THE DISCOVERY PROCESS FOR CASE MANAGERS

W. Fulton Broemer
BROEMER & ASSOCIATES, LLC
3336 Richmond Avenue, Suite 400
Houston, Texas 77098
Telephone: 713/328-1101
Facsimile: 713/328-1130
E-mail: WFB@BroemerLaw.com

I. YOUR LAWYER IS YOUR FRIEND. ...IT'S TRUE!

A. If you have the opportunity, you should develop a working relationship with your employer's attorneys. If you know the attorneys and have an idea of what they need when they defend a claim, you will be able to tailor your activities to provide the best possible defense when litigation does happen. By getting to know your employer's attorneys, you can develop systems which will strengthen your employer's position every time a claim is challenged. You can develop systems specifically designed to protect yourself and your employer.

B. Get to Know Your Lawyer. If you don't have a relationship with your employer's attorneys, or if you work for several different companies and can't get to know all of their lawyers, then try to contact the attorney representing your side as soon as litigation is filed. ...Or, even better, as soon as you realize that a particular case is likely to result in litigation. This early contact with the attorneys defending the claim can provide you with the advantage of knowing what portions of the file are critical to the defense and what actions you can take to support the claim decision.

C. Communicate. Don't be intimidated by your lawyer; he or she is (usually) on your side. You must be able to communicate with your lawyer, because he or she will someday act as your Moses to lead you through the wilderness of the Discovery Process.

D. <u>Prevention is Better than a Cure.</u> When you see a potential trouble case (problem denial, subrogation issues, etc.), go ahead and contact your lawyer. Don't wait until the trouble starts to get your lawyer involved. Let your lawyer review the claim and advise you on potential pitfalls. Your lawyer can help you sculp your claim file, while the claim is active, to provide you with the maximum possible protection if litigation later ensues.

II. WHAT IS THE DISCOVERY PROCESS?

A. When there is litigation over a claim, lawyers use the discovery process to gather and collate information on the claim. The discovery process is a comprehensive program within the legal system which provides for the transfer of almost all information relating to a litigated claim. The discovery process has several basic elements.

1. <u>Interrogatories</u>. Interrogatories are the basic foundation for discovery in any case. They are written questions about the claim or case. In Texas (and in most other jurisdictions) Interrogatories may not exceed 30 questions. A Case Manager may occasionally be required to provide answers to Interrogatories. If the attorney representing the Plan or TPA (or whoever you are providing services for) presents you with Interrogatories to answer, be sure to discuss them with the attorney and reach an understanding on what the attorney expects from you. Usually, the attorney will simply want concise answers in your own words which he or she will later put into a legal format.

2. <u>Requests for Production (RFP)</u>. RFPs are very much like Interrogatories except they require you to produce documents. Each RFP should request a specific document or a specific category of documents. Typically, there is no limit to the

number of RFPs which may be presented in a lawsuit. Don't be surprised if a lawyer sends you a set of RFPs and asks you to produce all of the documents requested. Again, contact your lawyer. Discuss the nature of the documents requested and the format in which the documents should be produced. Often, you won't have to produce some of the documents requested because they are privileged (see below) or they are outside the scope of discovery allowed in the case. The items which the claimant's lawyers can request will commonly change from case to case, depending on the facts and jurisdiction. After discussing the RFPs with your lawyer, try to produce them as promptly as possible. In most jurisdictions, the courts require documents to be produced within 30 days from the date the RFPs were served on your lawyer.

3. Requests for Admission (RFA). RFAs will rarely be served on a Case Manager. They are requests that a party (in the case of insurance claims, usually the Defendant) admit or deny the truth of a statement. They are essentially a "true or false" quiz. If your lawyer asks you to respond to RFAs, be sure to consult with the lawyer and get specific instructions. RFAs are serious business and an improper answer can be very damaging.

