

## Workers' Compensation Lawyers Association MCLE

Professional Responsibility Bootcamp

### Professional Ethics for Workers' Compensation Lawyers



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February 12, 2014  
8:30 - 10:00 a.m.

## Agenda

- Ethical Concerns in the Use of Social Media
- Fees and Billing
- ARDC Resources

## Ethical Concerns in the Use of Social Media



"Lawyer Puts Photo of Client's Leopard-Print Undies on Facebook; Murder  
Mistrial, Loss of Job Result" - *ABA Journal* (9/13/12)



## Ethical Considerations in Using Social Media

- Competence and Diligence
- Confidentiality
- Candor to the Tribunal and Others
- Conduct Prejudicial to the Administration of Justice
- Advertising and Solicitation



## Competence and Diligence

ABA Proposed Amendments to the Model Rules  
(\*20/20 Commission)

- **Rule 1.1 Competence** - amends paragraph 6 of the Comment to include a provision that would state that competence requires that lawyers have a basic understanding of the risks and benefits of technology.
- **Rule 1.6 Confidentiality** - adds a new subpart (c) to the Rule that would state that "A lawyer shall make reasonable efforts to prevent the inadvertent disclosure of, or unauthorized access to, information relating to the representation of a client."
- **Rule 4.4 Inadvertent Receipt of Documents** - adds language that would make it clear that inadvertently disclosed information can include electronic data (metadata).



## Confidentiality

- Rule 1.6
- ALL information relating to the representation of a client is confidential unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted or required by one of the exceptions to the Rule

## Confidentiality: Protecting Information



VS.



## Protecting Confidential Information

- Concern about protecting client confidentiality.
  - 1) Educate yourself re: storage and processing technologies
  - 2) Use of known entities vs. fly-by-night companies
  - 3) Assess risk on a case-by-case basis
  - 4) Consider getting client's permission; disclaimer in attorney-client agreement?
  - 5) Don't forget deletion issues...how long will this information be in the cloud? A.B.A. Formal Op. 08-451
- ABA Commission on Ethics 20/20 has identified the following potential threats to security:
  - Unauthorized access to confidential client information
  - Servers located in countries with fewer legal protections for ESI
  - Vendor's failure to backup data adequately
  - Unclear policies on ownership of stored data
  - Policies for notifying customers of security breaches
  - Policies for data destruction when there is no longer a need for the ESI or the client switches firms

## Confidentiality: Intentionally Revealing (a/k/a Venting)

See: *In re Kristine Ann Peshek*, M.R. 23794, 2009 PR 00089 (Ill. May 18, 2010). Ms. Peshek was suspended for 60 days.

Confidential information revealed:

- Client pled guilty to protect older brother
- Client lied to judge about drug use
- Client high on cocaine when appearing in court
- Counseling clients against correcting misrepresentations



## More Venting...

- Client fires Lawyer, hires new counsel;
- Client posts negative reviews of Lawyer on consumer websites;
- In response, Lawyer reveals personal and confidential information about client on internet;
- Petition for voluntary discipline is filed with Georgia Supreme Court seeking public reprimand;
- Court rejects petition, finding sanction insufficient. Court cites Illinois, Oregon precedent.
- In Oregon, lawyer suspended 90 days for posting to listserv personal and medical information about a workers' comp client whom she named and whom she described as "difficult" and unwilling to accept a "very fair" offer from insurer.
- *In the Matter of Margrett Skinner*, NO. S13Y0105 (Ga. Mar. 18, 2013)
- See also *In re 2013PR0095* (H.B. 1/15/14) (Hearing Board reprimand for posting confidential information in respond to client's negative review on AVVO website)

## Confidentiality: What to Tell Clients Re Social Media Use

1. Remind clients there should be no talking about their case with others.

- posts to Facebook or other social media can and will be used against them in a court of law and they need to be made fully aware of that reality.
- No spoliation - avoid encouraging potential or actual clients to close accounts or remove damaging information

2. Tell clients they should not use anyone else's computer to communicate with you

3. Document these discussions

- A sample notice might read as follows:

*We strongly encourage you to refrain from participating in social media (Facebook, Twitter, Tumblr, Flickr, Skype, and the like) during the course of representation. Information found on social media websites is not private, can be discoverable, and if used as evidence may be potentially damaging to your interests. Understand that information shared with others be it verbally; in writing via email, text message or letter; or even posted online could result in a waiver of the attorney client privilege were that information to relate in any way to the legal matter that we are handling for you. In addition, you should not delete or remove information from any social media website as that could be considered destruction of evidence, spoliation of evidence, or obstruction of justice.*

