Insights: Perspectives

# 8 Key Takeaways | Ethics of Claim Handling – From Before They Arise Until Their Resolution

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8 KEY TAKEAWAYS

# Ethics of Claim Handling – From Before They Arise Until Their Resolution

Kilpatrick's Brian Gaudet recently participated in a panel of industry thought leaders at the 36th annual prestigious "Construction Super Conference." The panelists discussed the practical and ethical issues that arise when dealing with claims and addressed common issues that arise, during contract negotiation, claim notification, claim substantiation, negotiation, and trial/arbitration. The speakers also referenced key provisions of the ABA Model Rules, case law, and applicable statutes.

Mr. Gaudet's key takeaways from the discussion, include:

1. The ABA Model rules requires lawyers to provide competent representation including the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. In the construction context this extends to understanding and negotiating the contract as well as advancing any claims the client has.

2. The ABA Model rules require the attorney to abide by the client's decisions concerning the objectives of representation (provided such objectives are not prohibited by other rules). This means that the client controls the objectives of the contract negotiation as well as the presentation and outcome of any negotiations on claims.

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4. The ABA Model rules prevents a lawyer from knowingly making a false statement of material fact or law to a third person or to fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client. Lawyers must take great care when assisting their clients in asserting claims without proper justification and support. That isn't to say that a claim without proper justification and support is automatically criminal or fraudulent, however, the less justification and support there is, the more one potentially approaches an area where the rule has applicability.

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The ABA Model rules require the lawyer to exercise independent professional judgment and render candid advice. Such advice may also include moral, economic, social, and political factors that may be relevant. Lawyers must consider that these claims do not arise in a vacuum. There can be "other than legal" implications from asserting a claim or a defense to a claim that can be relevant to a client. For example, project owners with assets in particular places may need to weigh the potential impact of asserting technical legal defenses to a claim at the expense of other impacts to their business. Contractors need to weigh the commercial impacts of potential future business with a customer or reputation in the market before deciding what to include or exclude in a claim.

According to ABA Formal Opinion 06-439 (2006), negotiation tactics including representations about "bottom dollar" or "top dollar" are material facts. Parties must be careful in negotiation that "puffing" or negotiation does not cross the line to include material misrepresentations.

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The ABA Model rules prohibits a lawyer from offering evidence it knows to be false. However, the lawyer's obligations do not end there. If during the proceeding a lawyer comes to know of the falsity of evidence the client has offered the lawyer has additional obligations arising from its duty of candor to the tribunal. ABA Model Rule 3.3 addresses this circumstance.

The Federal False Claims Act as well as various state false claims act may provide additional legal restrictions and penalties on the claims process in certain circumstances.

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