**Decision Making**

**Making Fair and Consistent Decisions**

Claims processing could be defined as all the work necessary to bring a claim to a decision, with decision making being the final stage to conclude that work. Necessarily, some of the tasks and tools requisite to effective claims processing, such as clear policies to interpret program statute and rules, checklists for full documentation of a claim, and quality control, are important to this conclusive step.

Claims evincing similar fact situations should be decided similarly. Acknowledging that facts will never be exactly the same from one case to another, programs do owe it to the victims they serve that there should be a high level of consistency on interpretations of the facts and the law governing the program. It is simply unfair for one victim to receive compensation and another to be denied, if there is no reason for that difference than the opinion of two different staffers who have different ideas about how to interpret program statutes and policies.

Program managers are making use of a variety of techniques to maintain quality and consistency in decision making, some of which are explored below. It’s worth spending a little time in this discussion on decisions related to contributory conduct, which are often the most troublesome for programs to handle.

***Case Conferences***

Programs have found that regular discussion among claims staff and management can help ensure that similar cases are analyzed in equivalent ways. In some staffs, this discussion occurs informally on a nearly continual basis, as individual staffers approach others to compare thoughts on a claim. Other programs have instituted more regularized case conferences, on perhaps a weekly basis, to consider those fact situations that are most troubling to claims staff.

***Index of Case Decisions***

Just as courts keep volumes of decisions in individual cases to guide work and rulings on future ones, some programs keep a brief synopsis of common fact situations and how the program has decided them. This usually is far less than a compilation of all cases, but rather reveals a focus on the recurring fact situations that pose dilemmas in interpreting program law and rules.

At least one program incorporates these “case briefs” within its policy and procedure manual, rather than maintaining a separate index of case decisions.

***Staff or Board Discussions and Retreats***

Some programs have found it beneficial to set up special discussion times, or even day-long retreats, to explore challenges surrounding decisions. A manager might wish to ensure that decision making on cases involving contributory conduct is more consistent, or more reflective of the program’s mission and philosophy. By setting aside time outside regular work pressures, or even outside the office itself, managers can get staff or Board members to focus exclusively on the issues that seem to divide decision makers, and try to reach some consensus to guide future determinations.

At least one program manager held such a retreat out of desperation, when conflicts between decision makers on contributory conduct claims had become particularly argumentative. This manager found that regular retreats subsequent to this one helped head off such conflict on other issues.

***Contributory Conduct***

Every compensation program’s governing law has a provision requiring reduction or denial upon a consideration of the victim’s conduct that may have contributed in some way to his victimization. These are called “contributory conduct” provisions, and interpreting what they mean in individual fact situations generally becomes one of the more contentious aspects of compensation program work.

There is no national standard for what is the appropriate decision to make in specific cases. NACVCB and its member programs have not sought to develop such a standard, believing instead that individual programs have differently worded contributory conduct provisions, and different approaches and philosophies to how these decisions should be made. While this Association has spent a good deal of time at conferences and in other settings discussing contributory conduct, the goal has been less to achieve consistency across states than to explore fully all the challenges facing programs in making these decisions, and illuminating the reasons why programs may come to different conclusions. But the final decision in these cases is up to each program itself.

Some concrete suggestions for programs can be made, however:

***Read and Understand Your Law.*** Contributory conduct decisions must be based on the law in each state, which may not be the same from state to state. One of the most fundamental differences is whether the contributory conduct statute requires that a denial be allowed only when the victim’s conduct “contributes to” or “causes” the victimization, or whether denial can be based simply on any criminal conduct on the part of the victim, whether it actually leads to the victimization or not. An example would be a drunk driver who is killed by another drunk driver, in a situation where there is no evidence that the killed drunk driver was doing anything other than driving drunk. While driving drunk is against the law, one state supreme court directed the compensation program to pay a victim’s claim in these circumstances, when there was no evidence that anything else the victim had done had caused the fatal crash to occur.

