Getaway CLE Seminar

Everyday Ethics in Workers' Compensation

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QUESTION 1

May a practitioner charge for each non-revenue producing hearing in addition to the contingency fee provided for in the contract?

ANSWER

Probably not

Rule 1.5(e): Division Of Fees Among Lawyers

Lawyers who are not in the same *firm* may divide fees only if all of the following apply:

(1) the division of fees is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation and agrees to be available for consultation with the client;
(2) the client has given *written* consent after full disclosure of the identity of each lawyer, that the fees will be divided, and that the division of fees will be in proportion to the services to be performed by each lawyer or that each lawyer will assume joint responsibility for the representation;
(3) except where court approval of the fee division is obtained, the *written* closing statement in a case involving a contingent fee shall be signed by the client and each lawyer and shall comply with the terms of division (c)(2) of this rule;
(4) The total fee is *reasonable*.

Division of fees by lawyers who are not in the same firm may be made only with the prior consent of the client and if all of the following apply:

(1) The division is in proportion to the services performed by each lawyer or if by written agreement with the client all lawyers assume responsibility for the representation;

(2) The terms of the division and the identity of all lawyers sharing in the fee are disclosed in writing to the client;

(3) The total fee is reasonable.

Waterman v. Kitrick (1990), 60 Ohio App.3d 7.

A distinction must be drawn between a contract for a referral fee without performance of any services for the client (a fee-splitting arrangement unrelated to services) and co-counsel agreements. While pure referral contracts are prohibited by R.C. 4705.08 and DR 2-107(A), co-counsel agreements specifically are not. The agreement is a "pure referral contract" if it provides that an attorney will receive a fee for merely forwarding a client to another attorney while doing nothing toward handling the case. Such an agreement is violative of R.C. 4705.08 and DR 2-107.

However, where one attorney performs services for the client and refers the client to another attorney who also performs services on the case, fee splitting would be permitted to the extent allowable under DR 2-107. In other words, provided that the client consents to the arrangement after full disclosure and that the division of fees between the attorneys is "made in proportion to the services performed and responsibility assumed by each," fee splitting is permissible.

Fee Contract and Disbursement Sheet

(1) Signature of both lawyers

(2) Consent by Client

Sample Language

In the fee contract "client agrees that referring attorney shall serve as co-counsel, shall have equal professional responsibility with retained counsel and shall share in legal fees paid at a rate of _____."

Sample Referral Letter

Dear Referring Attorney: I met with our client to discuss his industrial injury. I have agreed to represent him in connection with his claim. In that regard, I am enclosing a retainer fee agreement which I have signed. This requires your signature as well. Please sign this and return it to my attention.

The basis of our representation is a 33-1/3% contingent fee contract. In the event we are successful and earn a fee, I will pay you ____% of that fee in return for your continued assistance and cooperation. In this regard the law requires that the referring attorney be available to the client as necessary for consultation and that, in addition the attorney be financially responsible to the client. For further information on this, please see Ohio Prof. Conduct R. 1.5(e). Further, the division of the fee must be disclosed to the client and agreed to by all parties in writing. As you know, it is our practice to keep the referring attorney advised as to the status of the claim and we will forward to you copies of correspondence, pleadings and other items from time to time. Please feel free to call our office at any time.

OSBA v. Zuckerman (1998), 83 Ohio State 3d. 148.

Here Zuckerman was asked by Glidden Corporate Counsel to represent Glidden in a couple of matters. Zuckerman then kicked back half of fees to corporate counsel. Held: No circumstances would have justified Zuckerman's payments to corporate counsel whether they were characterized or gifts or as fees. Corporate counsel was required to actually have done some work or at least have assumed some responsibility.

Cleveland Bar Assoc. v. Mishler, 118 Ohio St. 3d 109, 2008-Ohio-1810.

This case does not deal specifically with workers' compensation. However, it does deal with the question of hearing coverage. Mishler used the services of another unaffiliated lawyer, but did not charge the client for the work or the fees of the contract attorney, or share with that lawyer part of that contingency fee. The court then found that there was no "clear and convincing evidence upon which we could rely to find a single billing to the client covering the fee of two or more lawyers who are not in the same firm." Consequently, the court did not find a violation of the R2-107, which deals with the division of fees between lawyers who are not in the same firm which requires a division in proportion to the services performed by his lawyer and an agreement of the client that the total fee is reasonable. The court said at ¶ 38 of the *Mishler* opinion, "In sustaining respondent's objection, we had also admonished that the enlistment of, reliance on, and payment to a second lawyer to represent his client are not without ethical difficulty. Notwithstanding issues of improper fee splitting, lawyers are cautioned against engaging unaffiliated counsel without the client's consent. Such improprieties would indicate a violation of an attorney's duty to preserve client's secrets and confidences and may also impinge on standards demanding an attorney's undivided loyalty to the client." Consequently, it is probably wise to make sure that the client's consent is obtained, at least in the fee contract, that other attorneys may be retained and when dictating the letter to the *per diem* attorney that the client is advised in a companion letter that the office that was retained will not be appearing at the hearing.

