

Ethics in Your Workers' Compensation Practice Hypothetical Situations

*Any time you have a question of Ethics that needs immediate attention, you can call the Florida Bar's Ethics Department at 800-235-8619.

The Rules Regulating The Florida Bar, Rules Regulating Professional Conduct (Chapter 4) and Ethics Opinions can be obtained by going to:

<http://www.floridabar.org/tfb/TFBETOpin.nsf/EthicsIndex?OpenForm>

For purposes of the following hypotheticals, assume that you are a Workers' Compensation Attorney. You will flip back/forth between representing Employees and Employer/Carriers, as defined by Chapter 440.

#1

ISSUE: *You represent an Employee. You have received a subpoena requesting a copy of your entire client's file from Centers For Medicare & Medicaid Services (CMS). What should you do?*

RULE: 4-1.6 CONFIDENTIALITY OF INFORMATION

(a) Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

(b) When Lawyer Must Reveal Information. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to prevent a client from committing a crime; or
- (2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;
- (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
- (3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;
- (4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (5) to comply with the Rules of Professional Conduct.

(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

(e) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

ANALYSIS/CONCLUSION: Unless your client has consented to the release of his file, the contents of his file are protected by 4-1.6 (The Confidentiality Rule). A such, a letter should be sent to CMS, refusing to voluntarily release a copy of your client's file, based upon both confidentiality and attorney-client privilege (if this applies). If CMS obtains an Order from the Court compelling production, you will need to comply with the Order and release the records.

#2

ISSUE: You represent Employees. About six months ago, Jack Justinjured settled his tenth Workers' Compensation case with your office. The Carrier (timely) issued the settlement checks to your office, which you promptly deposited into your trust account. Since that time, you have written 12 letters to Jack (at his last known address) to let him know that you are holding his settlement funds and that he needs to come into the office. Your office has also documented over twenty phones calls to Jack's phone number, before it was disconnected five months ago. You are concerned because Jack has not responded to you, and you do not know his present whereabouts. What should you with Jack's settlement funds?

RULE: 5-1.1 TRUST ACCOUNTS

(i) Unidentifiable Trust Fund Accumulations and Trust Funds Held for Missing Owners.

When an attorney's trust account contains an unidentifiable accumulation of trust funds or property, or trust funds or property held for missing owners, such funds or property shall be so designated. Diligent search and inquiry shall then be made by the attorney to determine the beneficial owner of any unidentifiable accumulation or the address of any missing owner. If the beneficial owner of an unidentified accumulation is determined, the funds shall be properly identified as the lawyer's trust property. If a missing beneficial owner is located, the trust funds or property shall be paid over or delivered to the beneficial owner if the owner is then entitled to receive the same. Trust funds and property that remain unidentifiable and funds or property that are held for missing owners after being designated as such shall, after diligent search and inquiry fail to identify the beneficial owner or owner's address, be disposed of as provided in applicable Florida law.

ANALYSIS/CONCLUSION: You must make a "diligent search and inquiry" to locate the client. Your trust account record must show that the funds are being held for a missing owner. If you have no other contact information located in the file you should try contacting the last treating doctor, the lawyer who referred case, or other avenues. Should still come up with nothing following your diligent search, you need to dispose of the funds according to FS Chapter 717, which pertains to Unclaimed Property through the Department of Financial Services. Go to: <http://www.fltreasurehunt.org/Holder.jsp> to obtain the information that you need in order to report the unclaimed settlement funds to the State. This website outlines all of the "firey hoops" that you must jump through in order to properly dispose of these funds.

#3

ISSUE: You represent a Carrier. The Carrier has repeatedly ignored the defense bills that you have submitted. Two years have passed and your defense bills have gone unpaid. Can you charge interest on the past-due legal defense bills?

RULE: See Ethical Opinion 71-26 (September 13, 1971): It is not unethical for an attorney to charge interest (or service charges) at an agreed legal rate on fees that are delinquent. See also Ethical Opinion 86-2 (April 15, 1986): Lawyers may charge a lawful rate of interest on liquidated fees and costs either as provided in advance by written agreement or upon reasonable notice.

