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CIVIL CLAIM SETTLEMENT TALKS INVOLVING THIRD PARTIES AND INSURANCE COMPANY ADJUSTERS: WHEN SHOULD LAWYER CONDUCT STANDARDS APPLY?

JEFFREY A. PARNESST

INTRODUCTION

Operating on behalf of insurance companies, adjusters have long been active in facilitating settlements of civil claims. Adjusters work both before and during lawsuits to help resolve differences between the companies and company insureds, thus engaging in first-party adjusting. Adjusters also facilitate pre-lawsuit and post-lawsuit civil claim settlements between their companies and those harmed by company insureds. Such third-party adjusting and first-party adjusting are quite distinct. For example, they raise very different issues regarding the possible application of professional services or civil procedure standards governing lawyers to nonlawyer adjusters.

Some important issues on applying lawyer conduct standards to adjusters in third-party settings have been resolved. Resolutions have been made in areas such as the unauthorized practice of law and the mandatory attendance of adjusters at settlement conferences in pending civil actions.¹ To

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¹ Of course, unauthorized legal practice standards may bar lawyers as well as nonlawyers from engaging in certain acts. *Compare In re Banks*, 805 A.2d 990, 994 (D.C. 2002) (noting the unauthorized-practice-of-law rule covers conduct by nonlawyers who, though law school graduates, were never admitted to practice and who misrepresent themselves to the public as the functional equivalent of lawyers), *with* NEV. SUP. CT. R. 189(4) (recognizing the unauthorized-practice-of-law rule covers conduct by lawyers, including out-of-state lawyers who establish in-state legal practice offices and in-state lawyers who provide legal services though they are

date these resolutions demonstrate serious conflicts over the applicability of lawyer conduct standards. Similar and related resolutions will likely continue in coming years, prompting the need for a more comprehensive study of the application of lawyer conduct standards to third-party adjusting.

In such an examination, a central question should emerge: When should insurance company employees undertaking third-party adjustments be governed by the same or similar professional legal services and civil procedure standards that govern lawyers who facilitate civil claim settlements for their clients? Those who find the question bizarre need only consider the Washington Supreme Court's decision in *Jones v. Allstate Insurance Co.*,² where the court found that some insurance company adjusters dealing with unrepresented third parties must abide by certain professional legal services standards on truthful representations usually applicable to lawyers.³ They can also look to the Court of Appeals for the Eleventh Circuit's decision in *In re Novak*, where the court found that a nonparty insurance company adjuster, as well as the lawyer for the insured, could be compelled to attend a pretrial conference to discuss possible settlement of a third-party claim against an insured/client.⁴ These decisions accompany other singular discussions of the central question. Unfortunately, there has never been a comprehensive examination of when lawyer conduct standards should apply to third-party adjusting.

In approaching this central question, distinctions seem necessary between authorized and unauthorized legal practice acts by adjusters; between pre-lawsuit and post-lawsuit adjuster conduct; between adjuster conduct before and after attorneys have been retained; between the regulatory authority of

inactive or suspended members of the Nevada Bar).

Courts may order parties to produce individuals with full settlement authority at pretrial conferences. The insurer must provide the necessary individual or grant settlement authority to the party or his attorney. See *In re Novak*, 932 F.2d 1397, 1408 (11th Cir. 1991).

² 45 P.3d 1068 (Wash. 2002).

³ The cited standards appear in the Washington Rules of Professional Conduct whose preliminary statement notes: "The Rules of Professional Conduct are mandatory in character. The rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. . . . The rules make no attempt to . . . undertake to define standards for civil liability of lawyers for professional conduct." WASH. RULES OF PROF'L CONDUCT (2003).

⁴ 932 F.2d at 1408.

legislatures, courts, and administrative agencies; and between post-lawsuit adjuster activities that occur within and outside of courthouses.

After briefly reviewing the *Jones* and *Novak* decisions, this Article explores other settings involving the interplay between lawyer conduct standards and third-party adjusting. Other settings explored include ex parte communications, privileged conversations, work product material, settlement authority, and good faith negotiation. This Article urges that courts, as rule makers; legislatures; and administrative agencies should have some voice in determining how adjusters act and in whether adjusters should abide by lawyer conduct standards. Finally, this Article concludes that, at times, laws should treat differently comparable third-party settlement actions by insurance company adjusters and by lawyers. It concludes with a call for more comprehensive inquiries into lawyer conduct standards and third-party adjusting.

I. *JONES V. ALLSTATE INSURANCE COMPANY*

Janet and Terry Jones sued Allstate Insurance Company in a Washington state court asserting negligent legal practice, bad faith, civil fraud, and consumer protection claims based upon the acts of its employee Christy Klein.⁵ Klein was a nonlawyer claims adjuster who attempted to resolve disputes between the Joneses and company insureds, members of the France family.⁶ All claims centered on an accident in which Jeremy France ran a stop sign and broadsided a car driven by Janet Jones.⁷ The resulting medical expenses for Janet alone totaled nearly \$75,000.⁸ The Allstate policy had a \$25,000 limit on bodily injuries.⁹ An insurance policy the Joneses had with Farmers provided underinsured motorist coverage.¹⁰

At issue in the high court was the legal sufficiency of the negligent legal practice claims.¹¹ The court sustained the

⁵ *Jones*, 45 P.3d at 1071.

⁶ *Id.* at 1070-71.

⁷ *Id.* at 1071.

⁸ *Id.*

⁹ *Id.* at 1072.

¹⁰ *Id.* at 1071.

¹¹ *Id.* at 1073 (examining intermediate appellate court certification to high court of a case involving a trial court grant of partial summary judgment to the Joneses on the basis that under Washington law Allstate "engaged in the

claims¹² and held "that insurance claims adjusters, when preparing and completing documents which affect the legal rights of third-party claimants and when advising third parties to sign such documents, must comply with the standard of care of a practicing attorney."¹³ The relevant pre-lawsuit preparation, completion, and advice provided by Klein to the Joneses involved an insurance payment by Farmers, a release and other papers involving a \$25,000 bodily injury payment by Allstate, and certain subrogation waivers.¹⁴ The professional legal services standards that govern lawyers were deemed applicable to Klein and involved responsibilities of "an attorney to an unrepresented third party"¹⁵ and included duties regarding corrections of certain misunderstandings, conflicts of interest, and informed decision making.¹⁶

unauthorized, negligent practice of law and breached its fiduciary duties to the Joneses" by advising them to settle without indicating the "consequences" and by not maintaining "a plainly adversarial posture" with them).