*We also advise you to refrain from communicating with us on any device provided by your employer or any computer, smart phone, or other device that is shared with someone else. In addition when communicating with us, do not use your work email address or a shared email account. You should only use a private email account that is password protected and only accessed from your personal smart phone or computer. We reserve the right to withdraw as counsel if the above advice is not followed.*



## Candor to the Tribunal and Others

- Rule 1.2(d)-Scope
- Rule 3.3-Candor to tribunal
- Rule 3.4-Fairness to Opposing Party and Counsel
- Rule 4.4-Respect for Rights of Third Persons
- Rule 8.4(c) and (d)-Misconduct

## Candor Issues



Allied Concrete v. Lester,  
Record No. 120074 & 120122  
(Virginia January 10, 2013)

and  
In re Matthew B. Murray,  
Nos. 11-070-088405, 11-070-088422 (Virginia, July 17, 2013)  
(Five year suspension)

## Candor Issues

*Lester v. Allied Concrete Co.*, Nos. CL08-150, CL09-223  
(Va.Cir.Ct. October 21, 2011):

- Wrongful death suit
- Lawyer discovers client has a picture on his Facebook page wearing “I [heart] hot moms” t-shirt, and holding a beer can with other young adults
- Lawyer tells paralegal to have client get rid of picture because “we don’t want blow ups of this stuff at trial”
- Paralegal does just that
- What happens next?
- Lawyer sanctioned over \$500,000 by trial court, resigned from firm and agreed to a five-year suspension

## Candor Issues

- *Castellano v. Winthrop*, 27 So. 3d 134 (Fla., Jan 29, 2010)
  - Mother comes into possession of USB drive of father
  - Mother retains firm
  - Firm reviews flash drive
  - Files Petition to Vacate Final Order
  - Flash drive has confidential financial information of father’s current wife, confidential business information of father, work product information of father’s attorneys, attorney-client communications between father and counsel

## Candor Issues



- *Castellano v. Winthrop*, 27 So. 3d 134 (Fla., Jan 29, 2010)
  - Despite receiving flash drive under “very, very suspicious circumstances, firm spent in excess of 100 hours reviewing its contents”
  - Firm obtained improper informational and tactical advantage
  - Firm disqualified
  - Attorney may be required to advise client to consult with criminal defense lawyer

## Candor Issues

- *Castellano v. Winthrop*, 27 So. 3d 134 (Fla., Jan 29, 2010)
  - Note Fla Bar Prof’l Ethics Formal Op. 07-1
  - Where lawyer receives confidential documents he knows or reasonably should know were wrongfully obtained by client, ethically obligated to advise client that materials cannot be retained, reviewed, or used without first informing opposing party and attorney. If client refuses to consent to disclosure the attorney must withdraw from further representation.

## Pretexting

Lawyers violate the Rules when the lawyer (or their agent) “friends” a third party on a social networking site under false pretenses (Rules 4.1, 5.3 and 8.4).

- See Phil Bar Ethics Op. 2009-02 (March 2009) (unethical for lawyer to ask a third person to “friend” a witness for the purpose of gaining access to information on the witness’s Facebook and MySpace pages for possible use in litigation)
- Cf., New York City Bar Ass’n Comm. On Prof’l & Judicial Ethics, Op. 2010-2 (2010) (lawyer may “friend” a third party on a social network without disclosing the reasons for making the request if the lawyer uses her real name and profile)
- E.g., *In re Milos*, M.R. 24760, 2011PR00069 (Ill. 2011) (lawyer suspended 90 days for falsely identifying himself as a real estate broker in order to gain access to opposing party’s residence for purpose of obtaining incriminating evidence)



## Conduct Prejudicial to the Administration of Justice

- “Today I was impaneled along with 12 others from the voter rolls of San Diego County in a felony theft and burglary trial in Dept 37, in courtroom of Laura Palmer Hammes, a stern attentive woman with thin red hair and long, spidery fingers that as a grandkid you probably wouldn’t wanted snapped at you.
- Nowhere do I recall the jury instructions mandating I can’t post comments in my blog about the trial.(Ha. Sorry, will do.) So, being careful not to prejudice the rights of the defendant-a stout unhappy man by the first name of Donald...”