***Explore what “Causation” Means.*** If a contributory conduct law requires that the program make a connection between what the victim did and what subsequently happened to the victim, then program staff must understand what “causal connection” or “causation” means. This is not a difficult legal concept, but rather a common-sense phrase or word. The essential thing for managers to do is to discuss with staff how to apply the concept to individual fact situations. Can a prostitute’s work cause her “clients” to assault or even kill her? She may be breaking the law while plying her trade, but has she contributed to her victimization only through illicit conduct, or is what she is doing contributing to what others are doing to her? Is it enough to conclude that some men who use the services of prostitutes tend to be violent, so she has assumed the risk of her actions? Is assuming some risk the same thing as contributing to an attack against her? There is no right answer to these questions; but they deserve to be explored by every program staff.

***Study Case Law in Other States.*** A number of state courts have made rulings on contributory conduct cases decided by crime victim compensation programs. Some of these decisions are particularly illuminating in exploring terms such as contributory conduct, proximate cause, and substantial evidence. These cases were analyzed in a 2005 Kansas Supreme Court case, which may be instructive to states considering application of their contributory conduct provisions.

**Notifying Victims of Decisions**

Programs make decisions in different ways: In some programs, managers make decisions; in others, decision making is delegated to claims processing staff; and in others, citizen boards meet periodically to decide claims.

In most programs, once the decision is made it is final, unless the applicant makes a formal appeal of the decision in writing. In some programs, the applicant is afforded an opportunity to make an informal request for a review of the decision, if the applicant can point out some error or provide further documentation supporting the victim’s claim. This procedure can be particularly useful if the grounds for a denial is not some eligibility problem, but rather a failure to provide necessary documentation upon which to base a payment.

However decisions are made, programs must notify applicants of the result, and inform them of their rights to appeal. A few recommendations can be made with regard to notification.

Programs should develop clear and concise letters and forms to notify victims of decisions and inform them of their appeal rights and the procedures to follow in making an appeal. The language used should be geared to an elementary school reading level to ensure that communication can be easily understood.

The following information regarding the decision should be included:

* If denied, the reason for denial in simple terms, with appropriate reference to the statute.
* If paid fully, a clear and accurate detailing of the expenses paid.
* If paid partially, a clear and accurate detailing of which expenses were paid and which were not, so the victim knows what remains outstanding.

Appeals procedures also should be described in the letter, if there has been a denial or only a partial payment. Time frames for making appeals must be spelled out. If the applicant is afforded an opportunity to seek a review of the decision by program staff and management by providing more information or documentation (a process short of a formal appeal), this must be communicated clearly.

Some programs will send a copy of the decision letter to the advocate or program that assisted the victim in filing the application. Some programs also encourage advocates to assist or accompany the victim if the victim decides to appeal the case. This may sound counterproductive – why encourage the questioning of the program’s decision – but programs also have found that it helps them reach better decisions if all that is missing is some piece of information to support the victim’s claim, and that any appeal will be better made and handled more expeditiously if the victim has some help in making it.

**Handling Appeals**

Appeals, of necessity, are governed by statute and administrative procedure in the state. Within these constraints, some programs have practices that may assist victims in making appeals, and decision makers in adjudicating appeals fully and fairly. Among these practices are the following:

***Provide an orientation for the applicant prior to the appeals hearing***. In some states, a staff member of the program telephones the victim who has made an appeal to discuss procedures. On the day of the appeal, a program also may assign a staff member to meet with the victim and provide some orientation and even support prior to the hearing. If the victim is more comfortable with the process, this not only may help the victim, it also may cut down on the time that must be spent by the appeals body explaining rules and procedures during the hearing itself.

***Encourage the victim to bring an advisor or victim assistant with the victim.*** While attorneys generally are not necessary, a victim-witness assistant familiar with the case, or simply a trusted adviser to the victim, may be able to help facilitate responses to questions and ensure that the victim understands the proceedings.

***Hold hearings in locations convenient to the victim.*** A number of programs move their appeals hearings around the state to afford victims an opportunity to more easily travel to hearings. Other programs make use of telephone conferences to allow the victim to present information without having to make a personal appearance.