



SOCIETY OF ACTUARIES

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The Actuarial Ethicist: Responses to "Deep-End of the Pool"

By Frank Grossman

THE CASE STUDY

Briefly summarized¹, Stanley the FSA was the sole actuary for a smaller insurance company and hired Trevor after college graduation five summers ago. During the past two years, their firm started selling new insurance products—not in Stanley or Trevor's primary area of practice—manufactured by another firm but written on the smaller company's paper.

Stanley coped with the increasing complexity of the new product's external reporting by contacting Walter the FSA, an old school chum and consultant. Walter would tell Stanley to read this or that document, which seemed to work okay for Stanley. Following Stanley's death in a tragic holiday traffic accident, Walter fielded telephone calls from Trevor, who is now an FSA, seeking assistance with year-end reporting. Walter didn't see any harm in helping the "friend of a friend," and Trevor seemed to be managing alright.

The following April, Trevor called Walter asking for help with correspondence for the state regulator. Walter said, "It would be best if you hired me as a consultant to do this properly," but Trevor replied, "Maybe next year." Walter eventually gave in, and suggested "I might say something like this ..."

A couple of weeks later, Walter received several frantic messages from Trevor: the state regulator discovered a material inconsistency and was seeking clarification. Trevor had apparently been afraid to ask his management for additional resources. According to Trevor, his entanglement with the regulator wouldn't have happened had Walter's instructions been clearer. Walter pushed back, whereupon Trevor blurted out, "I'm just doing the best I know how!"

READER RESPONSES

Your comments and suggestions about Walter's next move included "tough love" for Trevor, as well as the advisability of retaining legal counsel. Responses have been edited for space considerations.

Extending a Helping Hand

Offering helpful "information" or "guidance" or "advice" to an actuarial colleague is a frequent part of contemporary actuarial practice. Yet the distinctions inherent in this type of collaboration vis-à-vis performing actuarial services *per se* underscore the situation confronting Walter.

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RESPONSES TO “DEEP-END OF THE POOL” | FROM PAGE 1

Many actuaries sought guidance from the SOA’s Code of Professional Conduct (COPC) which speaks directly to an actuary’s fundamental responsibility.

COPC Precept 1: An Actuary shall act honestly, with integrity and competence, and in a manner to fulfill the profession’s responsibility to the public and to uphold the reputation of the actuarial profession.

COPC Annotation 1-1: An Actuary shall perform Actuarial Services with skill and care.

The COPC also formally defines “Actuarial Services” and “Actuarial Communications”.

COPC Definitions – Actuarial Services – Professional service provided to a Principal by an individual acting in the capacity of an actuary. Such services include the rendering of advice, recommendations, findings, or opinions based upon actuarial considerations.

COPC Definitions – Actuarial Communication – A written, electronic, or oral communication issued by an Actuary with respect to Actuarial Services.

Based on the feedback received, analysis of the case revolves about twin axes. Did Walter provide actuarial services? Was the quality of Walter’s actuarial communications adequate? One reader wrote, *“This (case) all boils down to whether you buy the idea that Walter performed actuarial services.”*

Regarding the Dear Departed

Many actuaries noted that Stanley crossed the line from the outset by adopting an inappropriate approach to handling the new products that became entrenched as accepted practice at his company—and ultimately ensnared both Walter and Trevor.

“First and foremost, Stanley should not have been ‘handling’ or ‘coping’ with the complexities of new insurance products that were not his area of expertise. ... Further, reaching out to a ‘friend’ for his help, albeit good advice, is not acceptable business practice. Stanley the FSA clearly violated

the COPC’s precepts.”

The statement of the case somewhat ambiguously describes the new insurance products as “not in Stanley or Trevor’s primary area of practice”, though this fact need not necessarily contravene COPC’s second precept.

COPC Precept 2 (in part): An Actuary shall perform Actuarial Services only when the Actuary is qualified to do so ...

Rather, it was that both Stanley and Trevor reached out to Walter for routine assistance which *ipso facto* constituted evidence of their lack of expertise as noted by several readers.

Was Advice Rendered?