¹² The civil claim analysis might differ dramatically if the relevant legal practice acts of the nonlawyer adjuster were unauthorized. The court in *Jones* expressly declined to reach the issue of authorization because it found that no request for an injunction against the alleged unauthorized practice of law had been made. *Id.* at 1071. Compare *Commonwealth v. Allstate Ins. Co.*, 729 A.2d 135, 141 (Pa. Commw. Ct. 1999) (finding that the use by adjusters of Allstate brochures and other form documents did not constitute the practice of law, although it may be barred under the Unfair Trade Practices and Consumer Protection Law or under the Unfair Insurance Practices Act), with *Jones*, 45 P.3d at 1079 (holding that by preparing legal documents and giving advice affecting legal rights, Klein was engaged in the practice of law).

Incidentally, *Jones* may be troublesome for summarily determining that one engaging in unauthorized legal practice who harms another that in good faith believed there was proper authorization owes only a duty to act reasonably. One could ask: Why was the good faith belief by the Joneses in the authority of Klein to act as she did sufficient to prompt a duty? Is it correct to hold an adjuster responsible for discerning legal practice boundaries when dealing with third-party accident victims, especially when the adjuster never said she was giving legal advice and the Joneses had consulted a lawyer about other aspects of the accident? *Id.* at 1072 (noting that the Joneses met with lawyers to discuss possible defective seat belt claims). Conversely, one could ask: Why is there not strict liability for all who cause harm when acting in ways that are unauthorized by law?

¹³ *Jones*, 45 P.3d at 1075. Beside such document work, the court noted that legal practice can involve representation in a court of justice and the provision of certain forms of "advice and counsel." *Id.* at 1074. Seemingly, a broader definition of the practice of law appears in Washington General Rule 24(a) (indicating that legal practice includes representation in a "formal dispute resolution process" and "negotiation of legal rights or responsibilities"). WASH. GEN. R. 24(a).

¹⁴ *Jones*, 45 P.3d at 1072.

¹⁵ *Id.* at 1077.

¹⁶ See *id.* at 1077-79 (citing WASH. RULES OF PROF'L CONDUCT R. 4.3, 1.7(b),

In sustaining the negligent legal practice claims, the Supreme Court of Washington pointed to other settings in which nonlawyers acting like lawyers owe duties under tort law that are tied to professional legal services standards.¹⁷ One setting involves the activities of mortgage lenders in preparing loan documents;¹⁸ another involves licensed brokers and salespeople who “complete form earnest money agreements.”¹⁹ A third example involves escrow agents dealing with buyers and sellers who have “adverse interests.”²⁰ The high court did not say why these other settings were so comparable, though only in *Jones* were there existing civil claims that might trigger private lawsuits for individual redress,²¹ making the relevant nonlawyer work on these claims much more likely connected to professional legal services provided inside courthouses.

The *Jones* court did not look beyond tort law and professional legal services grounds in allowing nonlawyers like Klein to act like lawyers prior to litigation but requiring them to follow professional services standards.²² There were other available analogous grounds. For example, the Washington Admission to Practice Rules expressly allow certain nonlawyers, as licensed limited practice officers, to process documents affecting “the legal rights” of parties in certain property transactions.²³ A Washington General Rule allows a nonlawyer

1.4(b) (2003)). The majority, but not the dissent, also looked to the duties owed by lawyers who represent two or more clients simultaneously. *See* WASH. RULES OF PROF'L CONDUCT R. 1.8(g). Based on those duties, the court found that Christy Klein represented the Joneses. *Jones*, 45 P.3d at 1078–79, 1084 (Madsen, J., dissenting).

The majority hints that professional legal services standards applicable to insurance company adjusters in third-party settings may not always operate exactly as they do for lawyers. *See id.* at 1076–77 (noting that duties are “akin” to those of attorneys and that the essence of duties are those of attorneys).

¹⁷ *Jones*, 45 P.3d at 1074–75.

¹⁸ *Id.* at 1075 (citing *Perkins v. CTX Mortgage Co.*, 969 P.2d 93, 105–06 (Wash. 1999)).

¹⁹ *Id.* (citing *Cultum v. Heritage House Realtors, Inc.*, 694 P.2d 630, 635 (Wash. 1985)).

²⁰ *Id.* at 1078 (citing *Bowers v. Transamerica Title Ins. Co.*, 675 P.2d 193, 200 (Wash. 1983)).

²¹ *Id.* at 1075.

²² *Id.* at 1077.

²³ WASH. ADMIS. PRAC. R. 12(e)(2)(ii) (authorizing certain lay persons to select, prepare, and complete legal documents incident to the closing of real estate and personal property transactions); *see* *Bishop v. Jefferson Title Co.*, 28 P.3d 802, 810 (Wash. Ct. App. 2001) (holding that lay persons who exceed the scope of acts permitted under Rule 12 engage in the unauthorized practice of law).

to engage in certain acts that seemingly constitute the practice of law, including “[a]cting as a lay representative authorized by administrative agencies or tribunals.”²⁴ Another General Rule expressly recognizes that a nonlawyer may be authorized by a published Supreme Court opinion to undertake conduct constituting the practice of law in Washington, as did Klien’s conduct in *Jones*.²⁵ Because the conduct of Christy Klein was not random or unauthorized but flowed from Allstate policies,²⁶ a better approach to resolving issues involving the conduct of insurance company’s employees in pre-lawsuit third-party adjusting would have been to proceed by a new General Rule, if not creating a new Admission to Practice Rule. Any new rule would follow quasi-legislative hearings in which all interested persons could participate.²⁷ One appealing feature of any new rule could be requirements for certain mandatory disclosures by adjusters in third-party settings, like the new rules in Florida regarding compelled disclosures by lawyers to clients about lawyer roles where the lawyers are hired by insurers to defend policyholders;²⁸ the rules in Ohio dictating certain disclosures by lawyers about insurance and other matters to potential clients soon after accidents or disasters have befallen the potential clients;²⁹ or the proposed rules demanding that lawyers provide

²⁴ WASH. GEN. R. 24(b)(3).

²⁵ *Id.* R. 24(b)(10).

²⁶ Allstate’s “confidential plan, known as Claims Core Process Redesign (CCPR),” was adopted in “the early 1990s” and “generated a wave of litigation.” John Budlong, *Domino Strategy*, 37 TRIAL 20, 20–21 (2001). “State attorneys general, state bar associations, and private individuals have filed at least fifty-six lawsuits against Allstate in twenty-two states, alleging that these [CCPR] practices are fraudulent, deceptive, confusing, and illegal. The suits seek . . . damages and injunctive relief on behalf of third-party claimants and Allstate’s own insureds.” *Id.* at 21. The plan apparently continued to operate even after a few courts deemed its practices illegal. *Id.* at 22 (“Despite [such] rulings, Allstate’s illegal practice of law and defiance of state consumer protection acts continues unabated.”).