4. Deposition by Written Question (Records Subpoena). This is probably the most common type of discovery for a Case Manager. In a Records Subpoena, the claimant's lawyer will serve a set of written questions (very much like Interrogatories) on the Case Manager. Most of the questions will include a request for specific documents or specific categories of documents (much like RFPs). A court reporter will appear at the Case Manager's office to officially ask the

questions and to collect the documents produced by the Case Manager. This is a very straight forward process. The court reporter will record your answers to each question and take the documents. ...That's it.

a. <u>You're on your own.</u> Usually, no lawyers attend a Deposition by Written Question. When you are served with a Deposition by Written Question, you should contact your lawyer immediately to discuss the proper answers to each question and to discuss the documents requested. Your attorney should advise you on how to answer the questions and which documents you should produce.

b. <u>Non-Party witness</u>. Occasionally, you will be served with a Records Subpoena in a case in which your employer is not a party. In that case, it is likely that no attorney will be active in the case on your behalf. If your employer doesn't have an attorney involved in the case, or an attorney available to consult with you on the contents of the Records Subpoena, you should find one. Even though you and your employer may not be a party to the lawsuit in question, you should seek legal counsel every time you receive a Records Subpoena. Remember that just because you aren't a party today, doesn't mean you won't be a party tomorrow! If your responses reveal any vulnerabilities, the claimant's lawyers could decide to add you or your employer as a Defendant to the case. By then, the damage would already be done.

5. Oral Deposition. This is the most exciting part of the discovery process and the second most likely way for a Case Manager to become involved in discovery (after Depositions by Written Question). Giving testimony at an oral deposition is very much like testifying at trial. You will be required to swear an oath to tell the truth and you will be questioned (probably at length) by the opposing lawyer. In essence, an oral deposition is a question and answer session with the enemy. The purpose of the deposition is to allow the opposing lawyers to find out what you will say if you testify at trial. They can ask you questions about any part of your role in reviewing the claim. They can (and will) ask you a lot of questions about your background, prior work history, and credentials. In most depositions, the opposing lawyer will ask you "open ended" questions. These are usually "who, what, why, how, when" questions. During the deposition process, most opposing lawyers will want to get as much information from you as they can. Their goal is to pin you down on the issues so that they can predict what your answers will be if you testify at trial. When you get to trial, the questions will typically be "yes or no" questions based on your answers given in deposition.

    a. Notice of your deposition. Typically a Case Manager would be set for Oral Deposition *after* RFPs and Interrogatories. Your deposition can be set in two ways: 1) you will be served with a Subpoena (usually by a constable), or 2) you will simply receive a call from your lawyer who has agreed to present you as a witness in the case.

b. <u>Preparation.</u> Of all of the types of discovery, an oral deposition takes the most preparation. The oral deposition may be held at your office, your lawyer's office, or the opposing lawyer's office. Ask your lawyer to provide you with a written confirmation of the time and place of your deposition. Unless your lawyer advises you otherwise, you should carefully review all of your records a few days prior to the deposition. You may make reference notes, but <u>be sure to share any such notes with your lawyer if you intend to take the notes to the deposition with you.</u> If you refer to your notes during the deposition, they opposing lawyer can demand to see them and can make them an exhibit to the deposition.

c. <u>Woodshedding.</u> Be sure to spend some time with your lawyer before the deposition. This process is called woodshedding. You should meet with the lawyer for your side a few days before the deposition to discuss the topics on which your lawyer expects you to be questioned. Your lawyer should warn you about sensitive topics and confirm for you how those topics should be addressed. It is a good idea for your lawyer to ask you a few hypothetical deposition questions so that you can get the feel for how the question and answer process works. If you are required to bring any documents to the deposition (see Subpoena Duces Tecum, below), be sure to go over those documents with your lawyer. Spend as much time with your lawyer as you need to get comfortable.

d. Be comfortable. Being comfortable and relaxed is the best way to prepare for an oral deposition. Go over the records and files until you feel comfortable with your working knowledge of the claim. Be sure to address all of your questions to your lawyer before the deposition. Everyone has anxiety about oral depositions, and your lawyer is used to witnesses being jittery, so don’t be hesitant or embarrassed to ask "stupid" questions before a deposition. Any lawyer would rather hear a stupid question before the deposition than a stupid answer during the deposition. Remember, too, that you have the *right* to be physically comfortable during the deposition. If you need a break for any reason (to smoke, for some coffee, to use the facilities), just tell your lawyer. It doesn’t matter if you interrupt the deposition. Remember, it’s better for you to interrupt the deposition to go to the restroom than for you to give a thoughtless answer because you’re uncomfortable.

