CRITICAL ETHICS ISSUES

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INTRODUCTION

Lawyer ethics' issues in Worker's Compensation matters represent a microcosm of the same ethics issues found with attorneys who maintain a general litigation practice. The primary difference is the closed nature of Worker's Compensation litigation. Frequent dealing with the same opposing counsel, the same administrative law judges or others levels of the Worker's Compensation process, is a potential breeding ground for problems. Also, attorneys who are solos or in small firms are statistically more likely to receive a Bar Complaint than attorneys in a medium or large size law firm or attorneys who are in-house or government counsel. Therefore, to the extent that a Worker's Compensation lawyer is a solo or in a small firm setting, he or she is more likely to be on the wrong side of Bar Complaint.

The following is a review of certain portions of the Rules of Professional Conduct. There is only one set of Rules governing the ethical conduct of attorneys in Kentucky. The Rules of Professional Conduct are found in the Rules of the Supreme Court beginning at

SCR 3.130. As a result, the same Rules which apply to attorneys in litigation apply to attorneys in Worker's Compensation matters and attorneys doing transactional work. The following is a review of selected portions of the Rules of Professional Conduct, with special reference to recent reported decisions where attorneys have been found to have violated the Rules in Worker's Compensation matters.

In reviewing disciplinary cases, reference will not be made to the sanction the attorney received. In most, if not all, of these cases, the attorney was charged with multiple ethics violations. As a result, the sanction which the attorney received cannot be tied to a single ethic's violation.

RPC 1.1: Competence

This Rule provides that a lawyer shall provide competent representation to a client. Such representation requires legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

The issue of competence in RPC 1.1 is another way of saying that the right attorney needs to be selected for the right case. For example, if the client needs a tax attorney, and you are not a tax attorney, although you are legally authorized to represent the person since you are an attorney at law, RPC 1.1 provides that such representation should not occur since the attorney would not have the required "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation," as required under RPC 1.1.

Even if you are competent to represent a client regarding a given matter, it would not be unusual for a client to have more than one legal issue arising from a single transaction. For example, a case involving a civil tort claim may also include issues of federal employment law, worker's compensation, etc. RPC 1.2 provides that an attorney, in consultation with the client, may limit the task for which the attorney is retained.

Kentucky Bar Association v. Keesee, Ky., 952 S.W.2d 705 (1997). (Attorney failed to provide competent representation to a client by failing to prepare and file the necessary documents in the client's application for Worker's Compensation benefits).

RPC 1.3: Diligence

This Rule simply states that "a lawyer shall act with reasonable diligence and promptness in representing a client."

Klapheke v. Kentucky Bar Association, Ky., 31 S.W.3d 895 (2000). (Attorney failed to file pleadings in a Worker's Compensation case within the statute of limitations).

Kentucky Bar Association v. Keesee, Ky., 952 S.W.2d 705 (1997). (Attorney failed to prepare and file Worker's Compensation Application for client).

Kentucky Bar Association v. McChord, Ky., 931 S.W.2d 155 (1996). (Attorney failed to diligently pursue Worker's Compensation case, for one year after being retained. (Reciprocal discipline pursuant to SCR 3.435 based on 1995 Connecticut disciplinary sanction)).

Attorney failed to take medical proof and timely join Special Fund. Kentucky Bar Association v. Clay, Ky., 932 S.W.2d 369 (1996).

RPC 1.4(a): Communication

A lawyer should keep a client reasonably informed about the status of the case and should promptly comply with the client's reasonable requests for information.

A breakdown in communications between the attorney and the client is frequently an indication that there is some problem with either the attorney's activity in the case, or some problem with the client. In any event, a breakdown in communication is one of the first indications that there may be larger problems out there which need to be addressed, e.g., the client has unrealistic or unreasonable expectations regarding the outcome of the case, the attorney does not have adequate time to do the tasks required for the representation, etc.

The communication obligation is not equal between the lawyer and the client. Under RPC 1.4, the lawyer has an obligation to respond to reasonable requests for information from the client. Moreover, even if the client does not request information, the lawyer has a separate affirmative obligation to keep the client reasonably informed about the case status, even if the client does not ask.

It should be noted that RPC 1.4 states that a lawyer "should" keep a client reasonably informed. The Rule does not say that the lawyer "shall" keep the client reasonably informed. The use of "should" would appear to make the Rule more aspirational rather than mandatory.

Kentucky Bar Association v. Wells, Ky., 967 S.W.2d 585 (1998). (Attorney failed to keep client reasonably informed regarding the status of the Worker's Compensation case).

RPC 1.5: Attorney's Fees

This Rule generally provides that a lawyer's fees shall be reasonable, and sets out a number of criteria to determine reasonableness.

