

Insurance Practice: Strategically Resolving Insurance Coverage Disputes

Spring 2012

Class Syllabus

Appalachian School of Law
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COURSE MATERIALS:

Required Books and Materials:

- DEANNE C. SIEMER, FRANK D. ROTHSCHILD, & SAMUEL H. SOLOMON, HOMESTEAD PROPERTIES, INC. V. MANHATTAN FIRE & CASUALTY CO.: COURTROOM TECHNOLOGY CASE FILE (NITA 2d ed. 2000), ISBN 1-55681-706-1.
- PAUL J. ZWIER, LEGAL STRATEGY (NITA 2005), ISBN 1-55681-923-4.
- ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW (LexisNexis 4th ed. 2007), ISBN 978-1-4224-1746-1
- Supplemental Materials

On Reserve:

- Jury Instructions
- Shepard's Causes of Action, KF8863.S542
- West Digests for Relevant Insurance Topics
- State Statutes Governing Insurance Coverage Law
- Robert E. Keeton, Insurance Law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices (1988), KF1164.K376 1988
- Eugene R. Anderson, et al., Insurance Coverage Litigation (2000), KF1189.5.A6.A53
- Leonard E. Murphy, et al., Property Insurance Litigator's Handbook (2007), KF1190.Z9.p76
- TIPS, Litigating the Coverage Claim: Denial of Coverage & Duty to Defend (1992), KF1215.A75.T57
- TIPS, Pretrial Procedures and Strategies for Insurers, Insureds, and their Counsel (1993), KF1215.L58
- David Frangiamore, How Insurance Companies Settle Cases (2009), KF1164.3.M55
- Insurance Law for Virginia Practitioners (1997), KFV 2585.Z75.153
- Insurance Law in Virginia (2006), KFV2585.I1572

Insurance Treatises and Practice Books:

- Couch on Insurance 3d, KF1159.5.C63
- Holme's Appelman on Insurance 2d, KF1164.A672
- New Appleman Insurance Law Practice Guide (2007), KF1164.A675
- Miller's Standard Insurance Policies Annotated, KF1160.M555
- Insurance Claims & Disputes: Representation of Insurance Companies and Insureds (2007), KF1164.W565
- Pat Magarick, Casualty Insurance Claims (2009), KF1215.M292
- David L. Leitner, ed., Recurring Issues in Insurance Disputes (1996), KF1164.R43
- William M. Shernoff, Insurance Bad Faith Litigation (1984), online only
- Responsibilities of Insurance Agents and Brokers (Matthew Bender), KF1167.H35, online only

Insurance Resources on the Web:

- National Association of Insurance Commissioners, <http://www.naic.org/>
- Insurance Information Institute, <http://www.iii.org/>
- ABA's Tort Trial and Insurance Practice Section (TIPS), <http://www.abanet.org/tips/>
- Facebook Page for TIPS, <http://www.facebook.com/pages/Chicago-IL/American-Bar-Association-Tort-Trial-Insurance-Practice-Section/42381486269>
- TIPS Law Journal, <http://www.abanet.org/tips/journal/lawjournal.html>
- American Insurance Association (AIA), <http://www.aiadc.org/aiapub/>
- Facebook Page for AIA, <http://www.facebook.com/pages/Washington-DC/American-Insurance-Association/54240758526?ref=ts>
- Judicial "Hellholes," <http://www.atra.org/reports/hellholes/>
- P & C National Underwriter, <http://www.property-casualty.com/Pages/default.aspx>
- Reinsurance Association of America, <http://www.reinsurance.org/i4a/pages/Index.cfm?pageID=3615>
- International Association of Insurance Receivers, <http://www.iair.org/>
- National Association of Insurance and Financial Advisors, <http://www.naifa.org/>
- State Insurance Law Digest, <http://www.ambest.com/legal/statelawdigest.html>
- LexisNexis Insurance Law Center, <http://law.lexisnexis.com/practiceareas/insurance>
- Insurance Law Links on Web, <http://www.megalaw.com/top/insurance.php>
- Internet Resources Assembled by Washburn University School of Law, <http://www.washlaw.edu/subject/insurance.html>
- Blogs
 - Law and Insurance, <http://lawandinsurance.typepad.com/>
 - Insurance Defense Blog, <http://www.insurancedefenseblog.net/insurancedefenseblog/>
 - RiskProf, <http://riskprof.typepad.com/tort/>
 - Declarations and Exclusions, http://www.declarationsandexclusions.com/insurance_coverage_analysis/
- By State:
 - Virginia: <http://www.ambest.com/legal/digest/virginia.pdf>

Writing Resources on the Web:

- Ten Underused Microsoft Word Keyboard Shortcuts, <http://blog.legalwriting.net/2008/09/30/useful-keyboard-shortcuts.aspx>
- Ethical Legal Writing, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1324821
- Active vs. passive voice, http://owl.english.purdue.edu/handouts/grammar/g_actpass.html
- Verb list, <http://www.webresume.com/resumes/verbs.shtml>
- E-Prime syntax, <http://en.wikipedia.org/wiki/E-Prime>
- Ten Common Misspellings, <http://theoatmeal.com/comics/misspelling>

Please let me know if you find other resources I should mention in the syllabus for next year.

