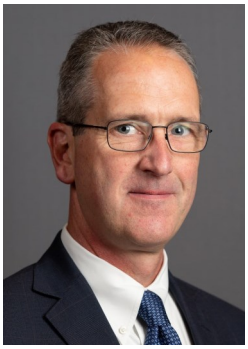
Spring 2021 Volume 5, Issue 2

CLEW NEWS

Soon to be "L'CREW News"

CPCU SOCIETY
Coverage, Litigators, Educators & Witnesses Interest Group

Message from the Chairs



Paul Tetrault, JD, CPCU, ARM, AIM
L'CREW IG Chair

Christine Sullivan, CPCU
L'CREW IG Vice Chair

Welcome to the 2021 Spring Issue of "CLEW News:" the newsletter of the Coverage, Litigators, Educators and Witness Interest Group (CLEW).

This edition of the newsletter focuses on "Witnesses." Barron's describes an "expert witness" as a "witness that possesses special knowledge of the subject about which he/she is to testify; the expertise may derive from either study and education, or from experience and observation." Your experience in the insurance industry coupled with the CPCU designation makes you a valuable asset in analyzing a specific scenario and/or claim and educating others. The decision to use an expert witness in a specific case and choosing the right one can be critical.

In this edition of the newsletter, you will find articles that will provide you valuable and practical information on how and what an expert witness does from several angles. Whether you are trying to determine whether an expert witness is necessary as a way to educate a jury, judge or other trier of fact or preparing an expert to testify, you will find content in this newsletter that will assist you. If you are an

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Inside this issue:

Message from the Chairs (continued)

expert witness, the articles will provide you with information as to how you come across in court and how to prepare an expert report. And if you are thinking of becoming an expert witness, this newsletter will provide you with context and different points of view you may want to consider before you make that decision.

As you may have heard, the CLEW Interest Group is merging with the Regulatory & Legislative ('Regs & Legs') Interest Group. Our new group, entitled "L'CREW" (Legal, Coverage, Regulation and Legislation, Education, and Witnesses) plans on continuing the top-notch educational programs and content both interest groups have brought to you in the past. We believe this merger will provide additional expertise, volunteer opportunities and networking for CPCU members who are currently part of these interest groups as well as those who may be joining us in the future.

This will be the last newsletter under the banner "CLEW News;" our newsletters in the future will be under the banner "L'CREW News." Our goal remains the same: to continue to provide you the type of technical education, information, and resources that you can use. We welcome comments, suggestions and submissions for future articles from members of the newly formed "L'CREW" Interest Group and anyone interested in topics related to insurance legal issues, coverage, regulation and legislation, education and witnesses.

We would also be remiss if we didn't thank CLEW's News editor in chief, Michael Gay, and the excellent work of Chip Boylan and Julie Moore in laying out and editing each newsletter to bring CLEW News to us in the past several years.

You can send your comments directly to Chris Sullivan, L'CREW Vice Chair at casconsulting.llc@gmail.com.

Paul Tetrault, Chair L'CREW
Christine Sullivan, Vice Chair, L'CREW

Writing a Bulletproof Expert Report

By Kevin Quinley
CPCU ARM, AIC, AIM, Are, RPA

One core competency that expert witnesses need to continually hone and improve is writing. In federal cases, you will be submitting a Rule 26 report. Even in some state cases, your report will have the flavor of a Rule 26 report. In other cases, counsel may only need or want a brief bullet point disclosure of your opinions.

Regardless of the form that it takes, your written report will manifest your thought process on the case and is the source document opposing counsel uses to question you at a deposition and trial. It represents the distillation of your opinions and reinforces to the client the value you add as a subject matter expert. Thus, whether experts view themselves this way or not, they are professional writers. You get paid for writing! Skill at writing is a core pillar underlying a successful expert witness practice. Here are twelve tips and strategies for upping your game and written work product:

#1. Renegotiate tight deadlines. Maximize the length of your runway. Clients are notorious for approaching experts at the proverbial 11th hour:

> Attorney at 5:17 PM phone call: "There are 3000 pages to review and report is due in 10 days. Can you do it?"
>
> Expert: "Umm…. No thanks!"

