

# Examinations under Oath

## *Myths and Misconceptions*

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The analysis, conclusions, and/or opinions expressed in this article are the authors' own and do not necessarily reflect the position of Bullivant Houser Bailey or DRI, or the opinions of their clients.

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# Examinations under Oath

## *Myths and Misconceptions*

### **I. Introduction**

Examinations Under Oath (“EUOs”) have long been recognized as one of the insurer’s most effective tools for discovering and combating fraudulent claims. But the tool seems to be too infrequently used in claims that do not involve suspicious circumstances.

The requirement that an insured submit to an EUO is a contractual obligation that is generally based on specific policy language, which with some variations typically requires the insured, “as often as we [the insurer] require,” to “submit to examination under oath, while not in the presence of another ‘insured,’ and sign the same.” For more than a century, courts have upheld and enforced EUO clauses and recognized the importance of the EUO process in assisting the insurer in gathering facts related to the claim. In 1884, in *Claf- lin v. Commonwealth Insurance Co.*, the United States Supreme Court called the EUO clause the mechanism to “enable the [insurance] company to possess itself of all knowledge, and all information as to other sources and means of knowledge, in regard to the facts, material to their rights, to enable them to decide upon their obligations to protect them from false claims. *Claf- lin v. Commonwealth Ins. Co.*, 110 U.S. 81, 94-95 (1884). After all, some states—Washington, for example—make it an insurer’s duty to root out insurance fraud and to have mechanisms in place for doing so. *Pilgrim v. State Farm Fire & Cas. Co.*, 950 P.2d 479, 483 (Wash. Ct. App. 1997). Since *Claf- lin*, every case addressing the issue acknowledged the importance of the EUO as a fraud detection tool and a way to expedite claim evaluation and settlement. See, e.g., *Krigsman v. Progressive N. Ins. Co.*, 864 A.2d 330, 334 (N.H. 2005); *DiFrancisco v. Chubb Ins. Co.*, 662 A.2d 1027, 1032 (N.J. 1995); *State Farm Fire & Cas. Co.*, 813 F. Supp. 1208, 1212 (S.D. Miss. 1992).

Because many companies and claim adjusters tend to use EUOs only in special investigations unit (“SIU”) situations, claim folks in other departments may be unfamiliar with EUOs as a fact-finding tool. Perhaps as a consequence of that, we find that many myths and misconceptions have developed surrounding EUOs. Let’s discuss a few.

### **II. Myth 1: The Duty to Cooperate May Include the Duty to Submit to an EUO**

Rarely will you run across a property or auto policy does fails to include an EUO clause. Nonetheless, it sometimes happens. If the policy is silent with regard to a right to sworn EUOs, the insurer may be tempted to demand that the insured submit to examination as part of the insured’s general duty of cooperation. See, e.g., *Stover v. Aetna Cas. & Sur. Co.*, 658 F. Supp. 156 (S.D. W. Va. 1987). However, while the argument is reasonable, it seems likely that a court would find that a general cooperation clause does not give the insurer a right to an EUO. *Charter Oak Fire Ins. Co. v. Coleman*, 273 F. Supp. 2d 903 (W. D. Ky 2003).

### **III. Myth 2: Only the Named Insured Is Required to Submit to an EUO**

#### **A. Generally**

Generally, policy language dictates who may be examined under oath. For example, a policy may require that the contract duties, including the obligation to submit to an EUO, be performed “either by you, an ‘insured’ seeking coverage, or a representative of either[.]” Under this language, the insurance company has a

right to examine (1) the named insured, that is, “you”; (2) any person falling within the policy definition of an insured, typically spouses and other family members residing with the named insured, business partners, managers, or key employees; and (3) persons assisting the insured in submitting the claim. *Florida Gaming Corp. v. Affiliated FM Ins. Co.*, 502 F. Supp. 2d 1257, 1261-62 (S.D. Fla. 2007); *Miracle Sound, Inc., v. N.Y. Prop. Ins. Underwriting Ass’n.*, 564 N.Y.S.2d 346, 349 (N.Y. App. Div. 1991).