LEARNING OBJECTIVES:

Course Coverage:

Goals of a Professional Education:

[E]ducation to prepare professionals involves six tasks:

1. Developing in students the fundamental knowledge and skill, especially an academic knowledge base and research;
2. Providing students with the capacity to engage in complex practice;
3. Enabling students to learn to make judgments under conditions of uncertainty;
4. Teaching students how to learn from experience;
5. Introducing students to the disciplines of creating and participating in a responsible and effective professional community; [and]
6. Forming students able and willing to join an enterprise of public service.

WILLIAM M. SULLIVAN, ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 22 (Carnegie Foundation 2007) (Carnegie Report). The authors of the Carnegie Report worried that current law school courses “prolong and reinforce the habits of thinking like a student rather than an apprentice practitioner.” *Id.* at 240.

General Objectives of this Experiential Course:

- Expose students to the demands, constraints, and methods of thinking in role, and to explore the impact of role on thinking.

- Expose students to the demands, constraints, and methods of analyzing and dealing with unstructured situations, in which the “issues” have not been pre-identified.
- Give students a basis for examining the interaction of legal analysis and human behavior, including interpersonal dynamics and communication.
- Provide professional skills instruction.
- Provide insights into the functioning of the legal system and to raise questions about its capacities and limitations.
- Develop a set of analytic and behavioral techniques, which they can train on the varied problems that confront lawyers and the law.

This course is designed to help you continue to develop the skills needed in the next century, as Carrie Menkel-Meadow describes them:

to diagnose and analyze problems, to talk to and listen to people, to facilitate conversations, to negotiate effectively, to resolve disputes, to understand and present complex material, to use ever-changing technologies, to plan, to evaluate both economic and emotional components and consequences of human decision-making, and to be creative – to use tried and true methods when they are appropriate, but not to fear new and category-smashing ideas or solutions.

Carrie Menkel-Meadow, *Taking Problem-Solving Pedagogy Seriously: A Response to the Attorney General*, 49 J. LEGAL EDUC. 14, 14 (1999).

How We Will Reach These Objectives:

This course acknowledges your status as second semester, third year law students, who will soon assume responsibility for the representation of clients with various legal problems, including insurance coverage disputes. It also acknowledges your potential feelings of disengagement from the law school educational experience. Accordingly, it will not use Socratic dialogue to analyze specific cases involving insurance law. “The standard casebook approach offers no sense of how problems unfolded for the lawyers or ultimately affected the parties. Nor does it adequately situate formal doctrine in social, historical, and political context Missing from this picture is the background needed to understand how law interacts with life.” DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE* 197-98 (2000). Instead, we will use a standard treatise to convey the basic concepts of insurance law. Students will also consider how to apply the law of one or more specific states -- most likely Virginia, Kentucky, Tennessee, West Virginia, or North Carolina -- to a case file simulation involving a claim by a corporate insured under an excess policy for damages caused by termites to mass-manufactured, modular, apartment buildings. The file raises several coverage issues and questions about whether the insured and the insurer satisfied their respective duties under the insurance policy.

This course will focus on a property and casualty insurance policy, but most of the concepts discussed in that context apply to other types of insurance contracts. We will not specifically consider coverage issues arising in life, health, or other lines of “personal” insurance.

We also will not spend time considering issues arising under other types of liability policies, including auto policies.

Students, working at a hypothetical mid-sized law firm as junior associates, will consider the facts they need to investigate, the documents they need to review, the relevant legal issues raised by contract and statutory law, the theme they need to develop to explain their client's theory of recovery at trial or in settlement, the strategy to adopt in negotiations with the opposing party, and the design of a mediation process for the dispute. Along the way, students will collaboratively write short legal memos to a hypothetical senior partner -- played by the professor -- concerning the various issues raised by the dispute. Much of the written work will use the Wiki software available on TWEN that facilitates collaborative team work.

