WORKERS' COMPENSATION

Ethics 2008

#1:Solicitation

Barfly Bart, general practice lawyer, bserves Wanda limping to the bar. After me small talk, Bart asks her about the limp.

anda says it’s work-related. Bart says he’s
awyer and can represent her in a worker’s
mpensation claim.
Is his contact with Wanda Appropriate?

#1 The Solicitation

Rule 7.3(a) Direct Contact With Prospective
ients.

- A lawyer shall not by in-person or live
ephone contact solicit professional employment
om a prospective client with whom

the lawyer has no family or prior professional
ationship when a significant motive for the
wyer’s doing so is the lawyer’s primary gain.
Alaska Rule 7.3(a) Is the same

2 The Retainer

Falsely Documented Worker

Wanda tells Bart she’s working using her
ead cousin’s Social Security Number.
Bart signs her up and begins the case.
Okay?

#2 The Retainer: Falsely Documented Workers Probably not under proposed rule 9.0(g) which defines “informed consent” How much initial information is required to satisfy “informed consent”?

2 The Retainer: Falsely Documented Worker Example: Potential crimes

USC Section 1325(a):Felony unlawful entry

8 USC Section 1546 (a): Felony false document use for employment

USC Section 1546 (b): Felony falsely filling out employment.

USD Section 911: False claim of US citizenship.

2 The Retainer:

Falsely Documented Workers

xamples of attorney's potential liability:

USC Section 1325: Felony harboring or aiding illegal alien.

USC section 2: Felony aiding/abetting another in commission of crime.

SUC section 4: Felony misprision of a felony (knowing person committed crime and filing to inform authorities)

2 The Retainer:

Falsely Documented Worker

hical Question:

an a lawyer represent a client in a worker's
compensation claim if the client is using a
false identity?

2: The Retainer:

Falsely Documented Workers

e 1.2 (d) says lawyer shall not assist client in conduct lawyer knowsi
criminal or fraudulent.

ska 1.2(d) "A lawyer shall not counsel or assist a client to engagei
conduct that the lawyer knows is criminal or fraudulent,

e 3.3(a)(4) :Duty not to use false evidence. Alaska Same.

e 1.16(a)(1) :No representation if violation of ethical code or “othe
aw” . Alaska Same

e 1.16(a)(4) :Withdrawal required if services used to further crime
Alaska Rule 1.16 (b)

3 The Specialist

art tells Wanda that worker’s compensation
is one of his “specialty areas.”

ppropriate?

#3: The Specialist

ule 7.4 Communication of Fields of Practice.

l) A lawyer shall not state or imply that thelawyer has been recognized or certified as aspecialist in a particular field of law except(where such certification is granted by the proper regulatory agency)

aska Rule 7.4 Same Exceptions patent practice, certifications by agencies whose certifications are granted by an organization or authority whose specialty certification program is accredited by the American Bar Association.

#4 : The (In) Competence

rt has very little worker’s compensation experience.

anda tells Bart she was receiving $400/wk from United
Heartless when benefits were denied after “independent”
Wedenyem. She still hurts and her own doctor keeps her
work.

rt completes hearing Application using $400
wage($10/hr & 40 hr wk). Heartless concedes.

anda, in fact, works 70 hr/wk, triggering an enhanced weel
wage and disability rate under an Administrative Rule, of

which Bart is unaware.

as he violated an ethics rule?

#4 The (In) Competence

ule 1.1 Competence

lawyer shall provide competent representation to aclient. Competence requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

aska Rule 1.1 (a) A lawyer shall provide competent representation to a client. Competent

representationrequires the legal knowledge, skill, thoroughness andpreparation reasonably necessary for the representation.

Comment “ In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.”

5 Justice Delayed

art is a busy lawyer and never gets around to obtaining a form (necessary for medical proof admissibility) from Wanda’s doctor .

art received a Notice from the Worker's Compensation Division and soon after an order dismissing the claim (without prejudice) for lack of medical evidence.

olation?

#5 Justice Delayed: (Busy Practice)

ule 1.3 Diligence

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

omment: A lawyer should pursue a matter on behalf ofa

client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor; A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

aska 1.3 is same.