Burke v. Kentucky Bar Association, Ky., 876 S.W.2d 613 (1994) and Kentucky Bar Association v. Williams, Ky., 734 S.W.2d 793 (1987). (Under old Code of Professional Conduct). (Attorney sanctioned for charging and collecting attorney's fee in a Worker's Compensation case without approval of the Worker's Compensation Board as required by statute. (Under old Code of Professional Conduct)).

RPC 1.7 to RPC 1.10: Conflict of Interest

The Rules regarding conflicts of interest, in particular, RPC 1.7 and RPC 1.9, use some loose language, such as the phrases "reasonably believes," "materially limited," and "adversely affected." The Rules are designed to cover multiple situations, and do not provide overly limited definitions of broad rules of ethics. However, that general language should not be used as a shield by an attorney who is charged with an alleged conflict of interest. Technical interpretations and constructions of the conflict of interest Rules and engaging in "hairsplitting," have a real potential of creating problems. For example, if you find yourself using the phrase, "Technically, I don't believe I have a conflict," chances are there is at least a potential conflict which in some form should be addressed.

An attorney has an affirmative obligation at the beginning of the representation of a new client to determine if there are existing conflicts of interest with a current client, or, for that matter, a conflict with the attorney's own interests.

The conflict of interest issue may also arise after representation has begun when another person, typically an adverse party in litigation, contends that the attorney has a conflict of interest because of some prior dealings between the attorney and the former client, now an adverse party. This latter conflict issues may result in disqualification Motions being filed. Such disqualification Motions have the potential of being viewed as manipulation on the part of the former client and the former client's current counsel, and viewed as an attempt to deprive the current client of his chosen counsel. Moreover, threats that an attorney has committed an ethics violation, when made by opposing counsel, may run afoul of RPC 3.4(f). That Rule prohibits an attorney from pursuing, or threatening to pursue, a disciplinary charge against an attorney "solely to obtain an advantage in any civil or criminal matter."

RPC 1.7 provides that even if there is a conflict, each client may waive the conflict after consultation. The Rule does not state with whom the clients should consult. However, consulting with the attorney who has the alleged conflict is probably itself a conflict. Any client consent should be after the client has either consulted with another attorney or has been given the opportunity to engage in such consultation.

Most applications of RPC 1.7 concern conflicts between existing clients. However, RPC 1.7 also provides that it would be a conflict of interest for an attorney to represent a

client if that representation would be materially limited by the lawyer's responsibilities to a third person or the lawyer's own interests.

RPC 1.8: Conflict of Interest: Prohibitive Transactions

This Rule provides, in part, that a lawyer shall not provide financial assistance to a client regarding pending or contemplated litigation except for advancing Court costs and expenses.

The issue of the lawyer's own interests may arise in the issue of business transactions with a client. Business transactions with a client are covered in RPC 1.8(a), which generally sets forth a multi part test which the attorney must meet in order to enter into a business transaction with the client.

Kentucky Bar Association v. Johnson, Ky., 660 S.W.2d 671 (1983). (Attorney sanctioned for lending money to a Worker's Compensation client during pending case(Under old Code of Professional Conduct)).

RPC 3.3: Candor Toward the Tribunal

This Rule provides, in part, that a lawyer shall not "knowingly . . . make a false statement of material fact or law to a tribunal" or "offer evidence that a lawyer knows to be false."

Kentucky Bar Association v. Hammond, Ky., 619 S.W.2d 696 (1981). (Attorney disciplined for forging physician's name to fraudulent medical reports in a pending Worker's Compensation in pending case.(Pre-Rules of Professional Conduct)).

Hammond is of particular interest given the Court's quotation from Omar Khayyam, an 11th Century mathematician and astronomer, who wrote:

> "The moving finger writes; and, having writ, moves on: Nor all your piety nor wit shall lure it back to cancel half a line nor all your tears wash out a word of it."

As the Court stated: "So let it be with Jimmy M. Hammond."

RPC 4.1: Truthfulness in Statements to Others

This Rule represents one of the few times in the Rules where an attorney has an ethical obligation to a third party. This Rule provides that during the course of representing a client, a lawyer shall not "knowingly make a false statement of material fact or law to a third person."

Concerning negotiations, Comment 2 to RPC 4.1 expressly addresses this issue, when it states:

> "Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category,..."

As noted in Comment 7 to RPC 1.6, under RPC 1.6, a lawyer does not breach client confidentiality by making a disclosure in negotiation that "facilitates a satisfactory conclusion." However, the lawyer's discretion in this area is somewhat limited. The lawyer may not, even if requested by the Judge, tell the Court the settlement authority which the client has given the attorney. An appropriate example of where client confidentiality would

not bar disclosure would be to advise the opposing party that the client has executed the settlement agreement and release documents.

RPC 5.3: Supervision of Non-Lawyer Assistants

Although an attorney may delegate certain tasks to non-lawyer personnel, the attorney may not delegate the ethics liability and malpractice liability if the non-lawyer personnel does not properly perform the task. Classic examples of these problems are handling client funds and, in particular, failing to draw the very important distinction between escrow accounts and the attorney's personal and/or operating accounts.

