

Restoration Contractors of the Future: Will they get a Spine or be Rolled Over?

Panel discussion with our guests:

Pete Consigli (Global Restoration Industry Watchdog), Ken Larsen (industry trainer, author & advocate), the "Restoration Lawyer" Ed Cross, Peter Crosa (independent insurance adjuster, private investigator and sitting President of NAIIA) and the hosts "RadioJoe" Hughes and Cliff "Z-Man" Zlotnik.

Nuggets mined from today's episode:

RIA convention update by Pete Consigli, CR, WLS

- Traditionally, the RIA has gotten good attendance on the west coast; the 2017 convention was well attended.
- Keynote speaker on team building & leadership Former Navy Seal and founder of TRX training Randy Hetrick. Lessons learned as a Frogman and entrepreneur on leadership and team building, told the audience to bitch up (never down and rarely sideways).
- Advance designation induction ceremony. (For the first time ever, 3 inductees completed 3 advance designations in one year. Completing their CR, WLS and CMP and commuting from Australia to do it.)
- Accepted the C&R Magazine Golden Quill award on Z-Man's behalf for an article on concerns over the water restoration industry and delivered my acceptance speech.
- Ken Larsen highly honored by receiving the Martin L. King Award.
- Peter Crosa and Mike Bowdoin did breakout session on gratuities, comps, referral fees and deductibles. Moderated by Ken Larsen.
- Day 2 Keynote presentation by Ed Cross on 6 new legal points restoration contractors need to know about to survey in 2017
- Town hall panel closed out the convention and was well attended late on a Friday afternoon!
- Industry conversation going on for over a decade was term An "Avoidable Risk" by Marty King in 2007!
- Dynamic interaction during Town Hall meeting, open mic for moderated Q&A with members for almost 45 minutes.
- **Key message:** In associations members do together what they can't do individually. It's time for industry to come together and speak with one voice. We must understand history and lessons learned to avoid repeating past mistakes. We need SBFs (science based facts). We need good education: for our industry, the public we serve the insurance industry, government entities and other stake holders. We need to network both domestically and internationally.

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- As an Association RIA should embrace a “Pro Restorer” message to the industry and reject a false narrative that it is “Anti Insurer”! That misconception I opine percolated under the radar in 2007 after RIA’s support of Colorado’s Anti Steering Legislation.

The storyline from C&R Magazine and editorial advisory committee by Pete Consigli: (fellow members, Larsen, Zlotnik, Crosa and Phil Rosebrook, Jr.)

- The State and Future of the Drying Industry
- Narrowing the divide debate
- Referral fees?
- Building bridges not walls
- Opting out of program work
- TPAs
- Stop being bullied, standup for yourself and “get a spine”.
- Registered Third Party Evaluator Series
- Town Hall theme Future of the industry

Note: Ken Larsen, CR, WLS, CMP provided written answers to all the questions the hosts provided. Due to the time constraint we were unable to pose all of the questions during the broadcast. Here are the questions and Ken’s detailed answers.

As a consultant, what do you consider ethical and unethical, professional and unprofessional regarding referral fees and gratuities?

This is actually a difficult question to answer.

- On one hand, I understand the logic of compensating an individual for marketing that leads to the contractor’s sale of services. This style of incentivizing others to bring you work has a long history in many industries.
- On the other hand, there is a legitimate concern expressed by paying parties who wonder if that referral fee and gratuity is ultimately costing the payer more money on the bottom line. This is especially true when referral fees become several thousand... even hundreds of thousands of dollars on larger projects.

Defining ethical / professional practice within the restoration industry must be left to the courts to answer. My opinion is merely an opinion – so it has minimal value in the actual marketplace. But I will say this:

Some jurisdictions have declared it illegal to pay a referral fee to others (like plumbers) for an insurance claim lead. Therefore, in my mind – this raises the important question on how appropriate – or even legal – it is for a contractor to pay a Third Party Administrator or contractor network a referral fee or percentage on their assignments.

