

## Do Your Homework

By Jeffrey M. Baill, Managing Partner,  
Yost & Baill, LLP



***Thirty years ago, ethics issues seemed pretty straightforward. There were many things you knew were wrong: stealing, lying, misrepresenting, and other clearly “bad” acts.***

I doubt many of us stayed up at night worrying about whether something we were doing was inappropriate or not. As life has become more complicated, the lines between what is ethical and what is not have become blurred and require closer scrutiny by all of us.

One example of an area presenting new ethical challenges relates to electronic information on social media. Let's say you have a case against an individual and you want to learn some information about them. Is it OK to friend them on Facebook to get access to their account? The rules may be different for a lawyer and a claims professional. Part of the answer may depend on when you try to gain “friend” status. Does it matter if this is before suit is filed or after? Does it matter if the target is represented by an attorney or not? Can the claims professional do it when a lawyer may not be able to? Does the law differ from state to state? Is there any law on the issue?

I am not an expert on social media and I suspect most of you are not. The important point is that we recognize when we are stepping into uncharted waters where ethical issues arise. There are people, many in our organization, who have a good

understanding of social media and the ethical issues surrounding its use in claims handling and litigation. These voices of wisdom, along with the ever-changing law in the relevant jurisdiction, need to be identified and consulted. If you do not recognize issues, you will have a diminished chance of making good decisions. Recognition, followed by investigation, is required with any ethical conundrum.

I remember a case from long ago where a lawyer sent a check for one dollar to someone he was trying to recover money from. The check included a bogus explanation of what the money was for. When the check was cashed, the attorney knew where the defendant had his bank account and the lawyer proceeded to file a garnishment against the account. Somehow, the defendant found out how the attorney found his bank account and filed an ethical complaint. My recollection is that the Professional Responsibility Board sanctioned the lawyer for the unethical conduct of engaging in deceit. I remember thinking at the time that this lawyer was clearly zealously representing his client and that the difference here may have been the bogus explanation for the transfer to the defendant. Would the result have been different if the check had been sent with no explanation?

We face many issues on a daily basis that have ethical components. Can we make a claim for replacement cost when the state we are in only allows fair market value? Do we have to tell a defendant at a scene investigation that our insured has been convicted of insurance fraud in the past for intentionally starting a fire? Do we have to inform someone we are negotiating with that our insured fixed the property for half of our estimate?

Issues related to ethical conduct need to be recognized and explored before a decision on how to proceed can be made. We are in the “life is complicated” business. Doing your homework and using the insight of multiple informed sources can help chart an ethical course that avoids scrutiny by others.