LEGAL ETHICS

PRACTICAL TIPS FOR ATTORNEYS INCLUDING CONDUCT TO AVOID, CONFLICTS OF INTEREST AND EX PARTE COMMUNICATION

PRESENTERS

- Hon. Anthony Corso, Workers' Compensation Judge, San Francisco

- Hon. Jamie Spitzer, Associate Chief Judge for the Southern Region, Anaheim

DISCLAIMER

- **Disclaimer – What we discuss here today are solely our opinions and not intended as legal advice. Our opinions do not represent the Department of Industrial Relations, Division of Workers' Compensation or the WCAB. All attorneys should do their own legal research.**

DEMEANOR

- The DWC Ethics Advisory Committee spends most of its time reviewing complaints filed against workers' compensation judges for potential violations of the Canons of Judicial Ethics for conduct involving demeanor. We believe it would be helpful to address some of the behavior of attorneys that may give rise to or may be in part responsible for some of the demeanor infractions alleged by litigants before the WCAB.

MANY RULES GOVERN ATTORNEY CONDUCT

- California Rules of Professional Conduct
  - Adopted by the Board of Trustees of the State Bar and approved by the Supreme Court of California
- The State Bar Act (B&P§6000 et seq.)
  - Enacted by the Legislature and Governor
- California Rules of Court (CRC)
  - Title 9, Rules on Law Practice, Attorneys, and Judges

RULE 1.7 – CLIENT CONFLICTS

- Rule 1.7 Conflict of Interest: Current Clients
- (a) A lawyer shall not, without informed written consent from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.
- (b) A lawyer shall not, without informed written consent from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person, or by the lawyer's own interests.
- (c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written disclosure of the relationship to the client and compliance with paragraph (d) where:
  - (1) the lawyer has, or knows that another lawyer in the lawyer's firm has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or
  - (2) the lawyer knows or reasonably should know that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer's firm or has an intimate personal relationship with the lawyer.

RULE 1.7 (CONT.)

- (d) Representation is permitted under this rule only if the lawyer complies with paragraphs (a), (b), and (c), and:
  - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  - (2) the representation is not prohibited by law; and
  - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.
- (e) For purposes of this rule, "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, transaction, claim, controversy, investigation, charge, accusation, arrest, or other deliberation, decision, or action that is focused on the interests of specific persons, or a discrete and identifiable class of persons.

BUSINESS & PROFESSIONS CODE 6068(E)(1); RULE 1.6

- An attorney shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1), unless the client gives informed consent, or [attorney may disclose if reasonable belief that disclosure will prevent death or substantial bodily harm to another and attorney follows disclosure rules].
- An attorney has a duty to maintain a client's confidences which survives the termination of their relationship; thus, an attorney cannot represent an adversary of the former client without informed written consent. See Rule 1.7(b).

DISQUALIFICATION OF ATTORNEY(S) - WORKERS' COMPENSATION CASES

- An attorney represented Applicant at Trial and then after the Trial concluded but before a final decision issued, went to work for the Defense firm that was on Applicant's case.
- Is there a conflict? Could disqualification be avoided in some way?
- Herrera v. Bistro Hermitage 2011 Cal.Wrk.Comp P.D. LEXIS 222 (Panel Decision).

Yes disqualification is required unless the prior Applicant's attorney obtained applicant's informed, written consent before the employment with the defense firm began. Since that did not occur, the entire firm is disqualified.

City and County of San Francisco v. Cobra Solutions, Inc. (2006) 38 Cal.4th 839, 847-848.

DISQUALIFICATION ISSUES

- If disqualification of an attorney or law firm is raised by a party, a record must be made to determine if disqualification is required.
- McKenna v. City of Sacramento, 2015 Cal.Wrk.Comp P.D. LEXIS 327
- This case involved the WCAB granting a Petition for Removal where a WCJ disqualified a defense firm (without holding a hearing) because an attorney from the firm who represented the Applicant went to work for the defense firm. The WCAB stated the WCJ needed to create a record of evidence relevant to the issue of disqualification and determination if disqualification was required under Kirk v. First American Title Insurance Co. (2010) 183 Cal.App.4th 776.

