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ETHICS IN WORKERS’ COMPENSATION CLAIMS

I. INTRODUCTION
The focus of this paper is on key ethical issues that frequently arise in Texas Workers’ Compensation claims from the perspective of the claimant’s attorney. This paper will primarily discuss the attorney/client relationship but will highlight a few key points regarding attorney/attorney relationships and attorney/tribunal relationships. In many instances, this paper will cite to the Texas Rules of Disciplinary Procedure but the reader must be aware that the Texas Rules of Disciplinary Procedure is not all encompassing for every aspect of the workers’ compensation claims handling. Therefore, an attorney should never forget when considering what action to pursue in any matter that honesty and integrity are two principles that should be followed in every case. If an attorney is honest and practices with integrity he/she will discover that the rules will come naturally.

II. HISTORY OF TEXAS ETHICS
Prior to the adoption of the Texas Rules of Disciplinary Procedure, the judges of the Northern District of Texas issued an en-banc decision with regards to standards of conduct for attorneys. See Dondi Properties Corp. v. Commerce Savings and Loan Ass’n., 121 F.R.D. 284 (N.D. Texas 1988). The decision set forth the following eleven standards of conduct to be followed:

1) In fulfilling his or her primary duty to the client, a lawyer must be ever conscious of the broader duty to the judicial system that serves both attorney and client.
2) A lawyer owes, to the judiciary, candor, diligence and the utmost respect.
3) A lawyer owes, to opposing counsel, a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves.
4) A lawyer unquestionably owes, to the administration of justice, the fundamental duties of personal dignity and professional integrity.
5) Lawyers should treat each other, the opposing party, the court, and members of the court staff with courtesy and civility and conduct themselves in a professional manner at all times.
6) A client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct. A lawyer shall always treat adverse witnesses and suitors with fairness and due consideration.
7) In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer’s conduct, attitude or demeanor towards lawyers.
8) A lawyer should not use any form of discovery, or the scheduling of discovery, as a means of harassing opposing counsel or counsel’s client.
9) Lawyers will be punctual in communications with others and in honoring scheduled appearances, and will recognize that neglect and tardiness are demeaning to the lawyer and to the judicial system.
10) If a fellow member of the Bar makes a just request for cooperation, or seeks scheduling accommodation, a lawyer will not arbitrarily or unreasonably withhold consent.
11) Effective advocacy does not require antagonistic or obnoxious behavior and members of the Bar will adhere to the higher standards of conduct which judges, lawyers, clients and the public may rightfully expect.

Soon after the Dondi decision, the Texas Disciplinary Rules of Professional Conduct became effective. The Texas Disciplinary Rules of Professional Conduct are the ethical standards governing the practice of law in Texas. While a violation of the ethical rules does not automatically mean the attorney has committed malpractice, many clients will attempt to use the findings of an ethical violation as the basis of a malpractice claim. See Martin v. Trevino, 578 S.W.2d 763, 770 (Civ. App.—Corpus Christi, 1978 writ ref’d n.r.e.) Furthermore, while a violation of the ethical rules does not establish a per se cause of action, Texas courts do look to the disciplinary rules as a standard of conduct for attorneys in legal malpractice cases. Vail v. Havana Painting Co., Inc., 761 S.W.2d 398, 400 (Tex. App.—Houston [14th Dist.] 1988 writ den’d). Therefore, every attorney practicing law in the State of Texas must be aware of the ethical standards and how they apply to the area of law the attorney practices in.