#6 The Diligence Dodge

anda gets a copy of dismissal order and asks Attorney Bar an explanation. After receiving assurance from the W.C. D that he can re-file, Bart tells Wanda the dismissal was "routine."

rt need not tell Wanda real reason for dismissal since she can re-file and no harm done to Wanda.

rt must tell Wanda the basis for the dismissal.

rt must tell Wanda the real reason and advise Wanda she should see a malpractice lawyer (and Bart knows one-a drinking buddy from the corner bar).

#6 The Diligence Dodge

ule 1.4 Communication With Client.

)(3) A lawyer shall keep a client reasonably informed about the status of a matter and promptl comply with reasonable requests for information.

) A Lawyer shall explain a matter to the extent

reasonably necessary to permit the client to make
informed decisions regarding the representation.

aska 1.4 same

#7 The Miscalculation

anda’s doctor says she is permanently and totally
disabled. Bart says to Larry Low Ball insurance
company attorney, “ my case is 100% Permanent
Total Disability. That comes out to $177,000.00.
(Maximum of PPI) We will take $150,000 to settle.
Larry immediately realizes the value of the case

(based on the PTD rate) exceeds $500,000.

rry must inform Bart he miscalculated?

rry can take the deal as an advocate for his client
?

#7 : The Miscalculation

ule 4.1 Truthfulness in Statements to others

the course of representing a client, a lawyer shall not
knowingly make a false statement of material fact or lawto
third person.

omment: A lawyer is required to be truthful when dealingwi
others on a client’s behalf, but generally has noaffirmative
duty to inform an opposing party of relevantfacts.

omment: An omission that is the “equivalent of anaffirmativ
false statement: can be misrepresentation.

#7: The Miscalculation

aska Rule 4.1

the course of representing a client a lawyer shall not
knowingly : (a) make a false state of material fact or law

to a third person

omment

awyer is required to be truthful when dealing with others on a client's behalf; but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

#8 The Limited Retainer

avvy Lawyer Tom Knows Wanda's Case

may likely involve other areas. (ADA, FMLA
OSHA, NLRA, ADEA, EEOC, ERISA,
OWPA, SSD, Medicare)

s Retainer Agreement specifically limits
representation to worker’s compensation.
ppropriate?

#8 the Limited Retainer

nformed Consent” defined by 1.0(f) and its Comments has some crucial elements:

xplanation of facts/circumstances (services awyer will and will not provide)

xplanation of advantages/ disadvantages of proposed course of conduct (explain risks of limited scope represent)

#8 The Limited Retainer

Proposed Alaska Rule 9.0 (g)
“Informed consent” denotes the agreement
a person to a proposed course of conduct
er the lawyer adequately explained the
aterial risks of, and the reasonably available
ernatives to, the proposed course of
nduct.

#9 The Misdirected E-Mail

m receives an e-mail from opposing counsel, Larry,
obviously sent in error and intended for Larry’s client,
United WealthCare. E-mail outlines case strategy,

complete with dollar amounts.

ptions:

Contact Larry to tell him he received the e-mail.

Abide by Larry’s wishes as to how to dispose of the confidential material.

Print doc & use information fo his client’s advantage.

d) Tell Larry he will delete (but print & copy anyway)

#9 The Misdirected E-Mail

ame question:

arry (Defense counsel):

Can insist Tom not tell his client the contents.

Can refrain from telling United wealth

Care about the erroneous transmission.

Must tell his client about the screw-up.

#9 the Misdirected E-Mail

ıle(s) 4.4 Respect for Rights of third Persons
d Rule: ABA Formal opinion 92.368
n attorney who received information mistakenly has an
ethical duty to “attempt to return the information

unopened and without revealing the information:.

rther “the law of good sense” supports the conclusion that
receiving counsel’s obligations are to avoid receiving the
materials, notify the sending counsel, and abide by
sending the counsel’s wishes as to how to treat the
disposition of the confidential materials.”

9 The misdirected E-Mail

ule(s) 4.4 Respect for rights of Third Persons

ew Rule: The lawyer receiving the erroneous information should “promptly notify the sender.”Comment: “Some lawyer may elect to returndocument unread: the decision to voluntarily return is a matter of professional judgment.”

aska 4.4 In representing a client, a lawyer shallno use means that have no substantial purposeother than to embarrass, delay or burden a thirdperson, nor use methods of obtaining evidence that violate the legal rights of such a person.