Renegotiate unrealistic, compressed deadlines unless you're willing to spend 24/7 on the case. Often, if you diplomatically push back, counsel can get the opposing side and the Court to agree to extensions of a Scheduling Order. In some cases, they can't. If they can't, be willing to "just say no" and walk away. "Hot takes" are for sportscasters and TV news network talking heads. Your report should be more than a "hot take." Ultimately, you'll be the one on the hot seat at deposition or trial, trying to defend your opinions and your report.

Reports should be reflective, not reactive. Never sacrifice responsiveness for quality. It's your name on the report. It's your professional reputation on the line. If you render half-baked opinions, that becomes part of your permanent record as an expert witness. It can compromise your credibility on downstream assignments and hurt your odds of

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Writing a Bulletproof Expert Report (continued)

These twelve tips are quality control steps in producing the best possible written work product and optimizing the process.

getting subsequent assignments, due to the hurried quality of the report you scrambled to complete by an unrealistic deadline.

#2. Give yourself permission to write a crappy first draft. Ease the pressure on yourself by considering your first draft a "beta version" of opinions. Take off your Editor Hat. Don your "Crazy Madman" hat. Psychologically, this frees you to break the deadlock and get words on paper (or on the computer screen). We procrastinate, in part, because we want to write the Perfect Report. Remove that psychological burden. Tell yourself it's okay to write an imperfect first draft.

#3. Eat the elephant one bite at a time. You can be frozen into inactivity and procrastination by wondering, "Where the world to even begin?" Compartmentalize. Break the project down into specific, manageable steps. One writing session will be devoted to facts of the case. Another devoted to your background and qualifications. Another session devoted to your methodology.

The core of your report will be your opinions. Break those down into individual writing sessions or modules. How do you eat an elephant? One bite at a time! Shrink the size of your world to just you and the computer screen in front of you.

#4. Create subfolders for each opinion. Part of eating an elephant "a bite at a time" involves creating individual files for each opinion. This keeps the separate ideas discrete. Your report may have five or six major opinions. Maybe more. Maybe less. Create a Word document for each one of them, using abbreviations as appropriate. Each day, each writing session, attack one of these opinions to get thoughts on paper. You can always merge them, edit them, change them, reword them and polish them later. Don't think about writing a report. Write modules!

#5. Get clear on exactly what your report must include and collaborate with retaining counsel. Clarify with retaining counsel whether he or she needs a Rule 26 report or a pithy bullet-point disclosure. If the case is in federal court, Rule 26 will likely apply. If the case is in state court, retaining counsel may still want you to do a Rule 26-type report. Others will want more of a bullet point disclosure of your opinions. Don't waste time on a detailed report if a bare-bones disclosure is needed. On the other hand, avoid situations where you assume that the lawyer only needs a bare-bones disclosure and you come to learn that a detailed federal type report is desired.

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Writing a Bulletproof Expert Report (continued)

#6. Proofread! Use spell-check but don't rely upon it solely. Run the report through a spellchecker, but realize that it will not catch all bloopers. This is why it helps to have another person read your draft with a red pencil or pen.

#7. Speak, don't write. For at least 20 years, most of my "writing" has consisted of dictating into a speech to text software tool, Dragon Naturally Speaking (https://tinyurl.com/93tk4umu) . (I "wrote" this article using dictation software.) Although many people complain of Writer's Block, I've never heard of anyone afflicted with "Talker's Block." Proficient typists can keyboard 60-70 words per minute. Speaking at an average pace, however, puts you around 130-140 words per minute. You can get much more text on the page by speaking into a microphone than by typing. Still proofread carefully, just as you would even if you were typing. Get comfortable with speech-to-text software and turbocharge your report writing productivity!

#8. Consider editing software such as Word Rake or Grammarly. Once you have a draft, run it through word editing software. Word Rake (https://www.wordrake.com/editing-software-for-writing-professionals-about) identifies unnecessary verbiage and suggests changes. Grammarly (https://www.grammarly.com/) is like having your own private editor. It flags grammatical mistakes which are much better for you to catch before a report goes "live." Errors in spelling and grammar detract from substantive opinions.

#9. Look sharp! Appearances count. Your report needs to be buttoned down, lucid and well documented. The manuscript should also look tight. Report typography is beyond the scope of this article, but I enthusiastically recommend *Typography for Lawyers: Essential Tools for Polished and Persuasive Documents* by Matthew Butterick.

