without reasonable cause as the facts appeared to a reasonable and prudent person at the time the claim was denied, before trial, not merely because the jury verdict and court judgment, after trial, was adverse to the insurer. No recovery can be had under Missouri's §375.420 statutory penalty provision for refusal to

pay a loss without reasonable cause or excuse where there is a bona fide dispute over the existence or extent of liability. A refusal to pay when payment is due is not vexatious if founded upon what at the time appeared to be the facts. The insurer has a right, without penalty, to litigate an open question of law or disputed facts for which there was reasonable cause for belief. An insurer is allowed an honest difference of opinion regarding its liability under a policy so long as it acts in good faith and it may contest an issue of fact or law or both.

With such favorable support in the law against awarding statutory penalty damages, why are so many claim adjusters, investigators and attorneys afraid of "bad faith" damages? There is a taboo in the insurance industry against paying any insured any amount above and beyond policy limits. When hit for "bad faith" awards, whether common law or statutory penalties, which usually are on top of policy limits, insurance company executives may be prompted to find a scapegoat, attorneys can lose clients, insurance adjusters can lose their jobs because claim supervisors have to find someone to blame, all of which is counterproductive and plays right into the hands of insureds' attorneys who routinely file "bad faith" counts for threat value and settlement leverage. It is an entirely intolerable situation when fears about "bad faith" penalty awards cause insurers to settle cases that should be defended, especially in such cases as arson fraud claims. If you have a claim that merits denial as a claim, then it merits a full defense in court. If your claim denial does not merit a full defense in court, then the claim should not be denied in the first place, but should be adjusted and paid.

It is "bad faith" to deny a claim just to see if you can get away with it. Denying a claim without intending to sustain your position of no coverage in court, intending instead to settle if the insured has the gumption to file suit, is an invitation to receive substantial "bad faith" penalties. "Let's deny his claim and see if he sues," intending to settle and pay if suit is filed, while intending to keep the money if the insured goes away without taking the insurer to court, is a sure recipe for getting cooked in a "bad faith" oven.

What can we do to be in good faith, keep the faith, and avoid bad faith? Here are some suggested approaches:

Scrupulously observe and comply with laws and Department of Insurance Rules and Regulations governing unfair and improper claims practices:

Do more than escape violating these legal requirements. Turn them into positive affirmations and follow them religiously, as **Articles of Good Faith,** as you investigate and process fire insurance claims:

Adopt and implement reasonable standards for prompt investigation and resolution of claims. Follow a written Claims Manual.

Acknowledge pertinent communications from insureds with reasonable promptness. Make written Claim File Activity Log entries of your verbal and telephone communications with insureds and send confirming correspondence. Reply in a timely manner to written communications from insureds and keep copies in your Claim File.

Provide insureds with necessary insurance claim forms (Sworn Statement in Proof of Loss: Contents Inventory) promptly and explain how to use them effectively by the insureds-claimants providing all required information, properly filling in all blanks, and attaching all documentation necessary to substantiate the claim. If the insured's original policy is missing, lost, stolen, burned in a fire, washed away in

a flood, blown away in a windstorm, eaten by the dog, or otherwise unavailable, promptly provide the insured with an Underwriting Certified Copy of the insurance policy contract.

Accurately represent relevant policy provisions and facts relating to coverage questions and issues to all insureds and claimants, their agents, brokers, representatives, public adjusters and lawyers.

Conduct reasonable investigations based on all available information. Pay or deny claims only after carefully evaluating the results of thorough claim investigations.

Affirm or deny coverage within a reasonable time after all proof of loss documents (Sworn Statement in Proof of repair estimates, Contents Inventory, ALE receipts, Fair Rental Value records, Business Interruption figures, claim substantiation papers, and signed Examination Under Oath transcripts) have been completed and submitted.

Attempt in good faith to effectuate prompt, fair and equitable claim settle7ments where coverage and liability have become reasonably clear.

