

Toward a Disciplined Profession

LATELY THERE HAS BEEN A GOOD DEAL OF DISCUSSION of the efficacy of the Actuarial Board for Counseling and Discipline (ABCD), which, as is always the case with discourse and debate, will only serve to strengthen both the ABCD and the profession. Nevertheless, I've found some of the discussion disturbing. It seems to have a dark and foreboding undertone, conjuring up visions of *film noir* depictions of the third degree being administered under bright lights and within close quarters. This view conforms with neither my understanding of the purpose of the ABCD nor with what I have observed in practice.

First, let me state that in this context I do not represent the ABCD or MMC Enterprise Risk, or anyone else. In other words, if you disagree with what I say, take heart—it's only one man's opinion.

Second, my practice is primarily litigation support and expert testimony. As a result, I believe I have a good understanding of some of the worst actuarial work being performed by casualty actuaries; but my view may be somewhat skewed.

Finally, I do have some actual experience with the ABCD as an investigator and where my client was a complainant.

So What Is the ABCD Anyway?

Let's first examine what it's not. The ABCD is not an arm of the federal government. Now, I probably shouldn't have to even mention this fact, but there seems to be a bit of confusion about this, judging from the number of constitutional issues that have been raised. The last time I looked, the U.S. Constitution dealt with the powers granted to the federal government.

There also seems to be some confusion about the applicability of the Sixth Amendment, which suggests that I should point out that the ABCD is not a criminal court. The rights guaranteed to us by the Sixth Amendment—a speedy and public trial, an impartial jury, to be informed of the nature of the charges against us, to confront witnesses against us, to compel witnesses to testify, and to have assistance of coun-

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sel—are valuable rights indeed. But they apply only to *criminal* prosecutions.

Those fortunate enough to spend less time in the company of lawyers than I do may have missed this, but the Sixth Amendment and, for that matter, the Fifth Amendment do not apply to civil suits. Nor do they apply to rate hearings, arbitration processes, labor union negotiations, or Little League rule interpretations. They don't apply to country club membership committees or presidential debates. And they don't apply to the ABCD.

"But," some may say, "the same basic decency that gave rise to the Sixth Amendment guarantees in the case of criminal prosecutions should likewise manifest itself in the rules that govern the ABCD. After all, if these rights are good enough for criminals, they're good enough for actuaries."

Let's Look at That.

First, the right to a public trial, which has its roots in the English common law and our distrust of secret trials by the Spanish Inquisition, the English Star Chamber, and the French *lettres de cachet*, was instituted as a safeguard against the use of our courts as instruments of persecution. Given the actual powers of the ABCD, I question whether the profession's right to be protected against excessive mediation and counseling is an acceptable rationale for eliminating the protection afforded the subject actuaries by the confidentiality of the ABCD process. After all, the subject actuary can waive the confidentiality requirements. And there is nothing that prevents the subject actuary from

publicly discussing an ABCD investigation.

The rights to an impartial jury and to be informed of the nature of the charges need not be discussed since, based upon my experience, they are better protected by the ABCD than by our criminal justice system.

While there currently exists no explicit right of the subject actuary to compel witnesses to testify on his or her behalf, I don't believe anyone has raised a question about this. Should the issue of "hostile" defense witnesses arise in the future, it might be dealt with through a requirement that the ABCD request, in writing, the testimony of witnesses identified by the subject actuary. To the extent the witnesses were actuaries, Precept 15 of the *Code of Professional Conduct* would effectively compel their testimony.

Who's Pointing the Finger?

Now we get to a biggie: the right to con-

front your accuser. Should the subject actuary have the right to be informed of who, precisely, has leveled the accusation of failure to abide by professional standards?

It's important to understand that the right to confront one's accuser doesn't arise out of some macho desire to say, "Come out in the open, you cowardly cur!" Although over time court decisions have confirmed that the language of the Constitution does, with rare exceptions, guarantee the right to physically confront one's accuser, the U.S. Supreme Court, in an 1895 case captioned *Mattox v. United States*, held that "the primary object of the constitutional provision in question was to prevent depositions of *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness." Or, in other words, to assure that there was a right to put *evidence* to the test of open examination by the court and the jury.

Precept 14 of the *Code of Professional*

Conduct requires U.S. actuaries to disclose unresolved material violations of that code to the ABCD. While compliance with this so-called snitch rule is often uncomfortable, failure to disclose such violations is harmful to both the public and the profession. In addition, a failure to disclose known violations could subject the actuary to liability or possibly criminal prosecution. In other words, it may be uncomfortable, but it's necessary.