III. THE RULES
The Texas Disciplinary Rules of Professional Conduct establish the lowest or minimum standards of professional conduct below which no lawyer can fall without being subjected to disciplinary action. Anderson Producing Inc. v. Koch Oil Co. 929 S.W.2d 416 (Tex. 1996). See also Spears v. Fourth Court of Appeals, 797 S.W.2d 654, 656 (Tex. 1990). It is every lawyer’s ethical responsibility to maintain the highest standards of professional conduct because even minor wrongdoing tends to lessen the public’s confidence in the legal profession. Bray v. Squires, 702 S.W.2d 266, 270 (Tex. Civ. App.—Houston [1st Dist.] 1985, no writ). A lawyer is expected to refrain from any conduct that creates the impression of dishonesty, fraud, or deceit. Id.
Upon initial review of the Rules, an attorney who handles Texas Workers’ Compensation claims must be aware that the Rules can be divided into three general categories. The first category is attorney/client relationships, the second being attorney/attorney relationships and the third being attorney/tribunal relationships.

A. Attorney/Client Relationship

Prior to being retained by a client, an attorney must first determine if he/she is competent to handle the matter. In today’s ever changing field of workers’ compensation law, an attorney needs to keep abreast of the legislative and rule changes and how these changes affect the client’s rights. An attorney should never accept representation of a claim that he/she is not competent in or is not willing to do the research to obtain the competence. Relevant factors in determining competence are the attorney’s understanding of the complexity of the issues involved, the attorney’s experience in the field of workers’ compensation and the attorney’s ability and willingness to study and prepare for the issues involved.

In addition to having competence, the attorney must be diligent in the representation and not neglect legal matters entrusted to the attorney. This sounds like common sense, but workers’ compensation attorneys typically handle a high volume of cases. Making sure you have adequate time allotted to deal with the issues of a particular case is mandatory. Many times, a client’s case can be adversely affected if the attorney is not diligent in the representation. For instance, if a client approaches an attorney twenty days after the alleged injury and informs you that he has not provided notice of the injury to his employer, you need to immediately provide notice on your client’s behalf. Failure to promptly provide notice may give the insurance carrier a notice of injury defense that bars the claimant from all workers’ compensation benefits.

Another area of concern is the scope of representation. Many clients who have disputed workers’ compensation claims have preconceived expectations of what an attorney can accomplish. Some of the expectations may be valid while others are impossible to achieve. An attorney must inform the client of the scope of the representation from the beginning and give a clear explanation of how the attorney will attempt to achieve the goals of the client. If a client has unrealistic expectations or impossible goals, the attorney should immediately counsel the client on what is expected and what the attorney is capable of achieving. As an attorney you should never attempt to avoid a client with unrealistic expectations but instead inform them of what they should expect to achieve.

Sometimes in the course of investigation the attorney will determine that a client is committing a criminal or fraudulent act in making a workers’ compensation claim. For instance, the attorney may find out that the client was not actually injured on the job, but instead was injured at home. If an attorney has determined through the investigation that the client is making a fraudulent claim, the attorney must immediately take action by discussing with the client what the illegal or fraudulent act is and why the attorney cannot help further the present course of action. Furthermore, the attorney should send a letter, both by regular mail and certified, indicating that the attorney is incapable of continuing the course of action as it is not permitted by the Texas Disciplinary Rules of Professional Conduct and/or other laws. If the client refuses to obey with the directives of the attorney, the attorney should immediately withdraw from the case so as to avoid furthering the criminal or fraudulent acts.

One of the largest problem areas in the attorney/client relationship is that an attorney shall keep the client reasonably informed about the status of the claim and promptly comply with reasonable requests for information. Attorney who deal with workers’ compensation claim typically have a large client base. Keeping all clients informed about the status of their claim and diligently responding to their requests for information can sometimes become overwhelming. An attorney should make every effort to return client phone calls on the same day the client calls. Nothing will frustrate a client more than not getting a return phone call. Clients typically do not understand you have other clients and they are only concerned about their individual case. If an attorney makes a concerted effort to return phone calls the same day, client relations will stay strong. Sometimes it can be physically impossible to return calls the same day because a call came in late after the attorney has left for the day or maybe the attorney is out of town or in trial. If this occurs, the attorney should return the phone call as early as possible the following day. Other times, it is a good practice to have a legal assistant call the client and explain why the attorney is incapable of immediately returning the phone call and setting up a time when the attorney will be able to return the call. If this is done, it is very important to return the call when promised or the client will become further upset and possibly terminate the representation.