²⁷ See WASH. GEN. R. 9(a)(2) (stating that public process rule making provides an opportunity for all interested persons and groups to have their views regarding a proposed rule heard).

²⁸ FLA. RULES OF PROF’L CONDUCT R. 4-1.7(e) (2003). This rule was prompted in part because insureds often misunderstood the lawyer’s role and even some insurers were confused. Joan C. Rogers, *Florida Adds Two Ethics Rules Regarding Insurance Defense Lawyers, Staff Counsel*, 19 A.B.A./B.N.A. LAWYERS’ MANUAL ON PROF. CONDUCT 96 (2003).

²⁹ OHIO CODE OF PROF’L RESPONSIBILITY DR 2-101(H)(1) (2003).

statements of clients' rights and lawyers' responsibilities when discussing contingency fee retainer agreements.³⁰

Furthermore, the supreme court in *Jones* did not look for support in legal grounds allowing nonlawyers to act like lawyers during civil litigation but requiring them to follow civil procedure standards. For example, the Washington Superior Court Civil Rules on civil procedure for courthouse proceedings, supplemented by inherent judicial power precedents,³¹ may apply to insurance company adjusters at pretrial conferences when negotiating the settlements presented against company insureds. An analogous application was found in the following federal case.

II. *IN RE NOVAK*

In *In re Novak*, the Court of Appeals for the Eleventh Circuit interpreted the 1983 version of Federal Rule of Civil Procedure 16 to allow parties with attorneys and agents of parties, including adjusters employed by nonparty insurers, to be ordered to personally attend certain pretrial settlement conferences.³² Rule 16 at that time only expressly permitted unrepresented parties or lawyers for parties to be compelled to attend pretrial conferences.³³ The court in *Novak* found these expressed limits too narrow, explaining that where the parties are represented, problems can arise at settlement conferences attended only by lawyers in two different circumstances.³⁴ The first circumstance is when an otherwise represented party refuses to delegate full

³⁰ Victor E. Schwartz et al., *Consumer Protection in the Legal Marketplace: A Legal Consumer's Bill of Rights Is Needed*, 15 LOY. CONSUMER L. REV. 1, 16-17 (2002) (describing model legislation drafted by the American Legislative Exchange Council).

³¹ The Washington Court Rule on pretrial conferences and Federal Rule of Civil Procedure 16 do not expressly note either settlement facilitation or nonparty insurance adjuster participation in settlement conferences run by trial court judges. WASH. SUP. CT. CIV. R. 16; FED. R. CIV. P. 16; see, e.g., *O'Connor v. Matzdorff*, 458 P.2d 154, 158 (Wash. 1969) ("We hold . . . that we have the inherent power to waive the requirements of our rules."); see also Mich. Ct. R. 2.401(F) (stating that the presence of "representatives of insurance carriers" may be compelled). Federal district courts have recognized the court's inherent powers to compel the presence of nonparty insurance company adjusters at settlement conferences. See, e.g., *In re Novak*, 932 F.2d at 1406-07 n.8 (citing *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 653 (7th Cir. 1989) (en banc)).

³² *Novak*, 932 F.2d at 1407-08.

³³ *Id.* at 1405.

³⁴ *Id.* at 1406-07.

settlement authority to her lawyer.³⁵ The second arises when a nonparty insurer in charge refuses to delegate settlement authority to either the named party or to her attorney.³⁶ In these situations, "a pretrial conference participant's ability to discuss settlement is impaired, and the value of the conference may be limited."³⁷ Thus, while Rule 16 does not expressly allow for compulsory attendance orders "directed at represented parties or nonparty insurers,"³⁸ the court in *Novak* found that such orders are permitted.³⁹ Authorization was found in two sources. One source was the inherent power of the court;⁴⁰ the other source was Rule 16.⁴¹ Beyond the court's inherent power, the *Novak* court found that "a party who refuses to give full settlement authority to his attorney and who retains control over settlement negotiations is, in fact, his own attorney for settlement purposes."⁴² Therefore, because the party is then seen as unrepresented for settlement purposes, the court interpreted the 1983 version of Rule 16 to permit the court to compel the attendance of an otherwise represented party at a settlement conference.⁴³ If a nonparty insurer is truly in charge, the insurer's attendance can be accomplished through an order directed at the insured,⁴⁴ with the adjuster as his agent as in

³⁵ *Id.* at 1405-06. Such a refusal is not blameworthy and is actually encouraged by professional legal services standards. See Jeffrey A. Parness & Austin W. Bartlett, *Unsettling Questions Regarding Lawyer Civil Claim Settlement Authority*, 78 OR. L. REV. 1061, 1080-99 (1999) (discussing delegation of settlement authority).

³⁶ *Novak*, 932 F.2d at 1405-06. The court ultimately held that the trial court is "unauthorized, by statute, rule, or its inherent power, to order *Novak*, an employee of the defendants' insurer, to appear before it to facilitate settlement discussions." *Id.* at 1409. Even so, the insurance adjuster's presence could be compelled by an order directed to the named party to produce someone with settlement authority who then, as an insured, could send the insurance company adjuster as an agent. *Id.*

³⁷ *Id.* at 1406.

³⁸ *Id.*

³⁹ *Id.* at 1408.

⁴⁰ *Id.* at 1406 n.18 (citing *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 653 (7th Cir. 1989), where there were significant disagreements between the judges over the breadth of inherent judicial power given the presence of a written rule on compelling attendance at pretrial conferences).

⁴¹ *Id.* at 1407 n.19 (construing Federal Rule of Civil Procedure 16 liberally).

⁴² *Id.*

⁴³ *Id.* ("[T]here is a colorable argument that Rule 16, on its face, empowers the court to order such a party to attend a pretrial settlement conference; the party is an unrepresented party with respect to settlement, and, thus, his attendance is crucial.").

⁴⁴ *Id.* at 1408.

Novak, where the adjuster had the authority to make settlement decisions and the interests of both parties were “aligned.”⁴⁵

Presumably, insurance company adjusters, like Roger Novak, who are compelled to attend pretrial settlement conferences in civil actions must act as or “akin” to⁴⁶ lawyers under civil procedure rules because they serve as representatives of the parties. Civil procedure standards usually require, *inter alia*, substantial preparation and good faith participation, with sanctions available upon noncompliance.⁴⁷

Similar to *Jones*, while the result in *Novak* seems correct, there were better avenues to achieve the same result. Inherent power, while “a potentially useful tool for effecting settlement, even if there is some difficulty in finding a legal basis for [it],”⁴⁸ “encourages judicial high-handedness,”⁴⁹ invites “judicial abuse,”⁵⁰ and undermines “uniformity of practice” by permitting each trial court “to march to its own drummer.”⁵¹ Additionally, a rule seems overly stretched when a provision on unrepresented parties covers some parties who are chiefly represented by counsel.⁵² As in *Jones*, judicial rule making is a better avenue to resolving issues of adjuster conduct.⁵³

III. PRE-LAWSUIT SETTLEMENT TALKS

The court in *Jones* found that pre-lawsuit settlement talks between insurance company adjusters and third parties implicated certain professional services standards that involved “an attorney” and “an unrepresented third party,” including standards on corrections of misunderstandings,⁵⁴ conflicts of

⁴⁵ *Id.* at 1408 n.20.