Cleveland Metropolitan Bar Association v. Schiff, 2014-Ohio-2573

In this case decided in June of 2014, an attorney was given a two-year suspension stayed on conditions because of his failure to obtain client consent for the division of fees with an attorney who was not in the same firm and for the manner in which the fees would be divided. This case arose out of an investigation conducted by the Board of Commissioners into Brian Scott Freeman, another Cleveland attorney. In 2010, Schiff contacted the FBE and Disciplinary Counsel to raise his concerns about Mr. Freeman's conduct in handling matters that Schiff had referred to him. A contingent fee contract failed to disclose that Freeman was not a member of Schiff's firm and did not disclose Schiff's intent to refer the case to an attorney outside of his law firm. Contracts also did not disclose the fees would be divided between Schiff and Freeman nor did they identify how the fees would be divided. Mr. Freeman was disbarred in 2011 but this investigation into Mr. Schiff, who made the original referral, followed. The court found that based upon previous precedent, Schiff had engaged in conduct suggesting a professional affiliation when none existed and failed to obtain the client's written consent for a fee sharing arrangement with an attorney from another firm. He also failed to communicate with a client and failed to have a client sign a closing statement that disclosed the division of fees with the lawyer not in the same firm. Consequently, the court suspended the lawyer for two years but stayed the suspension on the condition that the commit no further misconduct and that he complete twelve hours of continuing legal education on the topic

of law firm management within two years.

A. Resolution R-89-1-008 Fees on Temporary Total Disability.

B. R-95-1-3 Fees Regarding Permanent Total Disability

C. Disciplinary Rule 1.5 (Old Ethical Consideration 2-17)

How To Get Paid - Statutory Authority Ohio Revised Code §4123.06.

1. Contingent Fee Contract

2. Rule 1.5 (a): The lawyer shall not make an agreement for, charge, or collect an *illegal* or clearly excessive fee. A fee is clearly excessive when after review of the facts a lawyer of ordinary prudence will be left with a definite and firm conviction that the fee is in excess of a reasonable fee.

3. Rule 1.5 (b): The nature and scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, *preferably in writing*, before or within a *reasonable* time after commencing the representation...

4. Rule 1.5 (d): A lawyer shall not enter into an arrangement for, charge, or collect any of the following: 3. "A fee denominated as earned upon receipt", "non-refundable", or in any similar terms unless the client is simultaneously advised in *writing* that if the lawyer does not complete the representation for any reason, client may be entitled to a refund of all or part of the fee based upon the value of the representation pursuant to division (a) of this rule.

Case Law

1. Contingent contract under which an attorney in a workers' compensation case is received from the claimant for his services one-half of any award made is against public policy and invalid. *McCain v. Payer* (1939) 135 Ohio St. 660.

2. Ohio Revised Code §4123.06: "With respect to payment of fees to attorneys for services in securing an award under §4123.64 of the Revised Code, the Commission shall (A) approve, disapprove, or modify applications for lump sum payment for attorneys' fees; (B) allow payment of a reasonable fee after review of the application; (C) require the attorney to disclose all fees received in obtaining the award under which the fee is requested and certify that the client is liable for no further fee with respect to continuing compensation, except if a later dispute arises in the claim requiring additional services; (D) require such supporting evidence as the Commission deems necessary to justify such application.

3. *Andrews v. Sajar Plastics Inc.* (1994) 98 Ohio App. 3d 61. In this case, claimant's counsel made application for $2,500 in a trial to the court. In that case the trial court awarded the maximum statutory attorneys' fees under Ohio Revised Code §4123.511. In that case claimant's counsel submitted a time sheet showing approximately 140 hours spent on the case. The court found that $2,500 was not sufficient to cover the cost of all their time and consequently it was not excessive.

4. *Sonkin and Melena Co. L.P.A. v. Zaransky* (1992) 83 Ohio App. 3d 169. The Industrial Commission's Resolution on temporary total attorneys' fees indicates that it is a requirement that the attorney must submit a fee dispute to the Industrial Commission for establishment of a reasonable fee prior to proceeding to court. This case stands for the proposition that a trial court does have subject matter jurisdiction to award damages in a fee dispute between two attorneys regarding representation of workers' compensation clients where clients had paid fees to the attorney being sued because workers' compensation rules govern the fee between attorney and client.

5. *Cincinnati Bar Assn. v. Stridsberg*, 123 Ohio St. 3d 69, 2009-Ohio-4182. In this case, an attorney was given a six month suspension stayed on conditions because of his excessive fee being charged on a workers' compensation benefit check which he knew was an overpayment.

6. *Columbus Bar v. Chasser,* 124 Ohio St. 3d 578, 2010-Ohio-956. In this case, Timothy Chasser was given an indefinite license suspension because of issues surrounding a case in which the Bureau's subrogation interest was settled for $30,000. These sums were never provided to the BWC and the injured worker upon reading about the class action lawsuit against the BWC contacted Mr. Chasser about the refund of that $30,000. Mr. Chasser then engaged in multiple disbursement sheets to account for the $30,000 and also additionally charged the injured worker for additional fees associated with the recovery. The court found failures on the part of Mr. Chasser for conduct involving dishonesty, fraud, deceit, or misrepresentation, and failing to honor a fee agreement, and improper retention of client funds.

7. *Columbus Bar Association v. Adusei*, 136 Ohio St. 3d 155, 2013-Ohio-3125. Here the attorney was given a public reprimand for collecting an illegal or excessive fee and failing to reduce a contingent fee agreement to writing and creating a conflict of interest by representing multiple member of Joseph Addai's family. The court was upset with Mr. Adusei for charging an excessive fee by taking a 1/3 fee on a life insurance policy, when there was very little work involved in obtaining the proceeds of the life insurance policy.