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Now, interestingly... I have heard some TPAs say “We don’t charge a “referral fee.” We charge a “management fee.” My reply to that is: *If it looks like a duck... walks like a duck... it’s a darn duck!*

If the TPA is in fact charging a “management fee” it is hardly the contractor’s overhead expense. It would be an expense to the insurance claim and should be reflected to the insurance carrier as an expense to the insurance claim.

Furthermore, many states define actions that constitute “contracting” that may require a contractor’s license and / or a business license.

Now I’m no attorney here but I think it would be wise for restorers to discuss this subject with their attorneys.

In Florida, Statute 489.105 says, (6) “Contracting” means, except as exempted in this part, engaging in business as a contractor and includes, but is not limited to, performance of any of the acts as set forth in subsection (3) which define types of contractors. The attempted sale of contracting services and the negotiation or bid for a contract on these services also constitutes contracting.”

The state of Washington RCW 18.027.010 (1) b) defines a contractor to be: “(b) “Contractor” also includes a consultant acting as a general contractor.”

It is my understanding that many states have similar expressions that may have a long reaching impact on the TPA’s role in the function and billing of a contractor’s work.

I think that a TPA who claims to manage a contractor on a project or insurance claim introduces some licensing questions worthy of consideration.

Why did the insurance industry create “contractor program work”?

Originally – it was to identify and coordinate quality contractors and expedite the assembly of good documentation so that a qualified insurance claim representative could efficiently review the file, settle the claim and expedite the process. THIS is actually a very honorable service with legitimate value.

Unfortunately, program work has devolved into a service whereby a group of uneducated bullies exercise price reduction tactics that do not reflect a fair settlement. There is only one way to handle a bully... and that is to “grow a spine” and stand up to them.

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The illustration I like to use is about the poor abused step-child who lives their whole childhood in a house where the father relentlessly and heartlessly beats the poor child. For many years, this child has nowhere to go. They must endure this heartless and unfair treatment.

But... there shall surely come a day when the child will grow up... muster up the courage and strength to stand up to this abusive parent... and leave the house.

I say restorers have matured in the last 10 to 15 years after having endured this abusive relationship. They are now committed and strong enough to see the program work is non-sustainable and certainly not a fair agreement.

Do you know how “insurance company repair programs” and TPAs gained the necessary knowledge to gain the upper hand advantage over contractors?

That’s an interesting question.

I think they gained their knowledge in how to manipulate the contractor through lazy restoration business owners who sold out to the low hanging fruit of paying for restoration assignments and worrying about how sustainable the business model would be later. They sold their soul in the process.

Every time a contractor agreed to yet ANOTHER price concession or increased administrative obligation, the insurers were being told the contractors have boat-loads of extra revenue that they would be willing to forfeit in order to receive the assignment.

The result is that contractors are now doing MUCH more work with microscopic margins – and at times even LOSING money on the job. No matter how hard you try, such a business practice will surely fail eventually. You can’t make up for this non-profit model in volume.

Ken, referring to restoration as invertebrates “spineless” is harsh criticism; do you really mean it?

I feel the biggest need in the restoration industry today is the need for the contractor to muster up the courage to “grow a spine” and stand up to these people who demand unreasonable and unfair concessions on a competently executed project.

There are so many plainly uneducated reviewers who demand your forfeit of perfectly justifiable charges and who demand you deliver substandard product.

Look... what would a reasonable person say defines the actions of a “first rate restorer?” I would suggest that most people would define those contractors as:

1. They deliver a quality product that falls into compliance with the standard of care to be followed.
2. They provide good customer service which includes the ability to warranty the end product and manage their own risks associated with running their own business.

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3. And, they must have reasonable, usual and customary pricing so that their business model is sustainable.

People make their buying decisions on these three factors: quality, service and price. The buyer can control any two of those factors... but the third factor must be controlled by the seller.

One of the things

Any program that dictates all three factors for the contractor must therefore be a “one sided” agreement. A “first rate restorer” would not agree to one sided programs. A “first rate restorer” would not agree to massive price reductions of between 50% and 75% demanded by these “reviewers.” What do you think the insurance industry believes about the contractor’s honest and fair pricing when they cave to the reviewer’s demands for price reductions? Surely that contractor MUST have misrepresented the services and prices reported in their scope of work. That contractor... could not possibly be viewed as a “first rate restorer.”