⁴⁶ *Jones v. Allstate Ins. Co.*, 45 P.3d 1068, 1076 (Wash. 2002).

⁴⁷ *See, e.g.*, FED. R. CIV. P. 16(f) (stating that sanctions are available against a party’s attorney who appears at a pretrial conference “substantially unprepared” or who “fails to participate in good faith” at the conference).

⁴⁸ *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 657 (7th Cir. 1989) (Posner, J., dissenting).

⁴⁹ *Id.* (Posner, J., dissenting); *id.* at 670 (Manion, J., dissenting).

⁵⁰ *Id.* at 661 (Coffey, J., dissenting).

⁵¹ *Id.* at 666 (Ripple, J., dissenting).

⁵² *See* Jeffrey A. Parness & Matthew R. Walker, *Thinking Outside the Civil Case Box: Reformulating Pretrial Conference Laws*, 50 KAN. L. REV. 347, 365 (2002) (criticizing the *Novak* court’s reading of Federal Rule of Civil Procedure 16).

⁵³ *Id.* at 369–74 (urging amendments to the Federal Rules of Civil Procedure while demonstrating the available models in certain state and local trial court rules on compelling insurance adjusters to attend settlement conferences).

⁵⁴ WASH. RULES OF PROF’L CONDUCT R. 4.3(a) (2003) (stating that when

interest,⁵⁵ and informed decision making.⁵⁶ The extension of lawyer-like responsibilities to adjusters only occurred in *Jones* after the court assumed, without challenge, that at least some professional legal services in furtherance of pre-lawsuit settlements may be similarly undertaken by lawyers and nonlawyers alike.⁵⁷ That is, the court assumed that the acts done by Christy Klein did not involve the unauthorized practice of law.⁵⁸ Should all pre-lawsuit third-party settlement initiatives by nonlawyer insurance company adjusters be barred as unauthorized if properly challenged, or should only certain pre-lawsuit professional legal services be barred? Assuming there are certain pre-lawsuit settlement acts that may be undertaken by insurance company adjusters in third-party settings without any unauthorized legal practice, should professional legal services standards always apply, or should applicable standards at times originate in other legal sources, such as state insurance department regulations?

A *Unauthorized Practice of Law*

Where the practice of law is defined, professional legal services standards typically encompass pre-lawsuit civil claim settlement initiatives undertaken on behalf of others. For example, in Washington, where *Jones* was decided, the supreme court has expressly defined the practice of law as embodying, inter alia, “[g]iving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration,” as well as negotiating “legal rights or

“dealing on behalf of a client” with an unrepresented person, a lawyer should “not state or imply” that the lawyer is disinterested and should “make reasonable efforts to correct” any misunderstanding as to the lawyer’s interests).

⁵⁵ *Id.* R. 1.7(b) (stating that normally a lawyer shall not represent a client where the lawyer’s work “may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests”).

⁵⁶ *Id.* R. 1.4(b) (stating that a lawyer “shall explain” all matters so that the client can “make informed decisions regarding the representation”). While the *Jones* court did not find that the Joneses were clients of Christy Klein, it seemingly found that the Joneses thought they were clients due to the “lack of an adversarial posture” and that therefore Klein should have explained “the inherent conflict of interest in the settlement process.” *Jones v. Allstate Ins. Co.*, 45 P.3d 1068, 1079 n.22 (Wash. 2002).

⁵⁷ See *Jones*, 45 P.3d at 1079.

⁵⁸ See *id.* at 1077.

responsibilities on behalf of" others.⁵⁹ This rule is not limited to litigation settings,⁶⁰ yet all settlement initiatives that involve advice or negotiation advanced by insurance company adjusters representing the civil claim interests of insureds are seemingly not unauthorized, as evidenced by the implicit ruling in *Jones*.⁶¹ Are there, however, certain pre-lawsuit settlement acts involving third-party adjusting that should be unauthorized?

Seemingly, acts by insurance company adjusters involving the drafting of legal documents to initiate pre-lawsuit settlements with third parties, such as the Joneses, should be unauthorized. A Washington Court Rule defines the practice of law, in part, as drafting legal documents or agreements affecting legal rights.⁶² Pre-lawsuit settlements between insurers and third parties will not be deterred much, or made unduly burdensome or costly, if only the drafting is left exclusively to lawyers. Interestingly, in *Jones* there was no significant judicial inquiry into how Klein helped the Joneses secure payment from Farmers or how she helped them obtain "subrogation waivers."⁶³

B. Application of Professional Legal Services Standards

1. Ex Parte Communications

Assuming there are no unauthorized legal practice barriers, can professional legal services standards be applied to third-party adjusters for communicative acts extending beyond those directed at unrepresented third parties as found in *Jones*? Consider, for example, whether Klein would be held to professional legal services standards on ex parte communications involving possible France family and Allstate

⁵⁹ WASH. GEN. R. 24(a)(1), (4).

⁶⁰ See *id.*

⁶¹ While third-party adjusting involving settlement talks between those hurt by insureds and nonlawyer insurance company employees may involve authorized legal practices, other third-party adjusting may not. See, e.g., *Utah State Bar v. Summerhayes & Hayden*, 905 P.2d 867, 872 (Utah 1995) (finding that third-party adjusting involving public adjusters who settle with the insurers of alleged tortfeasors on behalf of those hurt by insureds falls within the unauthorized practice of law).

⁶² WASH. GEN. R. 24(a)(2).