The case file raises the following general legal issues: the insured's duty to read the policy to ensure it contains the desired coverage; the tension between coverage provisions and exclusions in the insurance policy; the interpretive rule that insurance policies should be construed against the drafter (typically the insurer); whether the termite loss constitutes excluded "ordinary wear & tear," whether the loss satisfies the "single occurrence" requirement of the policy; whether the loss is precluded under the "known loss" doctrine; whether Homestead timely reported the claim to Manhattan; whether the failed termiticide treatment constitutes a "defective specification" under the policy; and the insurance agent/broker's relationship to and duty on behalf of Homestead. It might also raise issues about the recovery of damages for the bad faith of the insurer.

In creating this experiential learning environment, I hope to create a student-centered classroom, to encourage you to take the interests and needs of clients seriously, to value feelings and emotions, and to seek to engage in the highest levels of professional conduct. I also hope to create an environment supporting "respect, expectation, support, collaboration, inclusion, engagement, delight, and feedback." Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 87 (2002).

What You will be Able to do with the Knowledge Gained in the Course:

- Represent a client in an insurance coverage dispute.
- Work with clients to identify their objectives, identify and evaluate the merits and risks of their options, advise on solutions, and otherwise engage in "ends-means thinking,"¹ while exercising sound practical judgment.
- Help a client resolve the question: "How do I get myself out of this mess?"
- Help you resolve the question: "How on earth do I get started in dealing with this situation?"
- Respect the participatory decision-making of the client.
- Analyze and interpret insurance policies.
- Find and apply applicable state and federal law governing insurance coverage disputes.

¹ Ends-means thinking is described as: [T]he process by which one starts with a factual situation presenting a problem or an opportunity and [then] figures out the ways in which the problem might be solved or the opportunity realized." Mark Neal Aaronsen, *Thinking Like a Fox Overlapping Domains of Good Lawyering*, 9 CLINICAL L. REV. 1, 21 (2002).

- Size up the situation, by discerning the salient features relevant, not just to law, but to legal practice.
- Write memoranda of law on various coverage issues.
- Plan witness interviews and document productions.
- Develop a legal strategy for resolving an insurance coverage dispute to progress the case expeditiously and with propriety.
- Develop distributive bargaining skills involving money damages.
- Design ADR processes to satisfy the needs of your client, including mediation, neutral fact-finding, and legal neutral evaluation.
- Write insurance coverage complaints and answers in litigated cases.
- Develop practical team-oriented skills.
- Answer questions about substantive insurance law on the bar examination.
- Further develop professional conduct demonstrated by a lawyer’s civility, honesty, integrity, character, fairness, competence, ethical conduct, public service, and respect for the rule of law, the courts, clients, other lawyers, witnesses, and unrepresented parties.
- Enhance your self-esteem, relate to others, gain autonomy, act authentically, provide competent service, and achieve other sources of professional well-being.

In short, you will develop the knowledge, skills, and values needed to competently handle an insurance coverage dispute. The course should help you “translate messy situations into the clarity and precision of legal procedure and doctrine and then to take strategic action through legal argument in order to advance a client’s cause before a court or in negotiation.” WILLIAM M. SULLIVAN, ET AL., EDUCATING LAWYERS 46-47 (Draft July 2006), cited in BEST PRACTICES at 72.

GRADING:

I will base your grade on the completion of your class participation, your written responses to discussion questions posed in the Class Assignments, your legal memoranda analyzing the issues arising in the case, your negotiation simulation performance, and your questions for the classroom guests. I will deduct points from your grade if you miss a deadline. Specifically, I will compute your grade as follows:

	<u>Points</u>
In-Class Participation and Discussion:	100
Wiki Participation on Assigned Legal Memos:	DNA
Wiki Participation on Legal Memos Assigned to Other Teams:	DNA
Final Legal Memo on Substantive Insurance Law Issue:	200
Negotiation:	100
Questions for Classroom Guests:	200

Total Points Possible:

600

Deadlines for the written work appear in the Class Assignments. In the past, students enticed me to extend one or more of these deadlines. When I did, at least one student complained, in his or her student evaluation of the course, about my leniency. Accordingly, I am not inclined to grant any extensions this year. Just write the required element and move on to the next event in your life.

In-Class Participation:

I want each of us to learn from one another. For this to work, each of you must speak up in class, on a frequent basis. I expect you to make discussion points based on the readings and based on your prior experiences. I also expect you to ask questions of me and your fellow students. Often a good question is just as valuable as a good statement. Of course, you must be physically present to participate, so I will also factor unexcused lateness or absences into your participation grade.

If the current design of the class does not foster high quality class discussion, I reserve the right to make changes that may better serve that purpose. I hope to include you in those class design decisions.

The Class Assignments indicate when answers to discussion questions should be posted on the TWEN Wiki and when you will hand in your type written answers at the end of the class. Both requirements should help you prepare to discuss the topics in class.

Modules 3 & 4 Wiki Legal Memo Research & Writing²

I expect that each team will write one law memo (7 to 15 pages in length).