A persistent concern in the Sub-Rules concerning paralegals found in SCR 3.700, is that the paralegal disclose his or her paralegal status when engaging in paralegal functions.

Sub-Rule 2(A) provides that one of the requirements, so that the paralegal's actions does not constitute the unauthorized practice of law, is that the "client understands that the paralegal is not a lawyer."

The issue of the attorney's stationary is addressed in Sub-Rule 6:

> "The letterhead of a lawyer may include the name of a paralegal where the paralegal's status is clearly indicated: a lawyer may permit his name to be included in a paralegal's business card, provided that the paralegal's status is clearly indicated."

Lastly, Sub-Rule 7 requires a disclosure to a client, the Court and/or an administrative agency, another attorney or the public generally. This Sub-Rule reads, in full:

> "A lawyer shall require a paralegal, when dealing with the client, to disclose at the outset that he is not a lawyer. A lawyer shall also require such a disclosure when the paralegal is dealing

> with a Court, administrative agency, attorney or the public, if there is any reason for their believing that a paralegal is a lawyer or is associated with a lawyer."

Although Sub-Rule 7 appears to compel disclosure only if there is some reason for a Court or administrative agency to believe that the paralegal is a lawyer, the Commentary to Sub-Rule 7 emphasizes that there is an affirmative obligation on the paralegal to disclose their status. The Commentary notes that if a paralegal appears before an administrative agency or a Court where a lay person is entitled to represent a party, the paralegal should nevertheless disclose his status as a paralegal to the tribunal.

Occasionally, (if not typically), an attorney may request that his or her paralegal or non-legal assistant have contact with the client without the attorney being present, whether in or out of the attorney's law office. This issue may arise in situations where the client comes to the attorney's office to provide information, such as in a Worker's Compensation case, and the attorney is not present when the paralegal meets with the client. In such instances, a number of dangers may arise if the paralegal and the attorney are not cautious. Client confusion as to the paralegal's status, the client's questions seeking legal advice, and related matters, may cause a problem unless the paralegal appropriately confers with the attorney in relation to the meeting with the client. The Supreme Court, in Sub-Rule 2(B) of SCR 3.700, generally requires that the attorney supervise the paralegal in the performance of the paralegal's duties.

The KBA expressly addressed this issue in KBA U-47. In that Opinion, the issue was the ethical duties and responsibilities of an attorney when the attorney's paralegal is outside of the office talking to clients and the paralegal's supervising attorney is not present. In particular, the supervising attorney's question was whether the paralegal would be engaged in the unauthorized practice of law if:

1. It was made clear that the paralegal was not a lawyer;

2. The lawyer discusses specific issues with the paralegal both before the paralegal/client discussion and afterwards;

3. The attorney accepts full responsibility for the paralegal's actions and advice.

The KBA, in KBA U-47, concluded that the paralegal under such a situation would not be engaged in the unauthorized practice of law, and would properly be able to meet with the client outside of the office and without the attorney being present. As set forth in that Opinion, the key is the attorney's supervision of the paralegal's actions.

RPC 8.1(b): Disciplinary Matters

This Rule, unknown to many attorneys, provides that a lawyer shall not fail to respond to a request for information from a disciplinary authority.

Not every instance where the attorney ignores the Bar Complaint or ignores the Charge will the attorney be charged with violating RPC 8.1. Typically there will be aggravating circumstances which leave the KBA to believe that RPC 8.1 is a sustainable and appropriate allegation.

Kentucky Bar Association v. Wells, Ky., 967 S.W.2d 585 (1998). (Attorney ignored a Bar Complaint and Charge).

RPC 8.3(b): Misconduct

This Rule states that it is unprofessional conduct for an lawyer to commit a criminal act which reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other aspects.

Kentucky Bar Association v. Wells, Ky., 967 S.W.2d 585 (1998). (Attorney forged client's name to a settlement check).

RPC 8.3(c): Misconduct

This Rule, RPC 8.3, is the most serious violation which the KBA may charge against an attorney. Typically, an RPC 8.3 violation will be based on the same facts as a violation of another RPC.

This Rule provides, in RPC 8.3(c), that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Klapheke v. Kentucky Bar Association, Ky., 31 S.W.3d 895 (2000). (Attorney falsely advised client of case status by leading client to believe action had been taken).

Kentucky Bar Association v. Wells, Ky., 967 S.W.2d 585 (1998). (Attorney forged client's name to back of settlement check).

Kentucky Bar Association v. Clay, Ky., 931 S.W.2d 369 (1996). (Attorney continuously misrepresented the status of Worker's Compensation case to client).

Kentucky Bar Association v. Hammond, Ky., 619 S.W.2d 696 (1981). (Attorney forged physician's name to fraudulent medical reports for Worker's Compensation in pending case.(Pre-Rules of Professional Conduct)).