ANALYSIS/CONCLUSION: If you decide to proceed with charging interest on a past-due bill, you must check your written agreement with the Carrier to determine if this issue is located within the contract that you have with the Carrier. If you do not have a contract or other written agreement with the Carrier, you must give the Carrier notice (at least 60 days) of your intent to begin charging interest on the past-due legal bill.

#4

ISSUE: *You have been practicing the area of Workers' Compensation for forty years. You have a law firm with four associates that you oversee who all practice in workers' compensation. You have brought approximately 350 cases to trial before various Judges of Compensation Claims. You have been so busy with expanding your practice and your busy docket, that you have not gotten Board Certified. Your friends and colleagues call you a Workers' Compensation "specialist", and you would like to advertise yourself as a "Specialist in Workers' Compensation". Are you allowed to do so?*

RULE: **6-3.9 MANNER OF CERTIFICATION**

(a) Listing Area of Certification. A member having received a certificate in an area may list the area on the member's letterhead, business cards, and office door, in the yellow pages of the telephone directory, in approved law lists, and by such other means permitted by the Rules of Professional Conduct. The listing may be made by stating one or more of the following: "Board Certified (area of certification) Lawyer;" "Specialist in (area of certification);" or use of initials "B.C.S.," to indicate Board Certified Specialist. If the initials "B.C.S." are used, the area(s) in which the member is board certified must be identified; if used in court documents or a non-advertising context, the initials may stand alone.

(b) Members of Law Firms. No law firm may list an area of certification for the firm, but membership in the firm does not impair an individual's eligibility to list areas of certification in accordance with this chapter. Except for the firm listing in the telephone directory, a law firm may show next to the names of any firm members their certification area(s).

And,

RULE 4-7.2 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

The following shall apply to any communication conveying information about a lawyer's or a law firm's services except as provided in subdivisions (e) and (f) of rule 4-7.1:

(c) Prohibitions and General Regulations Governing Content of Advertisements and Unsolicited Written Communications.

(6) *Communication of Fields of Practice.* A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is "certified," "board certified," a "specialist," or an "expert" except as follows:

(A) Florida Bar Certified Lawyers. A lawyer who complies with the Florida certification plan as set forth in chapter 6, Rules Regulating The Florida Bar, may inform the public and other lawyers of the lawyer's certified

areas of legal practice. Such communications should identify The Florida Bar as the certifying organization and may state that the lawyer is "certified," "board certified," a "specialist in (area of certification)," or an "expert in (area of certification)."

(B) Lawyers Certified by Organizations Other Than The Florida Bar or Another State Bar. A lawyer certified by an organization other than The Florida Bar or another state bar may inform the public and other lawyers of the lawyer's certified area(s) of legal practice by stating that the lawyer is "certified," "board certified," a "specialist in (area of certification)," or an "expert in (area of certification)" if:

(i) the organization's program has been accredited by The Florida Bar as provided elsewhere in these Rules Regulating The Florida Bar; and,

(ii) the member includes the full name of the organization in all communications pertaining to such certification.

(C) Certification by Other State Bars. A lawyer certified by another state bar may inform the public and other lawyers of the lawyer's certified area(s) of legal practice and may state in communications to the public that the lawyer is "certified," "board certified," a "specialist in (area of certification)," or an "expert in (area of certification)" if:

(i) the state bar program grants certification on the basis of standards reasonably comparable to the standards of the Florida certification plan as set forth in chapter 6, Rules Regulating The Florida Bar, as determined by The Florida Bar; and,

(ii) the member includes the name of the state bar in all communications pertaining to such certification.

ANALYSIS/CONCLUSION: Unless you are board certified, you may not call yourself a "*Specialist in Workers' Compensation*". However, since your Firm's practice is primarily concentrates in the area of Workers' Compensation, you are allowed to state in your advertising that your area of emphasis is Workers' Compensation.

