

HYPOTHETICALS

1. *Your perpetually difficult client has agreed to settle her workers' compensation case. However, she has stated that due to the abysmally low settlement you obtained for her, she would like to renegotiate the fee agreement. Instead of the previously agreed 20%, she proposes that she instead gift you the equivalent of the attorney's fee in free promotional shirts bearing the logo of her new internet startup company. You refuse to renegotiate the agreement to which she says she no longer requires your services and requests a copy of her file.*
 - A. *Can you refuse to turn over her file until she signs a document agreeing to pay you an agreed amount for your time?*
 - B. *Can you counter her proposal by agreeing to waive your attorney's fee in exchange for a stake in her internet business?*
 - C. *When her prospective new lawyer calls, can you badmouth the former client and tell the new lawyer to run as fast as he can from this lady?*

Considerations:

(A)

See Rule 1.16 (Declining or Terminating Representation)

Rule 1.16(e) provides "[a]ll original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer.

- If the lawyer wants to keep a copy of original documents, the lawyer is responsible for the cost of duplication.
- The lawyer must provide, upon request, the following: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda and other attorney work product documents prepare or collected for the client in the course of the representation; research materials; and bills previously submitted to the client.

- The lawyer is not required to provide the client with copies of billing records and documents intended only for internal use, such as memoranda or difficulties arising from the lawyer-client relationship.
- The lawyer has met his or her obligation under Rule 1.16(e) by providing the client file one time at the client's request. The lawyer is not required to provide multiple copies.
- BUT the lawyer has not met his or her obligation under Rule 1.16(e) by providing copies of documents on an item-by-time basis during the course of representation.

(B)

See Rule 1.5 (Fees) and Rule 1.8 (Conflict of Interest: Prohibited Transactions).

Rule 1.5(a) states that a lawyer's fee shall be reasonable. See 1.5(a)(3), which states the fee customarily charged in the locality for similar legal services is a factor to be considered when looking at whether a fee is reasonable.

The manner in which claimant's attorneys are paid in workers' compensation cases different from most practice areas.

Rule 1.8(a) provides that a lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
- (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (3) the client consents in writing thereto.

(C)

See Rule 1.6 (Confidentiality of Information)

Rule 1.6(a) provides that a lawyer shall not reveal information protected by the attorney-client privilege under applicable law **or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client** unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation.

Answers:

A. No. See Rule 1.16(e), which states the file is the client's property. The client is entitled to his or her file regardless of whether attorney's fees are owed.

B. No. See Rule 1.5(a)(3) and Rule 1.8(a).

C. No. See Rule 1.6(a), which states a lawyer cannot share information gained in the professional relationship that would embarrass or be detrimental to the client.

2. *Your elderly client agrees to settle his workers' compensation case. Prior to execution of the settlement documents, you receive a call from his estranged wife advising you that he has passed away and wanting to know how much she stands to receive from the settlement.*

A. *Do you have an obligation to disclose to opposing counsel that your client has passed away?*

B. *What if the documents were already signed, but not yet approved by the Commission? Does this change your obligation? What if the Commission already approved the settlement?*

Considerations:

(A)

See Rule 4.1 (Truthfulness in Statements to Others).

Rule 4.1(a) states that in the course of representing a client, a lawyer shall not knowingly:

(a) make a false statement of fact or law; or

(b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

The Rules of Professional Conduct define "fraudulent" as conduct having a purpose to deceive and not merely negligent misrepresentation or failure to approve another of relevant information.

In the workers' compensation setting, the claimant's death would be relevant information and is likely to impact the carrier's liability.

See also LEO 952 and proposed LEO 1900.

- LEO 952 opined that where the administrator of the estate authorized the attorney to accept the settlement demand, it is not improper for an attorney not to disclose the death of his client absent a direct inquiry from the insurance company. However, the attorney should disclose the death of the client at the time he accepts the offer of settlement and let the opposing side know that the client authorized the range of settlement prior to his death and the estate's administration authorized the settlement.

BUT

- Proposed LEO 1900 opines that a lawyer must disclose the client's death to opposing counsel or the opposing part before any further substantive communication. If the matter is before a court, the lawyer must disclose the client's death to the court no later than the next communication with, or appearance before, the court.

(B)

See Rule 3.3 (Candor Toward the Tribunal).