⁶³ *Jones*, 45 P.3d at 1071 (stating only that there were subrogation waivers but not exploring how they were obtained). Subrogation waivers were presumably obtained from Terry Jones's own insurer, Farmers, from whom Klein helped Terry receive benefits. *Id.*

liability had the Joneses then been represented by counsel. Some American ex parte contact standards forbid a lawyer from communicating “with a person the lawyer knows to be represented by a[nother] lawyer” unless the other lawyer consents or there is authorization, while other standards forbid lawyer communications only “with a party” known to be represented.⁶⁴ In either setting, assuming the rules operate differently, as only in the latter might pending litigation be a factor, should Klein be held to these lawyer conduct standards?⁶⁵

2. Confidentiality

Consider, as well, whether Klein would be obligated to maintain the confidentiality of information about the accident that she received from Jeremy France and other France family members, from the Joneses, or from disinterested occurrence witnesses. Would any such obligations differ as between information contained in documents or other tangible things and information obtained from oral conversations or visual observations that are merely floating about in Klein’s head? Of course, state professional legal services standards usually require confidentiality of most information flowing between a

⁶⁴ Compare, e.g., OR. CODE OF PROF'L RESPONSIBILITY DR 7-104(A) (2003) (stating that while representing a client, a lawyer shall not “[c]ommunicate or cause another to communicate on the subject of the representation . . . with a person the lawyer knows to be represented by a lawyer on that subject . . . unless: (a) the lawyer has the prior consent of a lawyer representing such other person”), with WASH. RULES OF PROF'L CONDUCT R. 4.2(a) (2003) (“In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”). While appearing to be different, legal practice standards involving parties are sometimes read to include persons who are not in litigation at the time. Compare *Weider Sports Equip. Co. v. Fitness First, Inc.*, 912 F. Supp. 502, 505 (D. Utah 1996) (reading a state ex parte contact rule involving a “party” to apply only after litigation has commenced), with *Johnson v. Cadillac Plastic Group, Inc.*, 930 F. Supp. 1437, 1440–41 (D. Colo. 1996) (adopting most of the *Weider* court’s rationale but finding that a state ex parte rule involving a “party” can apply to pre-lawsuit acts as long as an “adversarial relationship” has arisen). A recent decision surveying the states’ ex parte contact rules is *Messing, Rudavsky & Weliky, P.C. v. Harvard College*, 764 N.E.2d 825 (Mass. 2002).

⁶⁵ For a possible answer to this, see, e.g., the standards in Maine where only lawyer representatives of municipal employees involved in employment grievances cannot undertake ex parte contacts with town officials. *Me. Bd. of Overseers of the Bar, Prof'l Ethics Comm'n*, Op. 181 (2003).

client and a lawyer.⁶⁶ At times the confidentiality of attorney-client communications have included certain information secured from an insured by the insurer's nonlawyer adjuster.⁶⁷ In *Jones*, however, the insured France family members at relevant times seemingly had no lawyer. Should Klein nevertheless be barred from revealing to the Joneses what the Frances told her?

Further, confidentiality standards can also include work product.⁶⁸ Work product encompasses materials prepared in view of litigation and thus would include certain materials received from occurrence witnesses by insurance company adjusters investigating claims.⁶⁹ In *Jones*, however, there may

⁶⁶ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2003) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . ."). As most ABA suggestions are followed, American state laws typically will require, to some degree, attorneys to maintain confidentiality of attorney-client communications and of work product documents and other tangible things prepared by an attorney in anticipation of or in preparation for litigation involving civil claim interests of clients. Some state professional legal services standards expressly recognize that confidentiality applies to both attorney-client communications and to certain work product. See, e.g., N.C. RULES OF PROF'L CONDUCT R. 1.6 cmt. 3 (2003) (stating that "[t]he confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source").

⁶⁷ See, e.g., *Exline v. Exline*, 659 N.E.2d 407, 410-11 (Ill. App. Ct. 1995) (finding that privilege attached to a communication about a fire between one insured and an insurance company employee that was prompted when a third-party sought recovery from the insurer for harm caused by the fire where a second insured was the only defendant sued later by the third-party; the court reasoned that the insured spoke when she knew of the possibility of a lawsuit against her and could reasonably assume statements given to the insurer would be transmitted later to an attorney in order to protect her interests). Compare *Pfender v. Torres*, 765 A.2d 208, 214-15 (N.J. Super. Ct. App. Div. 2001) (concluding that no attorney-client privilege attached because there was no lawyer yet involved and the insurer could easily be using the adjuster to promote the insurer's interests in avoiding policy coverage), with *Cutchin v. State*, 792 A.2d 359, 366-67 (Md. Ct. Spec. App. 2002) (similar).

⁶⁸ Ordinary work product—materials prepared in view of litigation that do not contain attorneys' opinions, mental impressions, theories and the like—is not always subject to confidentiality duties. Compare, e.g., FED. R. CIV. P. 26(b)(3) (stating that trial preparation materials remain confidential unless there is "a showing that the party . . . has a substantial need of the materials" and "is unable without undue hardship to obtain the substantial equivalent of the materials by other means"), with ILL. SUP. CT. R. 201(b)(2) ("Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney.").

⁶⁹ See, e.g., *Progressive Am. Ins. Co. v. Lanier*, 800 So. 2d 689, 691 (Fla. Dist. Ct. App. 2001) (finding that witness statements in insurance company claim files

have been no reasonable anticipation of civil litigation between the Joneses and the Franceses.⁷⁰ Under the facts of the case, could Christy Klein have shown the Joneses any documents pertinent to the accident that she prepared or secured from occurrence witnesses?

It is not clear in *Jones* that the Franceses would always be Klein's clients for any lawyer-client confidentiality purposes. For example, the Franceses may not be clients of an Allstate-hired lawyer if they and Allstate were then involved in an insurance policy dispute. It is not even clear the Joneses would never be legal services clients of Klein, even when she works with lawyers hired by Allstate solely to represent the Franceses. For example, the Joneses may be clients if they reasonably believed Klein was working to secure settlements for them of at least some civil claims arising from the accident. Further, even assuming Klein had no lawyer-client confidentiality duties,⁷¹ her information gathering on the circumstances of the accident and on any resulting claims may be work product developed on behalf of the Franceses or perhaps the Joneses.⁷² Has Klein sufficiently acted as a lawyer so that her tangible records may contain absolutely privileged opinion work product or that her recollections of conversations about the accident could not be examined by the Joneses through questions at a deposition or in court because a lawyer usually is prevented from being "an ordinary witness"?⁷³

are protected work product only if litigation involving the company was foreseeable at the time of the taking of the statements, as when an insured threatened suit against the company; otherwise, the files are "ordinary course of . . . business" documents).

⁷⁰ See, e.g., *Kidwiler v. Progressive Paloverde Ins. Co.*, 192 F.R.D. 536, 542 (N.D. W. Va. 2000) (employing a case-by-case approach, the court found that pre-lawsuit documents prepared by the insurer's agents who consulted with the insured constitute work product only where there is a "substantial and imminent" or "fairly foreseeable threat of litigation"); *Evans v. United Services Auto. Ass'n*, 541 S.E.2d 782, 788-91 (N.C. Ct. App. 2001) (similar).

⁷¹ See *Hickman v. Taylor*, 329 U.S. 495, 508 (1947) (noting that "the protective cloak" of the attorney-client privilege does not usually "extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation").

⁷² *Id.* at 511 (defining work product as "all written materials obtained or prepared" by counsel "with an eye toward litigation").

