



2014 CLM Annual Conference

April 9, 2014 – April 11, 2014

**Boca Raton Resort
501 E. Camino Real
Boca Raton, FL 33432**

Roundtable 2: Thursday, April 10, 2014 (11:30 am – 12:30 pm)

**Ethics - Ethical Dilemmas In The Tripartite Relationship Including Issues Unique To Insurance
Defense Staff Counsel Operations**

HYPO #1

Oliver is an in-house attorney in a staff counsel office that has recently transitioned to a paperless environment. He is employed by a national insurance carrier, but his office handles only litigation within his own state.

As paper documents are received in his office, whether from opposing counsel or his insured client, Oliver follows the procedure set out by his employer: large documents are sent to a processing center (or “hub”) where they are scanned and titled by clerks according to corporate naming conventions. Oliver is provided with electronic versions of the records, and paper documents are shredded. For smaller documents, staff in Oliver’s office does the scanning and naming internally (after Oliver has reviewed and redacted any sensitive material), after which Oliver is provided electronic copies of the documents. For internally scanned documents, Oliver generally keeps the paper in an unofficial “file” that he keeps in his office.

Oliver stores this information in an electronic folder he created to hold material he plans to serve on opposing counsel. This folder includes documents in various formats (Word, Excel, PDF) and Oliver serves them on opposing counsel by selecting all of the documents in the folder and attaching them to an email directed to Olivia, the lawyer representing his adversary in the litigation.

Upon receipt of the documents, Olivia immediately sends them to an expert in computer forensics with instructions to carefully examine the data in an effort to determine whether any redacted information might be recoverable.

- What ethical issues arise from this scenario?
- What would you change in this process?
- Assume this process is followed in a panel firm rather than staff counsel. What are the distinctions regarding document retention under that scenario?

HYPO #2

After several years of toiling in obscurity as a rookie insurance defense attorney, the day comes when your assistant delivers you your first big case from XYZ Insurance Company, an important client of your firm: A major automobile case with significant potential damages in which you will be representing Mr. Insured, the driver of the vehicle.

The case proceeds to litigation. Just before trial, Mr. Insured, confides to you that he is very nervous because he wasn't really driving the vehicle – it was his brother, who is an illegal alien without a driver's license. When the accident occurred, his brother ran from the car because he didn't want to be deported, so in the chaos following the accident he told the police he was driving. The policy does not cover unlicensed drivers.

- Whom do you represent (both Insurer and Mr. Insured, or Mr. Insured alone)?
- Now that you have knowledge of no coverage, what is your responsibility to Mr. Insured? What is your responsibility to XYZ Insurance Company?
- What should you tell Mr. Insured about the uncovered claims?
- What do you tell the claims adjuster assigned to the file with whom you have to work during the course of the case?

HYPO #3

You are a staff counsel attorney for ABC Insurance Company. Your company complies with bar ethics rules of professional responsibility requiring you to disclose your employment status with ABC Insurance Company on all letterheads, business cards, etc.

You are now defending an insured in a case that you are sure will go to trial—and you believe disclosing your employment status to the jury will be prejudicial to the insurer and the insured.

- What steps can you take to ensure your employment status is not disclosed?

HYPO #4

You are a Chicago client-appointed panel defense counsel under a commercial liability policy issued by ABC Insurance Company. Your client, Silver River Paper Company is a defendant in an EPA superfund pollution site case in U.S. District Court in Montana in which its self-insured retention [“SIR”] is \$1 million. Before ABC Insurance will commence defense payments under its CGL policy it requires an audit of your legal fees by an independent auditor, EZ Audit Company, to confirm the SIR has been satisfied. ABC demands that your legal invoices be turned over to EZ Audit before it commence reimbursement for defense costs.

- Can you send EZ Audit your invoice without waiving the attorney-client communication privilege?
- Would the result be different if the case was pending outside Montana?

Another defendant in the same case is Blue Mountain Paper Company. Its insurer CAPCO Insurance has used its own staff counsel to defend the case and file a cross-claim against Silver River for attorneys’

fees. Blue Mountain prevails on a summary judgment against Silver River and fees are awarded against Silver River.

- Are the staff counsel fees of CAPCO recoverable? If so, what is the measure of recoverable legal fees?