## **B. The Named Insured**

When the named insured is one or more individuals, determining who to examine is easy. However, when the named insured is a corporation, the answer is less clear. Because a corporation is not a separate entity, the insurance company should examine the principals of the corporation, along with any officer or employee present at the time of the loss or who assisted in preparing documents. A corporation should be required to produce employees, as long as they are under the corporation’s control. *Green v. St. Paul Fire & Marine Ins. Co.*, 691 F. Supp. 700, 703 (S.D.N.Y. 1988).

However, an insured does not breach the duty to submit to an EUO by failing to produce former employees. *Id.* In *Green v. St. Paul Fire & Marine Insurance Co.*, the insurer demanded an EUO of a former employee-officer who resigned five months before the demand was made. *Id.* The court held that contract language—which gave the company the right to examine the insured corporation—did not extend to the former employee. *Id.* Nor do insurance companies have a contractual right to examine independent contractors. *Mier v. Niagara Fire Ins. Co.*, 205 F. Supp. 108, 110 (W.D. La. 1962).

Keep in mind that we are speaking here about the EUOs that an investigating insurer is expressly contractually permitted to request, which could be treated as a breach of the policy if the insured fails to abide by. That an EUO provision normally would not require an independent contractor working for the insured to submit to an EUO does not mean that it cannot be requested of the contractor. If it is reasonably necessary as part of an appropriate investigation to request a third party to answer questions, recorded and under oath, then there is absolutely nothing that prevents an insurer from requesting that. But understand that a refusal by the third party to submit typically cannot be held against the insured.

## **C. “Insureds by Definition”**

A problem may arise with regard to category (2), sometimes referred to as “insureds by definition,” which includes children or household relatives who qualify as an insured because of their relationship to the policyholder. Because “insureds by definition” had no choice in selecting the policy, some argue that it may not be a breach of the EUO clause for the insured to refuse to produce the “insured by definition.” The Illinois Court of Appeals agrees. In *State Farm Fire & Casualty Co. v. Miceli*, the court concluded that the named insureds were under an obligation to submit to examination but their three children were under no such obligation. *State Farm Fire & Cas. Co. v. Miceli*, 518 N.E.2d 357, 363 (Ill. App. Ct. 1987). In fact, the children could refuse to submit to EUOs and still submit claims for their own losses.

Although *Miceli* has been cited for the general proposition that “insureds by definition” are not required to submit to EUOs, it is worth noting that the policy in question required only that “you” must submit to an EUO. “You” was defined as the named insured. Where the policy requires otherwise, clear and unambiguous language should control. In addition, the argument can be made that part of the insured’s duty to cooperate includes making others available for examination. Considering that courts tend to hold the insurance company to its policy language and will not compel a named insured to submit to an EUO under a cooperation clause, the argument may be a tough one to win.

The *Miceli* case highlights an important point that should be addressed here. Although it is tempting to talk in broad terms about what can, or cannot, be required under an EUO provision, the specific language of the provision can make a significant difference, and there is a variety of language used in different EUO provisions. Always refer to the specific language of the EUO provision in the policy with which you are working.

#### **D. Others**

If the policy requires the insured *and others*, including representatives, to be examined under oath, the insurance company can demand the examination of persons who assist the insured in preparing the claim, including public adjusters. In *Florida Gaming Corp. v. Affiliated FM Insurance Co.*, the court held that the insurance company had no right to examine a public adjuster under a policy that contemplated examination of “the insured only.” *Florida Gaming*, 502 F. Supp. 2d at 1262. The implication is that if the policy includes “others,” then others may include public adjusters.

### **IV. Myth 3: The Insurer Has No Right to Separate Examinations of the Insureds**

As with most questions, whether an insurer has a right to compel separate EUOs depends on the policy language. Most insurance policies require that the insured submit to examination “while not in the presence of any other insured.” When such language is at issue, it should be upheld. Jurisdictions differ when the policy is silent on this.

