The masterpiece of any insurer’s compliance program is its written claim manual. Claim manuals instruct adjusters on day-to-day operations, serve as training guides for new staff, inspire consistent, best practice standards for customer relations, and help minimize risk of financial loss. Of greatest benefit, claim manuals help ensure a company’s compliance with applicable state laws and mitigate regulatory risk.

However, while claim manuals are extremely valuable, drafting claim procedures is one of the most daunting tasks for any insurer, particularly those operating in multiple states, writing multiple lines of business. Companies constantly struggle with the process. The fifty states regulate insurance independently, and very different laws can apply in each state to separate classes of business. With this mottled palate, how do you paint a coherent vision and create practical guidelines that can be followed consistently on a day-to-day basis?

Drafting claim policies and procedures is an art, not a science. Good guidelines effectively balance and blend multiple perspectives:

- A company’s need for clear, efficient, cost-effective, and sustainable workflows
- Policyholders’ needs for prompt, fair resolution of claims
- The states’ responsibility to protect the public and enforce market conduct regulation

This article outlines the major points to consider in drafting claim guidelines, with some helpful composition tips.

**Preparing the Canvas: Overcoming Initial Challenges**

Drafting a manual for claims handling has some unique challenges as compared to compiling other policies and procedures, such as a corporate code of ethics or human resource protocols. In reviewing regulations, if the sheer volume of claim-related laws in one state can be intimidating, in all 50 states, the volume can seem impossible. Laws are also constantly being updated, and the risk of “missing” new provisions is high, particularly without strong internal controls and compliance management workflows.

Plus, since some laws address not only claim issues, but also policy wording requirements, consumer complaint issues, or general compliance matters, there may be a lack of clarity on who needs to respond. When a new law or change in law is identified, routing of the information can easily go awry and there may be insufficient accountability for implementing required changes. This is particularly true in larger claim departments where adjusters may be in multiple locations, are handling different lines of business, or may be otherwise segmented.
The Art of Drafting Claim Manuals

There are several ways to prepare the canvas for these initial challenges.

First, before starting any specific drafting work, smooth future rough spots first by developing a Guide to Writing Policies, an internal resource that will facilitate development of consistent policies and procedures throughout the claim organization. This document should include a list of content elements that should be addressed within each claim policy, perhaps with common forms or templates to be used by any author. For example, the Guide may instruct the author to address certain administrative issues such as who is responsible for maintaining the policy; who is required to comply with the policy; what are the review date(s) and crucial diary notes; and what are the sign-off procedures. Having a checklist of both key contacts and administrative issues will help in updating and disseminating policies. The Guide may also include specific writing-style tips so that the tone of the text is consistent across multiple authors and claim departments.

Second, make full use of whatever technology is available to build and store claim manuals, and ensure accessibility to all who need the information. No matter how a company maintains other policies, it is particularly important to automate claim manual storage and dissemination as much as possible to minimize the dangers noted above. Fortunately, many systems are available to share and store policies and procedures effectively. Look for a system that:

- Not only holds current policies, but also maintains archived versions within a common platform. Strong version control will help identify policies in place at a point in time, for both regulatory audits and potential litigation.
- Allows for the creation of master policies that have state-specific or class-of-business tweaks, or have changes reflecting the physical structure of the company’s claim organization. A good policy archive system should be able to create not only a “parent” master manual with information common to all claims or claim departments, but also “child” manuals, with sub-sets of changed information, allowing for quick edits or “touch-ups” to address specific issues, departments or business units.
- Prints out the claim manual—both the whole manual and sections thereof, current and archived copies. This may seem like common sense, but some systems were not originally built with a robust print feature. This functionality is particularly necessary for insurers, who are frequently subject to audits, market conduct exams, and discovery in litigation.

Third, discuss and agree in advance who will be responsible for tracking law changes and making updates to drafted policies. Regulatory changes most frequently impact claims, directly or indirectly. Document the policy change and dissemination process as clearly as the new law or policy statement is written. In many cases, policies are drafted or amended as a one-off activity, in response to specific corporate requests, internal or external audit findings, or in response to a newly-enacted law. But the person drafting the policy is not necessarily the person who would be tracking and reviewing regulatory information for changes in insurance laws. Will updates be monitored by Claims? Legal? Compliance? Again, there are helpful technology solutions to assist with regulatory change management, but the process should be sketched out well first, by all those potentially involved.