Industrial Commission Resolutions

1. R07-1-03 This resolution sets for the standards for honoring authorizations to receive checks (C230's). This resolution requires a written fee agreement between the claimant and the attorney. No fee shall be charged on ongoing compensation for Temporary Total, Permanent Total Disability, or Death Awards. It does permit a minimal fee for ancillary administrative services performed for a claimant but does prohibit a fee for being charged for the mere filing of C84 report forms. No fee for ongoing permanent total disability beyond the fee approved by the Commission under §4123.06 and §4123.64 of the Revised Code. Permits the charge of an additional fee if a later dispute arises in the claim requiring additional legal services. It is improper to file a suit for attorneys fees unless a matter has been submitted to the Commission on a fee dispute and the Commission has made a final determination in favor of the attorney. This resolution also provides that the matter if the guidelines have been violated then the matter can be referred to the Board of Commissioners on Grievance and Discipline of the Ohio Supreme Court.

A. What May An Attorney Do?

(1) Charge an administrative fee. Administrative fees can run anywhere between 3-10%.

(2) Can an attorney charge a separate fee for reviewing and filing temporary total disability forms (C84)? The Resolution specifically indicates that a fee may not be charged for the mere filing of a C84 report form.

(3) May an attorney charge a fee for attendance at an administrative hearing when the issue at the hearing does not involve payment of compensation?

(1) Rule 1.5 (d)

(2) *Columbus Bar Association v. Klos* (1998) 81 Ohio St. 3d 486. In this case the attorney was given a public reprimand regarding his fee contract and method of charging fees in an employment discrimination case. The court found that the fee contract was too ambiguous and one sided in favor of the attorney. There is a custom in the field of employment law for an attorney to take a retainer for an investigative fee which is then applied against the contingent fee after the investigation had been completed. The court upheld a public reprimand because the language in the contract was too ambiguous.

The court relied upon *Cincinnati Bar Association v. Schultz* (1994) 71 Ohio St. 3d 383 indicating "we were critical of single 'earned upon receipt' fees. In some situations, a non-refundable retainer might be justified, for example when an attorney is engaged to remain available to forgo other potential employment, particularly for a competitor of his or her client. Generally, however, a client should have the freedom to discharge an attorney at any time subject to the obligation to compensate the attorney only for the service rendered and related expenses. The attorney should not receive a windfall if he or she withdraws or is discharged by the client." The contingency fee portion of the contract was also flawed according to the court because "we disapproved of similar agreements because a liquidated hourly fee arrangement, upon termination of a fee contract precluded the application of DR-2-106(B) which sets out the elements to be considered in calculation of a reasonable fee." The court concluded that the general ambiguity of these contracts, the provisions in the investigatory part of the contracts were non-refundable retainers, so written to provide a windfall should

the attorney at his discretion withdraw from the case and the liquidated hourly fee and the contingent fee parts of the contract are precluded that the termination of a reasonable fee constitutes agreements for a clearly excessive fee as proscribed by DR2-106(A).

(3) *Columbus Bar Association v. Brooks* (1999) 87 Ohio St. 3d 344. In this case a claim was brought for police misconduct. The contract between the attorney and the client provided legal fees to be paid a rate of $125 per hour if the case was litigated, and a contingent fee if the case was settled. Fee agreement did not designate an hourly rate for paraprofessionals and also required that the client was to "pay all necessary filing fees, court costs and other out of pocket expenses incurred in said litigation". A 33% fee arrangement was made less the attorneys' fees paid prior to the settlement. The case was then settled for $30,000 and a fee of $9,900 was taken less the amounts the client had already paid the attorney. The client was then billed an additional amount of expenses separately from the filing fee, transcript and deposition costs of almost $3,000 which consisted of hourly fees for the respondent's secretary and law clerk. The costs of secretarial fees and fees of paraprofessionals were found to be the normal overhead to be subsumed in the percentage fee. The court found "in cases where legal services are contracted for at an hourly rate, an attorney's secretarial costs except in unusual circumstances and then only when clearly agreed to, are part of overhead and should be reflected in the hourly rate. If an attorney charges separately for a legal assistant, the legal assistant's hourly charges should be stated and agreed to in writing". The court found that by collecting the secretarial and law clerk expenses in addition to the filing fees, deposition fees and his 33% of the settlement, the attorney did not adhere to his written contract with the client and thereby charged an excessive fee in violation of DR2-106(A).

(4) *Cuyahoga County Bar Association v. Cook*, 121 Ohio St. 3d 9, 2009-Ohio-259. While this case does not deal directly with workers' compensation, it does address the issue of non-refundable retainers. The court again indicated its general disapproval of these non-refundable earned upon receipt legal fees absent a true general retainer agreement which requires the services of a particular attorney for any contingency and requires a lawyer to forego employment by a competitor of the client. Consequently, care should be taken in drafting contracts which require

a non-refundable retainer as well as a contingency fee in a workers' compensation context.

(5) *Dayton Bar Association v. Scaccia*, 141 Ohio St. 3d 35, 2014-Ohio-4278. In this case, the Supreme Court found misconduct for trust account violations primarily because of his charging of a non-refundable fee in the amount of $1500 on a contingent fee contract. There are a number of clients involved in litigation, most of whom had contributed something in the range of approximately $22,000 to the trust account. Approximately $17,000 of that was undocumented. The court did not find him guilty of any violation of the non-refundable fee but more so because of confusion regarding the failure to complete records of clients' funds and to maintain bank statements, deposit slips and canceled checks.