I will give higher grades to legal memos that go beyond description and instead take an analytical approach. I have suggested on the TWEN Wiki pages an approach for each memo. I ask you to use a modified CREAC analytical format – Conclusion, Rule, Rule Explanation, Analysis (application of rule to facts), and Conclusion, with recommendations and concerns. The form also asks you to consider how you anticipate opposing counsel to frame and argue the same issue.

In addition, I have set out below the taxonomy of educational objectives. I hope that most of you will strive to reach the highest level of understanding. Successful students will not simply summarize the relevant legal rules and facts, but will apply the law to the facts and reach a conclusion. They will also suggest ways to improve the client's legal theory based on the research they have conducted. This expectation will force you to put your intellectual skill, sound judgment, and creativity on the line – something good lawyers do daily.

² Jason, You will not be working on the TWEN Wiki, but you will be handing in drafts of your legal memo.

Taxonomy of Educational Objectives
Knowledge, comprehension, sorting and analysis.

- Students reach a high level of understanding when they can
 - Apply the information,
 - Detail the analysis, and
 - Conclude.

- A lesser level of understanding occurs when students
 - Apply the information,
 - Come to conclusions, but
 - Give no detail in the analysis.

- An even lesser level of understanding occurs when students':
 - Work is descriptive, even if detailed.

- The lowest level of learning occurs when students':
 - Work is descriptive, but without detail.

Tips on Writing: Every professor has biases and suggestions about writing. Here are mine:

- Never use a long word when a short one will do. You should choose “use” over “utilize.” Often this means you will choose an Anglo-Saxon word over its Latin counterpart.
- Please do not use semi-colons. Use shorter, snappier sentences instead, unless you are using them to separate elements of a list.
 - See *The Redbook: A Manual of Legal Style* for more information about this preference.
- Try to use active-voice verbs rather than passive-voice sentence construction.
 - See http://owl.english.purdue.edu/handouts/grammar/g_actpass.html.
- Avoid the overuse of “to be” verbs.
 - See <http://en.wikipedia.org/wiki/E-Prime>.
- Avoid the use of “such” when you should use instead: this, that, these, those, its, or the.
- Write in first-person rather than in third-person perspective. In other words, do not say “it is suggested” but instead say “I suggest.” Please note that the first phrase uses passive voice and the second phrase uses active voice.
- Don’t use unnecessary qualifiers because they weaken your writing. Do not say that the problem was “somewhat unique.”
- Leave time for re-writing and careful proofreading. Check your spelling and do not rely on spell check programs to do the final spell check. I once had a brief in which I described someone acting as an “automaton” (a robot). Spell check turned it in to “auto man” (a car mechanic).

Module 5 Negotiation:

We will spend at least three class periods learning techniques required for skillful distributive bargaining over money. During the fifth class of this module, you will attempt to settle this coverage dispute in negotiation.

Module 6 Mediation of Insurance Coverage Disputes:

Finally, we will consider the role of mediation, neutral fact-finding, and legal neutral evaluation in coverage disputes. You will design these ADR processes for this simulation during one class. At the next class, I have invited mediators and lawyers who handle insurance claims to join us to discuss their experiences with the use of mediation in this practice area.

ACADEMIC SUCCESS PROGRAM:

With the addition of Prof. Sangchompuphen to our faculty and the appointment of Sandra Lantham as Director of the Writing Center, we have high-quality resources to help you improve your writing in a way that will assure success on the bar exam essay questions. To ensure that you get all the coaching I think you need, I reserve the right to refer you to SLATE or to the Writing Center.

PLAGIARISM:

You all know not to plagiarize, but some of you may be confused as to what plagiarism means in the legal memorandum context. Of course you know that you cannot quote another author without attribution. In addition, it is also improper to paraphrase or borrow ideas from another, without attribution. If you have any questions on where cites are and are not needed, please ask me, or err on the side of citation.

Also, you will find the sources and footnotes in articles and books to be a rich source of information. However, to the extent that you rely on footnotes from those sources, you must read all the cited sources yourself to make sure they really say what the other author said they said. Often you will find you need to update the footnotes by citing to a more current statute, newer article on the topic, or more recent edition of the book.

ATTENDANCE:

Attendance is mandatory, especially given your work as a member of a team. If you miss more than **four classes**, without a pre-approved excuse, I will either dismiss you for excessive absences or fail you. I will also factor tardiness and absences into your class participation grade. If you do need to miss a class and you have a valid excuse, please write me a note or send me an e-mail in advance of class. Excused absences will still count against the four-class absence, but I will not hold them against you when I calculate your participation grade.