Selecting a Subject or Focal Point: Developing a Policy or Procedure

With thousands of laws, rules, and regulations as potential subjects, how does a company decide what should be the subject of a specific policy or procedure? Just because there is a law on a topic, do you need to have a specific policy? Is there already a policy or procedure addressing related issues, or do you need to have a whole new policy? What should the focal points of the claim manual be?

These basic questions may be asked when (a) new or amended regulations are issued; (b) internal or external audits raise an issue or problem that requires remediation; (c) consumer complaints are received, or (d) there has been litigation against the company or its insureds, involving a claim-handling matter.

Sometimes the answer is obvious. Guidelines will certainly be created to document the most common day-to-day responsibilities of claims handlers or adjusters. Procedures will be established when there is known, pervasive regulation in states governing a claim practice, like laws setting forth time specific periods for adjusting claims, paying interest on delayed claims, or considering after-market parts in auto claims. Policies will also be created to address industry hot topics, issues for which regulators, investors and the public may expect a policy, such as maintaining customer privacy or use of social media.

But more often, the response takes much thought. On one hand, companies want to have a set of rules that are complete enough to reasonably meet major regulatory needs. On the other hand, insurers may not want to create a whole new policy or procedure every time a new law or problem is unveiled. In the effort to ensure compliance, it is sometimes hard to draw the line on what absolutely needs to be documented—resulting in manuals that may be perceived as too large, cumbersome, ineffective, and hard to implement or keep updated.

While there is no one right answer, here are some points to consider in deciding whether to create a new policy:

- Is there an NAIC Model Law on the topic? If so, this indicates that the subject is of significant interest to state insurance regulators, and a majority of states are likely to have adopted either the law verbatim or with amendments. NAIC Model Laws are great starting points for developing the core of
compliance policies, but may be forgotten resources in the effort to research and document individual state laws. If a Model Law exists, there should usually be a companion policy or procedure to ensure company compliance. Then, the Model Law can be a solid starting point for the outline of the policy, to be shaded and highlighted by specific state law as needed.

- Similarly, the NAIC Market Conduct Examiner’s Handbook outlines issues and questions that state regulators will investigate as part of market conduct examinations. Claims are addressed specifically in several chapters. Do your claims procedures capture all key points that auditors will review? Further, market conduct exams that states have conducted on other companies are often published and are available through several online resources. These reports may shed light on what claims practices particular states view as most important, and on what behaviors fines, fees and penalties are more likely be assessed, as a practical matter. Know where the regulators’ eyes are being drawn.

- What are other companies doing? While insurers have to be mindful of anti-trust laws, it is acceptable to try to develop procedures to reflect general best practices of the market, and ensure that if others commonly have a written policy on a topic, your company does too, even if the actual position or procedure is different. Input may be sought on whether a procedure is unusual, outside the norm, too complex, inaccurate, or incomplete. Information about best claim practices can be gleaned from employees, vendors such as third-party adjusters, attorneys, auditors, and reinsurers (who will have similarly situated clients). Ask for their industry expertise and advice and use all available resources.

- When a new law or issue comes to light, consider all alternatives for ensuring compliance. In some cases, instead of creating a formal policy, companies may choose to maintain online research systems, lists or databases of applicable raw laws and regulations to refer to as needed, and develop policies on a case-by-case basis as claims arise. Some insurers generally allow or mandate adjusters to check statutes directly on a topic of concern for a claim, or have general procedures for the referral of less-frequent questions to a claims manager, state-specific claim expert, compliance liaison, or law department.

On the flip side, consider the ramifications of not having a specific policy or procedure. If a procedure is drafted, can it easily be kept updated and relevant? Will the policy affect a large number of handlers or only a select few in limited circumstances? Will a written guideline be needed to explain an unclear law or offer a corporate position on an issue that cannot be gleaned by just reading a statute, regulation or bulletin? Without a formal policy, how can you establish that the policy will be followed when necessary—are there alternative ways to document an audit trail?

There are infinite ways to paint a picture.

**Arranging Key Elements around the Focal Point: Digesting Applicable Law**

Pablo Picasso advised that “(e)very act of creation is first an act of destruction.” This is certainly true of the process of drafting claim procedures. Many claim laws are, physically, a jumble of concepts and ideas, often lumped together in one code or citation. Trying to set a guideline to comply with one statutory provision can be a challenge in itself. In order to draft effective policies, it may be necessary to first collect all applicable laws on a potential topic, break down each law or regulation to their basic elements, and build a new picture around key focal points.