However, the court did find him guilty of a violation of the code of professional conduct because of the fact that a client who asked the attorney to represent her in an employment matter. A non-refundable fee of $2000 was required. The money was placed into the firm's operating account as opposed to the trust account. The court found a violation of Prof. Conduct Rule 1.5(D)(3) which prohibits non-refundable fee agreements by charging a client a non-refundable fee, and also failing to put the money in the trust account.

HOW TO GET PAID IN A COURT CASE

There have been a series of recent cases dealing with the issue of attorneys' fees in cases under Ohio Revised Code 4123.512(F).

Cakic v. Ridge Pleasant Valley Inc., 2015-Ohio-2523. In this case the employer contested the award of $4200 of attorneys' fees which granted those awards to the plaintiff simply "as a prevailing party" in addition to the previously awarded costs.

The order contained no reference to Ohio Revised Code 4123.512(F), the "effort expended" or any findings related to the trial court's attorneys' fees award. The court analyzed *Holmes v. Crawford Machine Inc.,* 134 Ohio St. 3d 303, 2012-Ohio-5380, and held that an award of attorneys' fees under the statute is mandatory. However, the order contained no reference to the "effort expended" or any findings related to the trial courts attorneys' fees award. The court further said that Ohio Revised Code 4123.512(F) is based on the notion that a successful claimant should be reimbursed for litigation expenses, including attorneys' fees incurred in connection with the preparation and presentation of a successful appeal. While the motion was filed seeking to allow specific expenses with copies of invoices, no documentation was submitted in support of the motion for attorneys' fees. The court found this to be a "bare bones motion" and as such, because there was no affidavit from counsel, no timesheets or billing records detailing the amount spent by counsel, or counsel's hourly rate, or any other information or documentation supporting the request for attorneys' fees, and no hearing was requested or held

on the motion. The Court of Appeals felt that there was no evidence to support the attorney' fee award, and as such the trial court abused its discretion in awarding such attorneys' fees.

Smith v. Franciscan Communities Inc., 2014-Ohio-5291. A request for attorneys' fees was filed in a case in which the employer dismissed its appeal. A "bare bones" motion for attorneys' fees was filed without a request for hearing. There was no documentation submitted in support of the motion for attorneys' fees detailing the hours expended, counselor's hourly rate and the cost incurred in preparation for trial. The court indicated that in order for an award of attorneys' fees to be made the award must be supported by the record which would include documentation in support detailing hours expended, counselor's hourly rate, and costs incurred in preparation for trial. The court found in this case since none of that material was submitted, the trial court did not abuse its discretion in denying the request for attorney fees.

The moral of this story is that if you are going to make them pay, you have to do it right.

QUESTION 2

May an attorney utilize a Power of Attorney to cash any workers' compensation checks?

ANSWER

Now you may.

Am. Sub. HB 75, struck ORC 4121.43(D)

C-230 still specifically prohibits such a practice

Cautionary Caveat:

Ohio Ethics Opinions ETH 2010-6

SYLLABUS: A lawyer representing a client in a civil matter may not enter into a Contingent fee agreement whereby the client grants the lawyer a power of attorney to take any action and execute all documents that the attorney deems necessary in the matter, including but not limited to signing on the client's behalf a settlement agreement and release, a settlement check, or a closing statement. Such use of a broad power of attorney in a contingent fee agreement contravenes Prof. Cond. Rule 1.2(a) by improperly allocating all of the authority regarding the representation from the client to the lawyer and disregards Prof. Cond. Rule 1.4(a) by eliminating required communication by the lawyer to the client. Such practice is improper unless a lawyer is able to demonstrate that there is an extraordinary circumstance in which there is an exigent reason for a client to grant such authority to the lawyer. For example, an extraordinary circumstance might arise when there is an urgent surgery or travel to a remote location.

Cleveland Metropolitan Bar Assoc. v. Heller, 2021-Ohio-2211.

One-year suspension with six-month stayed due to a non-lawyer assistant allegedly embezzling client fees. Assistant taking _____ fees and either not keeping accurate records or not remitting all the hearing. Attorney claimed $19,000. So if you are given great power, be careful.

QUESTION 3

What are the ethical considerations for Ohio lawyers with clients entering into non-recourse civil litigation advance contracts?

ANSWER

Ohio Revised Code §1349.55

Ohio Ethics Opinion ETH 2012-3

SYLLABUS: Ohio lawyers may inform clients of the non-recourse civil litigation Advances are offered by alternative litigation finance (ALF) providers and regulated by R.C. 1349.55. If a client pursues such an advance, the lawyer must recognize the following ethical obligations the transaction creates:

1. Prof. Cond. R. 1.1, 1.4, and 2.1 require the lawyer to communicate with the client and provide competent, candid advice about the nature of the transaction and its terms.

2. Under Prof. Cond. R. 1.4, the lawyer must ensure that the ALF provider does not interfere with the lawyer's duty to exercise independent professional judgment.

3. Due to the confidentiality provisions of Prof. Cond. R. 1.6 the lawyer shall not reveal information about the representation to the ALF provider without securing the client's informed consent. The lawyer may only obtain informed consent after explaining to the client the risks of sharing information with an ALF provider, including the potential waiver of attorney-client privilege.

