

CONNECTICUT BAR ASSOCIATION

JOINT REPLACEMENT SURGERY SEMINAR - NOV. 14, 2008

**ETHICS AND CIVILITY – THE ATTORNEY REPRESENTATIVE’S OBLIGATIONS
AND CONDUCT IN HEARINGS AND DEPOSITIONS**

DEALING WITH MEDICAL/LEGAL ISSUES

John Mastropietro, Chairman, Workers’ Compensation Commission

There are certain ethical concerns that are going to be arising in the tough economic times ahead. These are being highlighted as practical day to day issues, not code issues. I will be raising them today, not in attempt to pass judgment on my colleagues, but to put them out there and let you decide where to draw the line.

A. Current Economic Climate

1. Challenges for claimants and respondents:

- a. Respondents need to save every dollar for financial survival.
Challenge for Respondent’s attorney: Is the respondent contesting the case for a legitimate reason or just to send a message to other employee’s that if you bring a claim, this is what you will have to deal with? If there is a valid contest, such as a “course of employment”, credibility or medical issue, then the denial is warranted. The ethical issue arises when the respondent’s attorney realizes that there is a prima facie case that was reported timely and the respondent still wishes to deny. The respondent’s attorney may find it difficult to keep up the trust level with an employer who is in a difficult financial situation, as trust will ultimately become secondary to the need to survive. Should then the respondent’s attorney vigorously defend a prima facie case? That is a question you must ask yourself before you start down that road.
- b. Claimants needing every dollar to make ends meet.
Challenge for Claimant’s attorney: Now claimant’s attorneys may have more clients who have reported their work injuries late. There are employees who do not report work injuries out of fear of rocking the boat and getting laid off. But now due to the economy they are getting laid off anyway so they report the claims late. This is certainly legitimate since they do fear for their job security. The claimant’s attorney is going to have to advise clients in this situation of the difficulties that will arise and to prepare for the long haul.

2. Legislative involvement: claimants are calling their legislators now about what they are not getting, that their attorneys are not helping them and that the system is not working. Specifically, they are questioning the process and it is taking too long. They have a hearing where it is discussed that they will be getting a check or authorized to see a doctor and it is taking too long for those things to happen. The claimant's and respondent's attorneys need to be concerned with this since the legislature listens to its constituents and will make changes that we may not like. We need to fix it before the legislature does it for us. More on this later . . .
3. Settlements: The commissioners will have a challenge in situations where the respondents will settle for less than an appropriate amount and the claimants, who have their back against the wall, will accept less money to work out short term problems. For example, to stop a foreclosure. However, the severity of the injury does not change. Should the commissioner approve it under this situation? It is going to be difficult for all involved.

B. Treatment of the Medical Community

1. We are dependent on the medical community to make our system work. We need reports to help move the case. If we are difficult to deal with, the medical community is going to be less likely to cooperate.
2. From a conduct point of view people tend to be nicer to those that treat them nice. There are going to be differences of opinions between doctors. Medicine is an art and a science.
3. Doctors are looking at things from a medical view, not a legal one. They base their opinions on diagnostic testing, examinations and charts. They answer questions based on those. You do have a right to challenge those opinions but do not have the right to badger the doctor. Civility seems to have left the profession and shame on us. If this keeps up the medical community is not going to cooperation any longer.
4. Medical Depositions: There has been an explosion of depositions lately. The laws have not changed in this respect. There is no good reason for this. There have been some new medical advancements but not enough to cause this many depositions.

5. Commissioners Exam Depositions: More of these as well. Why? A deposition is not needed to have it entered in evidence at a formal. The party who the commissioner's exam hurts are deposing the commissioner's examiner to find a reason not to have it relied upon. But from an ethical point of view, don't you need some basis first to challenge the exam? A good reason to challenge would be if the commissioner's examiner has not seen all pertinent medical records. On the other hand, if all medical reports have been provided and the party just does not like the opinion, it is not appropriate to just blindly take the deposition. The commissioner will not be happy.

C. Issues that May Bring on Legislative Change:

1. There is a growing propensity of adjusters not providing decisions in a timely manner. We are not asking for necessarily a favorable decision to the claimant, just a decision. Failure to respond is what really bothers the commissioners. This needs to be fixed or the legislature will step in and do our jobs for us.
2. Also, we are seeing treating doctors, for example, recommend four weeks of physical therapy and the adjuster only authorized two weeks. Why? The respondent's attorney must have something from the adjuster to substantiate that decision.
3. Why do we routinely see the requirement of pre-authorization for a claimant in an accepted case to be seen by the treating physician? That is not required by the statute.
4. Third-party vendors: Insurance companies have been increasingly requiring testing, for example, MRI's, to be done by specific facilities. This is not required by law. We can understand the need for cost cutting techniques especially in this economy, but not when they operate to the exclusion of the existing law.
5. There have been situations where the doctor has been given permission or authorization to perform surgery, then the authorization is pulled the day before the surgery. The reason given often is that more investigation is required. That investigation should have been done prior to authorizing the surgery in the first place. This is violated on a regular basis. Either we fix it or the legislature will.

D. Legislative Session:

1. In this new session the legislature will have to deal with a financial crisis and a huge deficit.
2. They are receiving complaints that constituents are not getting what they are entitled to.
3. Since there is no money to spend we will see non-monetary fixes, which will likely be increase in fines and penalties for conduct discussed above.
4. The legislature will fix this if we do not and the fault for the end result will rest with us.