I treat non-preparedness as an absence. I will circulate an attendance sheet every day. If you do not initial the sheet you will be marked absent. If I call on you and you are unprepared you will also be marked absent.

In addition, a student will violate the Code of Academic Conduct when:

(7) requesting that another person sign a student's name on the attendance sheet during a class that he or she did not attend, arrived late for or left early for, or signing another student's name on an attendance sheet.

LIBRARY RESOURCES AND WEB SITES:

I have included some of the better known resources in the insurance practice area at the beginning of this syllabus. All of the reference librarians are very capable and can assist you with your assignments. However, you need to ask for help sufficiently in advance of when you need the information in order for the librarians to assist you.

**Insurance Practice:
Strategically Resolving Insurance Coverage Disputes
Tentative Class Assignments
Spring 2012
Prof. Paula M. Young**

Class 1: Overview, Design, and Objectives of Course

Readings:

- Syllabus
- Class Calendar & Class Key (will be posted on TWEN)
- Legal Strategy text, Introduction, pp. xiii-xviii; Chap. 1, §§ 1.1 to 1.4, pp. 1-13 (19 pages); Chap. 2, §§ 2.1 to 2.6., pp. 15-36 (24 pages).

Discussion Questions:

- Why did you decide to take this course?
- What personal goals do you have in connection with this course?
- What experience, training, and skills do you bring to this course?
- What kinds of insurance do you know about?
- What substantive law do you want to apply to the facts in this insurance coverage simulation?
- How do you want to structure the associates assigned to the case?
- What legal memos may be assigned to you?
 - Your final memo will involve one of the following topics:
 - Insurance Policy Interpretive Rules.
 - Doctrine of Reasonable Expectations.
 - Waiver, Estoppel, or Election.
 - Bad Faith of Insurer and Possible Recoveries.
 - Single Occurrence vs. Multiple Occurrences.
 - State Statutory Remedies/Penalties.
 - Scope of Coverage/Scope of Exclusion/Whether Excess Policies "Follow Form."
 - Known Loss/Loss in Progress/Known Risk; and Notice of Loss
 - Use of the Following ADR Processes under Chosen Law: Mediation; Neutral Fact-Finding; Legal Neutral Evaluation; and,
 - Arbitration of Insurance Disputes or Disputes Arising under Adhesion Contracts.

Lecture and Discussion:

- Types of insurance.
- Structure of an insured's insurance program.
- Structure of insurance industry and role of excess insurance and reinsurance.
- Economic cycles that affect premiums and availability of insurance.

- Economic cycles that affect insurance insolvency.

Module 1: Analyzing the Case File, Identifying the Issues, Defining the Problem, and Developing a Legal Strategy

Class 2: Client Facts as the Foundation for a Legal Strategy

Readings:

- Legal Strategy text, Chap. 4, pp. 73-91, 113-126.

Class Preparation:

- List some of the “broad topics” you might want to discuss with the client relating to business, professional, or personal relationships; to community interests; to business consequences of any course of action (lump it, settle, litigate); social and psychological consequences of the dispute and any course of action; moral consequences, including how any course of action comports with the corporate mission statement or other values.
- What other topics might help you understand the client’s underlying interests and needs? (see Legal Strategy at pp. 97-98 for some additional ideas).

Class Activities and Discussion Questions:

- You will conduct a telephone interview of two representatives of the client: Carl Steadman and Eleanor Addington.
- Be prepared to ask the type of question assigned to you in Class 1: Open-ended; Broad; Who; What; Where; When; How; and Why?

Class 3: Client Facts as the Foundation for a Legal Strategy (cont.); Other Facts to Shape a Legal Strategy

Readings:

- Homestead Properties, Inc. (HPI) v. Manhattan Fire & Casualty Co. (MFCC) Case File (Case File), Exhibits 1-37, pp. 103-199 (96 easy pages).

Class Activities and Discussion Questions:

- De-brief interviewing experience.

- Which information exchange “inhibitors” (Legal Strategy text at 5, 19-28) did you suspect affected the interviews of Steadman and Addington?
- Do you have any concerns about the credibility of any of your client’s representatives or witnesses? What are those concerns and why? (on TWEN Wiki)
- What kind of additional information would you like to assemble to corroborate any of the facts alleged in the exhibits? (on TWEN Wiki)
- What additional records might you wish to request? (on TWEN Wiki)
 - You may want to examine sample requests for documents found on Library Reserve for this course.
- Why might you want to assemble press releases, SEC and national exchange disclosures, and information about shareholder meetings for other corporate clients if publicly available?
- Why might you search for magazine interviews, newspaper reports, television interviews, and YouTube clips relating to either corporate client?
- How do the witness interviewing strategies outlined in Chapter 2 relate to the communication techniques you have learned in your courses at ASL? How do they differ?