⁷³ *Id.* at 513. Tips on how insurance adjusters' claim files may be accessed or protected from fishing expeditions are found in periodicals. Robert L. Reibold, *Cutting the Fishing Trip Short: Protecting an Adjuster's Claims File*, S.C. LAW., July-Aug. 2000, at 33; Robert L. Reibold, *The Big Catch: An Adjuster's Claim File*, S.C. LAW., May-June 2000, at 14. Effective pre-lawsuit strategies regarding both

3. Settlement Authority

Finally,⁷⁴ consider professional legal services standards on settlement authority. Could Klein ever bind any France family members to settlements involving their own financial responsibilities to the Joneses? Professional legal services standards typically provide that a lawyer shall abide by a client's decision on the settlement of a civil claim unless the lawyer has been expressly delegated settlement authority by the client.⁷⁵ The Allstate policy may have recognized such authority in Allstate, at least where there is no conflict of interest between Allstate and its insureds, especially if there are no actual monetary payments to be made and no potential financial benefits to be lost by the insureds. What of an agreement that Klein arranged with the Joneses under which the Joneses would receive additional monies from the Frances as well as the policy limits from Allstate? Would any precedents on the implied or apparent authority of an attorney to settle come into play?⁷⁶

access and protection are, however, difficult where different forums are available for future litigation and where the standards for work product, as well as privileged communications, vary significantly between forums. *See, e.g.*, *Coregis Ins. Co. v. Law Offices of Carole F. Kafriksen, P.C.*, 57 Fed. Appx. 58, 60 (3d Cir. 2003) (observing that unlike the attorney-client privilege, where federal courts apply state law when state law claims are heard for work product disputes, the federal courts employ a uniform federal standard that is not required in state courts); *Lectrolarm Custom Sys., Inc. v. Pelco Sales, Inc.*, 212 F.R.D. 567, 569-70 (E.D. Cal. 2002) (stating that federal standards on both work product and privileged communications apply when federal question claims are heard).

⁷⁴ Other professional legal services standards may apply in third-party adjusting settings. For example, could Klein ever represent France family members where insurance coverage issues had arisen between the Frances and Allstate? Lawyer conduct standards usually prohibit certain conflicts of interest between lawyer and client; thus, there is the need for insurers to provide "independent" counsel for insureds in litigation with third parties once certain coverage issues emerge. *Compare, e.g.*, CAL. CIV. CODE § 2860 (Deering 2003) (providing for independent counsel to insured), *with State Farm Fire & Cas. Co. v. Super. Ct.*, 265 Cal. Rptr. 372, 374-75 (Cal. Ct. App. 1989) (finding that an insurer can use same adjuster where there are claims against an insured by a third party and claims involving insurance contract coverage, though attorney for insured cannot be used by insurer on coverage issue).

⁷⁵ *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 22(1) (2000) ("As between client and lawyer . . . the following . . . decisions are reserved to the client except when the client has validly authorized the lawyer to make the particular decision: whether and on what terms to settle a claim . . .").

⁷⁶ *See, e.g., id.* § 26(1) (stating that a client may expressly or impliedly authorize a lawyer's act); *id.* § 27 (stating that a lawyer's apparent authority is based upon the "client's . . . manifestations of such authorization").

C. Insurance Law Duties

Assuming no unauthorized legal practice barriers, insurance law duties embodied in varying legal sources such as statutes and administrative agency pronouncements may also speak to pre-lawsuit settlement talk activities involving third-party adjusting. Thus, in New York, the Insurance Department Office of General Counsel has informally opined that it is "improper for an independent adjuster to communicate directly with a claimant known to be represented by counsel," relying on a 1939 pact between lawyer and insurer groups and finding it "consistent" with the "well-known obligation of an attorney."⁷⁷ In Florida, the Administrative Code has an ethics code for all insurance adjusters that declares that an adjuster "shall not negotiate or effect settlement directly or indirectly with any third-party claimant represented by an attorney" without consent of the attorney.⁷⁸

Insurance law duties can originate outside agency sources and encompass pre-lawsuit acts of third-party adjusting that do not involve ex parte contacts. For example, Montana statutes deem as unfair claim settlement practices in third-party settings "neglect[ing] to attempt in good faith" to settle claims in which insurer liability is "reasonably clear,"⁷⁹ and "fail[ing] to acknowledge and act reasonably" upon communications about claims.⁸⁰ For a violation of the former, a statutory cause of action is available to both the insured and a third-party claimant.⁸¹ More generally, third-party adjusting can be statutorily regulated through licensing laws for adjusters.⁸²

⁷⁷ Independent Adjuster's Contact with Claimant Represented by Counsel, Inf. Op. N.Y. Ins. Dep't (July 12, 2001), available at <http://www.ins.state.ny.us/rg107121.htm> (noting earlier comparable findings "for an adjuster, or any other licensee"); 7 ERIC MILLS HOLMES, HOLMES' APPLEMAN ON INSURANCE § 49.23 (2d ed. 1996) (describing the agreement by stating that "[t]he [insurance] companies or their representatives will not deal directly with any claimant [first party or third party] represented by an attorney without the consent of the attorney").

⁷⁸ FLA. ADMIN. CODE ANN. R. 4-220.201(4)(i) (2003) (specifying that third parties do not include insureds or their resident relatives).

⁷⁹ MONT. CODE ANN. § 33-18-201(6) (2001).

⁸⁰ *Id.* § 33-18-201(2).

⁸¹ See *id.* § 33-18-242(1). In Illinois, a cause of action founded on the pre-lawsuit acts of an insurance adjuster toward a third-party claimant has been recognized in case precedent. See *Haddick v. Valor Ins.*, 763 N.E.2d 299 (Ill. 2001). While the third-party claimant had been assigned all the insured's claims against the insurer, the assignment came post-judgment, long after the discussed pre-lawsuit acts of the insurer toward the third party. The insurer's pre-lawsuit responsibilities to settle

There may be separation of powers limitations on such regulatory or statutory pronouncements addressing pre-lawsuit insurance law duties of adjusters to third parties. To the extent such duties are viewed as authorizations for nonlawyers to provide certain legal services, the duties may need to originate in high court rules or precedents where the court has exclusive lawmaking power regarding the practice of law.⁸³ Also, the creation of special pre-lawsuit settlement duties applicable to insurance adjusters in third-party settings may not foreclose the application of other more general statutory duties such as those involving fair business practices. While the court in *Jones* did not speak to the civil fraud and consumer protection claims based on Klein's pre-lawsuit third-party relations, other courts have recognized that insurance and consumer protection claims can be pursued simultaneously.⁸⁴

with the third party were intended primarily to benefit the insured, but the damages recoverable seemed guided by harm extending beyond injury actually incurred by the insured since the damages covered all of the third party's losses without any showing that the insured had the assets to pay for all losses extending beyond the liability limit in the insurance policy. *See id.* at 302-06.