DISQUALIFICATION (CONT.)

- A defense firm previously represented Applicant when he was working for the employer and was named as a defendant in a civil case against the employer.
- Applicant now brings his own workers' compensation case against the employer and the same defense firm who represented him is defending the case.
- Disqualification required? Yes – greater detailed analysis as in this case there was a waiver of a conflict signed but the waiver related to the conflict in the joint representation as a defendant with the employer.
- See Arends v. URS Federal Support Services Inc., 2014 Cal. Wrk. Comp. P.D. LEXIS 143 (Panel Decision)

OFFICER OF THE COURT
B&P 6068(B), (D); RULE 3.3

- Attorney, in addition to acting as an advocate for his/her client, also has duties as *an officer of the court.*
- Attorney has a duty to use legal procedures to the fullest benefit of his/her client, but also has a duty not to abuse the legal process.
- Attorney must take reasonable remedial measures where a client or witness offers testimony that the attorney knows to be false.
- Attorney must refrain from abusive or obstreperous conduct.
- Attorney may stand firm against an abusive judge but may not reciprocate.

RULE 3.3 – CANDOR TOWARD THE TRIBUNAL (PREVIOUSLY RULE 5-200)

(a) A lawyer shall not:

(1) Knowingly make a false statement of fact or law or fail to correct a false statement of material fact or law previously made to the tribunal.

(2) Fail to disclose to the court 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 . . .

(3) Offer evidence that the lawyer knows to be false. If the lawyer knows the client or witness offered material evidence that is false, the lawyer shall take reasonable remedial measures including, if necessary, disclose to the court unless prohibited by B&P section 6068 (e) and Rule 1.6.

BUSINESS AND PROFESSIONS CODE

- Note that Business and Professions Code Section 6068, subdivision (d), requires an attorney "[t]o employ . . . those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." This is almost the same language used in rule 3.3.
- The usual approach on these issues is for the State Bar to prosecute under the B&P Code rather than the rule (e.g., the *Hansen* case was prosecuted under the B&P Code) and then to usually add a charge of moral turpitude under B&P 6106, which states in relevant part, "The commission of any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension."

B&P CODE (CONT.)

- A WCJ is a judge or judicial officer within the meaning of the Business and Professions Code for purposes of determining attorney discipline. (See *In the Matter of Lantz* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 126, 134.)
- To establish culpability for a violation of section 6068(d) or rule 5-200,* the State Bar must prove that the attorney intended to mislead a court and the misrepresentation must be material to the issues before the court. (*In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 400, 407.)

**Renumbered to Rule 3.3*

RULE 3.4 – FAIRNESS TO OPPOSING PARTY & COUNSEL
(PREVIOUSLY RULES 5-220 & 5-310)

A lawyer shall not:

(a) Unlawfully obstruct another party access to evidence, including witnesses, or unlawfully alter destroy or conceal a document or other material having potential evidentiary value . . .

(b) Suppress any evidence that the lawyer or lawyer's client has a legal obligation to reveal or produce.

Moral Turpitude under B&P section 6106 can also apply here, if the suppression was intentional or grossly negligent.

RULE 3.5 – CONTACT WITH JUDGES, OFFICIALS EMPLOYEES AND JURORS

(b) Unless permitted to do so by law, an applicable code of judicial ethics or code of judicial conduct, a rule or ruling of a tribunal or a court order, a lawyer shall not directly or indirectly communicate or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:

(1) in open court;

(2) with the consent of all other counsel and any unrepresented parties in the matter;

(3) in the presence of all other counsel and an unrepresented parties in the matter;

(4) in writing with a copy thereof furnished to all other counsel and any unrepresented parties in the matter; or

(5) in ex parte matters.

(c) As used in this rule, "judge" and "judicial officer" shall also include . . . administrative law judges; neutral arbitrators, State Bar Court judges . . . .

EX PARTE COMMUNICATION

- Ex parte communication with a WCJ is prohibited because "it denies those persons legally interested in the proceeding the full right to be heard according to the law." The role of independent investigator and of advocate are not compatible with the role and adjudicative responsibilities of a judge. Judges should be meticulous in their care to keep those roles separate since to unite them not only tends to violate the requirements of due process but also tends to erode public confidence in the integrity and impartiality of the judiciary." Fremont Indemnity Co. v. WCAB (Zepeda) 49 Cal.Comp.Cases 288, 294-295.