e. Your lawyer is there to help you. You have a right to consult with your lawyer *during* the deposition, if necessary. You can just lean over and whisper to your lawyer, or you can request a break to consult with your lawyer. It’s your right. Never be embarrassed to ask to stop to speak with your lawyer.

f. Stay calm. Deposition anxiety is normal. Everyone gets nervous. Don’t let your own nervousness feed on itself. Simply accept that you're going to be under the microscope for a while, prepare yourself the best you can, stay calm, and tell the truth. Some lawyers will try to goad or bait you. *DO NOT* let yourself be drawn into a contest of wills and *DO NOT* try to match wits with the opposing lawyer. Getting caught up in a contest of wills will not help your employer or strengthen your case. It will simply prevent you from concentrating on the content of your answers. If a lawyer tries to bait you or goad you, just ask for a break. That breaks *their* concentration and gives you time to settle down.

g. <u>Tell the truth.</u> The most important rule of any deposition is to always stick to the truth. The lawyer questioning you has been *trained* to ferret out the truth. If you start giving evasive or false answers, the opposing lawyer WILL catch you!

h. <u>Think long and answer short.</u> The second most important rule is to think carefully about every question you are asked and then give short, concise answers. You should completely review each question the opposing lawyer asks you *before* you begin your answer. Keep in mind that these questions are asked orally, but used in a written form. Some lawyers use inflection and diction to make a question sound different than it will read. Completely reviewing the question in your mind also gives your lawyer critical time to consider the question and lodge any objections he or she may have to make. Remember to give your lawyer time to make his or her objections. Your lawyer is there to protect you; give him or her the time to do their job. Once you've reviewed the question in your mind, give concise, straightforward answers. If possible, limit your answers to "yes" and "no." When you can't give a "yes or no" answer, just give the most concise truthful answer you can. *DO NOT* volunteer information unless your lawyer has instructed you to or unless it is absolutely necessary in order to explain your answer.

i. Speak Slowly. Remember that your lawyer is trying to listen to your answer, analyze the opposing lawyer's motivations, and foretell the future every time you start answering a question. So *speak slowly*. Give your lawyer a break. If you bolt out your answer too fast, you may lose the benefit of your lawyer's counsel or protection.

j. Read and sign. When your deposition is completed, always ask to "**read and sign**" the transcript. This is your opportunity to look for mistakes made by the court reporter (and they DO happen). There will be a page for you to note all mistakes and corrections. Also, if you see an answer which you think might be incorrect or incomplete, this will give you a chance to bring it to your lawyer's attention so that he or she can provide supplementary information to the opposing lawyer. The chance to supplement incomplete or incorrect answers can be *critical* to a successful deposition.

k. Subpoena Duces Tecum (SDT) (pronounced DU-kes TAY-kum). Translated literally from Latin, this means "bring it with you or else!" The Subpoena Duces Tecum is a legal summons requiring you to bring specific documents or specific categories of documents with you to a deposition. It will usually be served with the Subpoena or Notice of Deposition. Make sure your lawyer shows you the SDT well in advance of the scheduled deposition, so you can get your records together. Also remember to go over your records with your lawyer BEFORE the deposition. Most SDTs will look a lot like an RFP. They will list types of documents from the claim file which the opposing lawyer wants you to bring. Typically, the opposing lawyer will want to question you on the documents in question, so be familiar with them.

III. PRIVILEGES

A. Attorney-Client Privilege. Communications (correspondence, telephone notes, notes from conversations, etc.) between you (or your employer, or the Plan) and your attorneys are usually privileged. Occasionally, in benefits cases, the courts may require you to produce your communications with your lawyers. However, unless you see a court order to the contrary, the rule is "**don't produce any communications with your lawyers.**" If its from your lawyer, to your lawyer, or it relates to a consultation with your lawyer, assume that it is privileged until you hear otherwise. If you are in doubt, consult your attorney. He or she will tell you if you should produce any privileged documents.