An attorney should never rely on legal assistants to maintain all client contact. When a client seeks representation they are not hiring a legal assistant they are hiring an attorney. While a legal assistant can help with the day to day handling of the claim, a client wants to hear from an attorney how the case is progressing. Further, maintaining client contact will help build trust between the client and attorney, which is essential for adequate representation.
In addition to maintaining a good relationship with the client, if a client requests a copy of the file, an attorney must immediately comply with the request. While the attorney may have the file physically in the office and has paid for all paperwork and other material within the file, everything contained in the file is the property of the client. Therefore, at any time, when a claimant requests any information from the file, they are only requesting their own property. The attorney must copy or duplicate the material and send it to the claimant. Even if the client has terminated the attorney’s services, the attorney must copy or duplicate the file at the attorney’s expense and send the original to the client. An attorney is not allowed to charge the client for any copying or duplicating of the file. If the client has terminated the attorney’s services, the attorney must copy or duplicate the material and send it to the claimant. An attorney is not allowed to charge the client for any copying or duplicating of the file. If the attorney wishes to retain a copy of the file to be placed in archives, it is an expense of doing business.

In addition to maintaining good client contact, the attorney must also explain all matters to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. This means the attorney must not only discuss the procedure the attorney is pursuing, but also what the possible outcomes that may result. Sometimes it may feel like the attorney is being asked to look in to a crystal ball to see what the future might hold. However, the attorney is not required to know precisely what will happen under each and every circumstance, but must inform the client of the possible outcomes that could occur. By keeping the client reasonably informed of the status of their claim, the client will be able to make informed decisions on which course of action to pursue.

An attorney also has a duty to keep information confidential. Confidential information is all information acquired by the attorney during the course of or by reason of the representation of the client. This duty of confidentiality is very broad. It is a good practice at the beginning of any representation to ask the client who is able to obtain information regarding the claim. For instance, a client may be married but does not want the spouse to have any information regarding the claim. An attorney’s failure to follow this request could make the basis for a grievance if the information is wrongfully disclosed. In addition, not only is the attorney required to maintain confidentiality, but so is every individual who works for the attorney. As an attorney, you are ultimately responsible not only for your actions but also the actions of your staff. Therefore, you must ensure that everyone within your firm is aware of and abides with all instructions from the client regarding disclosure of information. The prohibition against disclosure of confidential information applies even if (1) the information is not privileged and is publicly available; (2) the information comes from someone other than the client; (3) the client has never asked that the information be kept secret; (4) disclosure of the information would not necessarily be embarrassing or detrimental to the client; or (5) the lawyer obtains the information before the relationship begins or after the relationship ends. Charles F. Herring, Jr., TEXAS LEGAL MALPRACTICE AND LAWYER DISCIPLINE § 4.25 (1991).

While the general rule is that an attorney may not reveal confidential information, there are certain circumstances under which revealing confidential information is allowed. According to the Texas Rules of Disciplinary Conduct, an attorney may reveal confidential information:

1. When the lawyer has been expressly authorized to so in order to carry out the representation.
2. When the client consents after consultation.
3. To the client, the client’s representative, or members, associates, and employees of the lawyer’s firm, except when otherwise instructed by the client.
4. When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.
5. To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and client.
6. To establish a defense to a criminal charge, civil claim, or a disciplinary complaint against the lawyer or the lawyer’s associates based upon conduct involving the client or the representation of the client.
7. When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.
8. To the extent revelation reasonably appears necessary to rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services had been used.