4. The lawyer must also obtain the client's informed consent before providing a case evaluation to an ALF provider pursuant to Prof. Cond. R. 2.3 as the evaluation may materially and adversely affect the client's interest.

See also April 2013 Cincinnati Bar Association, article by William Strubbe.

QUESTION 4

What is the proper method of handling a situation where the party wishes to change counsel?

ANSWER

Ethical Rule 4.2 - Communication with a person represented by counsel

"In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer *knows* to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

It is my interpretation this means that the attorney should not talk to the prospective client, who is lawyer shopping, if the lawyer knows there is another lawyer on the case. The comments to Rule 4.2 indicate..."this rule [does not] preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter." Also, comment 8 states, "The prohibition on communication with a represented person applies only in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0 (g). Thus the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious."

Consequently, it appears that there may be an ethical violation if a person is taken by a top carding method if the attorney has not inquired or his staff has not inquired as to whether or not the person is represented.

Recognizing of course that this is a business, it is first, however, a profession. If we continue to engage in the reckless raiding of each other's clients, we will soon cannibalize the practice.

D. Roscoe Pound defines professionalism as, "The term refers to a group pursing a learned art as a common calling in the spirit of public service – no less a public service because it may incidentally be a means of a livelihood. Pursuit of a learned art in the spirit of public service is the primary purpose." *Roscoe Pound, The Lawyer From Antiquity to Modern Times 5 (1953).*

Suggested Course of Actions

(1) Ask that the prospective client schedule an appointment with the current attorney to attempt to resolve the differences.
(2) Ask permission of the client to contact the attorney to advise of the problem and alert the attorney that there is an issue with this client that needs to be resolved.
(3) Call the other attorney.
(4) Suggest to the prospective client that if the problem is not resolved after they have a meeting with the current attorney, then the claimant may call back.

QUESTION 5

What is the proper way to handle disbursement of funds and protection of expenses to third parties?

ANSWER

Ohio Prof. Rule of Conduct 1.8 E1

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except the lawyer may do either of the following:

1. A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

2. A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Comment 10 to this rule provides the following information: "Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on the lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the cost of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Ohio Prof. Rule of Conduct 1.15 - Safekeeping Funds and Property

(d) Upon receiving funds or other property in which a client or third person has a lawful interest, a lawyer shall promptly notify the client or third person. For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge and shall be limited to a statutory lien, a final judgment addressing disposition of the funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment from the specific funds or property. Except as stated in this rule or otherwise permitted by law or by agreement with the client or a third person, *confirmed in writing*, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive. Upon request by the client or third person, the lawyer shall promptly render a full accounting regarding such funds or other property.

(e) When in the course of representation a lawyer is in possession of funds or other property in which two or more persons, one of whom may be the lawyer, claims interests, the lawyer shall hold the funds or other property pursuant to division (a) of this rule until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or other property as to which the interests are not in dispute.

Comment 4 to this rule discussing divisions (d) and (e) addresses situations which a third person may claim a lawful interest in specific funds or other property in the lawyer's custody. In this case, the possibility of a fee due and owing to the previous law firm or expenses. The comment indicates, "A lawyer may have a duty under applicable law to protect third person interest of which the lawyer has actual knowledge against wrongful interference by the client. When there is no dispute regarding the funds or property in the lawyer's possession, the lawyer's ethical duty is to promptly notify and deliver the funds or property to which the client or third person is entitled. When the lawyer has actual knowledge of a dispute between the client and third person who has lawful interest in the funds or property in the lawyer's possession, the lawyer's ethical duty is to notify both the client and the third person, hold the disputed funds in accordance with the division (a) of this rule until the dispute is resolved, and consider whether it is necessary to file an action to have a court resolve the dispute. The lawyer should not unilaterally assume to resolve the dispute between the client and the third person. When the lawyer knows a third person's claimed interest is not a lawful one, a lawyer's ethical duty is to notify the client of the interest claimed and promptly deliver the funds or property to the client.

See also Ohio Ethics Opinion - ETH 2011-1

SYLLABUS: It is improper for a plaintiff's lawyer to personally agree, as a condition of settlement, to indemnify the opposing party from any and all claims by third persons to the settlement funds. Such agreements are not authorized by Prof. Cond. Rule 1.15(d) and violate Prof. Cond. Rules 1.8(e) and 1.7(a)(2). Further, it is improper for a lawyer to propose or require, as a condition of settlement, that a plaintiff's lawyer make a personal agreement to indemnify the opposing party from any and all claims by third persons to the settlement funds. Such conduct violates Prof. Cond. Rule 8.4(a). The Board recommends that this advisory opinion be prospective in application.
While this opinion deals with the personal guarantee as a condition of settlement to indemnify the opposing party from any and all claims by third persons as to the settlement funds, the opinion itself is instructive on the issue of the obligation of a lawyer to a third party. It discusses professional conduct Rule 1.15 and Comment 4. The court saying in Ethical Opinion 2011-1, "In short, a lawyer's ethical duty is to protect a third person's lawful interest of which the lawyer has actual knowledge. That lawful interest must be in the specific funds in the lawyer's custody." The rule also discusses Prof. Cond. Rule 1.8(e). In the event that the dispute cannot be resolved, it is suggested that the attorneys make use of the fee arbitration administered through the local bar associations to resolve the dispute. It is suggested that the lawyer not unilaterally resolve the dispute and should make every effort to ensure that third party expenses, including past attorneys' fees, are paid. At that point it is probably the

lawyer's obligation to sequester the funds in the lawyer's trust account and file a fee dispute motion on behalf of his client with the opposing firm to resolve the matter in front of the Industrial Commission.