## Conduct Prejudicial to the Administration of Justice

- Disclosed specific crimes, judge’s name and defendant’s name
- Violated applicable criminal statutes and RPC
- Judgment vacated by Ct. of Appeal and criminal case remanded
- *In re Wilson*, No. 06-O-13109 (Cal. State Bar Ct. 2008) – 45-day suspension

## Conduct Prejudicial to the Administration of Justice

- Calling a judge:
  - “Evil, unfair witch”
  - “Seemingly mentally ill”
  - “Clearly unfit for her position and knows not what it means to be a neutral arbiter”
- *Florida Bar v. Conway*, 996 So. 2d 213 (2008) public reprimand
- Defense was....

## Can Judges and Lawyers Be “Friends?”



- Lawyers must be careful to not “knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.” Rule 8.4(f).
- A lawyer may violate this rule if she “friends” a judge before whom she may appear if the lawyer is in a jurisdiction that labels these social networking connections as unethical.
- But there is a split of authority as to whether such conduct is unethical.
  - Found to be ethical by the judicial ethics committees of Kentucky, New York, and South Carolina and ABA Formal Op. 462 (Feb. 21, 2013).
  - However, a Florida committee on judicial ethics reached the opposite conclusion – Florida Bar Ass’n Advisory Comm. on Judicial Ethics, Op. 2009-20 (2009).
- North Carolina judge received public reprimand for friending a litigant mid-trial – *In re Terry*, No. 08-234, Jud. Standards Com. of N.C. (April 1, 2009)

## Can judges and lawyers be “friends?”

- Yes.
  - Remain impartial
  - Maintain dignity
  - No comments on any pending matter
  - No legal advice
  - Stay abreast of changes in social media site and policies
  - Be extremely cautious
  - ABA Formal Op. 462 (2/21/13) holds that judges can use social media, but must comply with relevant provisions of the Code of Judicial Conduct, and avoid anything that would “undermine the judge’s independence, integrity, or impartiality, or create an appearance of impropriety.”
  - See e.g.: Ohio Op. 2010-7 (12/2010); N.Y.Op. 08-176 (1/2009); and Ky. Op. JE-119(1/2010)

## Can judges and lawyers be “friends”?

- No
  - Conveys impression that the lawyer “friends” are in a special position to influence the judge.
  - Can be “friends” with lawyers not appearing before him/her
  - Can post material on Facebook as long as it is within the Rules.

Fla. Op. 2009-20 (11/2009); 2010-06 (3/2010)



## The “Ex Parte Party”

Former workers comp arbitrator involved in email exchanges with three lawyers appearing before her without copying the opposing side led to charges of improper ex parte communications

- In one email the lawyer asks the arbitrator how much the arbitrator thinks her cases are worth and in another complained to the arbitrator about opposing counsel, “Then he upped his demand to \$80k, but said he hadn’t talked to his client yet. WTF?” The arbitrator replied, “I think we should just finish the trial and you say, F him.”
- In another email exchange with the arbitrator, the lawyer called a claimant “my pro se from hell” and “insane” and made disparaging comments about opposing counsel, calling him an “idiot,” “annoying” and “a bad lawyer.”
- Disciplinary action against three lawyers: *In re Nadenbush*, M.R. 25622, 2011PR00077 (Ill. 2013) (90 days suspension+seminar); *In re Barringer*, M.R. 25465, 2011PR00079 (Ill. 2012) (censure+seminar); *In re O’Sullivan*, M.R. 24972, 2011PR00078 (Ill. 2012) (censure)
- Disciplinary action against arbitrator: *In re Teague*, M.R. 25817, 2011PR00076 (2 years suspension) (3/15/13)



## Sexting

See, e.g., *In re Judge Wade H. McCree*, (Mich. Judicial Tenure Comm. 2012)(public reprimand); *Disciplinary Counsel v. William Jeffrey Derweiler*, 135 Ohio St.3d 447, 2013-Ohio-1747 (Ohio May 2, 2013)(one year suspension).



## Advertising-Rules 7.1 -7.3

- Beware
  - Misrepresentations
  - Relationships with .com sites
  - Sharing legal fees with nonlawyers
  - Unintended attorney-client relationships

## Advertising & Social Media

- If online activities promote a law practice, the activity is considered lawyer advertising.
  - For example, a lawyer’s tweet proclaiming a court victory is likely an advertisement, and therefore subject to the Rules on advertisements.
  - But a personal blog or Facebook page that does not mention the writer’s profession is likely not an advertisement.
  - Trouble often arises when lawyers blend both.