Rule 3.3(a) states that a lawyer shall not knowingly:

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

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.

Note: In the workers' compensation setting, either party has 30 days to withdraw consent to settlement.

Answers:

A. Yes. Given the proposed LEO 1900, counsel should err on the side of caution and advise opposing counsel that the client died.

B. Counsel should advise opposing counsel of the client's death, even if the documents are signed. Whether an attorney has to advise of the client's death after the Commission's approval of the settlement will depend on whether the 30-day appeal period has passed.

3. *On the day of his hearing, your client shows up with a family “friend” who states that she does not approve of the way your client’s case has been handled and wishes to testify on his behalf so that she can expose the injustices of the workers’ compensation system. You politely decline, at which point she instructs you to tell the Deputy that your client is ill and cannot testify in the hopes of having the matter continued. How should you proceed?*

Considerations:

See Rule 1.4 (Scope of Representation) and Rule 3.3 (Candor Toward the Tribunal).

Rule 1.4(c) provides that a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may

- (1) discuss the legal consequences of any proposed course of conduct with a client;
- (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law; and
- (3) counsel or assist a client regarding conduct expressly permitted by statute or other applicable law that conflicts with federal law, provided that the lawyer counsels the client about the potential legal consequence of the client’s proposed course of conduct under applicable federal law.

See also Rule 1.4(d) which states that when a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct.

See also Rule 3.3(a)(4), (b) and (d):

Rule 3.3 (Candor Toward the Tribunal)

- (a) A lawyer shall not knowingly:
 - (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take a reasonable remedial measures.

Rule 3.3(b) provides that a lawyer may refuse to offer evidence that the lawyer reasonably believes is false. Also, Rule 3.3(d) states that a lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon the tribunal in a proceeding in which the lawyer is representing a client shall promptly reveal the fraud to the tribunal.

Answer: You cannot put the individual on the stand. If the client insist, then advise the client of consequences, and if the client still insists on the course of action, then request continuance so you may withdraw as counsel without prejudice to the client.

4. *You are defending a workers' compensation case. One day your phone rings and you pick up and it is the represented claimant, who has accidentally called you instead of her attorney. You advise that you cannot speak with her and before you can hang up, she blurts out that she is sick and tired of her case and ready to settle for whatever you can offer. You tell her that you will communicate this to her attorney. Did you handle this correctly?*

Considerations:

See Rule 4.2 (Communication with Persons Represented by Counsel).

Rule 4.2 states that while 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 by law to do so.

Answer:

Yes. Comment 3 of Rule 4.2 states “[a] lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.”

5. *Your sweet but somewhat gullible client has a workers compensation case for which she is being paid disability benefits under an award, and actively receiving medical treatment. She has a third-party liability case arising from the same accident which is being handled by another firm. One day the client calls you up and tells you that about a month ago, she settled her third-party case and received the full amount of the settlement, minus the other attorney's fee. That same day, you receive a voicemail from the workers' compensation defense attorney inquiring about the third-party case. Do you have an obligation to disclose to the WC defense attorney that your client has settled her third-party case?*

Considerations:

See Rule 4.1 (Truthfulness in Statements to Others).

Rule 4.1(a) states that in the course of representing a client, a lawyer shall not knowingly:

(a) make a false statement of fact or law; or

(b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

The Rules of Professional Conduct define "fraudulent" as conduct having a purpose to deceive and not merely negligent misrepresentation or failure to approve another of relevant information.

Answer:

Given that opposing counsel has directly asked about the status of the third-party suit, the attorney should advise opposing counsel of the client's settlement of the suit without the carrier's consent.

6. *Your client has authorized you to settle his workers' compensation case for \$50,000. After the settlement is approved, he says he wants to sign the check over to you, and for you to issue 4 checks to him each in the amount of \$9,999 and "keep the rest for your trouble". Should you comply with the client's request?*

Considerations:

The limited facts of this hypothetical make a definitive answer difficult.

See Rules 1.5 (Fees), 1.15 (Safekeeping Property) and Rule 8.4 (Misconduct). Possibly 1.2(c), if the lawyer knows the conduct is criminal or fraudulent.

Rule 1.5(a) states that a lawyer's fee shall be reasonable. Rule 1.5(a)(3) states the fee customarily charged in the locality for similar legal services is a factor to be considered when determining whether a fee is reasonable.