#10. Read it aloud and see what it sounds like. This alerts you to poorly worded sentences, lack of transitions between paragraphs, or possible internal contradictions in the draft report. Use this as a quality control step to enhance the readability of your report.

#11. Get someone who knows nothing about the case and ask them to proof it. Often, after finishing a report draft, I will hand it to my wife with a red pen and ask her to read it and mark it up with a critical eye. I am so close to the manuscript, I mentally insert omitted words in the draft or make other shifts and leaps that don't make sense. She catches spelling errors, grammar errors, sentence fragments and other mechanical imperfections. She also alerts me to sentences, conclusions or transitions that just don't make sense. Whether you use your spouse or significant other, find somebody who knows nothing about the case and ask them to flag mistakes, be ruthless about it, and ask, "Does this report make sense?"

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Writing a Bulletproof Expert Report (continued)

#12. Get clear with counsel about what he or she does or does not want to see in the way of drafts. Different attorneys have different philosophies. Another impactful factor is whether the case is in state or federal court and whether drafts circulated between the testifying expert and retaining counsel are or are not considered privileged. Some attorneys do not want to see drafts. Others are fine with doing so. Some don't want to see the draft but may ask you to read the report over the phone (a tedious exercise). Others will ask you to distill verbally over the phone the report's highlights. Others may want to screen-share the draft via Zoom. Before sending a draft to counsel, ask him or her about preferences on this issue.

These twelve tips are quality control steps in producing the best possible written work product and optimizing the process. Now that you've finished the report, pat yourself on the back and taken deep breath. Savor the interlude because, before you know it, the time will come to prepare for . . . your deposition!

About the Author

Kevin Quinley CPCU, ARM, AIC, AIM, Are, RPA is President of Quinley Risk Associates in the Richmond, VA area. A CLEW IG member, he maintains an active nationwide expert witness and claim consulting practice on issues of claim-handling, bad faith, extracontractual liability and adjuster standard of care. You can reach him at **kevin@kevinquinley.com**.

CPCU Society Mission

We are committed to providing resources, educational programs and leadership opportunities that attract talent and enable individuals to expand their technical insurance skills and business capabilities in order to improve the overall performance of the insurance industry while adhering to the highest ethical standards.

Five Tips for Improving Your "Likability Factor"

By Elise Farnum, CPCU, ARM, AIM, CPIW
Illumine Consulting

It's the job of the expert witness to educate the jury about the issues involved in the subject case so as to influence the decisions of the jury. The expert's opinion and testimony may be the most significant factor to ensure that the final outcome is favorable to the client's position. To perform the first requirement, experts are selected based on their knowledge of the subject matter, their experience, and their ability to communicate their knowledge to others. Too often the second requirement, the skill of influencing the jurors, is often overlooked. In my opinion, an expert needs something more than knowledge and experience to effectively influence the opinion of jurors. I call it the 'likability factor.' I believe that when jurors actually *like* the expert witness, they will do everything possible to find in the expert's favor.

> **"60% of all human communication is nonverbal body language; 30% is your tone, so that means 90% of what you're saying ain't coming out of your mouth."**

One of the best ways to know if someone likes you is whether or not they will look you in the eye. I've used that measure when watching jurors return from their deliberations to guess about their decision – will it be in my client's favor or not? Without fail, if the jurors look at me as they file into the court room, the verdict is in my favor.

In his article, "How Likable Should an Expert Witness Be?" (CLEW Newsletter 2013) Kevin Quinley referenced studies from the *Journal of American Academy of Psychiatry and the Law* confirming that "likability affects juror perception of trustworthiness." Trustworthiness is what sways a jury to the expert's way of thinking.

Communicating trustworthiness takes two forms – verbal and non-verbal cues. We tend to spend a lot of time focusing on the words we want to say, the policy provisions we want to reinforce, the legal issues that are involved. Less time is spent on how those concepts and positions will be presented. And yet, studies have shown that non-verbal cues are much more important than the words themselves.

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Five Tips for Improving Your "Likability Factor"

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As played by Will Smith, Alex "Hitch" Hitchens acknowledged this by saying, "*60% of all human communication is nonverbal body language; 30% is your tone, so that means 90% of what you're saying ain't coming out of your mouth.*" Yikes! That means all of the expert's scholarly thoughts expressed in words accounts for only 10% of what the jury hears.