10: Representing Both Sides

the hearing defense attorney Larry argues that United WealthCare's position on Wanda's weekly wage excludes overtime. One month earlier, representing an injured worker, Larry took the exact opposite position in front of this same tribunal.

oes Larry have a conflict.

#10 Representing both Sides

ule 1.7 conflict of Interest, Current Client. Comment

dinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients.

conflict of interest exists, however, if there is a significant risk that a lawyer’s action on behalf of one client will materially limit the lawyer’s effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client.

Representing Both Sides

aska Rule 1.7 Comment A lawyer may represent
rties having
antagonistic position on a legal question that has
arisen in different cases, unless representation of
either client would be adversely affected. Thus , it
is ordinarily not improper to assert such position in
cases pending in different trial courts, but it may
be improper to do so in cases pending at the
same time in a appellate court

#11 The Co-Worker Contact

anda tells Tom her supervisor admitted that supervisor removed the machine's safety guard, causing Wanda's injury. The supervisor is now retired.

an tom (or Wanda at Tom's request) contact the supervisor without permission from Larry?

#11 The Co – Worker Contact

le 4.2 Communication with Person represented by Counsel

lawyer shall not communicated 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.

mment: [7] Contact is now prohibited with the constituent of the organization who “supervises, directs, or regularly consults with the organization’s lawyer with respect to the matter , or whose act or omission in the matter may be imputed to the organization or purposes of criminal or civil liability”.

mment:[7] consent of the organization’s lawyer is not required for communication with a former constituent.
aska 4.2 is the same.
comment similar to above.

12 Requesting A Hearing.

Tom knows that the time for requesting a hearing under AS .30.110c is close. He has to still depose three doctors. However if does file an affidavit for a hearing he must assert that discovery has en completed.

If he doesn't the case may be time barred.

If he files an affidavit of readiness to proceed Tom know that Larry l assert that discovery is not completed.

Kim v. Alyeska Seafoods, Inc. 197 P.3d 193 Alaska,2008

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

13 Working with opposing attorney.

Claimant's case has been controverted in its entirety. Larry's IME doctor contends that the condition is not related to the injury .

Claimant needs surgery, cannot work and has no money. The claimant's doctor and the SIME doctor agreed that the condition is related to the injury

Tom wants to go to hearing but Larry has Smallwooded the SIME doctor and the claimant's doctor. Tom tries to set up the deposition but cannot get Larry to agree to the dates. Larry is a very busy defense counsel. Larry's secretary says that Larry has no openings for 60 days.

Frustrated Tom sets the dates of the deposition.

Rule 3.2 Expediting Litigation

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

Comment

Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain right redress or repose. I is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

14. Candor Before The Board.

arry files a brief citing case law supporting his osition. However some of the cases he cites are correct citations, while others have been verruled or seriously questioned by subsequent ases.

ule 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(3) fail to disclosed to the tribunal legal

authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client an not disclosed by opposing counsel;

15. Communications With the Board.

arry calls the Workers' Compensation office and asks when the case will be heard the next day. He nows that Tom has schedule to have witnesses stify long distance by phone in the afternoon. A clerk forms him of an opening in the morning. Larry says

at would be fine.

hen Tom finds out about the change he accuses arry of manipulating the schedule to keep him from alling his witnesses. An argument ensues between e attorneys in front of the Board.

ter the hearing Tom writes a threatening letter to arry about the “manipulation of the schedule” and oss copies the Board hearing officer.

ter the hearing Tom is at a party and runs into a ember of the hearing panel. Tom explains his ustration with Larry.

om’s client calls the hearing officer not knowing what
happening. The Board calls Tom and Tom tries to
scuss the status of the case with the hearing officer in
sponding to the clients complaints.

ule 3.5 impartiality and Decorum of the Tribunal
Lawyer shall not:
) seek to influence a judge, juror , prospective juror
other official by means prohibited by law:
) communicate ex parte with such a person except as
ermitted by law; or
) engage in conduct intended to disrupt a tribunal.