In Missouri, unless the policy requires it, courts will not require sequestering. *United States Fid. & Guar. Co., v. Hill*, 722 S.W.2d 609 (Mo. 1986). Other jurisdictions have upheld requests for separate examinations. *Shelter Ins. Co. v. Spence*, 656 S.W.2d 36 (Tenn. 1983). In *State Farm Fire & Casualty Co. v. Tan*, the court wrote:

Undoubtedly, separate examinations would greatly enhance State Farm’s ability to discover the true facts and to assess the veracity of Tan’s claims. “The expedient of sequestration is (next to cross-examination) one of the greatest engines that the skill of man ever invented for the detection of liars[.]” Recognizing the advantages of sequestering witnesses both California and federal laws of evidence permit this valuable truth finding technique.

*State Farm Fire & Cas. Co. v. Tan*, 691 F. Supp. 1271, 1273 (S.D. Cal. 1988).

In *Lidawi v. Progressive County Mutual Insurance Co.*, the court concluded that more accurate factual statements could be taken in cases where multiple parties are involved if the statements are taken separately. *Lidawi v. Progressive County Mut. Ins. Co.*, 112 S.W.3d 725, 732 (Tex. App. 2003) [citations omitted]. The Massachusetts Court of Appeals wrote:

[T]he use of separate examinations under oath of claimants involved in the same accident allows insurers to ascertain the legitimacy of their claims by determining whether the claimants’ versions of the same accident are consistent. If their versions are consistent, the insurer is at least provided with some indicia that their accounts are true and their claims should be paid, and, if not, the converse may be true. If a claimant is allowed to sit in another claimant’s examination, the claimant may tailor his or her responses to those of his fellow claimant and, thus, frustrate the objective of the examination.

*Morales v. Pilgrim Ins. Co.*, 792 N.E.2d 997, 999-1000 (Mass. App. Ct. 2003).

## V. Myth 4: The Insured Must Appear Alone

Ordinarily, an insured may bring anyone to the EUO, including an attorney or public adjuster. *Gordon v. St. Paul Fire & Marine Ins. Co.*, 163 N.W. 956, 957 (Mich. 1917); *Widener v. Tennessee Farmers Ins. Co.*, 1995 WL 571868, \*1-2 (Tenn. Ct. App. 1995). Although policy language may say otherwise, no currently used policy form requires private examination. One court wrote:

In all cases arising under it the party to be examined is entitled to the presence of his or her attorney. This is a reasonable condition, and changes no stipulations of the contract. The contract does not provide for a private examination of the insured, and there can be no reasonable objection to a bona fide request that such examination be conducted in the presence of the insured's attorney.

*Gordon v. St. Paul Fire & Marine Ins. Co.*, 163 N.W. 956, 957 (Mich. 1917).

## VI. Myth 5: The Insured's Attorney May Object and Instruct the Insured Not to Answer

EUOs are not discovery depositions, and therefore attorneys are not authorized to ask questions or make objections. *Liverpool & London & Globe Ins. Co. v. Cargil* 145 P. 1134, 1137-38 (Okla. 1914); *Spence*, 656 S.W.2d 36, 38-39 (Tenn. Ct. App. 1983). Any instruction by the attorney not to answer a material question can be sufficient grounds to deny the claim. As a practical matter, if the insured's attorney simply states objections that are not "speaking objections" designed to signal something to the insured, it is wise to note once for the record that such objections have no meaning in the context of an EUO, but let it go at that. An involved discussion (or argument) with the insured's counsel at the EUO can be a distraction and may hamper your effort to get at the truth. It may even be beneficial to allow the attorney to question the insured to be certain that all relevant information is exposed and to get an idea of what explanations the insured has for inconsistencies.

*Practice Tip:* If the insured attends the EUO with an attorney, and the attorney instructs the insured not to answer, the examiner should warn the insured, on the record, of the hazards of failing to answer a material question.