Improving nonverbal communication skills by focusing on how information will be shared with the jury is the expert's key to likability and a favorable verdict. Here are some tips that may help you to improve your non-verbal skills:

- Eye contact. **Look** at each member of the jury. Make them feel that they are important to you. Maintaining eye contact also relays your respect for their importance as jurors.
- Posture. Face the jury from the witness stand in an **open stance**. Make yourself appear approachable. No crossed arms or legs. Sit up straight without looking like a ramrod.
- Facial expression. Your face should remain **neutral**. Don't let the opposing attorney get to you or cause you to display arrogance, conceit, disgust, or sarcasm.

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Five Tips for Improving Your "Likability Factor"

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- Lower your tone of voice. The sound of your voice makes a difference. A **lowered voice** seems more credible. There are excellent Ted Talks and YouTube videos demonstrating exercises you can perform prior to your testimony to flex your voice.
- Take a few voice-acting lessons to improve the tone and timbre of your voice.
- Pay attention. If you are to remain in the courtroom during the trial testimony of others, pay attention, **show interest**. This demonstrates to the jury that the outcome matters to you.

As Mr. Quinley wisely pointed out, "Credibility + Likability = Success. Blending likability with credibility creates a powerful expert witness."

The nonverbal signals you send to the jury will confirm your likability, and who doesn't want to help out a nice person, someone we like? Appearing likable to the jury will make you the best expert witness you can be.

About the Author:

Elise Farnham, CPCU, ARM, AIM, CPIW has 40+ years of experience in the risk management and insurance industry including multi-line adjuster, branch manager, regional manager, and senior executive for TPA and independent adjusting firms. As owner of Illumine Consulting, she provides expert testimony, professional development and continuing education programs. Past President of the Atlanta CPCU Chapter and the International Association of Insurance Professionals, she currently serves as a director for the Society of Registered Professional Adjusters and as a member of the CLEW Interest Group Committee. Elise has been recognized for her service to the industry and is a guest author for many industry publications.

Belts And Suspenders

Top 10 Deposition Do's and Don'ts

By Bill Wilson, CPCU, ARM, AIM, AAM

The Spring CLEW issue focuses on the "W" in CLEW, referring to expert Witness issues. In last year's Spring issue, I mentioned my very first experience about 30 years ago as an expert witness. It was a case involving an agent who insured a small shopping center that experienced a major fire loss and a resulting coinsurance penalty.

Recently revisiting the agent's disastrous deposition reminded me of the critical importance of depositions to the credibility of the person being deposed, whether the defendant, plaintiff, or expert witness. Revisiting the deposition also reminded me of a list of 34 deposition Do's and Don'ts that I came across in an agent E&O class years ago from the Florida Association of Insurance Agents. I'll share my David Letterman-like Top 10 Do's and Don'ts in this article. This may be old news for many of you, but perhaps a reminder will be beneficial.

10. Avoid speaking "off the record." Even if your "off the record" comments are honored, they may come back to haunt you in some other way. If there is any doubt about whether you should say something "off the record" or how you should express it, consult with your counsel.

"Always tell the truth…" As Mark Twain said, "…this will gratify some people and astonish the rest."

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9. Avoid any attempt at levity. As someone who enjoys inserting humor into presentations, the opportunity to "lighten" a serious or tedious moment is hard to resist. I've done it inadvertently (and, fortunately, successfully) on the witness stand, but humor may not translate well in a written deposition. Litigation is a serious affair and it's usually not worth the risk of coming across as flippant.

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Top 10 Deposition Do's and Don'ts (continued)

8. Never express anger or argue with the examiner. An expert witness wants to be perceived as credible, knowledgeable, and professional, not as argumentative, temperamental, and out of control. Don't do the examiner any favors by endearing him or her to a jury as a victim of your perceived hostility.

7. Do not attempt to educate the examiner. In the case referenced at the outset of this article, I was deposed by an attorney who appeared to know almost nothing about insurance. But he was an excellent and skilled trial lawyer. One thing possibly worse than appearing argumentative is being perceived as "talking down" to the examiner. If you need to correct or clarify something, do so as a skilled teacher would a pupil who isn't unintelligent, just lacking in knowledge about the subject matter.