Promptly provide reasonable and accurate explanations of the basis in the applicable (1) insurance policy, or (2) public policy, or (3) law for denial of claims or offers of compromise settlement.

Resolve claims in a manner that avoids resulting in any of the following: (1) a disproportionate number of meritorious complaints against the insurer received by the State Department of Insurance; or (2) a disproportionate number of lawsuits being filed against (a) the insurer by its insureds and/or (b) the insurer's insureds by third-party claimants; or (3) insureds ultimately recovering from the insurer in litigation substantially more amounts of insurance proceeds than the amounts offered to settle claims before suits were compelled to be filed.

Process claims in a good faith manner that avoids the insurer engaging in bad faith acts or any "other acts" which are in substance equivalent to any acts of bad faith or unfair or improper claims practices. (There is always a "catchall" provision, so don't get caught in it!)

Good Faith Claim Files Audits:

Adjusters, audit your Claim Files for good faith compliance. Supervisors, audit your adjusters' Claim Files periodically to ensure compliance with the requisites of good faith. As you conduct Good Faith Audits, examine the Claim File for timeliness, thoroughness, completeness, absence of evidence of bad faith and inclusion of evidence of good faith claim administration. If a good job is being done, the Claim File should reflect it. If a deficiency is noted, correct it with dispatch. Any actions taken in bad faith are curable, especially if the insurer self-initiates the correction, rather than waiting for the problem to be pointed out by opposing counsel or an inspector from the State Department of Insurance.

Can your client's defense blow up in your face because the tangents of "bad faith" can overwhelm, cloud and confuse the main issues of insurance coverage?

Attorneys, **audit** your clients' Claim Files and your own Litigation Files. Are you and your insurance company clients keeping the faith? At trial, will you be able to proudly introduce Claim File documents into evidence? Will the insurance adjuster and the insurer's Claim File be able to successfully and convincingly withstand cross-

examination by the insured claimant's trial counsel? Or, does your case have an Achilles' heel just waiting to give way? Can your client's defense blow up in your face because the tangents of "bad faith" can overwhelm, cloud and confuse the main issues of insurance coverage? Will the bad faith "side show" become the "main event"? Will you unfortunately have to reluctantly recommend compromise settlement on an otherwise good case to defend just because the insurer is going to get hammered in front of the jury over some unnecessary delays or some inappropriate remarks or notations on one or two pages of an eight-page Claim Activity Log? Yes, that can happen unless we (1) prevent bad faith from occurring in the first place and (2) promptly remedy the situation by curing and correcting bad faith if and when it does occur.

How do you want to be perceived in court?

Pay undisputed claims where liability is reasonably clear:

If a claim is covered and the extent or value of damage is determined, then adjust and pay the loss. The business purpose of insurance companies is to pay claims. That is what premiums are paid for. Your purpose is not to reach for a way to get out of paying, to find a hook to hang your hat on, to find arson at every fire scene, to stretch in order to come up with some basis for claim denial. Our purpose is to provide indemnity by fairly paying claims. By the same token, it is never our purpose to pay excessive windfalls of over-indemnification unjust enrichment to insureds claimants who seek more than that amount of insurance proceeds to which they are duly entitled. If you owe it, pay it; no more; no less.

Promptly pay undisputed portions of claims when liability becomes reasonably clear:

Has the insured submitted acceptable proof of loss for the windstorm damaged commercial building and contents, but the extent of the business interruption claim remains unknown, questionable, speculative or in doubt? Has the insured homeowner turned in a building repair contractor's reasonable estimate for fixing the accidental fire damage to the house, but does not yet have available all records documenting incurred Additional Living Expenses? If so, make good faith partial payments on the undisputed portions of the pending claims, using a partial proof of loss, or under an Advance Payment, Non-Waiver, Reservation of Rights Agreement.