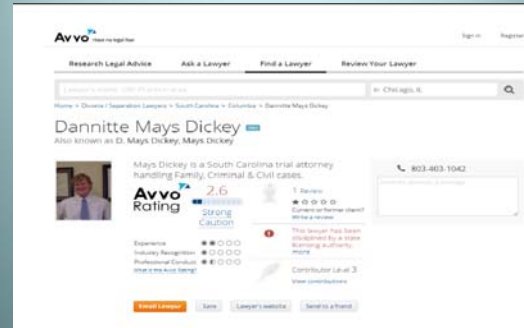
## Advertising & Social Media

- Rules recognize a lawyer’s right to include accurate, non-misleading information about themselves, their practice, and their firm on their own websites.
- Lawyers should update their information regularly.
- Lawyers may also include information about current or former clients on their websites if they obtain their clients’ informed consent, as required by Rule 1.6 (current clients) and Rule 1.9 (former clients).
- Lawyers are prohibited from allowing third parties to create unjustified expectations or otherwise mislead a prospective client.

## Advertising & Social Media

- Rules require advertisements to include “the words ‘Advertising Material,’” both “at the beginning and ending of any recorded or electronic communication.” Rule 7.3 (2010).
- But it may be impractical to shoehorn disclaimers into certain social media platforms.
  - Twitter’s 140-character limit

## *In the Matter of Dannitte Mays Dickey, 722 S.E.2d 522 (S.C. 2012)*



- Falsely stated that he handled matters in federal court
- Falsely stated that he graduated from law school in 2005
- Listed approximately 50 practice areas in which he had little or no experience

### False and Misleading

- *In re L. Tod Schlosser*, M.R. 24458, 2009PR00032 (Ill. May 18, 2011) disbarred for neglecting 8 immigration matters and failed to return >\$31,000.00.

**Website:** “we specialize in results not promises”, “100% success rate”

### Failure to Monitor Website

- *In re Thomas Paul Demuth*, M.R. 24908, 2011PR00122 (Ill. Nov. 17, 2011) Reprimanded (reciprocal) in Wisconsin for practicing law while suspended for non-payment of annual dues

**Website:** misleading statements about authority to practice law in other states

## Avoiding Unintended Lawyer-Client Relationships

- Facebook messages, online postings, and other online communications between a lawyer and visitor regarding legal representation or advice may lead the visitor to be categorized as a “prospective client” under Rule 1.18.
- A layperson that is directly communicating online with a lawyer may have a “reasonable expectation of confidentiality,” depending upon how the lawyer handled the direct messaging.
- Use conspicuous and easily understood disclaimers when posting information online to effectively limit, disclaim, or condition any obligations to website readers.
- Such warnings or statements should be written to avoid a misunderstanding by the visitor that:
  - 1) a client-lawyer relationship has been created;
  - 2) the visitor’s information will be kept confidential;
  - 3) legal advice has been given; or
  - 4) the lawyer will be prevented from representing an adverse party.



## Best Practices When Using Social Media

- **Regarding Clients**
  - Refrain from posting information about client matters online
  - Or obtain consent
- **Regarding Third Parties**
  - Use caution when blasting general legal advice over social media
  - Avoid posting false or misleading statements
  - Use caution about who you “friend” or “follow”



## Best Practices When Using Social Media

- **Regarding Judges**
  - Avoid communicating inappropriately with judges
  - Avoid publically commenting on their abilities
- **Regarding Advertisements**
  - Websites, posts, tweets, blasts and comments must be accurate
  - Should be up-to-date
  - Disclaimers should be clear and noticeable



## Fees and Billing

- 25% of grievances arise over a dispute with the client over fees and costs
- How disputes arise:
  - Attorney overreaching or client misgivings about the reasonableness of the fee.
  - Failing to discuss the fee with the client.
  - Not listening carefully to the client's problem.
  - Failing to manage unrealistic client goals.
  - Accepting cases beyond the attorney's expertise.