6. Do not tip off the examiner as to the existence of documents he or she does not know about. I once made the mistake of hosting a policyholder attorney in our office library for a deposition in an agent E&O case. Gazing around the bookshelves, he noticed a 3-ring binder that said "Agent E&O Loss Control Seminar." It was the manual I used to teach E&O classes, including my notes. The copy he was able to get provided great ammunition AGAINST the agent for whom I was serving as an expert witness.

5. If you are finished with an answer, and your answer is complete and truthful, remain quiet and do not expand on it. I believe it was Franklin Roosevelt who once said about public speaking, "Be sincere, be brief, be seated." Unless advised otherwise by your attorney, limit your responses to only the information necessary to answer the examiner's questions. Your counsel will have the opportunity to guide you through further elaboration as necessary later to support and solidify his or her case.

4. Do not answer a question you do not understand. This is pretty self-explanatory. you do not understand the question, ask the examiner to rephrase it or explain what he or she wants to know. Never assume.

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Top 10 Deposition Do's and Don'ts (continued)

3. Think before you speak. Collect your thoughts and respond succinctly and intelligently. Use full and complete sentences, minimizing the use of adjectives, adverbs, and superlatives, and avoiding phrases like "to be honest…." Giving a deposition is different than testifying in court before a live audience. If you pause for a minute or so, that's not obvious to whomever is reading or listening to the deposition.

2. Do not volunteer information. This is a generalization that encompasses tips 5- 7 above. Reply only in a way that accurately and adequately responds to the examiner's question. Any information beyond that should be presented only as directed by your counsel to support the case that he or she has constructed.

1. "Always tell the truth…" As Mark Twain said, "…this will gratify some people and astonish the rest." As an expert witness, you are selling your credibility. Nothing is more destructive to your credibility and the case at hand than to be caught in an untruth.

Last year, I first brought up the E&O case that I mention at the start of this article and said I would share some details of the actual case later. I forgot. But I will make an effort in the Fall "Litigation" themed newsletter to share that case, including excerpts from one of the most remarkable depositions I've ever read.

About the Author:

Bill Wilson, CPCU, ARM, AIM, AAM is the CEO and founder of InsuranceCommentary.com and the author of 6 books, including **"When Words Collide: Resolving Insurance Coverage and Claims Disputes"** and "**Why Insurance Doesn't Cover the COVID-19 Pandemic,"** both available on Amazon.

Be Prepared: Deposition Preparation

By Tommy Michaels, CPCU, SCLA, AIC, ARM

Several years ago, I published an article in this newsletter titled "The Expert Witness as a Deponent"[1]. The expert witness is only one of three types of testifying witnesses and not the most common. The other types of witnesses are the fact witness and the corporate witness, commonly referred to as the person most knowledgeable or 'PMK'. All three have different roles in the discovery process in litigation. The preparation is also different. In this article, I concentrate on the deposition preparation of the fact witness and PMK witness.

The fact witness is the most common. As the name implies, this witness speaks only from personal knowledge. This may be the claim handler, supervisor, underwriter, agent or someone else that was involved in the matter that gave rise to the litigation. This person may also be personally named in the suit as a defendant. Litigation involving insurance personnel usually arises from claim handling or denial of coverage. The allegations may be that coverage was wrongly denied or the claim handling was improper. The complaint often includes allegations of violations of parts of the Unfair Claim Practices act as well as Bad Faith claim handling or coverage denial.

If you are to be deposed in litigation, the attorney defending the suit will contact you initially to discuss a convenient time and place for the deposition. Once there is an agreed upon time and place, the attorney wanting to depose you will issue a subpoena naming this time and place. You may be personally served or the attorney may accept service for you. The deposition may occur several years after your involvement and you may even be working for another company. In the day or week before the deposition, you will meet with your attorney to prepare for the deposition. This may even occur the morning of the deposition. This meeting is important, especially if you have never been deposed, but the real preparation, and the preparation discussed in this article, occurs days, months or years before meeting with your attorney.

[1] CPCU Society Coverage, Litigators, Educators & Witnesses Interest Group, October 2013

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Be Prepared: Deposition Preparation (continued)

Depositions are part of the discovery process along with Interrogatories and production of documents. This means that before the deposition the opposing attorney has probably seen your complete claim file, any claim handling and litigation guidelines of the company, general policies and procedures, and possibly your employee personnel file among other things. The plaintiff's attorney hopes to find documents or get admissions that support his/her theory of the case.