Those who fail to represent themselves as a “first rate restorer”... must therefore be... a “second rate restorer.”

Tough words and they are hard to swallow. But I think few would argue the accuracy of the statement.

I spoke with a contractor recently who I think understands what I meant when I said contractors need to grow a “spine.” He said:

“I would offer that the need for Future restoration contractors to get a “Spine” is caused by the older generation, specifically the Nationals jumping over each other to undercut the other. I am confident that we and the Millennials coming on board in our companies will thrive, be disruptive with new tech, and with the energy I am seeing from them, watch what they can do.”

I am seeing a lot of contractors who have made their firm decision to abandon the whole TPA referral source of work. It is simply not sustainable. They are aggressively seeking work using creative and healthy business acquisition techniques.

I say it’s about time!

From the contractor’s perspective is there a noticeable difference between doing “program work” and oversight by a Third Party Administrator?

Absolutely! Look – originally “program work” loosely defined contractor qualifications and service expectations. The payment would be “usual and customary” prices common within the general industry. That’s a sustainable model! The buyer took control of TWO of the three purchasing decisions. That’s a fair arrangement.

The TPA model dictates the product, the service AND the prices. This is by definition; NON sustainable and abusive to the contractor’s freedom to conduct fair trade.

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Conceptually who is the Registered Third Party Evaluators ' client?

The RTPE is still an idea in development. I will say I am very excited and encouraged to see the level of interest among those in our industry with the highest level of formal education in restoration. They are aggressively signing up right now and getting their RTPE number assigned to them.

That being said, in a perfect world, the RTPE would objectively represent the needs of the project rather than any particular entity involved.

But the fact is that the RTPE would be called onto the job by one of the entities involved, so there would surely be a natural interest in communicating on the subject in a fashion that would be of particular interests to certain ones involved.

Look. There will be some bad contractors out there whose workmanship must be called out for what it is: Crap. There are certain homeowners who may or may not like the expert's call on the restorability of their property. And... there may be some insurance representatives who may wish certain structural repairs would not have such far reaching consequences and associated expenses. The facts – shall be the facts on a fairly evaluated project.

But at the end of the day, the needs of a competently executed project must be the final beneficiary. That's who the RTPE must ultimately represent.

The insurers have unqualified TPAs who bully the contractor. I say the contractor can benefit from having a giant friend with monster formal education credentials and a baseball bat of a resume who can help them in their discussions with the TPA bully.

How do you envision Registered Third Party Evaluators trumping TPAs?

Well – that is still being defined. But I will say that I have found RTPes to be effective in defending courageous contractors who are tired of being the abused step-child. TPAs rarely have much more than a Chihuahua's bark in their "recommendations" for a contractor to reduce their charges. There are definitely ways to make both the insurer and the TPA reconsider their statements and involvement in the settlement of an insurance claim.

But if I can say this once, I'd really like to emphasize this: If the contractor agrees in writing to an unfair or illogical program stipulation ... there is little that ANYONE can do for them! They agreed to it. That's now the contractor's fault. If the contractor agreed to the program for fear that the competition would get that non-profitable job... well hopefully they learned that "sometimes the most profitable word in the English language is... "NO!"

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Peter Crosa, AIC, RPA answers to questions and comments:

Why don't insurance companies differentiate between good and bad restoration contractors?

Insurance companies don't really care. That is, they tend to lump all contractors into one devious group that must be watched, reviewed, negotiated regardless of merit, and audited for the clawback.

As an independent insurance adjuster, what do you consider ethical and unethical about referral fees and gratuities?

Gratuities is not a preferred word, implies "paying back" for something. Promotion and entertainment are IRS permissible and apply to all businesses. Solid and ethical when done to reinforce a relationship. If done to pay back or influence outcome of a claim that's unethical.

What led to the institution of insurance company program work?

Program work started because insurance companies felt that they had lost control over property damage claims. Insurance companies control the purse strings and don't want contractors controlling the claim. "Let's make contractors play by our rules, not let them work on our losses unless they agree to our terms."