CALIFORNIA CODE OF REGS. SECTION 10410

This section prohibits ex parte communication with the WCAB.

CCR section 10410(a) – requires that letters and other writings filed with the WCAB shall be served on all parties together with a proof of service.

CCR section 10410(b) – provides that if the WCAB or a WCJ receives an ex parte letter or other document from any party, it must be served upon all parties to the case by the WCAB or WCJ with a letter explaining the document was received ex parte in violation of this rule.

CCR section 10410(c) – prohibits oral ex parte communications. No party is allowed to discuss with the WCAB or a WCJ the merits of any case pending before the board or the judge without the presence of all necessary parties to the proceeding. Exception when submitting a walk through document under 10789.

EX PARTE COMMUNICATIONS CONT.

Note that CCR 10410(c) prohibits communication with the WCAB or a WCJ on the *merits* of a case. Inconsequential communications such as when one party appears before the WCJ on a scheduled court date and the other does not, would allow those appearing to communicate about how to proceed i.e. continuance etc. . .

This is consistent with the California Code of Judicial Ethics – Cannon 3(B) which allows for ex parte communication when circumstances require for scheduling, administrative purposes, or emergencies that do not deal with substantive matters provided the judge believes no party will gain a procedural or tactical advantage and all other parties are notified promptly about the substance of the ex parte communication.

SANDAB SUON V. CALIFORNIA DAIRIES WCAB EN BANC (2018) 83 CAL.COMP.CASES 1803

Facts: In April 2016, Defendant wrote a letter to the Internal Panel QME and at the bottom of the letter cc'd Applicant's attorney (AA) but it did not list an address and a proof of service was not attached.

Approximately 5 months later in October 2016, AA states that he did not receive the letter sent to the internal QME. About 1½ years pass and the issue is tried in January 2018 with the WCJ making many findings including finding the letter was an ex parte communication to the Internal QME. WCAB orders the record further developed on whether this letter was ex parte or not and when AA received the letter.

SUON CASE – EX PARTE COMMUNICATION

WCAB holds re: ex parte communication that if ex parte communication occurs, the party aggrieved may elect to terminate the evaluation and seek a new evaluation (new QME) but the party must do so within a reasonable time following the discovery of the prohibited communication.

The trier of fact (WCJ) has wide discretion to determine the appropriate remedy for a violation of section 4062.3(b).

A Petition for Removal (not Reconsideration) is the appropriate procedural avenue to challenge ex parte communication with the QME.

LABOR CODE SECTION 5813 ISSUES THAT MAY ARISE FROM CONDUCT THAT VIOLATES THE RULES OF PROFESSIONAL CONDUCT

- Labor Code section 5813 - a party, party's attorney or both may be ordered to pay sanctions up to $2,500.00, including attorney's fees and costs, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.

- The party/parties who may be sanctioned must be given notice and an opportunity to be heard before sanctions are issued; this does not necessarily mean a trial.

- Usually the judge will set forth the basis for the sanction order in the Notice of Intention.

WHAT IS A BAD FAITH ACTION OR TACTIC? (WCAB RULE 10421: EXAMPLES)

- Failure to appear or appearing late where a reasonable excuse is not offered or there is a pattern of this conduct. (10421(b)(1))
- Failing to comply with the WCAB Rules of Practice and Procedure or the AD Rules including an order of discovery. (10421(b)(4))
- Executing a declaration or verification to any petition, pleading or other declaration that contains false or substantially false statements of fact that are substantially misleading or contain substantial misrepresentations of fact. (10421(b)(5)(A) and (B))
- Presenting a claim or defense or raising an issue or argument that is not warranted under existing law. (10421(b)(7))

EXAMPLES OF CONDUCT TO AVOID FROM ACTUAL CASES

- 1. Labor Code section 4610 does not preclude sanctions for bad faith actions or tactics in handling of medical treatment requests.
- 2. Lien Claimant is responsible for its agent's actions (i.e. dishonesty in filing a petition).
- 3. False statement in petition for removal stating Defendant did have notice of a MSC, but in Applicant's deposition transcript there was a discussion of continuing the MSC.
- 4. Statements made in a removal regarding Medical Unit not issuing a Panel QME timely when Medical Unit provided documentation of letters sent to Defendant on 3 separate occasions.