Rule 1.15(a)(1) requires that all funds received or held by a lawyer or law firm on behalf of a client or a third party, or held by a lawyer as a fiduciary, other than reimbursement of advices for costs and expenses shall be deposited in one or more identifiable trust accounts; all other property held on behalf of a client should be placed in a safe deposit box or other place of safekeeping as soon as practicable.

See also Rule 1.15(b)(3) requires a lawyer to maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accountings to the client regarding them.

Rule 1.15(c) requires an attorney to keep the following records (at a minimum):

- (1) Receipts and disbursements journals for each trust account. These journals shall include, at a minimum: identification of the client or matter; date and amount of transaction; name of the payor or payee; manner in which the funds were received, disbursed, or transferred; and current balance. A checkbook or transaction register may be used in lieu of separate receipts and disbursements journals as long as the above information is included.
- (2) A client ledger with a separate record for each client, other person, or entity from whom money has been received in trust. Each entry shall include, at a minimum: identification of the client or matter; date and amount of the transaction; name of the payor or payee; source of funds received or purpose of disbursement; and current balance.
- (4) All records subject to this Rule shall be preserved for at least five calendar years after termination of the representation or fiduciary responsibility.

Rule 1.15(d)(4) requires a lawyer to fully explain the purpose of all receipts and disbursements of trust funds reported in the trust journals and ledgers and supported by adequate records.

Rule 8.4(b) and (c) state that it is professional misconduct for a lawyer to:

* * *

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law[.]

Answer: The red flags are significant. Given the potential Rule violations, the attorney's best practice is to refuse the request of the client. It is best to avoid the appearance of impropriety.

If the attorney knows the client is engaging in criminal or fraudulent behavior, then see Rule 1.2(c), which states) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may:

(1) discuss the legal consequences of any proposed course of conduct with a client;

(2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law; and

(3) counsel or assist a client regarding conduct expressly permitted by statute or other applicable law that conflicts with federal law, provided that the lawyer counsels the client about the potential legal consequence of the client's proposed course of conduct under applicable federal law.

7. *Your client is embroiled in contentious litigation with her self-insured employer. She befriends one of the ladies who works in the risk management department who has access to emails between the defense attorney and the adjuster. One day, the client forwards you an email which contains the defense attorney's litigation strategy. The email does not contain any information you were not already aware of. What is your best course of action?*

Considerations:

See Rule 1.2 (Scope of Representation) and Rule 3.4 (Fairness to Opposing Party and Counsel).

Rule 1.2(b) and (c) state:

(b) A lawyer may limit the objectives of the representation if the client consents after consultation.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may

(1) discuss the legal consequences of any proposed course of conduct with a client;

(2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law; and

(3) counsel or assist a client regarding conduct expressly permitted by statute or other applicable law that conflicts with federal law, provided that the lawyer counsels the client about the potential legal consequence of the client's proposed course of conduct under applicable federal law.

See LEO 1702 wherein the Ethics Committee adopted the ABA Formal Opinion 94-382, which held:

[T]he Standing Committee is of the opinion that a lawyer receiving such privileged or confidential materials satisfies her professional responsibilities by (a) refraining from reviewing materials which are probably privileged or confidential, any further than is necessary to determine how appropriately to proceed, (b) Notifying the adverse party or the party's lawyer that the receiving lawyer possesses such documents, (c) following the instructions of the adverse party's lawyer, or (d) in the case of a dispute, refraining from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.

See LEO 1786 for an intentional disclosure rather than an inadvertent disclosure as discussed in LEO 1702.

Answer: The information received from the client is confidential information between the employer and its counsel and protected by the attorney-client privilege. The information was received through the improper means of a third party.

This situation involves a client who engaged in wrongful conduct gathering evidence. As such, the client should be counseled that his/her action was wrongful, that the wrongfully obtained information cannot be used by the lawyer and the wrongful action cannot occur again. The lawyer should not reveal that the client has engaged in wrongful conduct because the action is confidential as a past bad act, but the action may have to be disclosed in discovery or another similar situation. At that point, the lawyer will have to disclose the conduct, but should attempt to minimize the consequences to the client.

If the client persists in obtaining information improperly through a third party, the lawyer should withdraw as counsel.