Who is Widow Brown?

Insurance repair industry shouldn't complain about how they are being mistreated, they should complain about how "Widow Brown" is being mistreated. The insurance companies' perception is that you are a bunch of rich contractors. No one cares about a bunch of rich contractors saying poor me. If you want to fight the iniquities heaped upon the contractor, you need a campaign and focus on the results of the iniquities of the property owner. Tell the victimized property owners story, the Widow Brown!

Any prediction on the Third Party Evaluator concept?

The insurance industry will likely scoff at the Third Party Evaluator concept. It will need to be tested in court to attain credibility. You're dealing with someone who changes the rules during the game. The work around would be if designation was awarded by a consumer advocacy group.

Compared to well-known insurance companies we see ads for how is Florida Citizens different?

Florida Citizens was created as an insurer of last resort. A major insurer pulled out of Florida after hurricanes making obtaining standard homeowners insurance difficult so Florida Citizens was created for them. Citizens' policy is more restrictive than conventional policies. Florida is a seller's market.

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Citizens have entered into agreements with various independent adjusting firms throughout the state to handle claims. Citizens train the adjusters on the limitations of the policy and the way they want their claims handled. Citizens bid the adjustment out on an annual basis.

Can you offer any advice or tactics for dealing with TPAs who are pressuring the restoration contractor to cut scope of work and costs?

Limiting the scope of work is unethical. Mitigation is required to put the property back into a pre-loss condition, if being told to leave it wet or leave the mold you've got to document what you are being asked to do and let the policyholder and the agent know what's at stake, unless you want to comply and therein lies the growing a spine admonition. You either cower and do what you're told or raise hell and let everybody know, which may jeopardize the relationship but you are doing the right thing.

Ed Cross, Esq. answers to questions and comments:

Comment: Rules and laws are different among states. California is known to be pro-consumer and arguably anti-business. It has been said that laws move from west to east, that California is on the legal forefront on legal actions and legislative developments, and that parts of the rest of the country tend to follow.

Have the construction and restoration industries been singled out for disparate treatment, particularly in California?

Yes. There are many strict rules against certain contractor behavior that have no counterpart applicable to other professions. For example, contractors must satisfy judgments within 90 days or their licenses will be suspended. Not so for doctors, lawyers or real estate agents.

Home improvement laws contractors in California are prohibited from charging hourly fees, and I know of no such prohibition for any other industry. All "home improvement" work must be done for a lump sum price which is stated in writing signed by the customer before any work begins. Someone in the legislature is unhappy with contractors and restorers. Perhaps this is rooted in frustration over "bait and switch" tactics.

In California can a restoration contractor legally pay a referral fee to a plumber?

In California, Contractors may pay referral fees to other professions so long as they aren't contractors, but referral fees between contractors are illegal. The state published a newsletter characterizing finder's fees, referral fees and any other form of such compensation as "illegal kickbacks." The purported rationale for the rule is that the fees will increase costs to the consumer, and that allowing the fees creates an uneven playing field for contractors who obey the law and don't pay the fees. Ed doesn't share the concern.

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Other professionals, such as lawyers and real estate agents, are allowed to pay referral fees. If there is an uneven playing field, Ed believes it is because of this law which should never exist in the first place because referral fees should be viewed as a marketing expense.

What schemes are consumers in California using to extract money from contractors and how/where are they learning to do this?

On the Restoration Lawyer's "Threat Advisory System," I place the threat level for risks to contractor's licenses at "orange" (high).

Through new technology, consumers have instant access to information. Ed has noticed an uptick over the last couple of years claims against contractor's bonds and licenses. A big part of Ed's professional effort currently goes to defending California contractors against threats to their licenses. The California contractor's license board has a robust pro consumer website which anyone can go on to learn how to go after contractors. There is no charge to consumers for filing claims and the License Board prosecutes them fiercely. Years ago, most unhappy consumers would hire an attorney and incur fees, but more and more consumers are now making "free" claims against contractor's licenses and bonds. When a claim is filed, surety for the bond and the state license board undertakes the investigation, while consumer sits back.