Providing actuarial services includes rendering advice, and many readers zeroed-in on this point—arriving at different conclusions. For example, one wrote, *“Although the ‘comments/advice’ from Walter were not in writing, in some jurisdictions they would be considered ‘providing actuarial services’.”* It might be worth noting, however, that the full description of the case does not use the term “advice” to describe Walter’s suggestions.

A couple of actuaries noted Walter’s generosity, providing assistance to Stanley and Trevor apparently without remuneration. The absence of a fee was key, according to one actuary: *“You cannot have a valid contract without adequate consideration on both sides, so Walter should have no legal obligation.”* A second actuary wrote, *“My simple two cents is that Walter is not an employee, and not even a hired or paid consultant.”* While a third concluded: *“Friendly Walter can do nothing as he does not work for the company now seemingly in trouble with the regulators. ... Walter should sleep soundly that he has no liabilities relating to this issue.”*

Another actuary argued that receipt of a fee was not needed to establish Walter’s responsibility. *“The (preamble to the) COPC ‘identifies the responsibilities that actuaries have to the public,*

“This (case) all boils down to whether you buy the idea that Walter performed actuarial services.”

to their clients and employers, and to the actuarial profession,' and not just to paying clients and employers. Hence, I believe it is a strained interpretation to conclude that 'professional services' requires a paying client or employer. ... Perhaps there is an argument that Trevor isn't a client, but I think that he is arguably at least a non-paying client." What is incontrovertible is that both Stanley and Trevor "came to Walter because of his professional experience and asked for his expertise as an actuary."

Yet a canny actuary pointed out that Walter's putative delivery of actuarial services was quite possibly a moot point. "It is not clear whether any of Walter's advice has contributed directly to the inconsistency currently being questioned by the state regulator." Good eye!

A Friend of a Friend in Need

Given Trevor's callowness—presented as his too literal-mindedness or simply stark ignorance—the form of Walter's actuarial communication to him is something to consider. One actuary eschewed "Trevor the FSA" and wrote, "Walter's suggestions may have been misconstrued or misused by the incompetent-looking-to-cover-his-own-rear-end Trevor the employee." A second reader gently offered, "I wonder if Walter may have gotten himself in 'hot water' by giving in and providing 'verbal advice' to Trevor?"

There seems to have been some risk that what was said might not have been understood, and this is addressed by the COPC and echoed in Actuarial Standard of Practice (ASOP) 41 Actuarial Communications' Analysis of Issues and Recommended Practices.

COPC Precept 4: An Actuary who issues an Actuarial Communication shall take appropriate steps to ensure that the Actuarial Communication is clear and appropriate to the circumstances and its intended audience and satisfies applicable standards of practice.

ASOP 41 §3.1.1 Requirements for Actuarial Communications – Form and Content: The actuary should take appropriate steps to ensure that the form and content of each actuarial communication are appropriate to the particular circumstances, taking into account the intended users.

A third reader saw a further point also addressed by ASOP 41. "There is a very important difference between what Walter did for Stanley and for Trevor. 'Go read this' is advice, but it is pretty vague and fuzzy. 'I might say something like this' is advice, although it seems that Walter did not intend that Trevor should record this verbatim for (his company's) filing. Had Walter thought that Trevor was going to act on it, he should have followed up with written communication."

ASOP 41 §3.6 Oral Communication (in part): ... Where the actuary has a concern that the oral communication may be passed on to other parties, the actuary should consider following up with an actuarial document.

It bears noting that Walter's suggestions have been subtly transformed: Trevor asserted that the material inconsistency would not have happened "had Walter's instructions been clearer."—Walter is giving him direction! The third reader continued, "Walter now knows that Trevor will record things verbatim even without permission. Walter shouldn't give any response other than 'hire someone to do the work.'"

With perfect hindsight, a canny actuary noted: "Walter would be much better positioned in this situation had he communicated any advice in writing. He would then be somewhat shielded from significant misinterpretations of his verbal suggestions. He would also be more likely to provide appropriate caveats to his advice, were he sharing it more formally."