Charging Liens

Recently a question came up on the issue of whether or not an attorney has an obligation where a previous counsel had obtained a decision from the Industrial Commission on a fee dispute. Does the new attorney have an obligation to withhold funds from any disbursements which new counsel might obtain in the representation of the former client of the old firm.

The answer to that lies in Professional Conduct Rule 1.15(d)&(e). That provision indicates that "a third person's interest shall be one in which the lawyer has actual knowledge and shall be limited to a statutory lien, a final judgment addressing disposition of the funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteed payment from specific funds or property. Rule 1.15 requires a lawyer to promptly deliver to the client or the third person any funds or other property that the client or third person is entitled to receive. While this is not necessarily a charging lien or a statutory lien, which the rule covers, the written agreement between the former lawyer and client controls the situation. An Industrial Commission fee dispute determination is not a final judgment because in order for a final judgment to have occurred it has to be rendered in court. But the fact of the matter remains is that once the attorney is placed on notice of the amount owed pursuant to the fee agreement executed between the client and former counsel, there is no question that the new attorney has actual knowledge of the written agreement which guarantees payments from any proceeds recovered from the claim of the client.

In the event the client refuses to authorize the distribution of the funds, then the attorney would have an obligation to place those funds in trust until the matter is resolved.

Galloway v. Galloway 2017-Ohio-87. Elements of a charging lien.

(1) The right of the client to be heard on the merits; (2) the right of an attorney to invoke the equitable jurisdiction of the courts to protect his fee for services rendered; (3) the elimination of unnecessary and duplicative litigation; (4) the opportunity for the client to obtain counsel to litigate the claim for attorney fees; (5) the propriety of an order as opposed to a judgment; (6) a forum for the presentation of witnesses, if necessary, and (7) the equitable nature of the proceeding.

State ex rel. Strong v. Mark A. Adams, LLC, 2019-Ohio-4437

In this case, there was a fee dispute between two law firms. One law firm, Mark A Adams LLC, initially represented the Relator in her claim and the Bainbridge Law Firm took over representation. At issue was whether or not the Commission abused its discretion in applying the doctrine of quantum meruit for a fee dispute in which PTD was authorized by the Commission. The court addressed Ohio Adm. Code 4121-3-24(A) which outlines the nine factors upon which attorneys' fees shall be based when a Commission inquires into an attorney fee controversy. The Commission relied very heavily upon the contingent fee contract as well as items one, two, three, seven and eight in Ohio Adm. Code 4121-3-24(A). The fee invoice had been produced by the former law firm showing the date, time, fee amount and type of work that had been left uncompensated. The Commission ultimately determined the fee amount based upon quantum meruit. The Court of Appeals denied the requested writ of mandamus. The written fee agreement indicated, "Attorney shall be compensated at their usual hourly rates in effect at the date this agreement is signed (currently $150 per hour) for work already performed in the claims in the event of a termination.

Kisling, Nestico & Redick, LLC v. Progressive Max Ins. Co., 158 Ohio St.3d 376, 2020-Ohio-82

While this case does not directly address the issue of a workers' compensation matter, it does deal with a personal injury claim wherein an insurer settles a personal injury claim with an accident victim finding that the insurer does not have a duty to distribute a portion of the settlement proceeds to the victim's former lawyer pursuant to a charging lien. The court held that an accident to enforce a charging lien is an in rem proceeding against a particular fund, and that when a matter is resolved by settlement, the fund comes into being that the time the settlement is paid. A discharged law firm cannot call upon the equitable powers of the court to enforce a charging lien against the tortfeasor's insurer when no court action was initiated on behalf of the victim and an out of court settlement was paid to the victim. The discharged law firm must instead proceed against its former client for payment.

Here Thomas hired Kisling, Nestico & Redick (KNR) to represent him. He was insured by Progressive Southeastern Insurance Company (Progressive). The accident victim and KNR entered into a contingent fee agreement that purported to give KNR a charging lien on the proceeds of any insurance settlement, judgment, verdict, award or property obtained. An offer of $12,500 was made by Progressive to settle the tort suit. The accident victim subsequently discharged KNR. KNR claimed a lien. But there was no agreement between Progressive and KNR that Progressive would protect any lien. Thomas then settled the claims himself for $13,044, Progressive paying the full amount to Thomas. Thomas did not pay KNR the attorneys' fees. The trial court granted a charging lien to KNR for $3411.48. The Eighth District affirmed the trial court's judgment

in favor of KNR. The court found that a charging lien would only apply in the event there is a court created fund or judgment. Since Thomas, the accident victim, had never filed a personal injury lawsuit, there was no involvement by the court and there was no existing action in which KNR could pursue its claim to a portion of the fund created by the settlement. The Supreme Court said that KNR is essentially asserting an "equitable interest". The court said the fund was not created by Progressive until it paid the settlement to Thomas and received a release from him. But at that point, the money was out of Progressive's hands. To allow a charging lien against Progressive would permit the charging lien to be satisfied outside the property interests of KNR, had in the settlement proceeds. KNR had to proceed against its former client, Thomas, for payment." Paragraph 19. The court went on to say that an attorney's special or charging lien is a non-statutory common law equitable lien arising out of an express agreement between an attorney and a client, that the attorney would receive a specified amount of the recovery in a case."