How do you want to be perceived in court? As the insurer that has previously, voluntarily, paid in good faith most, if not already all, of the total amount to which the insured is entitled? Or, as the insurer, possibly in bad faith, holding up paying anything on a loss because there is not yet a final agreement on the last few dollars and cents? Can an insurer be found to be acting in bad faith for legitimately disputing a highly speculative business interruption claim for $633,600 in a case where that insurer has already paid $1.8 million for fire property damage to building and contents? I doubt it.

What can be done on a claim where the amount of loss is in dispute, when you determine that the insured's claim is reasonable, but too high, and the insured regards your offer as in the ball park, but too low? Issue payment in the amount you calculate as appropriate and demand or request **appraisal** to determine the balance, if any. If the insured declines a request, or refuses a demand for appraisal, you can initiate a Declaratory Judgment Action, asking the Court to declare that the insurer has already paid the correct and full amount of the claim.

Advance ALE and BI:

At the outset of all heavy-damage or total loss house fire claims, promptly upon receipt of notice of loss, contact the insured homeowner family and offer them at least $1000 for their Additional Living Expenses (ALE) being incurred. Make such an up front good faith payment under a standard Advance Payment Agreement or Non-Waiver Agreement containing a mutual Reservation of Rights. You will have earned the good will and gratitude of honest insureds who have sustained an accidental fire loss. Moreover, the insurer is entitled to a credit or setoff for this advance payment when it comes time to pay the adjusted and agreed final amount of the overall claim. However, on the other hand, if the insured is dishonestly attempting to collect insurance proceeds on an arson fire fraudulent insurance claims, you will have affirmatively demonstrated the insurer's **good faith** from the outset and also will have a basis for a $1,000 counterclaim against that insured for reimbursement of your generous, voluntary, cooperative advance payment. Your investment in an up front good faith advance payment of $ 1,000 is sure to pay dividends of tens of thousands of dollars not paid out later in "bad faith" penalties.

Similarly, when a major office building, manufacturing facility, retail store, factory, plant, refinery or warehouse is gutted by fire, it is a prudent exercise in good faith to immediately issue two to four weeks' of expenses for reasonably anticipated business interruption in order to allow the insured to maintain the status quo while the fire's origin and cause is being investigated. As usual, document this up front good faith advance payment with a standard Non-Waiver Reservation of Rights Advance Payment Agreement. If the claim turns out to be fraudulent, reimbursement can be sought, but at least good faith was clearly shown from the very beginning of the claim process. If the claim is valid, again, credit or setoff is taken for the advance and you have a grateful and cooperative insured with whom to resolve the balance of the claim for indemnity.

If the claim turns out to be fraudulent, reimbursement can be sought, but at least good faith was clearly shown from the very beginning of the claim

Exception to the Rule of Generally Making Advance Payments:

If you make an advance partial payment to an insured after discovering evidence of no coverage, or an applicable exclusion, or an unmet condition precedent to recovery, or an unexcused failure to cooperate, or voiding of the policy by the insured, then the insurer could have waived its rights, or be estopped, to deny coverage for the balance of the claim. This is why good faith advance payments are recommended to be made immediately, at the outset, up front, as promptly as possible, the claim investigation might implicate the insured as a culprit. Are there a few circumstances in which not to make advance payments? Yes! If the Named Insured has been arrested for the crime of arson to defraud an insurer, make no advance payment on the fire insurance claim, unless to an innocent spouse or other innocent coinsured. If the insured company CEO has been identified by law enforcement authorities as a prime suspect in torching the business, refrain from advancing insurance proceeds to that insured company. When you have been advancing weekly or monthly ALE to displaced homeowner insureds, or regularly advancing BI proceeds to a burned out business, and then the ongoing investigation reveals the insured's involvement in intentionally causing the loss, that is the time to discontinue further advances. Make no further

partial payments until the investigation is complete and you make a final decision on the merits of the claim.