The second reader concluded: "Considering the questions Walter was receiving from Trevor ... he should have realized Trevor was over his head—or at the very least have questioned his qualifications

It is not clear whether any of Walter's advice has contributed directly to the inconsistency currently being questioned by the state regulator.

to do the job Stanley was doing before him.” Hence, the importance of knowing a friend of a friend a little better *before* offering suggestions.

Fading to Gray

A wise actuary provided insight into the distinction between providing information versus advice mentioned earlier. *“It seems that Walter thought that he was providing information; not advice. I have taken the same attitude in the past ... However, latterly I have been warned by lawyers that the present day courts might not recognize any such distinction; not even if I had informed the other party that I was not qualified to give advice but could give only information that might be helpful and advised the other party to seek qualified advice.”* The actuary observed that other audiences *“might similarly not recognize the difference between advice and information.”*

One Lump or Two?

Several respondents commented on the role of the smaller insurance company’s management and corporate culture. The absence of succession planning seems to have been a weakness. One reader thought that *“Management – by turning a blind eye to the gap left with Stanley’s death – should also shoulder part of the blame.”*

Placing Walter on a retainer might have clarified the actuarial working relationships all around the table. The same reader noted, *“Walter did the right thing in asking for a formal contract”* even though Trevor declined. A second reader suggested, *“Meek Trevor should have asked for help from his superiors when he decided to take on Stanley’s workload rather than continue Stanley’s practice.”* Yet the case indicates that Trevor was *afraid* to ask his management for help—prompting the question “Why was he afraid?”

A possible answer may be found in a commonsense option submitted by a third reader. *“Obviously involving Walter in an unofficial capacity was a mistake. Trevor and Stanley should have gone back to the company that manufactured this product for assistance before involving Walter. Some type of service contract should have been established with*

that company in order to offer this new product on the smaller insurance company’s paper. The manufacturing company would have had the knowledge and expertise to avoid this situation.”

Inclusion of a service agreement, however, might have affected the pricing of the new product’s deal. It’s possible that the smaller insurance company made the mistake of taking on more product complexity than it was willing or able to support.

Fork in the Road

A couple of actuaries recommended that Walter meet with Trevor—in person if possible, by telephone if necessary—and try to “calm him down.” One actuary also suggested: *“There is still time to correct things if they can get the filings corrected to the regulators’ satisfaction. Walter should insist that Trevor hire him as a consultant, or another more experienced actuary, to supervise the work. It is clear that Trevor does not have the experience on this product or type of filing to be the lead actuary. If Trevor continues to refuse, Walter needs to report it to the Actuarial Board for Counseling and Discipline (ABCD) as Trevor is violating several precepts of the COPC—1 & 2 in particular.”*

The other actuary emphasized the need to engage Trevor’s management in the process, suggesting to Trevor that he recognize *“everyone has limitations.”* *“It is a little dicey if there has been no direct (formal) contact between Walter and the company. In Walter’s place, I would put a lot of pressure upon Trevor to go to management—including threatening to go myself if he did not.”*

A wise actuary summarized how Walter’s decision to informally help a friend was not quite the same as his subsequent decision to help a friend of a friend. *“Walter’s original relationship with Stanley was that of friends and fellow professionals. The exchange of ideas was likely mutual and I expect that each found discussion of a problem with the other to be beneficial but that neither would have considered that he was ‘relying on’ the other’s ‘professional advice’. Conversely, neither would have felt that the other was ‘relying on’ his comments as ‘professional advice’. Each would have been providing work*

Placing Walter on a retainer might have clarified the actuarial working relationships all around the table.

and advice in their own right and over their own signature. Such relationships are common and beneficial to the profession.”

“Walter’s subsequent relationship with Trevor is less clear. In particular, it appears unlikely to have been mutual. The exchange of information was probably one-sided. Walter appears to have eventually recognized this, which is perhaps why he suggested that Trevor’s employer retain him in a professional capacity. When Trevor declined this suggestion, it would have been prudent to withdraw. However, he did not and now is possibly at professional risk and legally exposed. ... Walter needs to move to protect himself. When in a hole, stop digging!”

The wise actuary concluded: “I suggest that Walter not try to resolve the situation by getting himself retained to straighten out the (presumed) mess. I would regard such a course of action as extremely risky and would certainly not even explore this possibility before discussing it with both legal counsel and a liability insurer.”