The old adage of claim handling is "If it is not in the claim file it didn't happen". Did you actually make contact? Was it timely and in compliance with company procedures and applicable statutes? Does a summary of a phone conversation or statement contain sufficient detail? Was proper an adequate supervision given? Preparation for the fact witness in this type of litigation begins the moment you are first involved. Preparation for a claim handler begins with the assignment of the claim. This may be a new assignment or reassignment. For the supervisor or manager, preparation begins when you were first involved or should have been involved. Whenever a new application or request for a policy change is received is when preparation begins for the Underwriter. Similarly, for the agent, preparation starts with a new or existing customer seeking coverage or a change in existing coverage.

You cannot correct claim handling deficiencies in a deposition so you need to be aware of and comply with statutory and company guidelines at the time you are handling the claim.

Whatever your role as a fact witness, during the deposition you will be shown documents that you may have created or received or sent and be asked to answers questions in regards to those documents. Most claim files or policy files now are digital with few paper documents. These documents will be printed out and may not appear as you are accustomed to on a computer screen. Emails will be in a string and you will need to be aware of the day and time of the email to understand the chronological order. Just as important is what is not in the claim file. It is hard to justify as proper claim handling when there are only seven notes in a claim file over a three-year period. Be aware as you handle the claim that sometime

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Be Prepared: Deposition Preparation (continued)

in the distant future you may be asked to explain why you did or did not do something.

Proper claim handling requires that you comply with statutory claim handling guidelines, such as Unfair Claims Practices Act, and also any company guidelines. The attorney deposing you will have these guidelines and statutory requirements and will compare them to the claim or policy file. You cannot correct claim handling deficiencies in a deposition so you need to be aware of and comply with statutory and company guidelines at the time you are handling the claim. As a fact witness, you can only be asked questions for which you have personal knowledge. You can not be asked about corporate policy.

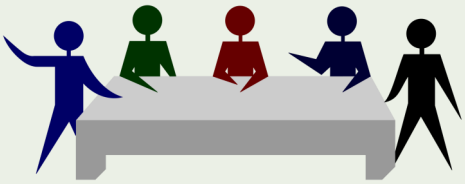
Questions of corporate policy will be answered by the person designated as Person Most Knowledgeable. This person is often referred to as the 'PMK' and speaks on behalf of the corporation. This person may have had no involvement in the claim and had little or no knowledge of it until that person was designated as the PMK. The attorney wanting to depose this type witness will present a list of topics that will be the subject of the deposition. There may be one or more of these witnesses to answer the different topics. The person designated as the PMK for a topic, must be knowledgeable on that topic on their own or obtain the knowledge elsewhere in the corporation.

Whether you are deposed as a fact witness or PMK, preparation begins long before you meet with your attorney.

About the Author

Tommy Michaels has over 40 years of insurance experience including litigation management, litigation witness, complex claim analysis and negotiation, instructor in insurance, claim handling and claim management. Tommy has 25+ years of experience in claim training and has taught CPCU and AIC courses. He has handled and supervised Environmental, Asbestos and Toxic Tort claims under Primary, Umbrella and Excess coverage involving multiple carriers. Michaels has taught insurance courses for over 25 years and he has given testimony in over 30 depositions in State and Federal Court cases, as well as testimony given at trial.

Mr. Michaels has served in various capacities in local CPCU chapters including President of the Memphis Chapter and three years on the Board of Directors of the Connecticut Chapter. He holds the insurance designations of Chartered Property and Casualty Underwriter (CPCU), Senior Claim Law Associate (SCLA), Associate in Claims (AIC), Associate in Reinsurance (ARe), and Associate in Risk Management (ARM). More information and contact information for Mr. Michaels can be found at /www.trmichaelscc.com.



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CPCU Society Calendar

In2Risk 2021	**September 23 — 25, 2021** **Orlando, FL**

Articles Wanted!

Share your knowledge, experience and writing skills with your CPCU colleagues by authoring an article for a future issue of ***L'CLEW NEWS***. CLEW News is published quarterly. Topics of interest to CPCU consultants, litigators, expert witnesses and educators will be considered.

Also, if you learn of an article in another publication that may be of interest to L'CLEW members let us know and we will investigate the possibility of a reprint.