*Practice Tip:* Although a "confession" is not necessarily the goal of an EUO in a suspicious claim, the examiner in that type of case should be sure to ask the "big" questions. "Were you involved in any way in the fire that destroyed your business?" "Did you know in advance that your car was going to be taken?" Often the examiner will nibble around the edges but avoid the central question. There is nothing wrong or defamatory in asking those questions in an EUO.

## VII. Myth 6: The Insurer Has No Right to an EUO after the Insured Gives a Recorded Statement

The majority of jurisdictions hold that a recorded statement is no substitute for an EUO. For example, in *State Farm General Insurance Co. v. Lawlis*, the court held that a four-hour recorded interview did not satisfy the policy condition for an EUO. *State Farm Gen'l Ins. Co. v. Lawlis*, 773 S.W.2d 948, 949 (Tex. App. 1989). In *Prince v. Farmers Insurance Co.*, the court said that the insured's having given two previous statements to the insurer that were not under oath was an insufficient excuse to refuse to appear for an EUO. *Prince v. Farmers Ins. Co.*, 790 F. Supp. 263, 266 (W.D. Okla. 1992). Likewise, in *Watson v. National Surety Corp.*, the court found that giving several taped interviews, which were later verified, did not constitute substantial compliance with the policy condition for an EUO. *Watson v. National Sur. Corp.*, 468 N.W. 448 (La. 1991). The Washington Supreme Court explained why a recorded statement was no substitute for an EUO: the recorded statement was



unsworn, insurers do not intend that recorded statements substitute for EUOs, and the policy language allowed the insurer to conduct multiple interviews. *Downie v. State Farm Fire & Cas. Co.*, 929 P.2d 484, 487 (Wash. 1997).

*Practice Tip:* Clients should be advised that, when taking recorded statements, adjusters should be careful to avoid conduct that could be deemed a waiver of the EUO requirement. The adjuster should put on the record that the statement is no substitute for an EUO, and that the company reserves the right to have the insured submit to an EUO and/or comply with all other policy requirements.

Occasionally a policy holder's attorney, trying to work up a "bad faith" claim, will point to the fact that the adjuster took a recorded statement very shortly after the claim was reported, but then later requested a sworn EUO. The attorney may try to argue that there is something nefarious in the idea of requesting an EUO after having already obtained a recorded statement, or in the fact that the EUO was requested some time after initial investigation. In point of fact, that is how an investigation *should* be approached. A general recorded statement taken as soon as possible after the claim is reported helps to get the investigation started. The vast majority of the time, that may be the only statement or testimony needed by the insurer. Only in a few cases will the more involved EUO process be necessary.

## **VIII. Myth 7: The Insurer May Exercise the Right to Take an EUO at Any Time**

Typically the EUO provision does not include a time limitation. Nonetheless, there is support for an argument that an insurance company can "waive" the right to an EUO. The insured should demand the EUO within a reasonable time after the loss and submission of the insured's sworn proof of loss, though the proof of loss may come later. *Beckley v. Ostego County Farmers Coop Ins. Co.*, 3 A.D.2d 190 (N.Y. 1957). Failure to make a timely demand can result in a waiver of the right to an EUO and permit the insured to properly refuse the demand. Appleman, *Insurance Law* §3551 n.8; *Beckley*, 159 N.Y.S.2d at 274-75.

In addition, an insurer may lose the right to examine the insured under oath when no other information has been sought, there has been ample time to demand the examination, and under certain circumstances, when the insured has provided information in an informal statement. *Travelers Fire Ins. Co. v. Robertson*, 120 S.E.2d 657-59 (Ga. App. 1961); *Sutton v. Fire Ins. Exch.*, 509 P.2d 418, 419 (Or. 1973); *Beckley*, 159 N.Y.S.2d at 274-75. In *Mier v. Niagara Fire Insurance Co.*, the court stated that an insured who had allowed himself to be interviewed by an adjuster in the presence of the state fire marshal need not appear for an EUO. *Mier v. Niagara Fire Ins. Co.*, 205 F. Supp. 108 (La. 1968).