For example, most states have a statute addressing Good Faith (or, conversely, Unfair) Trade Practices or Claim Practices. Often, this statute has rules that touch on multiple aspects of the claims handling process, like:

1. Acknowledging first notice of the claim
2. Corresponding with the insured during a claim investigation
3. Issuing reservation of rights or denials
4. Settling the claim
5. Calculating interest on late payments

In some states, one or more of these five distinct issues may have different regulations. On calculation of interest alone, state law varies widely. Issuing one procedure which attempts to comply with all sub-topics, across all states, may be physically difficult, cumbersome to read, and not ultimately effective.

Breaking down the law by its elements, however, allows the drafter to look at specific sub-topics across jurisdictions and paint a clear picture centered around one focal point. Just as the elements in a painting’s composition should feel they belong together, and not as separate bits that just happen to be in the same painting, ideally procedures should be drafted around common issues that make sense in the claims workflow, and not be forced together into a fruit salad policy simply because a state law has thrown apples and oranges into the same bag.

**Choosing Colors to Create a Theme: Blending the Law into a Coherent Picture**

Regulations on a particular claim topic across 50 states frequently vary. Policy drafters are often faced with a virtual spectrum of provisions to comply with and a palate of ideas and concepts from which to choose, when trying to set a corporate standard on any given claim compliance issue. There are numerous approaches to drafting claim policies for a company operating in multiple states.

On one end of the spectrum there are clearly local or state-specific laws that apply to only one state, region, or jurisdiction. Florida has specific laws regarding sinkhole claims, or Maine has laws relating
to snowmobiles. Companies may choose to create a policy solely on a state-specific basis.

On the other end of the spectrum, there are issues that require attention from all states in equal degree. Federal laws applying to the handling of claims involving Medicare recipients, or dealing with federal flood issues are good examples. A coherent policy here is easy to develop.

In the vast middle, there are laws that may have a common theme but have state-specific tweaks. These laws can be initially based on regulator’s perceptions of general claim principles, or developed out of an NAIC Model law, but have been amended by each legislature to adapt to the needs of local consumers. Addressing these laws, insurers have many options for creating a standard, and can:

1. Try to find the most common regulatory standard to set as a common policy—the common provisions applying to the majority of states.

   For example, many states may require a claim to be acknowledged or an investigation to be completed within 30 days. If these requirements are not met within the 30-day time period, a letter must be sent to the insured. Incidental states requirements may fall anywhere between and 60 days. One company’s procedure may take the middle of the road approach and set a default goal of investigating a claim within 30 days.

2. Try to comply with the most onerous regulatory standard—the most difficult standard for all states to comply with—assuming that the procedure addresses the most difficult requirement, it will, per se, be compliant in all states.

   In the above example, a company taking this approach may set a 5-day standard to acknowledge or respond to a claim. This way, they will be compliant with all state laws that state a specific deadline.

3. Set a company-specific standard that is stricter than even the strictest law. A company may want to not only meet all legal standards, but also raise the bar to provide enhanced customer service, or serve some other goal.

4. Adopt a blended approach, setting a core policy on either a company-specific “high standard” or a strict “most onerous” law as a default rule, then add state-specific references to flesh out the rest of the policy to ensure it is complete.

Any or all of the above approaches may be used to outline a specific procedure, and a claims manual may contain policies developed in more than one way. The most common routes of aggregating laws into a claim procedure are methods (2) and (3), trying to set some common base standards by either falling back on a “most onerous” rule or establishing a baseline strict company goal. The pros of taking one of these approaches is that they are:

- Usually the quickest and easiest rules to draft and implement, and can often be written based on NAIC model law wording
- The most consistent in application, applying to all claims for one or more lines of business, across multiple locations
- May be most easily understood and followed by the greatest number of people, when centralized under a common theme. Also, employees from multiple states may have some familiarity with a state-specific standard
- Easier to keep updated and maintain, based more on general good-faith claim handling principles than the black letter of specific statutes

On the other hand, generalizing policies into a common standard has some cons:

- It creates a risk of missing key requirements in specific states, and may limit the company’s ability to actually enforce any specific language or obligations set by specific statutes
- It can result in a policy that is too vague—serving all masters is a challenge, and some important procedural details could be left out
- It can increase the burden on employees, particularly those dealing with a claim in one specific state that otherwise has no or minimal legal requirement on an issue. Complying with a potentially heightened standard or a common standard based on laws found in other states can make the process for some matters less efficient, more time consuming or expensive.
- Laws could be directly contradictory—by intent of the legislature or regulators—in two or more states, and complying with a generic common standard may violate one or both states’ laws.

