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ETHICS AND THE WORKER'S COMPENSATION PRACTITIONER

"A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal systems and a public citizen having special responsibility for the quality of justice.

. . .

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living."

Preamble to Rules of Professional Conduct for Attorneys - SCR Chapter 20

MOST COMMON COMPLAINTS:

Based upon data from State Bar of Wisconsin the common complaints received from clients and former clients fall into three categories: Contact with the attorney / Failure to keep client informed; Trust account issues; and Conflict of interest.

Formal rules regarding the issues dealing with diligence, competence and conflict of interests are found at SCR 20:1.1, 20:1.3, and 20:1.7 and 20:1.8.

20:1.1 Competence: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for representation.

- Pursuant to rule 20:7.4 a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. However, a lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law unless: (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and (2) the name of the certifying organization is clearly identified in the communication.

ABA Comment: A lawyer is permitted to indicate areas of practice in communications about the lawyer's services. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but that communication is subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

20:1.3 Diligence – A lawyer shall act with reasonable diligence and promptness in representing a client.

ABA Comment: - A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. The duty to act with reasonable diligence does not require the use of offensive tactics or "preclude the treating of all persons involved in the legal process with courtesy and respect".

- A lawyer's work load must be controlled so that each matter can be handled competently.

- "Perhaps no professional shortcoming is more widely resented than procrastination." Unreasonable delay can cause a client needless worry, anxiety and undermine confidence in the lawyer's trustworthiness.

20:1.7 Conflict of interest current clients – A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk the representation of one or more clients will be materially limited by the responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Exception found in paragraph (b) the representation may proceed if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim

by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing signed by the client.

ABA Comment: A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions in paragraph b.

- Absent consent a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.
- Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interest.
- As indicated in paragraph (b) some conflicts are nonconsentable and the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.
- Under some circumstances it may be impossible to make the disclosure necessary to obtain consent.
- Each affected client must be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client.
 - issue with sophisticated and non – sophisticated clients
 - interest of person or entity paying for a lawyer's service
- A lawyer who represents a corporation or other organization does not necessarily represent any constituent or affiliated organization. See Rule 1.13(a).
- If the lawyer for a corporation or organization is also on the board of directors the lawyer should determine whether the responsibilities of the roles conflict.

20:1.9 Duties to former clients – Any lawyer who formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing a signed by the client.

- if prohibition exists for law firm in which lawyer was formerly associated then prohibition follows lawyer.
- even if cannot take case against former client lawyer is prohibited from disclosing information obtained from prior representation which can be used to the disadvantage of the former client or disclosing protected information.
- the subsections of this section provide for obtaining of former client written consent to representation (if you dare).
- under SCR 20:1.10 Imputed disqualification if the disqualification applied to one member of a firm the prohibition extends to all members of the firm.
 - There are again a number of exceptions and requirements for written consent and caveats as to whether the information gathered or services rendered were “isolated” and “minor”, however the ABA Comments indicate the primary concern is the opinion of the former client as to whether the duty of loyalty was breached.

If the individual lawyer is prohibited from taking certain action the lawyer cannot allow any nonlawyer employed or retained by (or associated with) a lawyer to act in any manner that is non-compatible with the professional obligations of the lawyer. SCR20:5.3 Responsibilities regarding nonlawyer assistants:

- a lawyer is responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by the lawyer if the conduct is ratified by the lawyer
- a lawyer is responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by the lawyer if the lawyer has managerial authority in the firm or have direct supervisory authority over the

person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Also: 20:8.4 Misconduct – It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

- if you cannot do it then cannot assist, induce or instruct an agent to do so on the lawyer's behalf.

RESPONDENT ATTORNEY PERSPECTIVE

ANATOMY OF A CLAIM WITH PRO SE APPLICANT

“You do not want to have a hearing with this pro se claimant. First I have to defend the applicant - then when I’m writing the decision I have to decide what a fantastically wonderful job I did.”

Anonymous DWD ALJ

Factual Scenario:

Ms. Sally Brown has been an employee of ABC Corp. for 5 years and on April 1, 2006 she slipped on oil that had accumulated on the floor of the machine shop where she worked and fell. She twisted her right ankle as she fell and also struck her right shoulder on the floor. She was taken to the emergency room and she was diagnosed with right ankle sprain and right shoulder strain and was allowed to return to work with sit down, light duty restrictions that were accommodated by ABC Corp.

She had no wage loss. She continued to work her regular shift from 6:00 a.m. to 3:00 p.m. and then attended physical therapy for her shoulder and ankle after work. The claim was initially conceded and paid.

After several months of no improvement on her ankle she was sent for x-rays and an MRI that revealed no structural issues with the ankle but she continued to have subjective complaints of pain. After several months of no improvement with her shoulder and an opinion that she now required permanent restrictions for the shoulder based upon suspicious findings on MRI of possible fraying and pain with motion, the matter was referred by the worker's compensation carrier for an IME.

The IME found that Ms. Brown had reached an end of healing for her temporary ankle sprain, had no permanent restrictions and no PPD. The IME also found that Ms. Brown had reached an end of healing for her temporary shoulder strain and that any fraying observed on MRI were the result of pre existing degeneration of a personal health nature and that any recommended restrictions were for her personal health condition and not the industrial injury. It was the opinion of the IME doctor that she had reached an end of healing for her industrial injury and there were no restrictions necessary and no PPD.