Advise insureds-claimants of their rights under the policy:

One representative of State Department of Insurance, Illinois, broadly defines "settlement of claims" as all activities of the insurance company or its representatives relating, directly or indirectly, to the determination of the extent of liabilities due, or potentially due, under coverage afforded by the policy. Evidence of claim settlement activity is required to be maintained in the Claim File. Therefore, do not leave hanging first party insureds, third-party claimants, and their attorneys, as the Suit Filing Deadline approaches. If you are going to settle a claim, get it settled, paid and released. If you are calling off settlement negotiations, advise the other party in writing. For example: "It appears from the disparity between your lowest demand and our best offer that we are not able to reach a mutually acceptable settlement agreement. Therefore, our previous settlement negotiations have been discontinued, terminated and ended. Your Suit Filing Deadline remains 5:00 p.m. on Tuesday, January 24, 1995." To avoid waiver and estoppel counterarguments from the insured-claimant's attorney, send out your written notice of termination of settlement negotiations reasonably in advance of the Suit Filing Deadline. Fifteen (15) to thirty (30) days in advance certainly is fair and reasonable.

Keep from shooting yourself in the foot:

In order for a Claim File to reflect "good faith," it should not contain any documentary evidence of "bad faith" such as: (1) your own personal opinions about first-party insureds or third-party claimants; (2) groundless accusations; (3) hunches, "gut feelings" and assumptions not supported by facts; (4) extraneous notations not related to the claim, such as your grocery shopping list, directions to a tavern for after work, or your significant other's home telephone number; (5) anything you would not feel comfortable seeing blown up into a 3'x4' enlarged exhibit in front of a jury in a courtroom; (6) any information you would not like to discuss on the witness stand before a judge at trial; or any defamatory (libel, slander, defamation of character) remarks, unless provable true. For example, an actual, real, fire insurance claim file contains the following March 16,1992 written memorandum in a staff adjuster's Claim Activity Log: "[The Insured] appears to be a terrible moral risk. He is an overly confident individual. He and his liquor store are known by the [local] Police for involvement in drugs and other illegal activity. Needless to say, there was a quick settlement paid in 1993 by the insurer of that insured's fire insurance claim, shortly after a photocopy of that staff adjuster's March 16, 1992 defamatory, libelous, untrue, unsubstantiated, false, inappropriate and unnecessary written Claim Activity Log entry was necessarily produced to that insured's attorney in civil litigation pretrial discovery.

Insurance Claims Files as Business Records:

Prior to the uncertain allowable time when insurance claim file information and documents become privileged as "client-to-attorney and attorney-to-client communications" in anticipation of litigation or "attorney work-product" mental impressions and legal theories of the case, from the outset of the claim (first report of loss and acord form) until that uncertain point in time when they become privileged, all information and documents gather in the routine, regular and ordinary course of the business of claim adjusting constitute business records, which are subject to pretrial discovery and admissibility into evidence in court. Remember that neither the ad-

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juster, fire investigator or insurance legal counsel will make the ultimate decision as to what is privileged and confidential and what is nonprivileged discoverable information in the Claim File. The insured's attorney undoubtedly will make a formal written request or demand for production of "the entire claim file." This kind of unlimited request or demand is overbroad, unduly burdensome, costly and oppressive, while not reasonably calculated to lead to the discovery of relevant factual information that is non-privileged and therefore discoverable in civil litigation. Usually a trial court judge, occasionally an Appellate Court, or rarely a Supreme Court, will make the final ultimate determination as to what claim file documents must be produced to the insured's attorney. Moreover, in "bad faith" litigation, often the entire claim file ends up becoming discoverable and therefore being produced at some point in time, including otherwise privileged communications to and from the insurer's legal counsel.

Some insurers may rely on an "advice of counsel" affirmative defense to an insured's claim for "bad faith" damages, in which cause virtually everything in both the adjuster's claim file and the insurer's counsel's litigation file become discoverable, as admissible evidence, on the bad faith issue. Since substantial issues exist as to what claim and counsel file data become discoverable when, the proper perspective to keep in mind is that eventually it may all come out, so there had better be thoroughly investigated, accurate, and reliable factual information, qualified and substantiated expert opinions, and reasonable findings and conclusions in the claim, investigation and litigation files of the insurer, its origin and cause investigator, and its legal counsel.