Handling Disbursement of the Checks

It is suggested that the attorneys join the modern age and obtain a scanner with the bank that maintains the IOLTA or trust account that the attorney maintains. The check can then be electronically deposited and the funds become available much faster than the traditional method of depositing checks. Our office has undertaken this and has also altered its disbursement sheet to tell the client not to cash or deposit the trust check for two business days from the execution of this acknowledgment, which the client signs and dates.

The following factual situation was presented to me.

A client was granted PTD in 2000. The client moved to Tennessee. The attorney received a letter from the client that he was in jail in another state. The client wants the attorney to assist him in getting out of jail.

The attorneys respond to client representation on the issue that he is in jail and inform him that he needs to inform BWC of the dates of his incarceration as he is not eligible for PTD while incarcerated. The question was presented whether or not there was an ethical obligation to advise the BWC of the client's incarceration.

Obviously, the client's communication to the attorney is a confidential communication.

Rule 1.2(d)(1) says, "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent. (Emphasis sic) The lawyer may discuss the legal consequences of any proposed course of conduct with the client and may counsel or assist a client in making a good faith effort to determine the validity, scope, meaning or application of the law."

Rule 4.1 states, "In the course of representing a client, a lawyer shall not knowingly (Emphasis in original) do either of the following: (a) make a false statement or material fact or law to a third person; (b) fail to disclose a material fact when disclosure is necessary to avoid assisting in illegal or fraudulent act by a client. (Emphasis in original)

The comments to Rule 4.1 clearly indicate the following: [Comment 3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is illegal or fraudulent. Rule 4.1(b) requires a lawyer to disclose a material fact, including one that may be protected by the attorney-client privilege, when the disclosure is necessary to avoid the lawyer's assistance in the client's illegal or fraudulent act. See also Rule 8.4(c). The client can, of course, prevent such disclosure by refraining from the wrongful conduct. If the client persists, the lawyer can usually avoid assisting the client's illegal or fraudulent act by withdrawing from the representation. If withdrawal is not sufficient to avoid such assistance, division (b) of the rule requires disclosure of material facts necessary to prevent the assistance of the client's illegal or fraudulent act. Such disclosure may include disaffirming an opinion, document, affirmation of the like, or may require further disclosure to avoid being deemed to have assisted in the client's illegal or fraudulent act. Disclosure is not required unless the lawyer is unable to withdraw or the client is using the lawyer's work product to assist the client's illegal or fraudulent act.

Furthermore, Professional Conduct Rule 1.6(b)(3) indicates that an attorney may reveal

information protected by the attorney-client privilege to mitigate substantial injury to the financial interests or property of another that has resulted in a client's commission of an illegal or fraudulent act, in furtherance of which the client has used the lawyer's services; (Emphasis in original). See also Comment 8 to Rule 1.6.

QUESTION 6

Direct mail solicitations taking the form of general mailings, who may or may not have filed claims.

ANSWER

Contained in Prof. Cond. Rule 7.1, 7.2, and 7.3.

Ethical Opinion - ETH 2013-2

Ohio Prof. Rule 7.1 provides, "A lawyer shall not make or use false, misleading or non-verifiable communications about a lawyer or the lawyer services. Communication is false or misleading if it contains material misrepresentation of fact or law or omits a fact necessary make this statement considered as a whole not materially misleading.

Rule 7.3 outlines what is to be included in a mailing and must conspicuously include in its text and on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication the recital - "ADVERTISING MATERIAL" or "ADVERTISEMENT ONLY."

(f) Notwithstanding the prohibitions in division (a) of this rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in - person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not *known* to need legal services in a particular matter covered by the plan.

Comment to Ohio Prof. Rule 7.2 permits advertising and recommendation of Professional employment which concerns the lawyer's name or firm name, address, email address, website and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of reference and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Ohio Ethics Opinion - ETH 2013-2

Dealing with text messages to solicit professional employment.

The opinion permits text messages to be utilized under Ohio Prof. Cond. Rule 7.2, but The text message solicitations must also comply with Prof. Cond. Rules 7.1 and 7.3.

Bevan & Associates v. Dewine, Case No. 2:16-CV-746. Decision 2/17/18.

In this case, the law firm of Bevan & Associates filed suit against Mr. Dewine, the Bureau and the Industrial Commission over Rev. Code §4123.88 which deals with solicitation. The Bevan Law Firm used targeted mailings to promote their services to potential workers' compensation claims. They complied the list of mailing recipients by collecting the addresses and phone numbers of workers' compensation claimants from a journalist, which under §4123.88(B) was an exemption to the solicitation charge. That journalist was then visited by agents of the BWC and the Bureau served that journalist with a subpoena for all records related to contacts with claimants/plaintiffs. A declaratory judgment action was then instituted by the Bevan Firm on the basis that the provisions in the administrative code and the revised code interfered with their First Amendment rights.

The holding of the court found that the Ohio Rev. Code §4123.88 bans solicitations based on information about workers' compensation claimants compiled by the State of Ohio. The court found that the entire statute is directed at maintaining privacy of workers' compensation claimants. Opinion page 6. The court said that reading the various provisions of the Rev. Code one cannot "escape the conclusion that the statute is intended to protect claimant privacy, not to hinder attorney speech". The court said, "The enforcement mechanism of the statute in effect makes use of ill-gotten claimant information illegal." Opinion page 7. The court thus granted the Attorney General's motion for summary judgment, denied the plaintiff's motion for summary judgment and dismissed the case in its entirety.