Now, consider the situation where an actuary at an insurance company is aware that the reserves carried by the company are inadequate and are based upon unreasonable methods and unrealistic assumptions. After discussing the situation with the company's chief actuary, and being told in no uncertain terms to "drop it," the actuary must decide whether to risk his position in order to fulfill his professional responsibility.

I ask you, is the actuary more or less likely to disclose the situation if his or her identity must be disclosed by the ABCD? Does it benefit the profession if the only actuaries who are in the position to refer complaints to the ABCD are those who are financially independent of their employment?

I believe that the right to present a confidential referral to the ABCD outweighs the subject actuary's right to know who originally presented the complaint. After all, isn't it the evidence that's important? Even if the complainant has a hidden agenda, the facts of the case will determine the outcome.

Keeping the ABCD Lawyer-Free

Finally we come to the right to assistance of counsel. Conveniently ignoring the question of whether "legal assistance" is an oxymoron, the complaint here seems to be that the ABCD, while allowing legal representation at hearing, will not allow the attorney to plead the case or examine witnesses.

Now, personally, I adore being cross-examined by a good, aggressive attorney—it's the fun part of how I earn a living and beats a good game of chess anytime. Unfortunately—well, actually, fortunately for

some of us—few actuaries share either the enjoyment or the facility to stand up under cross. The average actuary is generally a poor match for a lawyer in a verbal duel. I suspect, therefore, that the ABCD process has been intentionally designed to keep lawyering to a minimum—a worthy goal, in my opinion.

The ABCD rules and procedures specifically allow the subject actuary to be represented by counsel who may provide advice and articulate objections during the hearing. But the questioning of witnesses and the presentation of argument must be done by the subject actuary. The same restrictions apply to ABCD counsel. As one who has observed many attorneys struggle with actuarial jargon and concepts, and one who has often wished that I could personally pose questions to testifying actuaries, I applaud the ABCD process that leaves actuarial matters to professional actuaries and legal

matters to the lawyers.

As a final aside on the question of constitutional rights, I would point out that there is nothing in the ABCD process, whether it be guidance or counseling or recommendation of discipline, that in any way deprives any U.S. citizen of those hard-earned and highly valued rights. As a condition of membership in a noble and esteemed profession, we agree, much like Rousseau's *Social Contract* theory, to abide by a set of rules of our own making.

So the ABCD is *not* a branch of government and is not a criminal court and is not an abridgement of our Constitutional rights.

Finally, it's *not* perfect. It's a work in progress and it rests, as does so much of our professional infrastructure, on the volunteer efforts of those who are doing their best to improve the state of actuarial practice. The ABCD will evolve over time, always a bit behind the state of the actuar-

ial art and always regarded with suspicion by some, but always improving.

So What Is the ABCD?

Well, the first thing I would note is that it's *considerably better than what we had before* the ABCD—which was basically nothing.

And I believe the ABCD is necessary. Policyholders, stockholders, claimants, regulators, business associates, and “widows and orphans” all rely to some extent upon the professionalism of actuaries. To those who don't share our facility with mathematics, much of what we do appears to be occult—magic or voodoo or mumbo-jumbo. We have an obligation to protect those who use our work, directly or indirectly, through the adoption of a Code of Professional Conduct, standards of practice, and general principles. This obligation gives rise to a corollary obligation to deal with those actuaries who fail to understand or choose to ignore that code or those standards or those principles. It's this need that the ABCD fills.

Finally, in my opinion, the ABCD is *admirable*. While I have, on occasion, disagreed with specific actions of the ABCD, there's nobody in this or any other profession that has benefited from more talent, dedication, and care than the ABCD. May it ever be so!

Malefaction, like beauty, is “in the eye of the beholder,” and one man's protection of confidentiality is another man's “secret trial.” One of the most difficult things in life is to actually put your faith and trust in those over whom you have no control, and I can understand how some may cast a wary eye on a body such as the ABCD. But there's an old saw that goes: “Those who can't do, teach; those who can't teach, criticize.”

Now I like criticism. I make a good living through the critical appraisal of actuarial work and actuarial issues. But I would remind the critic to be cognizant that he or she who would criticize a necessary institution has an obligation to offer a concrete alternative. ●