Class 4: Case Analysis for Refining a Strategy

Readings:

- Legal Strategy text, Chap. 3, §§ 3.1 to 3.3, pp. 37-50, §§ 3.4.1 to 3.6, pp. 60-72 (we will discuss § 3.4. later in Module 5) (25 pages)
- Review fee agreements posted at the Module 1 Supp. Mats. tab on TWEN.

Class Preparation:

- Continue to create a time line of events. Include client’s thoughts, feelings, and motivations before, during, and after each key event. (on TWEN Wiki)
- List any “nonevents” or puzzling gaps that suggest the need for further investigation. (on TWEN Wiki)
- List any “lasting conditions,” (presumably sequences of time when the status quo prevailed). (on TWEN Wiki)
- List any questions that this time line raises for you that may require further investigation.
- Continue to prepare a “players list,” that includes the name, position, and any other pertinent identification information for any possible witnesses or persons with knowledge about the dispute. Organize the list in a logical format for easy access to the information. Consider alphabetical, chronological, organizational, or other types of organizing schemes. (on TWEN Wiki)
- Continue to prepare the “how” and “where” material on the TWEN Wikis.

Class Activities and Discussion:

- Demonstration of TWEN Wiki pages

- Continued discussion of Chap. 4 assigned readings:
 - Client counseling models.
 - Paternalistic
 - Client-centered
 - Delegation
 - Friendship model
 - What is our client's substantive end game?
 - What is our client's procedural end game?
 - Peace first?
 - Lowest cost to execute?
 - Simplest to execute?
 - Least public exposure?
 - Options listed at pp. 117-199.
 - Here, there, time and resource considerations at p. 121.
- Discussion of law firm compensation structures, competition in the profession, and the affect of these factors on fee agreements.

Class 5: Facts of Simulation

Readings:

- NITA Case File, pp. 1 to 40.

Discussion Questions:

- Further discussion of assigned readings in Zwier, Chaps. 3 & 4.
 - What legal theories are we considering?
 - What factual theories can we use?
 - What is the coherent story we might develop that will appeal to the emotions and intuition of the judge or jury or arbitrator?
 - What analogies might we begin to develop to capture theme and make it memorable?
 - What graphic images might we use?
 - What "anchor exhibit" would show our case theory and why we should win?
- What additional records might you wish to request based on this additional information? (on TWEN Wiki)
 - You may want to examine sample requests for documents found on Library Reserve for this course.
- What documents must the opposing party disclose to you under the Federal Rules of Civil Procedure?

Module 2: What is Insurance Law?

Class 6: What is Insurance?

Readings:

- Understanding Insurance Law text (UIL): Table of Contents; Introduction, pp. 1-4; Part A, Chap. 1, §§ 1-12, pp. 7-28 (48 pages).
- Module 2 Supplemental Materials: Best's Review, Chapter 4: Analysis Techniques (Sept. 2008) (25 pages).

Class Activities:

- Role of insurance in a commercially sophisticated society.
- Continued discussion of economic analysis of insurance industry and measures of economic health.

Class 7: What is Insurance? (cont.)

Readings:

- UIL text: *skim* Part A, Chap. 1, §§ 13-13C, pp. 28-59 (31 pages); *skim* my outline for Chap. 2, §§ 20-25 (sources of insurance law), posted on TWEN.
- *Carefully read* UIL text: Chap. 2, §§ 25A-25G, pp. 144-192 (48 pages).

Class Activities:

- Discussion of how the following affects Homestead's case:
 - the McCarran-Ferguson Act
 - Contract interpretive rules
 - Doctrine of reasonable expectations
 - Waiver, estoppel, and election
 - Bad faith of insurer
- Review of some relevant websites (if time).

Class 8: Policy Analysis

Readings:

- Module 2 Supplemental Materials on TWEN
 - Auto, Property, Disability policies
 - Commercial Property primary policy
 - Review NITA Case File: Manhattan Excess Policy at Exhibit 1, pp. 103-119.
- *Skim* my outline for Chap. 14, §§ 140-143 (Reinsurance), posted on TWEN.

Class Preparation:

- Identify four similarities among the policies provided in the readings.
- Identify four differences among the policies provided in the readings.
- *Turn in analysis for class participation points.*

Module 3: Establishing the Contractual Relationship

Class 9: Insurance Contract Formation

Readings:

- UIL text: Part B, Chap. 3, §§ 30-34, pp. 199-234 (35 pages).

Class Activities:

- Discussion of how the following affects Homestead's case:
 - Contract formation requirements
 - Duty to read the policy
 - Duty to explain the policy
 - Binders
 - Delivery of policy

Class 10: Insurance Contract Formation (cont.)