Where an insurer has one or more valid defenses to a claim, the issue of "bad faith" should be a moot point because the insurer does not owe the insured's claim. In order to be able to claim "bad faith" an insured first must prevail on the underlying insurance policy contract claim. Where an insured does not prevail on the basic coverage issue, there is no right to any "bad faith" extra-contractual damages. Whenever an insurer is not liable for any payment under a policy of insurance, then it is axiomatic that such an insurer does not breach the insurance policy contract in denying the insured's claim, so no "bad faith" extra-contractual damages are available. Thus, in order to avoid bad faith, the insurance company must prevail on any one or more of its available defenses to the insureds, claim.

Such defenses can include:

(1) lack of insurable interest;

(2) unpaid premium or unpurchased extension of coverage;

(3) non-fortuitous loss;

(4) lack of timely notice of claim;

(5) failure to report the loss to law enforcement authorities in case of theft;

(6) lack of coverage;

(7) exclusion of coverage;

(8) limitation on coverage;

(9) condition precedent to coverage not complied with by insured;

(10) fraud or material misrepresentation by insured in the application for insurance coverage;

(11) insured's unexcused failure or refusal to cooperate in claim investigation;

(12) unexcused failure to refusal to fulfill insured's Duties After Loss;

(13) intentional act exclusion;

(14) dishonesty by insured exclusion;

(15) increase of physical hazard;

(16) increase of moral hazard;

(17) neglect of the insured to use all reasonable means to protect and preserve the property;

(I 8) exaggeration and overvaluation of claim amount constituting material misrepresentation;

(19) claiming coverage for items never in existence, or not owned by the claimant, or not damaged or destroyed in the loss, or salvaged after the loss, or never located at the scene of the loss at the time of the loss, or removed from the loss site before the loss occurred;

(20) concealment or withholding of material facts that an insuredclaimant ought to disclose to the insurer in honesty and fair dealing;

(21) fraud or false swearing in the Sworn Statement in Proof of Loss and/or Building Repair Estimate and/or Contents Inventory and/or ALE receipts and/or Fair Rental Value records and/or Examination Under Oath (EUO);

(22) false swearing as to the insured's whereabouts at the time of loss involving the opportunity to have caused the loss;

(23) false swearing as to the insured's motive to have caused the loss;

(24) false swearing as to the origin and cause of the loss;

(25) other material violations of the insurance policy contract;

(26) violations of applicable statutes, laws or ordinances that vitiate insurance coverage;

(27) violations of public policy (e.g., arson by the insured);

(28) violations of established principles of equity (e.g., persons shall not benefit from their own wrong doing), laches, estoppel or waiver;

(29) insured's failure to timely file suit under the policy's Suit Filing Deadline or the jurisdiction's Statute of Limitation; or

(30) insured's failure to mitigate damages.

Any one or more of these **defenses,** asserted by an insurer in good faith upon a substantiated factual basis, creates a legitimate **bona flde dispute** on the question of coverage, thereby controverting the insured's claim that the claim denial was in bad faith.

A **Claim Decision** is defined as "reasonable" if in its written form it (1) is not frivolous and (2) exhibits a rational basis. If you are investigating and adjusting claims professionally, sensibly and timely, you should have no difficulty avoiding engaging in conduct that is vexatious, unreasonable and in bad faith.