An insurer also loses the right to demand an EUO once the insurer denies the claim, *Lititz Mut. Ins. Co. v. Lengacher*, 248 F.2d 850-53 (7th Cir. 1957), or when the insurer demands an appraisal, although the insurer may use the EUO to determine whether appraisal is necessary. 14 *Couch on Insurance* §49A:363 (1982). Where waiver is an issue, it will sometimes be a question of fact whether the insurer has denied liability by its conduct and thereby waived its right to an examination under oath. See *American Reliance Ins. Co. v. Riggins*, 604 So. 2d 535, 536 (Fla. App. 1992).

## **IX. Myth 8: An Insured May Plead the Fifth Amendment to Avoid Answering Questions**

In most jurisdictions, an insured will not be excused from complying with a demand for an EUO by asserting a constitutional right against self-incrimination. *Pervis v. State Farm Fire & Cas. Co.*, 901 F.2d 944, 946 (11th Cir. 1990); *Saucier v. United States Fid. & Guar. Co.*, 765 F. Supp. 334, 336 (S.D. Miss. 1991). This is true even where the insured is under indictment for burning the insured property. *United States Fid. & Guar. Co. v. Wigginton*, 964 F.2d 487, 489-91 (5th Cir. 1992). Other jurisdictions hold that an insurance company may

not deny a claim because an insured refuses to submit to an EUO while a criminal prosecution is pending. In *Weathers v. American Family Mutual Insurance Co.*, the insured's Fifth Amendment rights were implicated when the insurer's statutory obligation required it to report suspected arson to the state. *Weathers v. American Family Mut. Ins. Co.*, 793 F. Supp. 1002, 1022 (D. Kan. 1992). This obligation made the insurance company an agent for the state. *Id.*

While courts respect an insured's right against self-incrimination, the courts also recognize the difficult position in which an insurer may find itself. In *Wilson v. Allstate Insurance Co.*, the Sixth Circuit allowed the insureds to assert their Fifth Amendment right and to withhold their tax records. *Wilson v. Allstate Ins. Co.*, 1986 WL 16397, \*2 (6th Cir. 1986). However, the court also recognized that the insurer needed to cross-examine the insured to prove its defense of fraud. Therefore, the court struck all of the plaintiffs' direct testimony. The court stated:

The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry. Such a witness has the choice, after weighing the advantage of privilege against self-incrimination against the advantage of putting forward his version of facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put into dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell.

*Wilson*, 1986 WL 16397, \*3.

In *Powell v. United States Fidelity & Guaranty Co.*, the Fourth Circuit, applying Virginia law, held that insureds could not recover under their policy after they refused to appear for an EUO:

[T]hey may avoid incriminating themselves by refusing to submit to relevant requests made by USF&G under the policy provision, although to do so may ultimately cost them insurance coverage under the terms of the contract for which they and USF&G bargained.

*Powell v. United States Fid. & Guar. Co.*, 88 F.3d 271, 274 (4th Cir. 1996).

## **X. Myth 9: The EUO Must Satisfy the Insured's Convenience**

As long as the insurance company is reasonable in its request for an EUO, the insured is obligated to comply. *Brizuela v. Calfarm Ins. Co.*, 10 Cal. Rptr. 3d 661, 668 (Cal. Ct. App. 2004); *Mello v. Hingman Mut. Fire Ins. Co.*, 656 N.E.2d 1247, 1250 (Mass. 1995); *Hickman v. London Assur. Corp.*, 195 P.45, 48 (Cal. 1920). Reasonableness may include explicitly designating the time, place, and person to take the examination, *Higgins v. Hartford Ins. Co.*, 650 F. Supp. 38 (E.D.N.C. 1986), using clear and unambiguous language, *C-Suzanne Beauty Salon, Ltd., v. General Ins.*, 574 F.2d 106 (2d Cir. 1978), and *Nicolai v. Transcontinental Ins. Co.*, 378 P.2d 287, 288-89 (Wash. 1963), and scheduling the EUO in the county where the loss occurred, *Pierce v. Glob & Rectors Fire Ins. Co.*, 182 P. 586, 587-88 (Wash. 1919). Examination may be held outside the county where the loss occurred if the policy gives the insurance company the option to designate the time and place. *Ayuob v. American Guar. & Liab. Ins. Co.*, 605 F. Supp. 713, 716 (S.D.N.Y. 1985). Although incarceration may excuse the insured from attending, an EUO can be taken in jail, provided the proper authorities agree. *Roberto v. Hartford Fire Ins. Co.*, 117 F.2d 811 (7th Cir. 1949).