⁸² *See, e.g.*, FLA. STAT. ch. 626.864 (2002) (stating that a qualified individual may be licensed and appointed as a public adjuster, an independent adjuster, or a company employee adjuster); *id.* ch. 626.856 (stating that a company employee adjuster ascertains and determines claims and losses and undertakes to effect settlements).

⁸³ *See, e.g.*, *Gmerek v. State Ethics Comm'n*, 807 A.2d 812, 819 (Pa. 2002) (declaring the Lobbying Disclosure Act to be unconstitutional as an impermissible regulation of the practice of law); *see also* *Cleveland Bar Ass'n v. Picklo*, 772 N.E.2d 1187, 1189 (Ohio 2002) (holding that unlawful detainer and landlord-tenant statutes enlarged the pool eligible to practice law and were unconstitutional infringements on inherent judicial powers). Of course, principles like comity may prompt courts with self-proclaimed exclusive powers to yield to agency or General Assembly dictates or at least to effectively permit their operation by failing to address separation of powers issues. *See, e.g.*, *People v. Goodman*, 8 N.E.2d 941, 944 (Ill. 1937) (finding that while the General Assembly may pass laws forbidding certain legal practices, these laws can only augment and cannot "supersede or detract from, the power of the judicial department to control the practice of law"); *see also* *Linder v. Ins. Claims Consultants, Inc.*, 560 S.E.2d 612, 621 (S.C. 2002) (noting that it is "the duty" of the high court and not the legislature "to delineate the practice of law," while finding that the recently enacted statutory scheme covering first party public adjusting "deals with [the court's] concerns appropriately").

⁸⁴ *Compare* *Commonwealth v. Allstate Ins. Co.*, 729 A.2d 135, 139 (Pa. Commw. Ct. 1999) (rejecting argument that claims under Unfair Insurance Practices Act provided exclusive remedies and thus allowing Consumer Protection Law claims against Allstate for the use of the same documents that Klein employed in the *Jones* case), *with* *M. Dematteo Constr. Co. v. Century Indem. Co.*, 182 F. Supp. 2d 146, 160 (D. Mass. 2001) (denying private claim against insurer for unfair settlement

IV. SETTLEMENT TALKS DURING PENDING LAWSUITS

In *Novak*, insurance company adjusters' participation in post-lawsuit settlement talks with third parties during judge-requested pretrial conferences in pending civil cases was found to create an obligation to follow the civil procedure standards that guide lawyers.⁸⁵ Are there other settings where civil procedure standards should not guide the post-lawsuit settlement conduct of adjusters since all such conduct is left to lawyers and comparable acts by nonlawyers would constitute the unauthorized practice of law? Assuming no unauthorized practice barriers, should civil procedure standards always apply, and apply similarly, to lawyers and third-party adjusters? Finally, regardless of whether the standards on comparable conduct differ, should at least certain standards for adjusters come from sources other than civil procedure lawmakers, such as state insurance department officials, especially where the settlement activity by insurance company adjusters occurs outside courthouses and beyond trial court direction?

A. *Unauthorized Practice of Law*

Definitions of legal practice usually include post-lawsuit civil claim settlement initiatives undertaken on behalf of others.⁸⁶ Yet as implied in *Jones* and as expressly recognized in professional legal services standards defining the practice of law in Washington,⁸⁷ not all legal practice is exclusively left to lawyers, even when there is litigation pending. In post-lawsuit settings in Washington⁸⁸ and across the United States,⁸⁹ nonlawyers have long advocated on behalf of clients during administrative agency adjudications. In *Novak*, an insurance

practices where insurance commissioner was afforded the "exclusive authority to enforce" the statutory duty relied on by the claimant).

⁸⁵ *In re Novak*, 932 F.2d 1397, 1405-06 (11th Cir. 1991).

⁸⁶ See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 22 cmt. c (2000) ("In the absence of a contrary agreement or instruction, a lawyer normally has authority to initiate or engage in settlement discussions, although not to conclude them.").

⁸⁷ See WASH. GEN. R. 24(a) (specifying that the practice of law includes completing legal agreements that affect the legal rights of others and representing parties in formal dispute resolution processes).

⁸⁸ See *id.* R. 24(b)(3).

⁸⁹ See, e.g., N. J. PRACTICE OF LAW R. 1:21-1(f) (permitting appearances by non-attorneys in contested administrative agency cases in certain settings).

company adjuster was required to act as a negotiator when representing an insured who was a civil case defendant.⁹⁰ Are there limits on third party adjusting during civil litigation?

Consider, for example, the authority of an insurance company adjuster to settle civil claims against an insured that will be paid, in part, by both the insurer and by the insured. Settlements involving payments only by insurers seemingly involve no lawyer conduct standards, as adjusters act as agents of insurers. Do civil procedure standards, however, that presume lawyers possess settlement authority on behalf of their clients during in-court proceedings, including judicially supervised settlement talks occurring in courthouses,⁹¹ apply to insurance adjusters who speak about the insureds? There is good reason to say no, including *ultra vires* concerns and difficulty imagining the insured actually delegating settlement authority regarding personal assets to the adjuster.

B. Application of Civil Procedure Standards

1. Confidentiality

Assuming no unauthorized legal practice barriers, can civil procedure standards for lawyers be applied to third-party adjusters for acts beyond the compelled appearances at pretrial conferences found in *Novak*? For example, consider whether an adjuster such as Christy Klein would be obligated at a deposition to reveal information about the accident that she received from Jeremy France and other France family members. Would any obligation hinge on differences between information within documents in Klein's possession and information about conversations or observations floating about in Klein's head?⁹² If Klein did maintain documents, would they be in the Frances'

⁹⁰ 932 F.2d at 1398–99. Presumably, as in *Jones*, an adjuster in *Novak* would attend a settlement conference to facilitate resolution of not only insurance company liability to third persons but also of the insured's personal liability to third persons in order to satisfy the insurer's duty to defend.

⁹¹ See, e.g., *Brewer v. Nat'l R.R. Passenger Corp.*, 649 N.E.2d 1331, 1332–33 (Ill. 1995).

⁹² See, e.g., *Hickman v. Taylor*, 329 U.S. 495, 512–13 (1947) (recognizing that some tangible attorney-obtained work product may be discoverable from the client but excluding formal discovery where ordinary work product may only be obtained by orally questioning the attorney as a witness).

control?⁹³ Would any applicable lawyer-client communications privileges or work-product immunities recognized under civil procedure standards treat differently Klein's pre-lawsuit and post-lawsuit information gathering aimed at facilitating settlements?

