Worker's Compensation Ethics Seminar 2.0
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The Judge's Corner

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A few things have happened since we last met. We have a revised ethics code (which may be found online at http://www.legis.state.wi.us/rsb/scr/5200.pdf). The most recent version became effective July 1, 2007. Of course, most of the rules are the same, but there are some interesting items.

Another was that the Supreme Court in an ethics opinion found an attorney culpable of ethics violations for believing his client too much (or so it seems). That case is *Disciplinary Proceedings Against Nunnery,* 2007 WI 1, 298 Wis. 2d 289 (2007). In fact, it's that one we will start with.

I. THE ATTORNEY'S OBLIGATION TO INVESTIGATE THE ASSERTIONS OF THEIR CLIENT

Nunnery's practice generally concerned employment discrimination matters.

In the relevant instance, constituting Counts 10 and 11 of the disciplinary complaint, the attorney was engaged to represent a lady in an employment action against a technical college. She alleged racial discrimination and sexual harassment.

The claimant provided the attorney a number of "plastic-laminated" documents to support her claim, assuring the attorney the documents were authentic. She said that she had laminated the documents to prevent their theft. The referee found this to be "absurd."

The documents were purported emails, correspondence, and memos containing racially derogatory comments, an apology (for terrible sexual assaults, harassment and threats), and the like. These documents were offered as part of the litigation in Federal Court, and were felt by the court to obviously fraudulent.

The attorney had failed to inquire into the veracity of the emails, despite their suspicious nature (there were date discrepancies in the documents as well, though the referee found those were not readily apparently discrepancies). The attorney had been advised by the opposing attorney that the purported authors had denied writing them.

Despite an appeal to the Seventh Circuit Court of Appeals, the litigation was eventually unsuccessful. At each level was comment about the obvious and vexatious lack of merit of the worker's claims. In the court below, the attorney received sanctions for reliance on "false and forged pieces of correspondence."

The ethics referee found, and the Supreme Court concluded, that even though it could not be proved that the attorney had the requisite intent to support a charge that the continuation of the obviously false claim was an intent to take an action when it was obvious that the action would serve merely to harass or maliciously injure another.

However, the attorney's representation was felt to be a failure to provide competent representation, and thereby subject to action.

At pages 305-306 of the decision, the court set forth the explicit findings of the referee of the failures that were detailed in the decision's previous pages:

> By failing to meaningfully inquire into the veracity of the suspicious e-mails and letters that his client claimed were sent by defendants in the [E.J.] case; by blindly relying on his client's unreasonable assurances that the documents were authentic, and that their extraordinary contents were actually reduced to writing by their alleged authors; by filing the second amended complaint, which contained material allegations based directly upon the questioned documents, after failing to investigate the authenticity of the documents;

by essentially ignoring sworn statements of the purported authors that the documents were fabrications; by making conflicting statements to the District Court about the 'original' documents which prompted the court to question Nunnery's candor toward that tribunal; and by pursuing an appeal arguing the wrong legal standard, and presenting an appellate brief containing only one page of argument . .

For our purposes, then, this case stands as a warning in terms of blindly relying on a client's provided evidence and the client's assertions of the authenticity of the same. There is also warning for proceeding further in litigation when warned by a court and opposing counsel of the inauthenticity of documents and/or evidence without taking steps to investigate independently the veracity thereof.

In this instance, this was not the only count for which the attorney was found to have violated ethical canons, but it is the one with the slipperiest slope.

What if the attorney had told the client the documents were false despite her claims of truthfulness? Wasn't there risk of suit (or an ethics proceeding) against him if he had refused to prosecute her suit (once he took the case)? For that matter, is there any doubt from the opinion that the claimant would have sued him for taking such action? Or was he simply supposed to endure that, once having been taken in by her himself (he took her on as a client)?

What about the requirement of zealous advocacy ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." SCR 20, Preamble [2].)

The court took some pains to note that there was evidence that the client was a malingerer and pathological liar. The evidence was equivocal, but the court **did** mention it in the opinion.

Additionally, it must be noted that the attorney could have been found guilty of more than simply incompetent representation. Absent a finding of intent, the attorney was not found guilty of litigation that merely harassed or injured another. The next attorney might not be so lucky.

Hence, the court enforces on attorneys that they are not simply permitted to believe their clients. In fact, the court seemed to suggest that the claims and defenses of the defendant/respondent are relevant to the issue of the attorney's obligation to delve more deeply into the veracity of the client's evidence than previously the attorney had thought necessary.