In a similar vein, a fourth actuary wrote: “The first thing Walter needs to do is stop giving verbal advice, and particularly recognize that his interests and Trevor’s have seriously diverged. He may need to think about getting an attorney.”

A canny actuary provided a cogent roadmap for Walter. “The main issue facing Walter is how best to protect his reputation. ... Walter is currently exposed to the risk that Trevor will use Walter as a scapegoat to either/both of Trevor’s management and the state regulator. He should first impress upon Trevor (in writing) that he retained full responsibility for the filings when he chose not to hire Walter. He should also clarify what advice he gave Trevor (also in writing).”

“Hopefully, Trevor is smart enough to not blame Walter to the aforementioned audiences. If Walter remains concerned and has a reasonable expectation that he is not being treated fairly, he could communicate his perspective to those people directly. Since that could still reflect poorly on him,



Walter should probably wait until he hears bad feedback directly; he could then share his written follow-up to Trevor with others as needed.”

Facing the Music

As foreshadowed in the previous section, many readers thought that the way forward for Walter would reference COPC Precept 13 concerning violations of the code—although not every reader saw things the same way.

COPC Precept 13: An Actuary with knowledge of an apparent, unresolved, material violation of the Code by another Actuary should consider discussing the situation with the other Actuary and attempt to resolve the apparent violation. If such discussion is not attempted or is not successful, the Actuary shall disclose such violation to the appropriate counseling and discipline body of the profession, except where the disclosure would be contrary to Law or would divulge Confidential information.

COPC Annotation 13-1: A violation of the Code is deemed to be material if it is important or affects the outcome of a situation, as opposed to a violation that is trivial, does not affect an outcome or is one merely of form.

When in a hole, stop digging!

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Retaining counsel may be seen as a prudent measure by some people and as an offensive measure by others.

The majority of the replies were along the lines of the following: “Trevor is in breach of the COPC and Walter should report him to the ABCD before he (Trevor) digs himself into a deeper hole.”

However, one actuary sketched out a slightly different denouement. “In the end, it seems reasonably clear (are these situations ever clear?) that Walter has a professional responsibility to: inform Trevor that, in his opinion, he is not qualified to do the work he is currently doing in breach of the COPC; and report Trevor to the ABCD. This is easy to say, but the likely scenario is probably different: ‘If you hire me, I can help you, Trevor; get out of this mess ...’”

A second actuary suggested a different course of action. “Walter probably should think about reporting himself to the ABCD. He provided advice in a casual manner to Trevor that was relied on to complete regulatory filings. He was trying to be the nice guy, but that never seems to have a good ending. Lacking the full understanding of Trevor’s knowledge and competence, he should not have given advice without making sure he knew how it was going to be used. Both parties breached Precept 1 as neither used skill and care. The phone conversations were actuarial communications from Walter and he didn’t use care to make sure they were used appropriately (thereby breaching Precept 4).” As a matter of fact, a large part of the ABCD’s mission is to provide counseling to actuaries who find themselves in challenging situations, and this could be an opportunity for Walter to initiate a dialog with them.

A third actuary described the possibility of countervailing complaints. “An interesting stand-off from the COPC-side, as it would seem Trevor and Stanley were doing work outside their area of expertise, and thus in violation of the COPC and qualification standards. (It’s) unlikely that Walter is going to work this out with Trevor, which I think puts him into a situation that he should be reporting Trevor’s violation to the ABCD. However, as the facts come out, Walter is probably also in violation, so he might prefer not starting the ABCD process.

... Walter might decide to give Trevor a pass rather than start a process that was going to turn around and raise questions about his own actions.”

However Walter might decide to proceed, he must remember not to lose sight of COPC Precept 1.

Raymond Burr on Line One

An actuary coming into contact with the ABCD can retain legal counsel and have counsel present during an ABCD fact finding interview. The ABCD’s Rules of Procedure specifically mention this.

ABCD’s Rules of Procedure §V.D Investigation – Information Gathering (in part): ... Any person begin interviewed by the Investigator(s) may, at his or her volition and expense, be assisted or represented by counsel. ...