2. Sanctions for Litigation Misconduct

Consider, as well, whether Klein could be sanctioned for helping to present frivolous pleadings,⁹⁴ discovery documents,⁹⁵ or other litigation papers⁹⁶ in a civil lawsuit filed by the Joneses against the Frances in which Klein helped the lawyer representing the Frances.

3. Negotiation Guidelines

Finally, consider whether Klein could be held to any settlement-talk guidelines that operate for lawyers. Some guidelines may emerge from the "Ethical Guidelines for Settlement Negotiations" approved by the American Bar Association in August of 2002.⁹⁷ If such guidelines apply, the possible sanctions flowing from Klein's breach of settlement-talk guidelines may differ from the possible sanctions flowing from an attorney's breach.⁹⁸

⁹³ FED. R. CIV. P. 34(a)(1) (stating that a party may request any other party to produce documents "in the possession, custody or control" of the other party).

⁹⁴ See, e.g., *id.* 11(c) (stating that sanctions may be directed against "attorneys, law firms, or parties").

⁹⁵ 5 See, e.g., *id.* 37(b) (stating that sanctions based on failures to obey a formal discovery order may be directed against "a party or an officer, director, or managing agent of a party or a person designated . . . to testify on behalf of a party"; "a deponent"; or "the attorney advising" the party who fails to obey the order); *id.* 37(d) (stating that sanctions for other formal discovery failures may be directed against "a party"; "an officer, director, or managing agent of a party"; or "the attorney advising" the party who fails to act properly).

⁹⁶ See, e.g., *id.* 16(f) (stating that sanctions for pretrial conference misconduct may be directed against "a party or [a] party's attorney"); 28 U.S.C. § 1927 (2000) (providing that liability for excessive costs caused during federal civil litigation by unreasonable and vexatious multiplication of proceedings may be imposed on "[a]ny attorney or other person admitted to conduct cases").

⁹⁷ ABA *Delegates Approve Proposals to Allow Some Multijurisdictional Practice by Lawyers*, 71 U.S.L.WK. 2106, 2106 (Aug. 20, 2002) (describing guidelines endorsed by the ABA); ABA *Litigation Section Issues Guidelines on Ethical Issues in Negotiating Settlements*, 70 U.S.L.WK. 2776, 2776-77 (June 11, 2002) (describing guidelines that address such matters as misrepresentation, secrecy pacts, document disposal, and settlements through "extortionate means").

⁹⁸ Lawyers engaged in misconduct, unlike adjusters, may be subject to attorney

C. Insurance Law Duties

Assuming no unauthorized legal practice barriers, insurance law duties within agency pronouncements or statutes may also speak to post-lawsuit settlement talk activities involving third-party adjusting. Often, however, no distinction exists between pre-lawsuit and post-lawsuit acts in such written laws. Thus, the Texas Administrative Code simply says that no insurer shall engage in unfair claim settlement practices, including “refusing to pay claims without conducting a reasonable investigation based upon all available information” and “not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims submitted in which liability has become reasonably clear.”⁹⁹ Similarly, a West Virginia statute bars certain acts as “[u]nfair claim settlement practices” if the acts are part of “a general business practice,” including duties like those found in the Texas Administrative Code.¹⁰⁰ Application of such written laws to post-lawsuit acts undertaken in courthouses, as with litigation paper presentations, could prompt separation of powers issues if reasonable inquiry is not made or bad faith occurs in settlement conference conduct when liability is clear. Reasonable inquiries preceding all litigation papers might need to be guided by a single civil procedure rule, especially where high court authority over procedure is primary, if not exclusive. For insurance company adjusters, however, good faith settlement duties, even during civil litigation, may differ from litigation paper presentations duties, especially if settlement acts are deemed substantive in nature and therefore require special standards limited to the insurance context.¹⁰¹

disciplinary referrals. *See* *Ausherman v. Bank of Am. Corp.*, 212 F. Supp. 2d 435, 452 (D. Md. 2002) (involving the referral of a lawyer to the disciplinary committee for misrepresenting material facts during settlement negotiations). Yet, if adjusters were licensed by high courts as limited legal practice officers, other boards could receive comparable referrals. *See, e.g.*, WASH. ADMIS. PRAC. R. 12(b)(2)(v) (stating that the Limited Practice Board certifies nonlawyers as limited practice closing officers and investigates and adjudicates allegations of their misconduct).

⁹⁹ 28 TEX. ADMIN. CODE § 21.203(15) (West 2003); *id.* § 21.203(4).

¹⁰⁰ W. VA. CODE § 33-11-4(9) (2003).

¹⁰¹ Written laws expressly or implicitly recognizing insurance company good faith duties to third-party claimants are most likely to be deemed substantive. *See* *Stewart v. Mitchell Transp. Inc.*, 197 F. Supp. 2d 1310, 1316 (D. Kan. 2002) (finding third party was not the beneficiary of the insurer’s contractual obligation to act in good faith on behalf of the insured).

CONCLUSION

Acting both before and during lawsuits, insurance company adjusters help facilitate settlements of civil claims involving their companies, their insureds, and those harmed by company insureds. While some lawyer conduct standards have been applied to third-party adjusting, many related issues remain. Further, even certain developed rules are troublesome, both substantively and on separation of powers grounds. Serious reflection on a single question would help a great deal. We should explore the circumstances under which insurance company employees who undertake third-party adjustments should be governed by the same or similar professional legal services and civil procedure standards that govern lawyers who facilitate civil claim settlements for their clients. In such an exploration, we should distinguish between authorized and unauthorized legal practice acts; pre-lawsuit and post-lawsuit settlement acts; conduct before and after lawyers are retained; administrative, legislative, and judicial lawmaking responsibilities; and conduct within and outside of courthouses.

For pre-lawsuit conduct we should chiefly look to administrative agency or general assembly guidance, with lawyer conduct standards occasionally providing insights. Thus, it seems preferable for an administrative agency or a general assembly to speak to most of Christy Klein's actions in adjusting the third-party claims of the Joneses. Should a court speak, it should usually do so through written standards on the practice of law and not, as in *Jones*, on a case-by-case basis.

For post-lawsuit conduct we should chiefly look to high court rule making involving either professional legal services or civil procedure standards. Civil procedure standards should govern adjusters who talk settlement in courthouses, while professional legal services standards should typically regulate third-party adjustment talks outside courthouses to the extent there are no unauthorized legal practice barriers, especially where insurance company adjusters operate under the direction of lawyers.

The time is ripe to discuss and implement broad legal guidelines on third-party adjusting. Recent cases suggest there can regularly arise confusion, serious instances of adjuster misconduct, and separation of powers issues in circumstances involving third-party adjusters.