The alternative is to draw up policies state-by-state, although this is not always the best choice. On the plus side, state-specific policies offers the greatest protection to a company against compliance violations in all states, and in bad faith litigation. The down-side is that state-specific policies are extremely cumbersome to draft and manage. They require constant monitoring and updating, and failure to capture changes in laws may be magnified or highlighted when state law is showcased, front and center in a policy.

Adopting a creative, blended approach often brings the best results. This entails a topic-by-topic analysis of the laws to capture the most appropriate strategy for synthesizing laws and drafting a core policy to address each subject. In such a review, the drafter must first consider and weigh:

- Classes and line(s) of business covered by a protocol
- Specific jurisdictions where claims may occur
The size of a company, and the way a company’s claim function is organized

Resources available to handle claims, costs, people and systems. Technology can be a game-changer

The next step is to explore the palate of all applicable laws and layer those on to the analysis. Are there any mandatory requirements? How much do the various states differ on the rule? Are there dramatic differences in the laws among states, which lead to a policy that is state-specific? Alternatively, if differences among states is relatively minor, a common standard policy would be more appropriate.

Many companies also consider budgets, financial costs and non-financial risk costs of non-compliance. Some companies strive to be 100% compliant with all laws at any cost, but this is, with some areas of law, impractical or impossible. Other insurers do a cost-benefit analysis. They may consciously decide to bear some regulatory risk and potentially incur fines, fees, or penalties, if the financial cost of compliance far outweighs potential state fees or penalties. This comes down to a very personal, company-specific business decision.

In the latter case, a cost-benefit analysis should not be purely a financial, dollar-to-dollar comparison. Reputational costs with customers, business partners, and regulators can be significant. But having that discussion will be useful in ultimately determining the form of a policy or procedure—whether it will depict a more generic common guideline or will show more references to specific state laws.

Conservation: Ensuring Protection through the Discovery Process

Artwork can easily be damaged, so professional artists plan their care and conservation strategy from the time they select their initial media. Similarly, claim manuals can contain sensitive materials, and discovery of claim manuals in litigation can be a worry to companies. As part of your work, develop a protection strategy for potential disclosure of claim manuals in court.

Assume that anything written in a claim manual WILL potentially be discoverable in cases alleging bad-faith claim handling, as a matter of course. While a few companies have successfully argued that such guides are proprietary, the majority of courts routinely overrule insurer objections and order manuals produced. Claim manuals are deemed highly relevant in bad-faith actions, if it is alleged that certain claims conduct is a “pattern and practice” of a company, as written or outlined in a manual. Generally, claim manuals are not considered trade secrets (See, e.g., the Washington appellate court case, McCallum v. Allstate (204 P.3d 944 (2009)), and failure to have a policy addressing a procedure or incomplete policies, may be, in some instances, considered negligent or reckless. (See, for example, Uniguard Security Insurance Co. v. North River, 4 F.3d 1049 (1993)).

Companies often worry about producing claim manuals because the news picks up problem cases that arise from poorly drafted, biased, inaccurate or otherwise bad policy manuals that did not always reflect a company’s best intent. However, this is a case of the “one bad apple spoiling the bunch.”

An insurer can help protect against disclosure, on a limited basis, by ensuring that certain disclaimers are used. Common disclaimers include statements that the policy or procedure is for internal use only and is not intended to be used or relied upon by third parties. It also may state that a policy is for guidance only, and is not a warranty or representation or considered a fixed rule or requirement. The policy or procedure should be subject to change at any time, and if there is any discovered conflict between a policy and state law, the state law shall control. Some companies do add, in writing, that its claim manual contains proprietary or confidential information, which can help in limited circumstances. In some cases, policies may be considered legally privileged and confidential if prepared or reviewed by counsel. Legal advice should be sought before deciding on the final text and placement of any disclaimers.

Ultimately, however, if a manual is well constructed, accurately states the law, sets reasonable and appropriate guidelines for claims handling, is intended to be applied in good faith, and contains protocols based on either NAIC model law, market conduct standards, or industry best practices, there should be little danger in disclosing the document.

Finally... Seeing the Whole Picture

As there are infinite ways to create a painting, there is no one size fits all approach to drafting claim policies. Whether to draft a common protocol, a state-specific policy, or something in between depends on the specific regulation to be addressed, and a company’s general philosophy and appetite for compliance in line with specific local or state distinctions. It also involves an evaluation of resources and risks of non-compliance. A full analysis of all factors above can help craft a comprehensive picture of all claim policies that will be as legally compliant as possible, in light of all company concerns.
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