For any attorney handling Texas Workers’ Compensation cases, the attorney at some time will be discharged by a client with or without good cause or come across a case where the attorney believes that the representation must be terminated. In such cases, the attorney must take steps to the extent reasonably practical to protect the client’s interests. This means the attorney must give reasonable notice to the client, allow time for the client to obtain other counsel or seek the advice of a Texas Workers’ Compensation Ombudsman and must make available the client’s file to the client. No matter what the circumstances are regarding the withdrawal, the attorney must take all reasonable steps to mitigate the consequences of the withdrawal for the claimant. At times this may be difficult for the attorney because of a wrongful
termination. However, the lawyer must keep in mind that failure to act accordingly could result in a grievance and possibly a malpractice claim.

In addition to making the file available to the claimant, the attorney must advise the claimant of all upcoming deadlines in the case, any independent or required medical exams that are forthcoming, any TWCC-32’s on file that may require a designated doctor appointment or any other matter that is relevant to the claimant. Even though the attorney is not able to take any further legal action or file any paperwork on behalf of the client after the termination, the attorney must make sure the client is fully informed of any impending deadlines. For instance, if an attorney conducts a Benefit Contested Case Hearing and after the hearing the attorney is terminated, the attorney must inform the claimant of the potential appeal by the carrier or the need to appeal if the case was lost. Since the failure to abide by the deadlines for appeal have drastic effects on the claimant’s ability to pursue the matter to District Court review, the attorney must take reasonable steps in order to ensure the claimant is fully aware of the consequences of inaction. The attorney should not only try to talk to the former client to discuss the situation but should also send a letter both by regular and certified mail informing the claimant of the consequences of failing to act in a timely manner and informing the client of his/her deadline to file.

Another issue of concern regarding the attorney/client relationship is the billing of clients. To obtain a fee for representing an injured worker before the Texas Workers’ Compensation Commission or in District Court, an attorney must submit his/her billing pursuant to Tex. Lab. Code Ann. §408.221. Accordingly, the commission or court must approve the fee before the insurance carrier can pay the attorney a fee for representing an injured worker before the Texas Workers’ Compensation Commission or in District Court, an attorney must submit his/her billing pursuant to Tex. Lab. Code Ann. §408.221. Eureste claimed it would be impracticable to bill each client for the actual work that was being performed. Further, Eureste admitted that non-attorney time was billed at the higher attorney rate of $150.00/hour. In fact, Eureste never billed for legal assistant time. As a result of his actions, Eureste’s license to practice law was suspended for three years.

Every attorney who represents claimants should thoroughly review the Eureste decision. Nobody wants to lose their license and the Eureste decision provides guidance on many billing irregularities that are not allowed. If we as claimant’s attorneys do not take steps to properly and ethically bill our clients the regulatory bodies will surely do it for us.

**B. Attorney/Attorney Relationships**

The Texas Workers’ Compensation system is an adversarial proceeding that allows for the resolution of work related injuries. Since it is adversarial proceeding, an attorney’s primary duty is to his/her client, but the attorney also has a duty to the opposing counsel. The first duty to opposing counsel is to treat the opposing counsel with respect and courtesy. This does not mean that you must give in to every request of the opposing counsel. Instead, just like with your client, you should promptly respond to requests and/or telephone calls. It should not matter what is being requested of you or what the demeanor of the opposing counsel is, you should always act in a professional manner. If you continue to act in a professional manner in all of your communications with opposing counsel, you will soon gain a reputation that will necessitate the opposing counsel to treat you in a professional manner at all times.

An attorney should also not use “hardball” litigation tactics. This means an attorney should not use discovery tactics as a way of harassing opposing counsel or opposing counsel’s clients. Hardball tactics...
not only apply to discovery tactics but also includes cross-examining opposing counsel’s client during a contested case hearing. An attorney should refrain from questions that are irrelevant and only meant to harass the witness. Many times these tactics do nothing more than cause unnecessary arguments between counsel, not to mention potential damage with the hearing officer who will ultimately decide the case.