A certain amount of accommodation is reasonable and may be deemed a show of good faith. However, an insurance company should not be required to conduct the EUO at the insured's home, at night, or on

weekends to accommodate the insured's schedule or to make it more convenient for the insured. As long as the insurance company is reasonable, a certain amount of inconvenience to the insured should be tolerated.

*Practice Tip:* An EUO must be "demanded" before an insured's failure to cooperate will bar a claim. A letter requesting the insured to identify a convenient time and place for an EUO will probably not provide a sufficient foundation if the insured simply fails to respond. A better practice is to unilaterally specify a date, time, and location for the EUO in a letter, but then express a willingness to change the date, time, or location to accommodate the insured.

## **XI. Myth 10: The Insurer May Demand an EUO *or* the Production of Documents**

As part of the EUO, the insurer is permitted to examine financial books and records and to question the insured about any and all facts and circumstances of the loss. The insurer is not required to pick one or the other. Part of the insurer's right to demand an EUO is the corresponding right to demand production of the insured's financial books and records. The insured may be required to produce "all books of account, bills, invoices and other vouchers, or certified copies thereof if the originals be lost." Newer policies require the insured to produce "documents we [insurer] request." Documents may include financial books and records, federal and state income tax records, which are especially valuable when the insured's financial books and records are lost or destroyed, cell phone records, and credit reports. Tax records are valuable when there is a question about the accuracy of the insured's books or when no records have been retained by the insured. Where the relevant documents have been destroyed in a fire or cannot be located, the insured is obligated to provide authorization that allows the insurer to obtain the documents from third parties. *Wood v. Allstate Ins. Co.*, 815 F. Supp. 1185, 1193-94 (N.D. Ind. 1993).

## **XII. Myth 11: The Insurer May Deny the Claim If the Insured Fails to Return the Signed EUO Transcript**

When policies require the insured to sign the EUO transcript, it should follow that the insured must return the signed transcript to the insurance company. But at least one court has held that the insured was not compelled to return his signature because the policy did not explicitly require it. The court stated:

We realize, of course, that a signed transcript is of little value to INA if Varda keeps it. The policy's fuzzy language, however, coupled with INA's failure to demand that Varda return the signed transcript and Varda's cooperation during earlier parts of INA's investigation, persuades us that Varda's failure to return the signed transcript did not warrant the drastic remedy of dismissing Varda's suit.

*Varda, Inc. v. Insurance Co. of N. Am.*, 45 F.3d 634, 640 (2d Cir. 1995). It seems an absurd result, but the burden is on the insurer, specifically, the adjuster or examiner, to demand that the signed transcript be returned.

*Practice Tip:* The examiner should demand, on the record, that the insured sign and return the EUO transcript. Then, the insurer should continue to request the transcript until the signed transcript is received or the claim is denied. If the insured specifically asks that the insured return the transcript, the insured is not excused by the absence of policy language. The insured must "cooperate" with the insured's request.

### **XIII. Myth 12: Examinations under Oath Can Be Conducted Only by Attorneys**

There seems to be a belief among many claims personnel that an attorney must be retained if the decision is made to request an EUO from an insured. Although there may be good reasons for retaining an attorney to conduct the EUO, it is optional.

