WORKER'S COMPENSATION ETHICAL CONSIDERATIONS 2011

By

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A. CERTIFICATION OF READINESS AND REQUEST TO SCHEDULE A HEARING OR SETTLEMENT CONFERENCE AND THE RULES OF ETHICS

The Certification of Readiness and Request to Schedule a Hearing or Settlement Conference (COR) form implicates several rules of ethics. The form is prepared by the applicant's attorney, who certifies in writing that "I am fully ready and prepared to proceed to a formal hearing or settlement conference" on the issues identified in the form. The version of the COR in effect Oct. 4, 2011, also provided, "I further attest that I have contacted the insurer's representative and have shared all necessary information and documentation to resolve the dispute." The applicant's attorney certifies that the respondent "has either denied this claim in full or has had at least 90 days notice of the claim in order to investigate it."

The COR requires that the applicant's attorney indicate whether he or she believes there are issues over the average weekly wage, temporary disability compensation, permanent disability compensation, medical expense payment, disfigurement, death benefits and a safety violation. Specific amounts and dates are requested. There is space for listing other issues, such as vocational rehabilitation retraining and bad faith penalties.

The COR's instruction sheet indicates the purpose of the form is verification that the applicant's representative is "ready for hearing or settlement conference . . . without the risk that the applicant will request an adjournment." It is also "intended to encourage settlement discussions, resulting in earlier case resolution without the necessity of a scheduled hearing." The instructions further provide, "The applicant's representative is required to file all medical and vocational proof prior to submitting" the COR. The applicant's representative is to notify by the Worker's Compensation Division if the "status or nature of the claim changes" after filing the COR to "prevent scheduling of a hearing or settlement conference."

SCR 20:3.2 Expediting litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

The official comment to the rule makes some key points relevant to when the applicant's attorney should offer the COR. "Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client." It appears from the comments that the applicant's attorney must balance three considerations when deciding when to file the COR. First, personal considerations: will the applicant's attorney be able to handle the hearing? Fortunately, the Worker's Compensation Division allows attorneys to indicate when they are unavailable for hearing. It also allows the applicant to indicate when he or she will not be available. But what about a key employer witness or participant? Will the Division postpone a hearing so that person can appear?

It also appears from the comment that the applicant's attorney is not to delay filing the COR "solely for the convenience" of the lawyer on the other side. But if that lawyer requests time to prepare an adequate defense, the comment suggests that would be an appropriate reason for delaying COR filing. The comment deals more with delay than with a tactic of quickly filing the COR to catch the respondent off guard and unprepared, but it acknowledges "an opposing party's attempt to obtain rightful redress" as a legitimate consideration on the timing of taking action.

SCR 20:3.1 Meritorious claims and contentions

(a) In representing a client, a lawyer shall not:

(1) knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law;

(2) knowingly advance a factual position unless there is a basis for doing so that is not frivolous; or

(3) file a suit, assert a position, conduct a defense, delay a trial or take other action on behalf of the client when the lawyer knows or when it is obvious that such an action would serve merely to harass or maliciously injure another.

The COR sets forth the claims the applicant intends to make at hearing. The above rule makes clear that the applicant's attorney must make a good faith effort to assert claims for which there is factual and legal support. Thus, there must be some evidence that the wage is other than admitted by the respondent. There must be expert medical support for periods of temporary disability and amounts of medical permanent disability. There must be expert vocational evidence behind claims for lost earning capacity and vocational rehabilitation retraining. The COR's instructions provide that the evidence should be provided to the respondent's side before the COR is filed. The certification itself indicates "all necessary information and documentation to resolve the dispute" was provided to the respondent.

The COR goes further than the rule, as the comments indicate. "The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions." Given the comment, it would appear the COR ought to be filed after the lawyer devises the legal and factual strategy, and conducts some discovery to determine if the facts fit the legal theory. As a practical matter, that is the way it works as the Division will not accept a hearing application or COR without some medical and vocational proof of the applicant's claims.

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 a 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.

The Worker's Compensation Division is probably a "tribunal" as defined by SCR 1.0(p): "[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." Thus, the statements in the COR should probably be true, especially since the applicant's attorney is certifying and attesting to them.

There is an inherent conflict in the form's certification that "all necessary information and documentation to resolve the dispute" has been provided and the fact that it allows for an estimate of medical expenses. Anyone who has practiced worker's compensation law knows that a case cannot be settled without an accounting of the medical expenses by name of provider, dates of service, amounts billed and payments made by third parties. Is an applicant's lawyer who provided the respondent with an estimate of medical expenses without the bills truly "fully ready and prepared to proceed to a formal hearing or settlement conference?" The rule's comments indicate that a lawyer may make a statement based on his or her personal knowledge "only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry."

After several years, the COR has become something different than its instructions and plain language would seem to indicate. On its face, it appears the purpose of the COR is to notify the Division that the parties are unable to resolve their dispute, despite a full exchange of proof, so a hearing should be scheduled. It would almost seem as though it is a signal to the Division that a last resort -- a hearing -- is needed. But for some practitioners, the COR is offered along with the hearing application as if it is an adjunct to that form. It does not come with all the evidence the applicant's attorney intends to offer at hearing and certainly not enough "documentation to resolve the dispute." Is the applicant's attorney who offers the COR in that fashion being less than candid with the tribunal? Arguably not, because the Division's reaction to such a filing is to schedule a hearing. The Division does not seem to be interested in having the parties make a good faith effort to resolve the dispute before scheduling a hearing. By the manner in which the Division handles the COR it seems to have lost sight of its stated purpose. Attorneys cannot be faulted for reacting to the Division's conduct, not the words on the form.