Readings:

- UIL text: Part B, Chap. 3, §§ 35-36, pp. 234-272 (38 pages).

Class Activities:

- Interview of Mark Mutter, local Nationwide Insurance Agent.

Class 11: Insurable Interest Requirement

Readings:

- UIL text: Part B, Chap. 4, §§ 40-42, 44[a], 44[c], 45, pp. 273-292, 298-299, 301-308 (excluding all of the discussion of life insurance) (27 pages).
- *Skim* my outline of Chap 5, §§ 50-51, 52B[a]-[c], 53, pp. 317-328, 353-355, 359 (Scope of Obligations: Persons and Interests Protected), available on TWEN.

Class Activities:

- Discussion of how the following affects Homestead's case:
 - Whether Homestead had an insurable interest.

Class 12: Scope of Obligations: The Risks Covered (Coverage); Scope of Obligations: The Risks Covered (Limitations/Exclusions/Conditions)

Readings:

- UIL text: Part B, Chap. 6, §§ 60-62B, pp. 391-431 (40 pages).
- *Skim* sections on health, accident, life, and disability insurance.

- Review NITA Case File: Manhattan Excess Policy at Exhibit 1, pp. 103-119.

Class Activities:

- Discussion of how the following affects Homestead's case:
 - Scope of coverage
 - All-risk
 - Specified-risk
 - Parole evidence rule
 - Limitations on coverage
 - Explicit limitations

Class 13: Scope of Obligations: The Risks Covered (Limitations/Exclusions/Conditions) (cont.)

Readings:

- UIL text: Part B, Chap. 6, §§ 63, 63A, & 63C, pp. 431-445; 459-474 (29 pages).
- *Skim* sections on health, accident, life, and disability insurance.
- Review NITA Case File: Manhattan Excess Policy at Exhibit 1, pp. 103-119.

Class Activities:

- Discussion of how the following affects Homestead's case:
 - Requirement of fortuity
 - Known loss doctrine
- Intended or expected requirement in liability insurance.

Class 14: Scope of Obligations: The Risks Covered (Particular Coverage Issues in Liability Insurance)

Readings:

- UIL text: Part B, Chap. 6, §§ 65, pp. 507-552 (45 pages).
- *Skim* sections on health, accident, life, and disability insurance.

Class Activities:

- Discussion of
 - Occurrence vs. claims made policies
 - Meaning of "occurrence."
 - Trigger of coverage in CGL policies.
 - Problems in environmental coverage.
 - Coverage of multiple losses from a single cause.
 - Coverage of punitive damages.

Module 4: Performing the Contractual Obligations

Class 15: Performing the Contractual Obligations:

Insured's Duty to Pay Premium and to Properly Present Claims

Readings:

- *Skim* my outline of Chap 7, §§ 70-72 (insured's duty to pay premium), available on TWEN.
- UIL text: Part C, Chap. 8, §§ 80-87, pp. 599-636 (37 pages).

Class Activities:

- Discussion of how the following affects Homestead's case:
 - Notice of loss
 - Proof of loss
 - Limitations periods
 - Duty to cooperate
- Plan to ask questions of the guest claims adjuster.

Class 16: Performing the Contractual Obligations:

Insurer's Duty to Pay Proceeds (measuring loss)

Readings:

- UIL text: Part C, Chap. 9, §§ 90, 91, 93, pp. 637-641, 647-670; Chap. 11, § 115, pp. 931-934 (30 pages).
- NITA Case File, pp. 41-65 (24 pages).
- Review payment provisions of the Manhattan Excess Policy, NITA Case File, Exhibit 1, pp. 103-119. Compare that language to the language of the other policies we considered in Class 8.

Class Activities:

- Discussion of how the following affects Homestead's case:
 - Mitigation of damages
 - Measuring loss in property insurance cases
 - Coinsurance requirement
 - Replacement cost policies
 - Actual cash value
 - Replacement cost less depreciation
 - Market value
 - Choice of measure
 - Interest

Class 17: Performing the Contractual Obligations:

Insurer's Duty to Pay Proceeds (subrogation and other insurance)

Readings:

- *Skim* my outline on UIL text: Part C, Chap. 9, §§ 96, pp. 676-708 (subrogation), available on TWEN. We will not discuss subrogation in class.

- UIL text: Part C, Chap. 9, §§ 97, pp. 708-733 (other insurance clauses) (25 pages).

Class Activities:

- Lecture and discussion of three forms of other insurance clauses, and results when they conflict among applicable policies.