What makes it more nerve-wracking is that the penalties are inconsistent. A set of violations may trigger an action seeking to have a contractor's license permanently revoked (even with a clean record), whereas a similar set of violations by another contractor may be met with a slap on the wrist.

Comment: Restorers should focus keenly on the standards of care. The standard of care is practices common among those recognized as qualified and competent. That does not necessarily mean the practices of the very best companies, but practices common among "very good" companies. The standard of care may (or may not) be the state of the art. Stay out of trouble by: maintaining good customer relations, listening, and addressing needs of the consumer. Secondly, provide good workmanship, obeying standard of care. Thirdly, make sure you have good documentation and contracts, properly-prepared and updated to comply with current law.

Comment: The restoration industry must band together or burn together.

What do you think of a contractor taking an assignment of benefits, agreeing to perform the scope needed rather than the one approved and then suing for bad faith on a select basis?

Ed's general strategy is geared more toward litigation avoidance. He would not take a job if he knew at the beginning he was going to have to file a lawsuit to get paid. The insured is in the best position to pursue rights under the policy.

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However, in many states, those rights can be assigned under an assignment of benefits (AOB), which is the transfer of a legal right from one party to another. The holder of the AOB (in this case, a contractor) steps into the shoes of the policyholder.

A well-drafted AOB includes the right to sue for bad faith and many insureds do not have the resources to prosecute an insurance claim against a stubborn insurer and obtain a fair settlement. Contractors should take a sober look at the short and long term costs of suing an insurance company, including the impact on future projects.

Many contractors mistakenly believe that the “direction to pay” within their contract is an AOB, but it is not. Directing someone to drop off your car is different than signing over the title. The best AOBs are broad and transfer all rights in the policy related to the work done over to the contractor, not just the money, but all rights including the right to sue the insurance company. The AOB should be formally “tendered” to the insurance company in a letter that is dedicated exclusively to the AOB. The AOB is an important tool that can accelerate contractors’ collections.

Comment: In scope and pricing disputes, keep in mind the distinctions between pricing and the work that is being done. Because pricing is being negotiated, hopefully the scope isn’t being reduced or the contractor isn’t being paid for only part of the services. Formally notify the insured what is wrong, make the needed recommendations, explain the harm that will result and make sure the customer will pay for the necessary added work. If the customer refuses necessary remediation, the contractor should seek a release of liability. If the customer refuses to sign the release, the contractor should withdraw from the project, and send a detailed letter explaining the need for the work, and documenting the request for the release and the customer’s refusal, in order to create a paper trail showing unreasonableness.

Comment in response to audience text question: *Carrier price fixing using an arm length relationship between TPAs and Xactimate?*

The rich are getting richer and big companies are getting bigger. We’ll see more conglomerations of companies. Plumbers are getting into the restoration business. And bigger TPAs will likely become more intimately involved in contractor’s lives. It’s up to restoration industry to band together or burn together to try and stand up against it. It may be possible to prove a case for price fixing, but it will be expensive, hard work.

The insurance industry is careful how they navigate the pricing issues. Lessons can be learned from the way the auto repair industry successfully fought back against the insurance industry to reduce auto repair costs.

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Ed Cross' Final Comments:

First, on a micro level, many pros lose important collection opportunities because they miss their right to record mechanics liens. Recording liens is risky if not done by a trained professional. The deadlines are short and rigid, but mechanics liens are a great settlement tool.

I have filed many lawsuits to commence foreclosure proceedings on these liens, but actual foreclosures of mechanic's liens are rare. Having the lien gives leverage in negotiations with both homeowner and a mortgage company who is holding the funds.

I am also concerned about a recent trend of insurance companies belatedly seeking refunds of money already paid on old projects, in some instances, years after the check has cleared. They claim mistake or fraud and hire third party evaluators to critique old invoices to support a claim for a "claw-back."

On a macro level, I think it is vitally important for the restoration industry to join forces, get organized and hire lobbyists to protect their rights. The insurance industry has a powerful lobbying presence nationwide, but the restoration industry is essentially mute. It is important for RIA to act with other groups like IAQA to lobby and take on the role of a global voice for restoration contractors to preserve the rich legacy.