B. Work Product Privilege. Work you do in anticipation of litigation, or working on a file after litigation is filed, is also privileged. Again, in benefits cases, the courts may require you to produce the otherwise privileged materials. Unless you see a court order to the contrary, assume that any work you do, notes you make, or letter you write in anticipation of litigation or as a result of litigation are privileged. DO NOT produce them at a deposition unless your lawyer tells you to.

IV. USE YOUR RECORDS AS A SHIELD.

A. The discovery process in benefits cases is often limited to the claim file/administrative record. ...In other words, your file is often the only thing the courts will review. ERISA severely limits the documents which a participant's lawyer may require the Plan to produce. This *magnifies* the importance of your files. If your file is all the opposing lawyer is going to see, he or she is going to go over it with a fine tooth comb. Furthermore, your lawyer must construct your entire defense based on your file. It is your shield. Build it strong, and it will protect you. If your file provides legible and useful backup for every decision made during the processing of the claim, the Plan will usually prevail.

B. <u>Spot Trouble Cases.</u> You should always try to keep good records, because you never know when a claim is going to result in litigation. When you see a potential trouble-claim (i.e., a large claim, or a tricky denial) start paying extra attention to your file. The records you keep during the course of your review will protect you and the Plan if the claim winds up in litigation. Utilization Review and Case Management note are some of a lawyer's most valuable tools in defending a lawsuit based on a claim denial. Your records establish *exactly* what information the Plan was relying on at each critical point in the claim's evolution. When the Plan and the lawyers look to you for answers, there is no better treasure trove than a well-documented, organized claim file.

C. Make Notes. Every time you have an oral conversation (by phone, or otherwise) with a participant or provider, make a record of the date, time, parties, and content of the discussion. The new wave in benefit litigation is to sue for misrepresentation because someone somewhere told the provider or the participant that there would be coverage. DO NOT BE TRAPPED! If you make legible notes of the content of each conversation you have with providers and participants, you will be protecting yourself and the Plan. Good nurse's notes are the defense lawyer's best friend.

D. Stay Organized. Try to keep your files as organized and complete as possible. Attorneys are expensive. It's better for you to keep your file organized so that you can find any needed documents or answer any questions, than to pay some lawyer $200/hour to rummage through a disorganized file for 4 hours. When your file is produced for inspection by the opposing lawyers (and it will be), it will usually be produced in exactly the manner in which you keep it. If it is organized and complete, your deposition will move a lot faster. If it is incomplete and disorganized, opposing counsel will have to spend more time digging through your records and ask you more questions to fill in the gaps.

E. E&O Coverage and You. Never underestimate the importance of your records to an Errors & Omissions insurer. When a lawsuit for benefits is filed, your employer or the Plan will typically turn to either an E&O carrier or a Fiduciary Bond carrier to pay for the defense of the lawsuit. Most E&O carriers will then review the conduct of the Plan and any Third Party Administrator before it confirms or denies coverage. Your records could be the primary area of review by the carrier. Clear, concise, complete records will make it easier for the insurer to quickly confirm coverage of the Plan's defense.

V. WATCH OUT FOR THE BAD LAWYERS

A. Believe it or not, there are some bad lawyers out there. Benefit litigation is a very specialized area and it is not uncommon for a lawyer to get involved in a benefit case and have no idea how to proceed. Also, unfortunately, there are some lawyers out there that just aren't any darned good. Watch out for these! Here are some signs of a bad or overmatched lawyer:

1. Your lawyer doesn't call you to prepare for your deposition;
2. Your lawyer won't return your calls;
3. Your lawyer doesn't ask to see your file before it is produced to the other side;
4. Your lawyer doesn't consult with you before a Deposition by Written Question;
5. Your lawyer won't answer your questions; or
6. Your lawyer snores during your deposition.