ABCD’s Rules of Procedure §VII.C.2 Fact Finding Hearing – Hearing – Appearance of Subject Actuary (in part): ... The subject actuary may be accompanied by counsel at no expense to the ABCD, provided that the role of such counsel shall be limited to providing advice to the client and articulating appropriate legal objections. ...

Perhaps interestingly, both U.S. and Canada-based actuaries described the benefits of retaining counsel. One reader wrote: “Retaining counsel may be seen as a prudent measure by some people and as an offensive measure by others. ... Given that there is explicit provision in the procedures for counsel, I think that (Walter) having counsel would not be considered inappropriate and might even be wise.” A wise actuary recommended the following course of action. “Walter needs now, without delay, to contact his lawyer and arrange to receive counsel from a lawyer experienced in professional and legal liability issues. Based upon the advice received he should consider the following possible steps:

1. Organise his papers concerning contacts with Trevor in preparation for further possible developments.
2. Immediately report the potential exposure to his own professional liability insurer.

3. *Contact the ABCD.*
4. *Write a letter to Trevor to clarify his position and refute any suggestion that he gave Trevor advice on which Trevor and his employer were entitled to rely.*"

A third reader also saw the benefit of documentation: "Probably a little late and should only be done on advice of counsel, but Walter's first step might be a 'note to file' documenting the verbal advice he provided to Stanley and Trevor, with a recreation of the timeline as best he can recollect it."

Could there possibly be a silver-lining to the dark cloud of impending litigation and attendant legal fees? Well, at the very least Stanley had legitimate grounds to skip year-end this year.

CONCLUDING THOUGHTS

A sincere thank you to all who contributed their suggestions regarding Walter's next move. And especial thanks to Mary Simmons who was the creative spark for this eighth case and its ensuing discussion. Some more northerly correspondents referred to the "Rules of Professional Conduct" or simply "the rules". These references have been generally translated as the COPC for ease of understanding, inasmuch as the case refers to a "state regulator" and not a federal or provincial supervisory authority.

Thanks, as well, to all who variously contributed comments and their bright ideas to The Actuarial Ethicist during its second year. Quite simply, the case studies and written discussions wouldn't have happened without you! Several contributors opted for the cloak of anonymity, but both they and the following actuaries all had a hand in the column's success: Cindy Chen, Mike Dorsel, Jennifer Fleck, Keith Hartsough, Nick Jacobi, Eric Janecek, Kevin Leavey, Steve Malerich, Larry Mitchell, Joe Nunes, Bill Osenton, Guy Poliquin, Jackie Sankardyal, Mary Simmons, Dave Snell, Jeff Stock, Pat Tabor, Stephanie Weist, and members of the United Healthcare Actuarial Pricing Team. These names went into the drum and the winners of \$25 book store gift certificates are Mary, Mike, Bill and Dave. Congratulations!

Kudos to members of the Pakistan Society of Actuaries who saw an opportunity to leverage The Actuarial Ethicist early last year in support of their local continuing education program. And particular thanks to John West Hadley for his persistent optimism and goodwill, despite innumerable blown deadlines.

The Actuarial Ethicist will embark on an indefinite hiatus at this juncture. Readers are referred to a couple of good columns in the interim: "Up to Code" published in the American Academy of Actuaries' bi-monthly *Contingencies* magazine; and the "Ethical Issues Forum" in the Casualty Actuarial Society's *The Actuarial Review*.

An idea borrowed from the noted American conservationist, Aldo Ludwig, might provide a suitable parting thought, only slightly modifying the language found in his seminal 1949 work *The Land Ethic*:

I have purposely presented the actuarial ethic as a product of an ongoing discourse or an exchange of views because nothing so important as an ethic is ever 'written' ... It evolves in the minds of a thinking community.

The contents of this article should not in any way be construed as a definitive interpretation of the various actuarial guidance documents referenced within the article. This hypothetical case study and its discussion are intended for the personal use and (possible) edification of members of the Management & Personal Development Section. ●

END NOTES

¹ See the November 2011 issue of *The Stepping Stone* for the complete description of this case study.



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