It is, at the very least, an issue of competent representation. It has the potential of turning attorney into the inquisitor of the client, which has its own dangers vis-à-vis the trust the attorney and client must have in each other to proceed.

And it is interesting that the court did not find intent to harass, or the like. It claimed that the attorney was to be sanctioned as not providing **competent representation**.

SCR 20:1.1 provides that competence means the following: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Under that definition, what didn't this attorney do? "Meaningfully inquire" into the veracity of the documents provided is the phrasing used above.

But what does "meaningfully inquire" mean? Does it mean, "talk the client out of stuff a court obviously won't buy, no matter how much the client has talked themselves into the veracity of their 'stuff' "?

Regardless, the rule is out there: one cannot simply take one's client's word as to the veracity of the client's proffered evidence. Doing so becomes risky later when countering evidence/argument is presented.

Ultimately, it must be said that in this case the determination was frequently and often said to be obvious. How obvious it needs to be to endanger the attorney ethically is not said. That leaves the attorney with this admonition: Trust (if you wish), but verify.

For your own client's good, and yours.

II. RULES ON FEES **AND EXPENSES**, ESPECIALLY CONTINGENT FEES

Applicant's attorneys represent people on a contingent fee basis (still maximized at 20% of the recovery per Wis. Stat. sec. 102.26 (2)). Respondent's attorneys generally work on an hourly basis.

All attorneys must charge a "reasonable fee." Likewise, **the expenses** must be "reasonable." The reasonableness of the fee **and expenses** is subject to an eight point test contained in SCR 20:1.5 (a), which is commended to the reader for further study.

(Any idea what "unreasonable expenses" are?)

The new rules spell out that "The scope of the representation **and** the basis or rate of the fee **and expenses**" must be communicated to the client in writing either before or within a reasonable time after the commencement of legal services. The writing must not only contain the information that specifically informs the client of a fee and expenses (no

more bolding, you get the point) arrangement, but the attorney must confirm in writing for the client just what the representation entails.

If the fee and expenses are contemplated to be less than $1,000, the requisite information may be orally given. Any changes in the basis or rate of the fee must be communicated in writing. SCR 20:1.5 (b).

When a client inquires as to information on fees and expenses, the answer must be promptly given. SCR 20:1.5 (b) (3).

There are specific requirements for contingent fee contracts (the contingent fee contract is the norm for representing injured workers). Those are contained in SCR 20:1.5 (c) and are summarized thus:

The contingent fee contract must be in writing. It shall state the method by which the fee shall be determined (that is, including the percentage to be used to calculate the fee).

It must state the litigation and other expenses to be deducted from the recovery and whether the expenses are to be deducted before or after the percentage is applied for fees.

"The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party." The expenses may be made contingent on the recovery, but if not, whatever is not contingent must be spelled out in the writing. (Query, does "any expenses" mean, as I think it might, that the types of expenses to be expected are to be spelled out in the agreement?)

The writing setting forth the contingent fee must be **signed by the client.**

Further, upon conclusion of the representation, the lawyer shall provide the client a written statement stating the outcome of the matter, and if a recovery is made, the writing must show what the client got and how it was calculated.

III. RULES ON CONFLICTS OF INTEREST

Applicant's attorneys may run into potentials for conflicts of interest when the worker and the health insurer wish to simultaneously engage the attorney's services for recovery in a given work injury. Respondent's attorneys may run into a conflict where they represent the insurer and (nominally, if not actually) the insured.

Our brief discussion here will focus on the concept of "concurrent" conflicts of interest as that term is used in SCR 20:1.7.

Such a conflict occurs when the representation of one client is "directly adverse" to another client **or** when there is a "significant risk" that one client's representation will be "materially limited" by the representation of a current client, former client, third person (such as the interests of a person paying for services rendered to a client), or by the personal interests of the lawyer.

According to (a), the lawyer "shall not" represent the client in those interests where there is a "concurrent" conflict of interest. However, according to (b), there are instances in which an apparent concurrent conflict of interest can be waived.

All these requirements must be fulfilled for the representation to be permissible:

The lawyer must reasonably believe he will be able to provide competent and diligent representation for each client; the representation is not otherwise prohibited by law; the representation does not involve the assertion of a claim by one client in a given

litigation or proceeding against another client of the attorney in that litigation or proceeding; the clients both give "informed" consent in writing to the representation.

IV. PROHIBITED SEXUAL RELATIONS

Listed under the rubric of "Conflict of Interest: Prohibited **Transactions**" is this little ditty: SCR 20:1.8 (j) provides that an attorney may not have sexual relations with a current client unless the consensual sexual relationship existed already when the client-lawyer relationship began.