Certainly there is nothing in the express language of most EUO provisions that would require an attorney to conduct the EUO, and there are no cases we know of by which any court has characterized an EUO as “practicing law” and thus requiring that it be done by an attorney.

We suspect there are three primary reasons that attorneys are so commonly retained for EUOs.

- Because EUOs are similar to depositions, it may be believed that attorneys have a better-developed ability for questioning people, or that they would be more comfortable in the more formal setting of an EUO than would an adjuster.
- Because EUOs are so heavily used in SIU situations, it may be that those cases appear more likely than other claims to wind up in litigation
- Attorneys who practice in this area may tend to be more up-to-date than some adjusters about the necessary prerequisites for demanding an EUO and doing it in such a way that a refusal by the insured will be deemed a breach of the policy condition.

### **XIV. Myth 13: To Deny a Claim for Failure to Submit to an EUO, the Insured Must Be Prejudiced**

Many courts have inferred a requirement of “prejudice” before a breach of certain policy conditions will bar recovery on the claim. Policy conditions requiring “prompt notice” of the loss is an example. Although the provision does not seem to require that a breach of that provision will bar coverage only if the company is prejudiced, that requirement has been read into the contract by several states.

However, we have found no cases that held that an unexcused refusal to comply with a valid demand for and EUO would bar coverage only upon evidence that the insurer was “prejudiced.” Most courts that have looked at the effect of a failure to comply with the EUO provision have determined that it is an absolute bar to coverage. *Abudayeh v. Fair Plan Ins. Co.*, 105 A.D.2d 764, 481 N.Y.S.2d 711 (N.Y. 1984).

### **XV. Myth 14: There Is an Implied Right to Videotape Examinations under Oath**

The standard EUO provision is silent on whether an EUO can be videotaped. However, if we recognize that courts have no incentive to interpret policy conditions broadly, we recognize that any requests by an insurer that are not expressly set out in the insurance contract probably will not be a basis for a policy breach if the insured refuses.

Is there anything improper with an insurance company requesting that the EUO be videotaped? No.

If the insured, or the insured’s representative, refuses to permit the videotaping, will that be a breach of the policy condition? No.

*Practice Tip:* Sometimes the primary benefit of videotaping the EUO (or even a deposition) is the effect it can have on opposing counsel or public adjuster whom you anticipate will be disruptive. People tend to improve their behavior when a camera is rolling, and since you will be professional and courteous during your examination, there is no reason not to videotape the EUO.

*Practice Tip:* If you decide to videotape the EUO, you should give advance notice of that at the time you confirm the scheduling of the EUO. An insured may feel “ambushed” if the first time he learns that the EUO will be videotaped is when he arrives for the EUO. Always promise in the EUO scheduling letter—which you should write as though it may at some point be evidence—that you will provide a free copy of the videotape to the insured after the EUO.

## **XVI. Myth 15: Examinations under Oath Can be Taken Only in Front of a Court Reporter**

This myth probably arose because of the modifier in the standard EUO provision that refers to this process as a “sworn” examination. However, there are others besides court reporters who can swear in a witness. A notary public can swear in a witness, and in fact, it is because court reporters are notary publics that they can swear in witnesses.

Certainly, there are many good reasons to use court reporters to record an EUO. They can swear in the witness for you. They are charged with ensuring the record is accurate so they can worry about spellings and pronunciations while you are thinking about the answers or planning the next question. And when the EUO is finished, they can ensure that it is correctly transcribed, and if necessary, they can provide an independent witness to confirm that the insured said exactly what is typed in the transcript.

However, the cost of a court reporter should not be the determining factor in a decision to omit an EUO that is otherwise called for. Any notary public can swear in the insured, and the EUO can be recorded by audiotape, if necessary.

## **XVII. Conclusion**

Used correctly, the EUO provides the insurance company with an important tool, not only for rooting out fraudulent claims, but also to obtain truthful and detailed testimony on other factual aspects of a claim. Although some examinations under oath may be days-long and extremely detailed, others could be as simple as being sworn in by a notary public and being audiotaped.

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