

# WORKERS' COMPENSATION

Ethics 2008

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## #1: Solicitation

Barfly Bart, general practice lawyer, observes Wanda limping to the bar. After

some small talk, Bart asks her about the limp. Wanda says it's work-related. Bart says he's a lawyer and can represent her in a worker's compensation claim.

Is his contact with Wanda Appropriate?

## #1 The Solicitation

Rule 7.3(a) Direct Contact With Prospective Clients.

- 1 ● A lawyer shall not by in-person or live

telephone contact solicit professional employment from a prospective client with whom  
2 the lawyer has no family or prior professional relationship when a significant motive for the lawyer'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 dead 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

8 USC Section 1325(a): Felony unlawful entry

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

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

4 USD Section 911: False claim of US citizenship.

**#2 The Retainer:**

# Falsely Documented Workers

Examples of attorney's potential liability:

8 USC Section 1325: Felony harboring or aiding illegal alien.

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

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

## #2 The Retainer:

# Falsely Documented Worker

Ethical Question:

Can 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

Rule 1.2 (d) says lawyer shall not assist client in conduct lawyer knows is criminal or fraudulent.

Alaska 1.2(d) “A lawyer shall not counsel or assist a client to engage in conduct that the lawyer knows is criminal or fraudulent,

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

Rule 1.16(a)(1) :No representation if violation of ethical code or “other law” . Alaska Same

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

## # 3 The Specialist

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

Appropriate?

## #3: The Specialist

Rule 7.4 Communication of Fields of Practice.

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

Alaska 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

Bart has very little worker's compensation experience. Wanda tells Bart she was receiving \$400/wk from United Heartless when benefits were denied after "independent" Dr. Wedenyem. She still hurts and her own doctor keeps her off work.

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

Wanda, in fact, works 70 hr/wk, triggering an enhanced weekly wage and disability rate under an Administrative Rule, of which Bart is unaware.

Has he violated an ethics rule?

## #4 The (In) Competence

Rule 1.1 Competence

A lawyer shall provide competent representation to a client.

Competence requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Alaska Rule 1.1 (a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation 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

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

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

Violation?

**#5 Justice Delayed: (Busy Practice)**

## Rule 1.3 Diligence

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

Comment: A lawyer should pursue a matter on behalf of a 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.

Alaska 1.3 is same.

# #6 The Diligence Dodge

Wanda gets a copy of dismissal order and asks Attorney Bart for an explanation. After receiving assurance from the W.C. Dept that he can re-file, Bart tells Wanda the dismissal was “routine.”

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

Bart must tell Wanda the basis for the dismissal.

Bart 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

## Rule 1.4 Communication With Client.

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

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

Alaska 1.4 same

# #7 The Miscalculation

Wanda'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.

Larry must inform Bart he miscalculated?

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

## #7 : The Miscalculation

## Rule 4.1 Truthfulness in Statements to others

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

Comment: A lawyer 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.

Comment: An omission that is the "equivalent of an affirmative false statement: can be misrepresentation.

# #7: The Miscalculation

## Alaska Rule 4.1

In 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

## Comment

A lawyer 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

Savvy Lawyer Tom Knows Wanda's Case may likely involve other areas. (ADA, FMLA, OSHA, NLRA, ADEA, EEOC, ERISA, OWBPA, SSD, Medicare)

His Retainer Agreement specifically limits

representation to worker's compensation.  
Appropriate?

## #8 the Limited Retainer

“Informed Consent” defined by 1.0(f) and its  
Comments has some crucial elements:  
Explanation of facts/circumstances (services  
lawyer will and will not provide)

Explanation 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 by a person to a proposed course of conduct after the lawyer adequately explained the

material risks of, and the reasonably available alternatives to, the proposed course of conduct.

## #9 The Misdirected E-Mail

Tom 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.

Options:

- a) Contact Larry to tell him he received the e-mail.
- b) Abide by Larry's wishes as to how to dispose of the confidential material.

c) Print doc & use information fo his client's advantage.

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

## #9 The Misdirected E-Mail

Same question:

Larry (Defense counsel):

c) Can insist Tom not tell his client the contents.

b) Can refrain from telling United wealth

Care about the erroneous transmission.

c) Must tell his client about the screw-up.

## #9 the Misdirected E-Mail

Rule(s) 4.4 Respect for Rights of third Persons

Old Rule: ABA Formal opinion 92.368

An attorney who received information mistakenly has an ethical duty to “attempt to return the information

unopened and without revealing the information:.

Further “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

Rule(s) 4.4 Respect for rights of Third Persons

New Rule: The lawyer receiving the erroneous information should “promptly notify the

sender.” Comment: “Some lawyer may elect to return document unread: the decision to voluntarily return is a matter of professional judgment.”

Alaska 4.4 In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, nor use methods of obtaining evidence that violate the legal rights of such a person.

## #10: Representing Both Sides

At 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.

Does Larry have a conflict.

**#10 Representing both Sides**

Rule 1.7 conflict of Interest, Current Client. Comment  
Ordinarily a lawyer may take inconsistent legal positions in  
different tribunals at different times on behalf of different  
clients.

A 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

Alaska Rule 1.7 Comment A lawyer may represent parties 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 an appellate court

## #11 The Co-Worker Contact

Wanda tells Tom her supervisor admitted that supervisor removed the machine's

safety guard, causing Wanda's injury. The supervisor is now retired.

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

## #11 The Co – Worker Contact

Rule 4.2 Communication with Person represented by Counsel

[A] 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.

Comment: [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”.

Comment:[7] consent of the organization’s lawyer is not required for communication with a former constituent.

Alaska 4.2 is the same.

No comment similar to above.

## # 12 Requesting A

# Hearing.

Tom knows that the time for requesting a hearing under AS 23.30.110c is close. He has to still depose three doctors. However if he does file an affidavit for a hearing he must assert that discovery has been completed.

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

If he files an affidavit of readiness to proceed Tom know that Larry will 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. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

# 1. Candor Before The Board.

Larry files a brief citing case law supporting his position. However some of the cases he cites are incorrect citations, while others have been overruled or seriously questioned by subsequent cases.

## Rule 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 and not disclosed by opposing counsel;

# 1. Communications With the Board.

Larry calls the Workers' Compensation office and asks as when the case will be heard the next day. He knows that Tom has schedule to have witnesses testify long distance by phone in the afternoon. A clerk informs him of an opening in the morning. Larry says that would be fine.

When Tom finds out about the change he accuses Larry of manipulating the schedule to keep him from calling his witnesses. An argument ensues between the attorneys in front of the Board.

After the hearing Tom writes a threatening letter to Larry about the “manipulation of the schedule” and cross copies the Board hearing officer.

After the hearing Tom is at a party and runs into a member of the hearing panel. Tom explains his frustration with Larry.

Tom's client calls the hearing officer not knowing what is happening. The Board calls Tom and Tom tries to discuss the status of the case with the hearing officer in responding to the clients complaints.

## Rule 3.5 impartiality and Decorum of the Tribunal

A Lawyer shall not:

- (a) seek to influence a judge, juror , prospective juror or other official by means prohibited by law:
- (b) communicate ex parte with such a person except as permitted by law; or
- (c ) engage in conduct intended to disrupt a tribunal.