Good Faith Assertion of Suit Filing Deadline and/or Statute of Limitation:

When you deny a claim, why leave yourself open to allegations of waiver or estoppel to assert the applicable Suit Filing Deadline or Statute of Limitations? So when you deny a claim, in whole or in part, go ahead and advise the claimant in writing (Certified Mail Return Receipt Requested) of the number of days left before the expiration of the time to file suit and the exact date on the calendar when the claimant's legal right

to contest in court the claim denial notification will become barred by the lapse of time. For example: "If you wish to contest this determination of no coverage for your claimed loss of Monday, January 24, 1998, you have 275 days remaining in which to timely file suit in a court of law. You are obligated by law to file suit on or before [(l) time the court clerk's offices closes, on (2) day of the week, (3) month, (4) date, and (5) year] 5:00 p.m. on Tuesday January 24, 1999, or your claim will be time barred by the applicable Suit Filing Deadline and/or governing Statute of Limitation." In your Claim Denial Letter, set out verbatim the **Suit Against Us** Suit Filing Deadline provision in the insurance policy contract and specifically reference the statutory section of the governing Statute of Limitations in your jurisdiction.

When you deny a claim, why leave yourself open to allegations of waiver or estoppel to assert the applicable Suit Filing Deadline or Statute of Limitations?

If you waive the Suit Filing Deadline or Statute of Limitations on one or more claims, you may well be estopped to assert it on other claims. Be consistent. If a suit is filed a year, or a month, or a week, or even a day late, and therefore is untimely filed, assert your available Suit Filing Deadline and/or Statute of Limitations affirmative defense and pursue making it stick in court. (A possible exception to this rule can involve a continuing course of written and/or even verbal ongoing settlement negotiations that lulled the claimant into a false sense of security that the suit filing deadline was not going to be enforced because the claim was in the process of being settled. Consequently, there was no reason to undertake wliat would have been a useless and unnecessary act of filing suit on or before the deadline on a case that was in settlement negotiations.)

In order for an insurer to prevail in court on a Motion to Dismiss, Motion for Involuntary Dismissal, Motion for Summary Judgment, or Motion for Directed Verdict, it is most helpful to attach to the pleading as an exhibit a true and accurate copy of the **Claim Denial Notification** that allows the insurer's legal counsel to argue to the judge as follows:

"Your Honor claims cannot and do not remain open forever In this insurance policy contract, defendant's Exhibit 'A' there is a Suit Filing Deadline provision requiring an insured to file suit within a definite time or the right to bring a contested claim into court will automatically lapse. In our State, claims are barred as untimely if they are notified as a lawsuit on or before the expiration date of the Statute of Limitations. In this particular case, it is undisputed that this lawsuit was filed after the deadline. The court clerk's official date stamp shows on the face of the pleading the date it was filed in this court, which was beyond the right to sue expiration date. In fact, your Honor in the insurer's written claim denial letter defendants Exhibit 'B,' the exact Suit Filing Deadline date is without suit being timely filed by the plaintiff, who untimely filed suit after the deadline had expired. Also attached in support of our motion is our Claim Manager's sworn Affidavit defendant's Exhibit 'C, 'attesting to these facts: (1) there were no ongoing settlement negotiations when plaintiff's allowable time for filing suit expired, (2) this insurer applies and enforces Suit Filing Deadlines, and (3) this plaintiff was specifically advised in writing of the precise applicable Suit Filing Deadline date. Judge, here is the green card Return Receipt from the United States Postal Service, defendant's Exhibit 'D, 'showing that

plaintiff signed for the Claim Denial Letter and therefore actually received notice of the final available date to timely file suit well in advance, but this plaintiff filed suit after the deadline expired. Your Honor I rest my case. "

Accurately determine the number of days left to file suit under the applicable Suit Filing Deadline (count them on a calendar) and correctly calculate the exact date that the governing Statute of Limitations will time bar the insured-claimant's claim in court. Find out from legal counsel whether Saturdays, Sundays and Court Holidays extend the timely suit filing date over to the next day that the court is open to receive suit filing papers, or whether the deadline is contractual and enforceable, requiring the insured-claimant to actually file suit before the deadline that falls on a weekend or holiday, rather than on the next day when court is open after the deadline. Then advise the insured-claimant of the exact time, day and date that the deadline expires. Be able to prove that the insured-claimant was advised in writing and received the written notice. You are then acting in abundant **good faith** when you assert and enforce the Affirmative Defense of the Suit Filing Deadline Statute of Limitations.