Ken Larsen's final comments:

TPAs and programs allege costs of supervision and management are part of overhead. Contractors shouldn't forfeit rightful revenue of the leadership supervision and management necessary to coordinate an efficient restoration project.

He believes most restoration contractors want to be first-rate contractors. In order to be a first-rate contractor they must first define it, live up to it and aggressively go out and get it. They may need to revisit, readjust and reinvent themselves.

Peter Crosa's final comments:

AOB means let the court decide. Who's afraid of the big bad wolf? Who's afraid of the court? Answer that question and you'll see where the problem is.

It's about Widow Brown!

Pete Consigli's final comments:

TPAs have served as middlemen on claims for insurers since the 1980s. Early TPAs were operated by larger independent adjusting firms. They served the needs of insurance carriers who had overflow work in a market or where smaller carriers didn't have a claims office.

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Now the outside organizations receive all of the claims adjusting work. The knowledge, experience and talent of adjusters haven't been transferred. The new generation

TPAs are not trained in the same manner and don't understand contractors like the old school adjusters. That's where he thinks the issues are.

Global Restoration Industry Watchdog Takeaways:

- We need to unify the industry and improve it before passing it on.
- Antitrust laws are different in Canada. Deloitte Touche conducted market research in Canada (funded by the RCOC) and brought Xactware to the table.
- Xactware compiles data based on input from periodic request of its user data base. The company claims it "spits out what it is fed". The main point is restoration contractors (PM's, estimators, etc.) should find time to input the survey request! If they don't take the time to do that, then don't bitch about Xactware line item pricing.
- British Damage Management Association (BDMA) is working closely with the insurance industry to develop standards through British Standards Institute (BSI) for damage repair. The BDMA offers a Professional Adjuster designation. The Brits need to be invited to a future RIA event to share their lessons learned with the fellow global restorers!
- In 2007, RIA member Joe Arrigo won the Martin King award for leading "anti-steering" fight in Colorado.
- It was the last time Marty presented the award in person at RIA and he opened by calling Joe a "Hero". The first and only time in the history of the award that the recipients' name was divulged at the begging of the presentation speech!
- More and more high achieving women in restoration, they should be involved in more industry programs to offer their perspective.
- Insurance companies are "clawing back" and demanding money back from losses settled years before. Ed Cross addresses this in his talking points above.
- The AOB issue is bigger than just Florida. The issue is about the divide between restorers and insurers and the AOB contentious battle in Florida being played out in Tallahassee on a micro level underlies a larger macro global issue!
- It's political; we must sit at the table, step up and do something if we want to influence change. The upcoming FAIR Conference in Florida should be attended by local restorers and especially national companies that have Sunshine State offices. For more info: <https://floridainsurancereform.org/2017uninsuredrisk/>
- Contractors must submit their pricing data to Xactware in order to input their influence over the data. Reinforce the point made above!

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- Young Turks are visible, more prevalent and moving into a position to assume an industry leadership in the future.
- PIRC conference follows the auto collision industry. It's a forum to identify challenges and develop solutions. Jury is still out. We'll see where insurance industry and restoration contractors can come together. The model allows all stakeholders to sit at the table with a voice to identify challenges and come up with suggested solutions. For more info: <http://gotopirc.com/>
- Floridians should consider going to the FAIR show, Florida insurance reform group. See link above.
- We need to step up and take action. We have a duty to our industry to do it. The state of the industry must be in a better place for the next generation than it was from those that came before us.
- Don't quit. Never, ever, give up! Do what's right!
- If we embrace Jimmy V's famous Espy speech message and have a Heck of a Day Every Day by laughing, thinking and having our emotions moved to tears, together we can change the Restoration World we live in for the greater good for the disaster victim's world-wide served by the global men and women of restoration!
- Not sure what that means, take a few minutes to listen to Jimmy V: <https://youtu.be/HuoVM9nm42E>

Z-Man signing off

Trivia question:

The Advocatus Diaboli was formerly an official position within the Catholic Church. Translate Advocatus Diaboli into English?

Answer:

Devil's Advocate