Am. Sub. HB 75 changed this section.

ORC 4123.88(D)(1):

> (D)(1) Except as provided in division (G) of this section, upon receiving a written request made and signed by an individual whose primary occupation is an a journalist, the commission or the bureau shall disclose to the individual the name or names, address or addresses, and telephone number or numbers of claimants, regardless of whether their claims are active or closed.
>
> (2) An individual described in division (D)(1) of this section is permitted to request the information described in that division for multiple claimants in one written request.
>
> (3) An individual described in division (D)(1) of this section shall include all of the following in the written request:
>
> (a) The individual's name, title, and signature;
>
> (b) The name and title of the individual's employer;
>
> (c) A statement that the disclosure of the information sought is in the public interest;
>
> (d) A statement that the individual acknowledges that the information is not a public record and

that the individual will not disclose the information to any other person for any reason unrelated to journalism.

(4) Neither the commission nor the bureau may inquire to the specific public interest served by the disclosure of information requested by an individual under division (D) of this section.

(E) No person who receives information under division (D) of this section shall recklessly disclose the information to any other person for any reason unrelated to journalism.

(F) No person who obtains or receives records in violation of this section shall recklessly use that information to solicit, directly or indirectly, authority from a claimant or employer to take charge of, or represent the claimant or employer in respect of, any claim or appeal that is or may be filed with the bureau or commission.

(G) Neither the commission nor the bureau shall disclose to an individual described in division (D)(1) of this section the name, address, or telephone number of a claimant if the disclosure would reveal that the claim is for a condition that arose from sexual conduct in which the claimant was forced by threat of physical harm to engage or participate.

QUESTION 7

How to handle hearing officer or attorney fee complaints.

ANSWER

Ohio Revised Code §4123.06 - Commission procedure for suspension from Practice before the Bureau, District or Staff Hearing Officers, or the Commission.

Grounds:

1.One who violate any reasonable rule of the Commission. Presumably Ohio Admn. Code §4121-2-01 and Ohio Admn. Code §4121-15-10, demonstrated incompetence by being unfamiliar with the statutes and decisions of the courts and rules of the Bureau and Industrial Commission relating to workers' compensation.

2. Inadequate preparation before filing an application or appearing at a hearing.

3. Neglecting or procrastinating in regard to any matter in which he represents a party.

4. Failure to abide by the rules of the BWC or IC in appearing for a party or in filing an applications.

5. Failing to conduct himself in accordance with the code of professional responsibility.

Procedure

Written charges by the Commission or the person directly interested in the results of the services of a representative.

1. Stating the grounds of the complaint.
2. A copy of the written charges certified by the Commission's secretary and served upon the representative. After service a reasonable time to appear and make a defense. Introduce evidence and to be heard in either person or by counsel or both. Industrial Commission may suspend or reprimand a representative and then may be reviewed on appeal on questions of law in the Supreme Court which may affirm or modify the order or dismiss the complaint. Appeal proceedings shall be filed in the Supreme Court within forty days after the order of the Commission.

Readmission upon the Commission's own motion or upon the application of the person suspended.

The head of the legal department shall make the investigations contemplated by Ohio Revised Code §4123.06.

Filing a complaint against hearing officer.

This is covered by Hearing Officer Memo R-12.

Requirements:

1.Written complaint sent to the Director of Hearing Services at the Industrial Commission. The letter should delineate the issues or concerns. Contents shall contain the name of the hearing officer, the issue or concerns being questioned, when and where they occurred, and the other pertinent information which the Commission should be aware.

1. The Director of Hearing Services shall wait until the appeal period has ended.

2. After the appeals have ended, the Director of Hearing Services will adjust the issues before the Director. Complaint will then send a copy of the complaint to the hearing officer's regional manager, who will then discuss the issue with the hearing officer and ask the hearing officer to respond to the complaint in writing. The written response will then go to the Director of Hearing Services, who will then review the hearing officer's written response and act accordingly. If remedial or corrective action is required, the Director of Hearing Services will work with a regional manager and the hearing officer to implement the corrective action.

Practical Ramifications of both complaint procedures

1. Make an enemy for life.

2. Make an enemy of the hearing officer or representative's friends for life.

3. Hope that in an ideal world that professionalism will win out and either party will undertake the complaint in the nature that it was not personal, but that it reflects a lack of professionalism in the hearing room situation.

Hearing officer could place the complaint on a conflict list ensuring that the Hearing officer will not hear any further matters between the aggrieved party or representative. The danger with that is if there are a great deal of firms listed on the conflict list, the hearing officer might conflict themselves out of a job.

From the attorney's standpoint, the repeated failures may result in loss of ability to represent clients in front of the Commission. Thus, jeopardizing the attorney's ability to earn a living.

The Professionalism Code

A professional lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service; and engaging in these pursuits is part of a common calling to promote justice and public good. *Report of Professionalism Committee, Teaching and Learning Professionalism,* 6 (ABA section on legal education and admissions to the bar, 1995).

In 1997, the Supreme Court adopted, "A Lawyer's Creed," which included a list of lawyers' aspirational ideals. Contained in the Lawyer's Creed was, "To our colleagues in the practice of law, we offer concern about your reputation and well-being. We shall extend to you the same courtesy, respect, candor and dignity that we expect to be extended to us."