Don't give in to the untoward leverage and pressure to settle the whole claim just to get rid of the "bad faith" aspect of the case. You certainly could win.

Damage Control:

Although keeping the faith, maintaining good faith in claims handling, is the best and first line of defense, if and when you may become unavoidably involved in defending against a "bad faith" claim in court, all is not lost. Do not give up and rush to settle. Don't give in to the untoward leverage and pressure to settle the whole claim just to get rid of the "bad faith" aspect of the case. You certainly could win. The insurer could prevail against an unwarranted or unmeritorious "bad faith" claim. Also, depending on your local jurisdiction, the insurer could have available a "reverse bad faith" claim against the fraudulent insured-claimant.

Since January 1, 1993, Illinois has provided insurers a 145-5 statutory claim for substantial civil damages against insureds for insurance fraud, allowing insurers to recover either twice the value of insurance proceeds attempted to be obtained or thrice the value of insurance proceeds actually wrongfully obtained, plus the insurer's reasonable attorney fees. Thus, an insurer can claim or counterclaim against an insured for either (A) two times the value of the amount claimed on the Sworn Statement in Proof of Loss or (B) three times the amount paid out to the insured (advanced ALE) and/or co-insureds, such as innocent spouse and/or mortgagee, plus the insurer's reasonable attomey fees, which can be a considerable expense. This new law makes "bad faith" litigation a two-way street. In most jurisdictions, only the insured can sue the insurer for "bad faith" while the insurer has no available claim or counterclaim against a fraudulent insured, which is a totally unfair one-way avenue. However, keeping the new Illinois two-way street on an even playing field, an insurer that brings a 145-5 (a) claim against an insured "in bad faith" shall be liable to the insured for twice the value of the insurer's claim, plus the insured's reasonable attorney fees, under 145-5 (b). Unlike fraudulent insureds-claimants who routinely file "bad faith" claims on a regular basis to bootstrap themselves into artificially heightened settlement leverage positions, insurers will carefully consider their options before bringing 145-5 (a) claims due to

their potential exposure to 145-5 (b) counterclaims.

Beware!

If your insurance company gives in to the pressure brought to bear by "bad faith" I claims, and becomes known for caving in and settling when "bad faith" counts are tacked onto alleged breach of insurance policy contract lawsuits, then every insureds-plaintiffs' attorney in the area will become aware of same and all of them will sue for "bad faith" against such a "soft touch, roll over and play dead" insurance company. Do you want a dozen new "bad faith" claims on your desk next week? Okay, just go ahead and pay a couple of them today.

Yet another effective damage control method is for insurance defense counsel to file a Motion for Summary Judgment against the insured-plaintiff's bad faith claim at the earliest practicable time in the civil litigation process. Such a summary judgment motion is on the ground that there is no genuine issue of material fact on the issue of bad faith because there is a bona fide dispute on the question of coverage. Since there is a good faith bona fide dispute, there can be no bad faith. The insured plaintiff's response in opposition must necessarily argue that there is a genuine issue of material fact in order to defeat the summary judgment motion. But insurance defense counsel will reply that if there is a genuine issue, a question of fact, as the insured-plaintiff's attorney contends, then logically there must be

It is prejudicially unfair to allow all the ranting and raving that goes on in a "bad faith" claim to poison and cloud the atmosphere of a trial on the merits of an insurance policy coverage question,

a bona fide dispute, as the insurer contends. Therefore, there simply can be no "bad faith" where a bona fide dispute exists, proving the insurer's point and supporting its entitlement to summary judgment as a matter of law. When the Count 11 bad faith claim is knocked out on summary judgment, then the remaining Count I insurance claim can be fairly tried to verdict without the exposure to bad faith penalty damages hanging over the case like the Sword of Damocles.

