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## **The Sand Box is Small: Play Nice**

### I-The Rules of Professional Conduct

The concept of this discussion panel arose during a discovery and trial preservation deposition which was being taken in a Federal Court case, of an out of state witness in his home jurisdiction, who agreed to appear voluntarily. He agreed as long as the deposition was conducted after he completed his shift at a local brewery. The attorneys involved, for the most part, knew each other, all traveled to the deposition from various states and telephonic link was provided for those who did not attend in person.

The day started with a defense attorney entering the room and immediately announcing how the deposition was going to be conducted and admonished all counsel that the deposition was proceeding under the Federal Rules of Civil Procedure (forgetting about local USDC Rules) and then commenced an argument with plaintiff's counsel which lasted about an hour. The argument was about objections, the order of questioning, what was a proper objection, and advised if the phone link went down it would not be reestablished as there was no provision in the Federal Rules same.

Of course, plaintiff's counsel engaged in equally combative behavior which eventually lead to the witness leaving the deposition after about two (2) hours, but returning to continue. The discovery deposition lasted about five (5) hours, mostly filled with objections and discussion. The trial testimony lasted about three (3) hours, mostly filled with objections. During the trial examination each side objected to every question the other side asked with a rote list of speaking objections, most of which were irrelevant and baseless.

The witness left disgusted. There was not ability to call the Magistrate as the deposition took place in a different time zone, after hours. The record is practically useless. The out-of-state court reporters where confused. This experience left so many questions about our chosen profession.

#### HOW DOES THE PUBLIC REALLY FEEL ABOUT “THE RISK INDUSTRY”?

The witness sat for over eight (8) hours being asked repetitive questions by bickering lawyers after a full day of work. He did his best to answer questions directly in a case which dealt with complex mechanical issues. How did this man feel about the lawyers who were questioning him? He was shown documents he had never seen before, and asked to comment about the content. Was that fair without explanation? When he asked, he was told “I am sorry sir, I am here to ask you questions “How did he feel about the household name companies that hired these lawyers? How did he eventually feel about the legal system? Did he feel he was treated fairly? Did he think the individual for whom he appeared as a witness would be treated fairly?

#### HOW DID THE ATTORNEYS’ BEHAVIOR REFLECT UPON THE PROFESSION OR WAS IT EVEN ETHICAL?

Looking to the ABA Rules of Professional Conduct, an attorney owes a duty to zealously represent his or her client. However, there are boundaries and those boundaries are often crossed. An attorney cannot engage in discovery practices which are designed to harass or embarrass parties or nonparties. They cannot engage in behavior which is disruptive or delays the proceeding. They must conduct themselves in a manner of honesty and integrity while acting with professional diligence. There is advocacy and then there is graceless behavior. Baseless objections read off a sheet of paper during trial testimony is but one example. Picking a fight before the deposition without attempting to discuss stipulations or resolution is another.

#### WHAT WAS THE PRESPONSIBILITY OF THE OTHER ATTORNEYS IN THAT ROOM, OR THE PARTNERS WHO READ THAT TRANSCRIPT

Attorneys do have obligations to report unethical behavior. Also, supervisors are responsible for the conduct of their junior counsel.

## II THE ROLE OF THE CLAIMS PROFESSIONAL

### WHAT ARE THE DUTIES OF THE CLAIMS MANAGER

Assuming counsel reported the activities at the deposition to the claims manager or risk professional, what responsibilities or duties or triggered. If the claims professional reads the transcript of that deposition or trial testimony, and it was his or her counsel acting in an unprofessional manner, are any duties triggered? What should the claims manager do? How should the claims supervisor train and instruct claims handlers to deal with counsel acting in a manner which may cross the line? Should the claims manager even be concerned?

### THE FAIR CLAIMS PRACTICES ACT

The act regulates how insurance companies handle claims by consumers. Each state may have its own set of rules modeled on the Act. Generally, the Act prohibits flagrant and conscious disregard of the rules of conduct or a course of activity which arises to such a level as a general business practice. Claims handlers cannot knowingly misrepresent relevant facts or policy provisions to the policy holder. They must acknowledge pertinent communications properly. Companies must adopt standards which prompt sufficient investigation. There are consequences for failure to pay claims without a reasonable investigation, issues of bad faith and unfair trade practices.

### THE UNDERLYING CLAIM

The underlying story, was an actual suit pending in Federal Court. The lawsuit was filed. It was duly served on multiple parties and tendered to various insurance companies. This case was highly technical involving mechanical engineering issues and personal injury. The claims supervisor needs to make decisions about assignment of the initial investigation of the claim. There is a responsibility to assign the claim to someone who understands and knows the rules of claims investigation in that jurisdiction. Discussion and interaction with the policy holder is essential. The claims professional must determine if there is a conflict of interest, hire appropriate technical people to aid in investigatory efforts, and collect information. The appropriate legal team must be established to handle the claim. And most importantly good and sound decisions must be made in the best interests of the policy holder.

### III THE LITIGATION TEAM

#### THE PYRAMID OF RESPONSIBILITY

A common element is the “supervisor”, be that the claims manager or the partner attorney, is responsible for the conduct and training of those they employ. The person at the top of the pyramid carries the weight. The partner is responsible for the conduct of the associate, the paralegal, and professional assistant. This includes maintaining attorney client privilege, matters of confidentiality such as a party’s social security number and reporting unethical behavior.

The claims professional has the same basic duties. The supervisor must hire competent staff. Staff must be trained and have knowledge of legislation and the rules of claims management. The claims professional also owes a duty to the policy holder to assist in making and pursuing the claim.

#### WHO IS RESPONSIBLE FOR THE 3<sup>rd</sup> PARTY PROFESSIONAL?

In the defense of a claim often 3<sup>rd</sup> party outside vendors are hired. These include private investigators, record collection services, third party claims administrators, outsourced services to nonemployees, medical providers, process services, etc. Counsel may hire some of these directly. The claims handler may hire some directly. Counsel may be required to retain the services of a certain provider and that provider only. There are questions as to who is ultimately responsible for any bad behavior by these consultants. For example, HIPPA violations, privacy violations, identity fraud, etc.

### IV WHAT REALLY IS BAD BEHAVIOR

There is aggressive and zealous behavior which is required. There is also simply bad behavior. There is a difference. There is a line. It is important to know the difference and to be able instruct and guide others in determining the difference and fashioning one’s actions in order to always putting first the best interests of client.