B. MEDICARE SET-ASIDE ARRANGEMENTS AND A LACK OF DILIGENT REPRESENTATION

An applicant's attorney compromised a disputed worker's compensation claim and it was approved by an administrative law judge. The agreement required the respondent to create and fund a Medicare set-aside account (MSA) to cover the applicant's future medical expenses allegedly related to the disputed work injury claim. Attorneys for both sides exchanged materials related to the MSA for about a year after the settlement, but after that the applicant's attorney stopped communicating with the respondent's attorney and his client. After nearly another year passed, the applicant's attorney advised his client that he was sending the respondent's attorney a letter to establish final terms of the MSA. But instead of doing that, he asked the respondent's attorney for the MSA papers. Then the applicant's attorney fired his client because, at that point, she had filed a

grievance against him with the Office of Lawyer Regulation. He instructed his client to finish the MSA on her own.

The applicant's lawyer also admitted to a state bar investigator that he closed his office and disconnected his phone during the period when he was negotiating terms of the MSA. He did not notify his client that he was doing that, nor did he advise her how she could contact him to complete his work on the case. He contended that his work on the matter ended when he concluded the worker's compensation compromise, although he conceded to the investigator that he negotiated with respondent counsel over the terms of the MSA for at least a portion of the post-compromise period. He did not advise his client of her options should the respondent not fulfill its obligations to create and fund the MSA under the compromise agreement.

The attorney was charged with and found to have violated SCR 20:1.3 and SCR 20:1.4:

SCR 20:1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

SCR 20:1.4 Communication

(a) A lawyer shall:

(1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in SCR 20:1.0(f), is required by these rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests by the client for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The Wisconsin Supreme Court found that the applicant's lawyer stopped working on his client's MSA case in the midst of negotiations with the other side. It found that he

"failed to move them forward with diligence toward completion." *In the Matter of Disciplinary Proceedings Against Michael O. Erspamer, Attorney at* Law, 2011 WI 85 at ¶53. It also found that the applicant's attorney failed to communicate with his client for long periods of time so she did not know the status of her legal matter. Plus, he ignored her requests for status updates. Thus, he was found to have violated both rules as charged and his license to practice law was suspended for a fixed period time (the 60-day suspension was influenced by violations involving two clients).

The comments to rule 20:1.3 raise several issues regarding diligence. First, workload is to be controlled so each matter a lawyer undertakes can be competently handled. Second, a lawyer should not procrastinate as delay can cause the client to be anxious and it can also undermine confidence in the legal community. Third, the comments instruct the lawyer to communicate with the client about the scope of the representation. If in this case the lawyer truly did not agree to handle the MSA negotiations, then he should have made the clear to the client in writing after the compromise was approved. The lawyer should consider whether his initial retainer agreement with the client included the MSA negotiations.

MSAs are relatively new to worker's compensation matters. While Wis. Stat. Sec. 102.26(2) governs attorney fees in worker's compensation cases, does it affect MSA negotiations? The statute limits the attorney fees to 20% of any "claim for compensation." Wis. Adm. Code Sec. DWD 80.43(1) applies the 20% and other fee limitations to "representation for claimants under ch. 102, Stats." Wis. Adm Code Sec. 80.43(2) provides, "Fees shall not be allowed on medical expenses to the extent that other sources, such as group insurance, are available to pay such expenses." MSA creation and implementation are complicated and time-consuming. Creating the MSA requires specific physician input into the need for ongoing medical treatment and assessment of what that treatment costs under Medicare's fee structure. Implementing an MSA can require that the applicant open a special bank account, pay from that account for treatment that Medicare covers at rates Medicare uses, and that the applicant provide an annual accounting of payments as required by Medicare. Arguably, a lawyer's services in this area go beyond worker's compensation representation. It involves application and interpretation of a different law, the Medicare Secondary Payer Act. It is different than protecting an applicant from "liens" by group medical insurers because the Medicare exposure is not governed by any provision of the Worker's Compensation Act, as are the "liens." See Wis. Stat. Sec. 102.30(7). On the other hand, as in the above example, creation and implementation of the MSA often becomes a condition of the worker's compensation compromise agreement. Does that make it part of the worker's compensation case representation? The lawyer ought to make clear the parameters of the representation on this issue at the beginning of the case in the retainer agreement, not after the matter has been settled.

Lawyers must communicate with clients before making significant decisions affecting the legal representation. As the comments to the rules make clear, settlement offers must be communicated before decisions are made, unless the client earlier instructed the lawyer how to respond. In the MSA situation, clients may have to decide how much money

should be placed into an account, who manages the account, who reports to Medicare, and who gets any money left in the account at the end of its term. In the above example, the lawyer did not regularly report on MSA developments and was sanctioned for failing to do so.

How much information to provide depends on several factors, including timing, client sophistication and the complexity of the issue. The comments to the rule indicate that some clients may not be sophisticated or intelligent enough to understand the intricacies of an issue, but still an effort must be made to inform them. A lawyer does not have to explain every detail, but should provide enough information for the client to make an informed decision. Some tactical decisions are left to the lawyer, especially in the heat of trial where time constraints make it impossible to fully consult with the client on each decision. In the above MSA example, the lawyer simply stopped communicating with the client so it was easy for the court to impose sanctions.