



2017 CLM & Business Insurance Workers' Compensation Conference
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3 Common Ethical Dilemmas from 3 Different Perspectives

I. The Insurance Adjuster's Perspective

Scenario #1

Claimant experiences a work-related injury on 1/1/17. She immediately hires counsel. Employer hires a private investigator to watch Claimant to see if she is engaged in any physical activity inconsistent with her claimed injury. During the surveillance, the investigator sees Claimant holding a garage sale on her front lawn. The investigator, posing as an interested shopper, spends 20 minutes during the garage sale talking to Claimant about various items for sale. During the conversation, the investigator determines that it is clear that Claimant is able to perform activities inconsistent with her claimed injury.

Question: Did Employer violate any ethical rules?

Contacting Claimants who are Represented

Once a claimant is represented by counsel, insurance adjusters, similar to lawyers, are not allowed to contact the claimant directly. This also includes any agents of the insurance adjuster, i.e. investigators. The insurance adjuster must instead discuss the case with the claimant's attorney. However, the claimant's attorney can give consent to the insurance adjuster to contact the claimant directly.

To properly conduct an investigation of the claimant, you can observe them, but you cannot speak to them directly without their lawyer's consent.

II. The Attorney's Perspective

Scenario #2

Before trial, Claimant's attorney asks Employer's attorney why Employer is denying a case that seems otherwise compensable. Employer's attorney responds that his evidence will be revealed at trial. Claimant's attorney, who has known Employer's attorney for 20

years, says that whatever mysterious evidence Employer's attorney has, if it is persuasive, he will withdraw as Claimant's counsel and urge Claimant to dismiss the case.

In response, Employer's attorney reveals that he has damaging surveillance on Claimant. He shows it to Claimant's attorney. Claimant's attorney discusses the surveillance with Claimant. Claimant's attorney tells Employer's attorney that the evidence is not as strong as Employer's attorney thinks, and does not withdraw from the case or dismiss it.

The parties proceed to trial. Claimant testifies that the surveillance generally shows a few minutes of Claimant's otherwise very difficult life, and does not show her in a great deal of pain following the activity depicted on the tape. The arbitrator finds for Claimant and awards her medical bills, temporary total disability and a significant amount of permanency.

Question: Did Employer's attorney violate any ethical rules?

Revealing Evidence without Previously Discussing it with Your Client

A lawyer, as an advocate, zealously asserts his client's position. In properly representing his client, a lawyer must consult the client regarding the objectives of the representation and the case, and must abide by the client's decision.

The Workers' Compensation Act does not require a lawyer to produce any damaging evidence they have on the other party prior to trial.

When it comes to disclosing evidence to the other side, a lawyer should first consult the client about the evidence and how to properly proceed with it. The lawyer must then carry out the client's wishes and not do something that the client does not agree with or has not been informed of.

III. The Arbitrator's Perspective

Scenario #3

At trial, the arbitrator fails to disclose that Claimant's attorney works for a law firm where the judge formerly worked as a law clerk, 20 years prior.

Question: Has the judge violated any ethical rules?

Conflict from Previous Employment

As all arbitrators were practicing attorneys prior to their appointments, they often face the dilemma of sitting on cases where an attorney is a member of a firm the Arbitrator previously worked with.

Arbitrators' conduct is governed by the Canons of the Code of Judicial Conduct. Section 1.1(a) of the Illinois Workers' Compensation Act and Canon III of the Code of Judicial Conduct require that an arbitrator shall not be swayed by partisan interests, public clamor or fear of criticism.

A judge should not allow family, social or other relationships to influence the judge's judicial conduct or judgment. A judge must disqualify herself from a proceeding where her impartiality might reasonably be questioned, including where:

(b) a lawyer with whom the judge previously practiced law is serving as a lawyer concerning the specific matter;

(c) the judge was associated (within the preceding 3 years), in the practice of law, with any law firm or lawyer currently representing any party in the matter.

However, under Canon 3D, a judge can disclose, on the record, the basis for her disqualification and ask the parties and their lawyers to waive disqualification. If the parties and lawyers, without the judge's participation, all agree that the judge should not be disqualified, and the judge is willing to participate, the judge may continue to sit for and hear the matter. The agreement must be incorporated in the record of the proceeding though.

IV. Questions