8. *You work for a heavy volume plaintiff's firm with multiple offices and dozens of attorneys. You are representing a client who was injured at work and have negotiated a very good settlement of her WC case where the employer retains their right of subrogation against any third-party recovery. Meanwhile another attorney in the same firm is handling the third-party liability claim arising from the same accident. He has filed suit to protect the statute of limitations. At some point, that attorney leaves the firm and the third-party case lies dormant for several months. When the case is reassigned, the new attorney opens the file and realizes that the amount being sought in the suit is far below what the case is worth and the time to increase the ad damnum has passed. Shortly thereafter, the defense attorney on the liability case calls up and offers the exact amount of the ad damnum to settle. Your colleague asks you what he should do*
- A. *Can you recommend that the client accept the offer without disclosing the mistake?*
- B. *Do you have an obligation to disclose to the employer's attorney that the third-party case has imploded, and they will get pennies on the dollar for their lien? Would it make a difference if the employer waived their subrogation rights as part of the workers' compensation settlement?*

Considerations:

(A)

See Rule 1.2 (Scope of Representation), Rule 1.4 (Communication), Rule 1.7 (Conflict of Interest: General Rule) and Rule 1.10 (Imputed Disqualification: General Rule).

Rule 1.2(a) provides that a lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter.

Rule 1.4(b) states that a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.7(a) states a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client or

(2) there is significant risk that the **representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.**

Rule 1.10 (a) provides that while lawyers are associated in a firm, none of them shall represent a client when the lawyer knows or reasonably should know that any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9 or 2.10(e).

Answer:

A. No. Rule 1.4(b) requires the attorney to discuss all relevant information with the client so the client can make an informed decision regarding settlement.

B. No since the lawyer was not specifically asked about the value of the third-party suit. If the lawyer is asked directly, the lawyer cannot lie or mislead, but the lawyer should try to avoid disclosing the information if it is detrimental to the client.

9. *You are defending a workers' compensation case for a large corporate client. You wish to speak to the claimant's doctor to find out why he thinks a man who twisted his ankle two years ago cannot return to work. When you call the doctor's office his assistant tells you that the doctor would be happy to speak with you but the claimant's attorney has advised him not to. She says the doctor would be happy to schedule a deposition, for which he charges a flat fee of \$5,000 per hour with a two-hour minimum.*

- A. *Is the claimant's attorney allowed to instruct a doctor not to speak with defense counsel?*
- B. *Instead of paying the doctor's outrageous deposition fee, can you send a yes/no questionnaire with 30 questions on it and tell the doctor's assistant to instruct the doctor to check "yes" in response to each question?*
- C. *Assume you receive the questionnaire and it is filled out incorrectly. The doctor later sends a corrected one. Do you have an obligation to turn over the erroneous questionnaire to opposing counsel, or just the corrected one?*

Considerations:

See Rule 3.4 (Fairness to Opposing Party and Counsel).

Rule 3.4 states that a lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.

(b) Advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.

(c) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.

* * *

(h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the information is relevant in a pending civil matter;

(2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and

(3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Answer:

A. No.

B. No.

C. Probably not, if the first questionnaire response was incorrect.

10. *You are defending a workers' compensation case and are taking the deposition of your key witness via Zoom. At some point you become aware that your witness is speaking to someone else in the room who is feeding him the answers. The claimant's attorney is distracted and does not notice. What obligation do you have to disclose what just occurred to the other attorney or the Commission?*

Considerations:

See Rule 3.4 (Fairness to Opposing Party and Counsel) and Rule 1.2 (Scope of Representation).

Rule 3.4 states that a lawyer shall not:

* * *

(c) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.

BUT

Rule 1.2(c) states a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may

(1) discuss the legal consequences of any proposed course of conduct with a client;

(2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law; and

(3) counsel or assist a client regarding conduct expressly permitted by statute or other applicable law that conflicts with federal law, provided that the lawyer counsels the client about the potential legal consequence of the client's proposed course of conduct under applicable federal law.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Answer:

The best course of action is to stop the deposition and speak privately with the witness about the concern. If the issue cannot be resolved within the parameters of the Rules of the Professional Conduct, then the attorney will need to stop the deposition and (1) discuss how to proceed with the client; and/or (2) determine whether the attorney needs to withdraw as counsel.