#5

ISSUE: You are a Workers' Compensation defense attorney (Attorney Dewey) that shares a communal office area with (1) a Labor & Employment defense attorney (Attorney Cheatum); and (2) a general practice attorney that has recently become the Mayor of Podunk, FL (Attorney Howe). You decide that it would be beneficial to each of you if you advertise as a "Law Firm", using the same letterhead, and listing all attorneys names. The Mayor said that it would be fine with her if you put her name of the letterhead, even though she is going to "suspend" her law practice during the period of time that she is going to be the Mayor of Podunk. Basically, you want to make the public think that you have one practice that covers multiple areas of law; and, you want the Law Firm's name, "Dewey, Cheatum & Howe", to be noticed since the Mayor of Podunk knows many people in the community. Are you allowed to do so?

RULE: **4-7.9 FIRM NAMES AND LETTERHEAD**

(e) Name of Public Officer in Firm Name. The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(f) Partnerships and Authorized Business Entities. Lawyers may state or imply that they practice in a partnership or authorized business entity only when that is the fact.

ANALYSIS/CONCLUSION: No. Lawyers cannot imply that they practice in a partnership or other organization unless the lawyers are actually “in” a partnership or other binding professional organization. Further, you cannot use the Mayors name on the letterhead during the period she is not actively practicing law.

#6

ISSUE: *You are a Claimant’s attorney practicing in Workers’ Compensation for the last forty years. You run a law office with four associates. The “lead” associate in your office, the one that attends all of the depositions, all of the motions, all of the hearings, all of the court events, and all of the mediations, is leaving your Firm to open her own office. Which of your clients, if any, should be notified of the associate’s departure?*

RULE: **4-1.4 COMMUNICATION**

(a) Informing Client of Status of Representation. 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 terminology, 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 for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows or reasonably should know that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

AND,

RULE 4-5.8 PROCEDURES FOR LAWYERS LEAVING LAW FIRMS AND DISSOLUTION OF LAW FIRMS

(a) Contractual Relationship Between Law Firm and Clients. The contract for legal services creates the legal relationships between the client and law firm and between the client and individual members of the law firm, including the ownership of the files maintained by the lawyer or law firm. Nothing in these rules creates or defines those relationships.

(b) Client’s Right to Counsel of Choice. Clients have the right to expect that they may choose counsel when legal services are required and, with few exceptions, nothing that lawyers and law firms do shall have any effect on the exercise of that right.

(c) Contact With Clients.

- (1) *Lawyers Leaving Law Firms.* Absent a specific agreement otherwise, a lawyer who is leaving a law firm shall not unilaterally contact those clients of the law firm for purposes of notifying them about the anticipated departure or to solicit representation of the clients unless the lawyer has approached an authorized representative of the law firm and attempted to negotiate a joint communication to the clients concerning the lawyer leaving the law firm and bona fide negotiations have been unsuccessful.

(2) *Dissolution of Law Firm.* Absent a specific agreement otherwise, a lawyer involved in the dissolution of a law firm shall not unilaterally contact clients of the law firm unless, after bona fide negotiations, authorized members of the law firm have been unable to agree on a method to provide notice to clients.

(d) Form for Contact With Clients.

(1) *Lawyers Leaving Law Firms.* When a joint response has not been successfully negotiated, unilateral contact by individual members or the law firm shall give notice to clients that the lawyer is leaving the law firm and provide options to the clients to choose to remain a client of the law firm, to choose representation by the departing lawyer, or to choose representation by other lawyers or law firms.

(2) *Dissolution of Law Firms.* When a law firm is being dissolved and no procedure for contacting clients has been agreed upon, unilateral contact by members of the law firm shall give notice to clients that the firm is being dissolved and provide options to the clients to choose representation by any member of the dissolving law firm, or representation by other lawyers or law firms.

(3) *Liability for Fees and Costs.* In all instances, notice to the client required under this rule shall provide information concerning potential liability for fees for legal services previously rendered, costs expended, and how any deposits for fees or costs will be handled. In addition, if appropriate, notice shall be given that reasonable charges may be imposed to provide a copy of any file to a successor lawyer.

(e) Nonresponsive Clients.