Sub. (1) defines the term "sexual relations" to mean "sexual intercourse or any other intentional touching of the intimate parts of a person or causing the person to touch the intimate parts of the lawyer."

This may not be waived, even with independent representation, in writing, orally, or otherwise.

V. REACTING TO YOUR CLIENT'S CRIMINAL CONDUCT.

SCR 20:1.6 (b) provides that "A lawyer **shall** reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another."

SCR 20:1.6 (c) (2) permits (does not requires) the attorney to reveal confidences

"to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services. . . ."

SCR 20:1.6 (c) (1) permits disclosure to "prevent reasonably likely death or substantial bodily harm. . . ."

What illegal activities can our clients be doing that would implicate us as attorneys? Here are a few I have seen over the years (and a later one I suggest as possible):

A. Outstanding warrants (failure to appear in court). You can pick these up on CCAP.

B. Illegal immigrant status.

C. Social Security Fraud (using false numbers, or else using multiple numbers with one being correct). This sometimes goes hand in hand with illegal immigrant status.

D. Failure to file taxes (state and/or Federal); tax fraud.

E. Perjury.

Obviously, there are people who would be happy to have this information (including but not limited to various members of law enforcement). And, in a way, they (and we, as a society) are entitled to that information. I would doubt anyone here seriously supports lawbreaking.

That being said, of course, the attorney has confidentiality obligations to the client (Generally stated in SCR 20:1.6 (a)). So, when this information comes into the lawyer's hands, what is the lawyer to do?

Mandatory revealing of the information comes out of SCR 20:1.6 (b). The lawyer must reasonably believe the crime or fraud involved will likely result in death or substantial bodily harm or in substantial injury to the financial interest or property of

another.

If that is not true, then no matter how lawbreaking the client's conduct is, reporting the same is not mandatory (meaning failure to report is not an ethical violation). If an attorney reasonably believes to the contrary (that such harm will occur), reporting becomes mandatory.

Reporting becomes permitted (that is, the attorney is shielded from a conviction on an ethical complaint based on the reporting) under sub. (c). which includes reporting required by law or court order. Permitted reporting is, obviously, not required reporting.

In short, it does not appear that the attorney is required by the above rule to report any of these to legal authorities unless the requisite level of danger or damage is met. In fact, these sections require that unless the requisite level of danger or damage is met, the attorney may not reveal this information to appropriate authorities.

That does not prevent an opponent attorney who comes across this information from reporting it, however. There is no **requirement** that such be done, but it is obviously not prohibited.

Further, the old rule that said, in sum, that it was unethical to threaten criminal prosecution or reporting solely to gain advantage in a civil suit **no longer exists.** (Former SCR 20:3.10 no longer exists. That section is listed as "Omitted" in the current rules.)

I would offer 2 caveats.

First is that the attorney need take care not to in any way become involved in, complicit with, or in conspiracy with the client's chosen misbehavior. Commission of a crime by the attorney is itself a violation of the ethics rules (SCR 20:8.4 (b)), and

"engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation. . ." is likewise prohibited (SCR 20:84. (c)).

There remains one other consideration about which to take care. There are responsibilities of the attorney to make disclosures to the tribunal (or fail to make certain evidentiary claims before the tribunal) that are not only truthful, but remedial to past or current falsehoods offered before it (see 20:3.3 (a) (1), (3)).

The responsibility to disclose falsehoods to a tribunal, in this judge's view, does not necessarily end with the result in the case. "Reasonable remedial measures" would include disclosures at such time as the tribunal may still act on the matter presented (Stats. 102.18 (4) (c), providing for one year for the LIRC to set aside an award on grounds of "mistake or newly discovered evidence").

To conclude this section:

A. This judge is unaware of legal provisions that reports be made to appropriate authorities are **required of attorneys** in the above instances. Clearly should such be **required** by law, disclosure would at least be permissive (and, in my view, mandatory by the force of the statute).

B. The **required** disclosures are premised on harm that is specifically delineated in the rule.

C. The permitted reasons for disclosure are more numerous, and are set forth in the rule. Permitted disclosures are not legally **required** (failure to make them does not subject the attorney to discipline), but permitted disclosures do shield the attorney from a confidentiality ethics complaint (at least a successful one).

D. Even so, an attorney must not cooperate in the conduct in any fashion lest he become criminally complicit in it.

E. The attorney may still have requirements to disclose falsehood or fraud to the tribunal if relevant to the tribunal's decision, requirements that survive for some time the issuance of the tribunal's determination.