## Essential Requirements for Fee Agreements

- Lawyer's fee and expenses must be reasonable - RPC 1.5(a) factors
- Disclosure of scope and basis for fees and expenses at the commencement of representation
- Consent of client
- Agreement doesn't violate Rule 1.5, court order or other law

## What is a Reasonable Fee? ILRPC 1.5(a)

- Nonexclusive list of factors in Rule 1.5(a) to consider in determining reasonableness:
- Time and labor, novelty of issues and skill required
  - Preclusion of other employment
  - Customary fee in locality
  - Amount involved and results obtained
  - Time limitations imposed by representation
  - Nature and length of past relationship with client
  - Experience, reputation and ability of lawyer
  - Is fee fixed or contingent?

## Prohibited Fees

- Fraudulent
- Illegal
- Contingent fees in domestic relations matter (to secure divorce or alimony or support)
- Contingent fee in criminal case
- Fees in violation statute or court order

## Forbidden and Restricted Fee/Cost Arrangements

- Purchase interest in the litigation, except for liens and contingent fees - Rule 1.8(i)
- Financial assistance to clients, except can advance court costs to be repaid at end of litigation and if client is indigent may pay costs and expenses – Rule 1.8(e)

## Best Practices: Minimizing a Fee Dispute

- ✓ Prepare a thorough engagement letter and written fee agreement at the beginning of the representation and have the client sign it.
- ✓ Perform the work in a timely fashion.
- ✓ Keep accurate, detailed records of the attorney's work on the case.
- ✓ Reduce or write off fees when necessary.
- ✓ At the conclusion of the representation, prepare and send client an end-of-the-engagement letter.
- ✓ If a dispute arises, try to resolve it informally.

## RPC 1.5(e): Referral Fees

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

- (1) the division is in proportion to the services performed by each lawyer, or if the primary service performed by one lawyer is the referral of the client to another lawyer and each lawyer assumes joint financial responsibility for the representation;
- (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
- (3) the total fee is reasonable.

## Best Practices: Referral Fee Agreements

1. Do the same type of conflict-of-interest check when making a referral that you would do if you were handling the case directly.
2. Refer only to a lawyer that you reasonably believe is competent to handle the matter (*see* Rule 1.5, Comment 7).
3. Get a copy of the lawyer's malpractice policy.
4. Written agreement should contain full disclosure of division of responsibility and amount of fees, contains language that the client has the right to consent or refuse and has the client's signature.
5. Stay abreast of case status.

## Reciprocal Referral Agreements: RPC 7.2(b)(4)

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may \*\*\*

- (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
  - (i) the reciprocal referral agreement is not exclusive, and
  - (ii) the client is informed of the existence and nature of the agreement.

## Reciprocal Referral Agreement Requirements

Permitted if:

1. does not interfere with lawyer's independent professional judgment (Rules 5.4(c) or 2.1);
2. agreement is non-exclusive;
3. no payment for the referral unless it's a lawyer-to-lawyer referral payment under Rule 1.5(e); and
4. client is informed of the referral agreement



### Best Practices: Reciprocal Referral Agreements

- Review Rules:
  - RPC 2.1 & 5.4(c) cannot interfere w/indep. prof. judgment
  - RPC 5.4(c) cannot share legal fees w/non-lawyers
  - RPC 1.7 avoid conflicts of interest
  - RPC 7.5 law firm names must be only those of lawyers
- Periodically review agreement for compliance
- Agreement should not be of indefinite duration  
*See Comment [8] to RPC 7.2*



### Duty to Report Lawyer Misconduct (a/k/a “Himmel” duty): Rule 8.3

RPC 8.3 sets forth the **mandatory** duty as follows:

(a) A lawyer who [1] knows that [2] another lawyer has [3] committed a violation of Rule 8.4(b) or (c) shall [4] inform the appropriate professional authority.

\*\*\*

(c) This Rule does not require disclosure of information otherwise protected by the attorney-client privilege or by law or information gained by a lawyer or judge while participating in an approved lawyers' assistance program or an intermediary program approved by a circuit court in which nondisciplinary complaints against judges or lawyers can be referred.

### ARDC Resources



For the Rules of Professional Conduct  
& Disciplinary Law  
**ARDC website** at: [www.iardc.org](http://www.iardc.org)

For Guidance on the Rules and an IL Lawyer's  
Professional Duties  
Call the **ARDC Ethics Inquiry Hotline**:  
312-565-2600 (Chicago); 217-546-3523 (Springfield)

Talk it out with other lawyers  
See ILRPC 1.6(b)(4)