(1) *Lawyers Leaving Law Firms.* In the event a client fails to advise the lawyers and law firm of the client's intention in regard to who is to provide future legal services when a lawyer is leaving the firm, the client shall be considered as remaining a client of the firm until the client advises otherwise.

(2) *Dissolution of Law Firms.* In the event a client fails to advise the lawyers of the client's intention in regard to who is to provide future legal services when a law firm is dissolving, the client shall be considered as remaining a client of the lawyer who primarily provided the prior legal services on behalf of the firm until the client advises otherwise.

ANALYSIS/CONCLUSION: All of your clients for whom the associate a legal service should be told that the associate is leaving your firm. It does not matter whether the client was brought to your firm by the associate or not. The ideal way to notify your clients of the associate's departure is to draft a joint letter from you and the associate advising of the departure and requesting that the client decide which attorney that they want to continue handling their Workers' Compensation claim. Should you and your associate be unable to reach an agreement about what to say in the joint letter, the associate will be allowed to send a letter to the clients stating that she (the associate) has left the firm, and advising of the associate's new contact information.

#7

ISSUE: *You are an attorney that has been practicing in Workers' Compensation for the last forty years. For the first thirty-five years, you were a defense attorney working at a private defense firm; your primary defense client was You-Are-Not-Sick Insurance. Based on the length of time you have worked with You-Are-Not-Sick, you know their methodology and strategy. You also know that all of the adjusters at You-Are-Not-Sick Insurance have desk authority of \$10,000 to settle cases. For the past five years, you have been representing Employees who have been injured on-the-job. Recently, a new client has asked you to represent him in suing You-Are-Not-Sick Insurance for a work-related accident. Can you represent this new client and proceed with suing your former client?*

RULE: 4-1.9 CONFLICT OF INTEREST; FORMER CLIENT

A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent; or
- (b) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known; or
- (c) reveal information relating to the representation except as these rules would permit or require with respect to a client.

ANALYSIS/CONCLUSION: When looking at the applicability of Rule 4-1.9, you need to remember that this Rule has three parts, any of which individually or together, could satisfy the test for a "conflict". If a conflict does exist, you must obtain your client's consents before proceeding with representation. In most situations involving Workers' Compensation claims and counsel switching from defense to/from plaintiff (such as the hypothetical outlined above), there is not going to be a conflict.

#8

ISSUE: *You have been practicing in Workers' Compensation for the last forty years. Your file room looks like the National Archives. You would really like to get rid of your old and closed files, but you fear that you might violate some pesky FL Bar rule if you start shredding. How long must you keep a file after it has been closed? And, how do you dispose of the files?*

RULE: See Ethical Opinion 81-8 (January 16, 1981) A lawyer who intends to dispose of clients' files should make a diligent attempt to contact all clients and determine their wishes concerning their files. The file of any client who cannot be located must be reviewed individually and may be destroyed only after it is determined that no important papers of the client are in the file. A lawyer who is closing his practice should place files containing important papers in storage or turn them over to the attorney who assumes control of his active files. See also Ethical Opinion 63-3 (June 25, 1963) The length of time a lawyer's files should be maintained depends largely on the importance of a file's contents. If the client is available, he should be requested to pick up the contents or authorize the attorney to dispose of the material.

ANALYSIS/CONCLUSION: There is no specific number of years you are required to keep closed files. The exceptions are: (1) Trust accounting records (6 years); and (2) Closing statements in contingent fee cases (6 years). Also, there is no set time period after which closed files can be destroyed. Based upon Ethical Opinions, it appears that you should keep a closed files as long as is necessary, based upon the nature of the case and the materials found in the file. If you want to dispose of your closed files, you need to contact your clients and obtain their permission and direction regarding disposal of their file. Should you be unable to make contact with your client, you should remove any original documents or important papers (e.g., settlement releases). These papers should be indexed and kept for a reasonable length of time. You can then dispose of the remainder of the file. When disposing of the file, reasonable care should be taken to protect client confidentiality. The ideal way to dispose of a file is to have it shredded.