ABC Corp. informed Ms. Brown that as her restrictions were not related to an industrial injury but a personal health condition they could not accommodate the restrictions on a permanent basis and she was released from her employment. Ms. Brown was able to immediately secure employment within her restrictions making her same wage as at ABC Corp.

Ms. Brown has filed an application for hearing for past medical expenses, past out of pocket expenses, past mileage reimbursement and future prospective medical care for additional therapy. The case is now set for a pre hearing conference and you are representing the employer and the worker's compensation carrier.

SCR 20:4.3 Dealing with the unrepresented person.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall inform such person of the lawyer's role in the matter. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer role in the matter, the

lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

S. Ct. Order 04-07, filed January 5, 2007, eff. July 1, 2007.

At the time of the pre hearing Ms. Brown informs the administrative law judge that she has called several Applicant attorneys and since her claim only involves medical bills she could not find anyone to take her case.

Practice Dilemmas:

- A. In the hearing room waiting for the arrival of the ALJ, Ms. Brown asks if you think there are other claims she could be making other than those listed on the Application.
How do you respond?
- B. In the hearing room prior to the arrival of the ALJ Ms. Brown asks if you can help her prepare her WKC-3 Medical Treatment Statement as the form is confusing to her and she shows you a large stack of medical bills and statements and the blank WKC-3 form.
Can you volunteer to assist her with preparation of the WKC-3?
Are SCR 20:1.7, SCR 20:1.9 or other sections applicable?
Can you assist her with preparation of the WKC-3 with permission of the clients? If yes, what type of permission from the client is necessary?
- C. The pre hearing has begun and Ms. Brown shows the administrative law judge the large stack of bills and the blank WKC-3 Medical Treatment form. The judge would like to try and get the case settled at the time of the pre hearing. The ALJ informs you to go through the bills and “ballpark” the amount of the bills for settlement discussion.
Can you agree to do this? Why or why not?

Do you require permission from the clients prior to agreement to perform this task?

- D. The previous matter ran long and the ALJ is late arriving for the 11:30 a.m. pre hearing conference. Upon entering the hearing room the ALJ is advised Ms. Brown has this large stack of bills and she is confused as to how to complete the form so she is unaware of the total amount of medical bills being claimed. The ALJ indicates they are leaving to eat lunch and since their 1:00 p.m. hearing has settled they will do the pre hearing at that time. You are instructed by the ALJ to “assist” the pro se Applicant in reviewing the medical bills and prepare the WKC-3 during the time the ALJ is gone so meaningful settlement discussions can take place upon their return.

Are there any ethic issues regarding the assignment of this task?

Does it violate SCR 20:1.7, SCR 20:1.9, SCR 20:4.3 or any other rule of professional conduct?

(SCR20:4.3 Dealing with the unrepresented person – a lawyer shall inform such person of the lawyer’s role in the matter. . . . The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.)

Do you require permission from your clients prior to engaging in this task?

Can an argument be made that “it is in the best interest of your client” to comply with the request of the administrative law judge – the person who could potentially hear and decide this matter? Does that waive any responsibility or requirement to contact the client prior to engaging in this endeavor?

SCR 20:3.3 Candor toward the tribunal.

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If the lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in pars. (a) and (b) apply even if compliance requires disclosure of information otherwise protected by SCR 20:1.6.
- (d) In ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal of make an informed decision, whether or not the facts are adverse.

Applies to worker's compensation as under SCR 20:1.0(p) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will

render a binding legal judgment directly affecting a party's interests in a particular matter.

Requires - truthful statements of fact and law.

Requires – disclosure to tribunal of controlling legal authority.

Requires – correction of evidence discovered by the lawyer to be false.

ABA Comment states:

“Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.”

Practice Dilemmas:

A. Ms. Brown arrives at the pre hearing with her WKC-3 Medical Treatment completed. However, as you are reviewing it at the pre hearing in anticipation of settlement discussions you realize she has omitted a large medical bill for an MRI.

Do you have a requirement to volunteer that you discovered an error in her calculations?

The ALJ has observed that you are reviewing the bills and asks if you agree with the numbers on her WKC-3. What is your response at that time? Does it change from above?

What if this is a WKC-3 Medical Treatment Statement submitted by an attorney for hearing. If there is a mistake that favors your client and the parties begin to engage in settlement discussions, must you call the error to the attention of the attorney for Applicant? Does SCR 20:1.1 or SCR 20:1.3 influence your decision.

Why or why not is your response the same or different?

- B. Prior to the time the ALJ has arrived at the hearing you observe that Ms. Brown has a severe limp which she tells you was caused by the ankle injury. Prior to the arrival of the ALJ she asks you if she can collect money for that part of her claim under worker's compensation.
What is your response?
- C. The ALJ has arrived and settlement discussions have begun as to the claims for medical expenses, out of pocket expenses and mileage reimbursement as claimed on the Application. The ALJ then asks if you can think of any other item of damages that the parties should be discussing as part of Ms. Brown's case based upon the Application.
What is your response?
Is your response different in light of SCR 20:3.3 if the ALJ inquires as to whether you can "think of any other claims" to be discussed regarding Ms. Brown's Application?
How is your response the same or different?