Class 18: Performing the Contractual Obligations: Insurer's Duty to Pay Proceeds (remedies); Excuses for the Insurer's Nonperformance

Readings:

- UIL text: Part C, Chap. 9, §§ 98-99, pp. 733-747; Chap. 10, §§ 100-101, pp. 747-768 (35 pages);
- Skim UIL text: Part C, Chap. 10, §§ 102-104C, pp. 769-812 (43 pages).

Class Activities:

- Discussion of how the following affects Homestead's case:
 - Warranty and breach
 - Insured's misrepresentation
 - Insured's concealment
 - Waiver and estoppel
 - Incontestability clause
- Discussion of how the following affects Homestead's case (if necessary):
 - Interpleader
 - Contract remedies
 - Attorneys' fees and penalties
 - Punitive damages
 - Tort remedies

Class 19: Assessment of State Law as it Relates to Homestead Dispute

Class Discussion:

- Plan to discuss how the applicable state law relates to the legal memo issue assigned to you.

Module 5: Lawyer Roles in Strategic Decision Making: Client Counseling

Class 20: Refining the Legal Strategy

Readings:

- Legal Strategy text, Chap. 3 § 3.4.1-3.4.1.5.1, pp. 54-60; Chap. 4, §§ 4.4-4.9, pp. 92-113 (27 pages).
- UIL text, Chap. 3, § 36, pp. 269-272 (3 pages).
- Check TWEN for templates for the three charts.

Class Preparation:

- Prepare three client-counseling charts for your client based on the examples at pp. 99 (client-centered); 115, 117-119 (institutional client counseling), 121-124 (risk matrix).
- *Turn these charts in for class participation points*

Class Discussion:

- Discuss conflict of laws issue.
- Decide before class the three good facts and the three bad facts for your client and for the opposing party.
- Consider whether our client can use rules of civil procedure or rules of evidence to keep the “bad facts” from being disclosed at trial.
- If the client must deal with the “bad facts,” what might be the best way to do it? What “theme” may mitigate their impact?
- What themes or analogies may work to present a coherent, logically consistent, and emotionally appealing story for the fact-finder now that you have more facts and a better understanding of the applicable law?
- We will use the brainstorming techniques recommended in the text.
- We will discuss the relative merits of any course you might recommend to the client.

Module 6: Testing a Strategy Through Negotiation and Mediation

Class 21: Distributive Negotiation Techniques

Readings:

- Module 6 Supplemental Materials.

Class Discussion:

- Tension between Cooperative and Competitive Behavior in Negotiation
 - Prisoner’s Dilemma Exercise & De-briefing
- What is Distributive Bargaining?
- Role of Trust in Negotiations

Class 22: Distributive Negotiation Techniques (cont.)

Readings:

- Module 6 Supplemental Materials.

Class Discussion:

- The Distributive Negotiation "Dance:" Timing and Size of Concessions
- Role of Leverage (not Power) in Negotiations
- Opening Offer Strategies: Negotiation Role-play

Class 23: Distributive Negotiation Techniques (cont.)

Readings:

- Module 6 Supplemental Materials.

Class Discussion:

- Summary of Heuristics (Psychological Short-cuts) that Affect Opening Offers
- Five Opening Offer Tactics (four of which are likely to lead to a less optimal result)
- Protecting Yourself Against Exploitation: Review of Axelrod's Tit-for-Tat Strategy
- Hard Bargaining Tactics
- We will consider the negotiation approach that may work best on behalf of your client.

Class 24: Distributive Negotiation Techniques (cont.)

Readings:

- Legal Strategy text, Chap. 5, pp. 127-159 (32 pages).

Class Activity:

- You will plan your negotiating strategy in teams of two.

Class 25: Distributive Negotiation Techniques (cont.)

Class Activity:

- You will attempt to negotiate a settlement of the client's dispute.

Class 26: Neutral Fact-Finding, Legal Neutral Evaluation

Readings:

- Draft of legal memo on this topic

Class Activity:

- De-briefing of negotiation exercise.
- Discussion of neutral fact-finding and LNE (aka Early Neutral Evaluation or ENE).

Class 27: Mediating the Dispute: Guest Mediators and Advocates

Readings:

- Legal Strategy text, Chap. 5, pp. 159-169 (10 pages).
- Module 6 Supplemental Materials.

Class Preparation:

- Plan to ask the guests three or four questions.

Class Discussion:

- Several area mediators and legal advocates will discuss mediation in the context of insurance disputes.

Class 28: Arbitration in the Insurance Context; Closing and Evaluation of Course

Readings:

- Review Class 7 readings and outline.
- Draft of legal memo on topic.
- Module 6 Supplemental Materials.
 - State statutes under the Uniform Arbitration Act (UAA) governing insurance arbitration.
 - List of states adopting UAA or RUAA

Class Activity:

- Discussion of arbitration in the insurance context.
- Feedback about course.