An attorney should also attempt to accommodate opposing counsel with just requests for cooperation. For instance, interrogatories are due five days after being served on opposing counsel. This short time period can be very problematic depending on the number of additional questions asked and the nature of the questions. If opposing counsel requests a Rule 11 agreement for extra days to appropriately respond to the interrogatories and the extension does not affect your client or your ability to prepare the claim, there is not a valid reason not to accommodate opposing counsel. You never know one day you may be in the same situation and you will have to ask for additional time to respond. You should never forget the age old saying “what goes around, comes around.”

Finally, an attorney should never withhold discoverable material regarding a claim. If you take a recorded statement or obtain medical records that are adverse to your clients’ position, it is improper to withhold the information. Likewise, if you obtain medical records, you cannot pick through the records to determine what part of the records will be exchanged. You must exchange the complete set of records. This does not mean that when you go to a contested case hearing that you must place all medical records in evidence because it is up to the opposing counsel to decide what records he/she will introduce into evidence.

C. Attorney/Tribunal Relationship

An attorney has a duty to uphold the integrity of the administrative process. Attorneys who practice in the administrative context typically have less opportunity to do discovery in claims to determine all relevant facts and locate all relevant documentary evidence. As a result, an attorney in a Texas workers’ compensation claim has a duty to the commission to not knowingly make a false statement of fact at any benefit review conference, contested case hearing or to the Appeals Panel. The key language in this rule is that the attorney shall not knowingly make a false statement. As a claimant’s attorney, many times our evidence rests solely on the claimant’s own testimony. It can be very difficult at times to determine if the client is being truthful or is embellishing the facts. Prior to any hearings, an attorney should make every reasonable effort to corroborate the claimant’s expected testimony regarding the facts of the case by other witnesses or documentary evidence.

Along with not knowingly making a false statement, an attorney must not knowingly fail to disclose a fact to the commission when disclosure is necessary to avoid assisting in a criminal or fraudulent act. As previously stated, because workers’ compensation claims have very limited discovery available to the parties, it is a violation of the Texas Rules of Disciplinary Procedure to unlawfully obstruct a party’s access to evidence. This may be from obstructing an attorney from obtaining a statement from a witness with knowledge of relevant facts or failing to produce documents that are adverse to your clients’ position. At times, failing to disclose evidence is the equivalent to an affirmative misrepresentation.

An attorney shall not embark on a course of action that is frivolous. This means an attorney shall not assert or defend a position unless the lawyer reasonably believes that they have a good faith basis to make the argument. As an attorney, we all know that almost any law can be subject to interpretation. Further, the law is not stagnant but is subject to change as time evolves. This is especially true with the Texas Labor Code and the continuous modifications to the statute, Adopted Rules, and advisories. An attorney practicing in workers’ compensation must take into account the law’s ambiguities and potential for change. However, the attorney shall not take any course of action that may not be supported in good faith to extend, modify or reverse existing law.

An attorney also has a duty to inform a benefit review officer, hearing officer or Appeals Panel of any case law or controlling decision that would adversely impact the client’s claim for benefits. In the Texas Workers’ Compensation context, this can be very difficult because on many issues the Appeals Panel has promulgated decisions that are contrary to each other without specifically overruling any of the decisions. If an attorney is aware of a controlling decision that is adverse to the client, nothing prevents the attorney from discussing the case and arguing why it should not be controlling in the present disputed case. As we all know, Hearing Officers make decisions everyday based upon the individual facts of the case and the Appeals Panel is reviewing only a small number of the decisions. Therefore, an attorney’s ability to present a good argument why a controlling case is improper may help to change the law.

IV. CONCLUSION

It should not matter what side of the docket an attorney practices when it comes to questions of ethics. Acting in a professional manner at all times and conducting yourself with integrity should be the norm when practicing law. Unfortunately, we do not live in a perfect world and far too often we forget the mandates of the Texas Rules of Disciplinary Procedure. It is time for each of us to look inside
ourselves and make a personal commitment to treat others as we would like them to treat us.