CONDUCT TO AVOID

- 5. Omitting in a petition for reconsideration any evidence that supports injury AOE/COE was incomplete and misleading material facts.
- 6. Misstatement of the law quoting section of 4904 re: interest owed to EDD.
- 7. Personal attack on the WCJ in the Petition for Reconsideration.
- 8. Stating in a petition that Defendant was "denying and delaying the case waiting for Applicant to die."
- 9. Failing to disclose and return a privileged document obtained during discovery.

MORE EXAMPLES

- 10. Instructing a witness to not answer relevant questions.
- 11. Petition for Reconsideration filed to correct the WCJ's 3 cent clerical error.
- 12. Sanctions may be imposed for each separate, bad faith, frivolous actions such as:
  - a) Judge shopping to obtain a different order.
  - b) Disregarding (ignoring) prior orders of a WCJ.
  - c) Compelling a medical evaluation after discovery closed.

CASE CITATIONS

- 1. McKinney v. Enterprise Rent-A-Car of San Francisco, 2016 Cal. Wrk. Comp. P.D. LEXIS 495.
- 2. Montes v. Tomra Pacific, Inc., 2013 Cal. Wrk. Comp. P.D. LEXIS 218.
- 3. Johns v. WCAB (Stephenson) (2006) 71 Cal. Comp. Cases 1327 (writ denied).
- 4. Speight v. Vulcan Materials Co., 2010 Cal. Wrk. Comp P.D. LEXIS 324, and In the Matter of Hansen, 5 Cal. State Bar Ct. Rptr. 464
- 5. Minor v. BP America, Inc., 2012 Cal. Wrk. Comp. P.D. LEXIS 523.
- 6. Estrada v. Aitken Equipment and Repair, 2011 Cal. Wrk. Comp. P.D. LEXIS 430.
- 7. Acosta v. Floyd's 99 Barbershop, 2011 Cal. Wrk. Comp. P.D. LEXIS 458.
- 8. Palladino v. Orange County Transportation Authority, 2015 Cal. Wrk. Comp. P.D. LEXIS 539.
- 9. Lamouree v. WCAB (2005) 70 Cal. Comp. Cases 640 (writ denied).
- 10. Cabanilla v. WCAB (Rivera) (2003) 68 Cal. Comp. Cases 1375 (writ denied).
- 11. Vadnais v. Kraft Foods Nabisco, 2011 Cal. Wrk. Comp. P.D. LEXIS 253, 254
- 12. Hershewe v. WCAB (Clabaugh) (2002) 67 Cal. Comp. Cases 1198 (writ denied).

BUSINESS & PROFESSIONS CODE SECTION 6103 – RE: FAILING TO FOLLOW COURT ORDERS

- A willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitutes causes for disbarment or suspension.

BUSINESS & PROFESSIONS CODE SECTION 6068 – DUTY TO REPORT SANCTIONS OVER $1,000.00

- It is the duty of an attorney to do all of the following:[…]
- (o) To report to the agency charged with attorney discipline, in writing, within 30 days of the time the attorney has knowledge of any of the following: […] (3)The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000.00).

RULE 4.3 – COMMUNICATING WITH AN UNREPRESENTED PERSON

- (a) In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person incorrectly believes the lawyer is disinterested in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the lawyer knows or reasonably should know that the interests of the unrepresented person are in conflict with the interests of the client, the lawyer shall not give legal advice to that person, except that the lawyer may, but is not required to, advise the person* to secure counsel.
- (b) In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

RULE 3.10 - THREATENING CRIMINAL, ADMINISTRATIVE, OR DISCIPLINARY CHARGES

- (a) A lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.
- (b) As used in paragraph (a) of this rule, the term "administrative charges" means the filing or lodging of a complaint with any governmental organization that may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.
- (c) As used in this rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more persons under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.