Similarly, in the untoward event of a non-bifurcated trial, which is always a no-holdsbarred "Gunfight at the O.K. Corral" event, the insurer can still take away actual exposure to bad faith damages if successful on a Motion for Directed Verdict, either at the close of plaintiff's case, or at the close of all the evidence, before the case goes to the jury. Such a

In the "bad faith phase" of trial, the rules of evidence are relaxed and otherwise irrelevant and inadmissible evidence becomes admissible in a veritable circus show.

directed verdict motion against the bad faith count is on the ground that a jury submissible question of fact exists on either (1) the insured's claim for coverage or (2) any one or more of the insurer's Affirmative Defenses to the jury for their deliberation on contested questions of fact, then by definition there is a bona fide dispute between the insured and the insurer. Since the trial court judge has found that there is a **bona fide dispute,** there can be **no bad faith** by an insurer in having denied coverage on a claim where such a bona fide dispute exists. When an insurance

company demonstrates that the insured would not be entitled to a directed verdict on the underlying insurance policy contract claim, it necessarily follows that the insurance company had an arguable reason for denying the claim and litigating the question of its obligations under the policy.

In addition to fighting fire with fire by suing and counterclaiming against insureds for fraud, there are other damage control measures to limit, blunt, thwart and defeat "bad faith" claims. One approach is to move the Court to **bifurcate trial** on the separate issues of (1) liability on the policy and (2) added liability for bad faith. It is prejudicially unfair to allow all the ranting and raving that goes on in a "bad faith" claim to poison and cloud the atmosphere of a trial on the merits of an insurance policy coverage question. In the "bad faith phase" of trial, the rules of evidence are relaxed and otherwise irrelevant and inadmissible evidence becomes admissible in a veritable circus show. Insureds-plaintiffs' attorneys always want to try the "bad faith" case in the main action in order to prejudice the insurance company in the eyes of the jury by focusing on alleged bad claims handling by the insurance company and its adjusters, investigators, experts and lawyers. Insurance defense counsel always prefer to have trial issues focus on insureds and their motives for fraudulent insurance claims. And rightly so, because if there is no coverage for the claim in the first place, there should be no exposure to additional damages for "bad faith."

An even better damage control measure **is** to move the Court to **bifurcate discovery** into two distinct and separate phases: (1) the insurance claim itself, and if, and only if, the insured prevails on the merits of the insurance claim, then (2) the "bad faith" claim. Bifurcating discovery is on the ground that the manner of claim handling by the insurer is not germane to whether the insured's claim is covered under the policy in the first instance. There is no justification for permitting insureds' attorneys access to mental impressions, legal theories, privileged attorney-client communications and attorney work-product contained in insurance claim and litigation files before the insured has established coverage for the claim. Insurance claim files and advice of counsel should remain privileged and not subject to any pretrial discovery unless and until the insured has proven that insurance coverage actually exists and is not excluded, voided, forfeited or otherwise not in effect. Bifurcating discovery keeps the horse before the cart, addresses issues in a logical phased order, and prevents the inevitable harm, mischief and prejudice that comes from missing apples and oranges in a discovery free-for-all of both coverage and bad faith issues at the same time. The undue advantage gained by insureds' attorneys having premature access to insurers' claim and litigation files is improper and unnecessary. Bifurcation of discovery into two phases (Phase I on the insurance claim, followed by Phase 11 on the bad faith claim, if the insured wins Phase 1) solves the problem.

Conclusion:

Believe in acting in good faith. Act in good faith. Affirmatively show that your actions are in good faith. Assiduously avoid "bad faith" actions. Frankly, if insurance claim professionals dedicate themselves to affirmatively acting in good faith and dealing fairly with insureds, then they will never need to concern themselves about being caught in "bad faith" situations. This is because, fundamentally, if you are investigating and handling claims in good faith, then you absolutely cannot be in bad faith.

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