

WCLA SEMINAR- Professional Conduct

Legal Malpractice and the Rules of Professional Conduct

February 12, 2014

Scenario 1

Joe Attorney is hired by John Worker to represent him in connection with a workers compensation claim. Worker, a truck driver for Widgetco, was hurt when he drove the company truck around lowered railroad gates in an effort to cross the tracks in front of an oncoming train. The truck, which had recently been serviced, stalled in the middle of the tracks, leaving Worker in the path of the train. Worker suffered arm fractures after falling in his mad scramble to vacate the truck before it was obliterated by the train. Debris from the impact was propelled in all directions, striking cars, pedestrians, and buildings, and the impact caused several tanker cars on the train to derail and leak their contents.

When Worker first met with Joe, he told Joe about his arm injuries. Joe said he would pursue a workers compensation claim for him. Joe was worried about his bills, as he was facing foreclosure if he could not pay his mortgage.

As he left Joe's office Worker was approached by a process server who handed Worker a summons and complaint- he had been sued by the railroad for the damage caused by the collision. Worker walked back into Joe's office and showed him the papers the process server gave him. Joe said "don't worry about it."

Worker went home with his papers in hand. He quickly looked at them and noticed that Widgetco was also a defendant in the case. He feared that he would lose his job because his employer got sued. He called Joe right away and told him about Widgetco being sued. Joe told Worker, "I know- don't worry about it. Do what you have to do."

Worker was off work for months, as he could not drive a truck with his injuries. When he returned he noticed that the warehouse and garage were nearly empty and there were few employees to be seen. He asked a supervisor what was happening and was told that Widgetco was shutting down "because of your lawsuit." Worker responded "It's just work comp! What was I supposed to do?" The supervisor told him, "We're all out of a job now. Thanks."

Worker pulled out his cell phone and tried to call Joe, only to find that his cell service was cut off because he didn't pay his bill. He drove to Joe's office to talk with him. He told Joe that Widgetco was shutting down and that he was out of a job "because of that lawsuit." Joe said he knew Widgetco was shutting down, as the company's closure had been announced weeks before and was reported in the local newspaper, *The Beacon Fused*, but he did not know what lawsuit Worker was talking about. He asked Worker about it and Worker said "The lawsuit they gave me right outside your office. You're my attorney. Why don't you know?"

Questions

1. Based on the above, does Joe represent Worker in the lawsuit?
2. What else did Joe accept professional responsibility for?
3. Does Joe have any responsibility to Worker to investigate or give advice on the potential liability of the company that performed service on the truck?
 - a. If so/not, why?

1-A

Joe is worried about the lawsuit and wonders what Worker is talking about, so he checks the clerk's website and learns that a default was entered against Worker because Worker did not file an answer to the Complaint. Because Widgetco was sued as principal for Worker, the railroad obtained summary judgment against Widgetco and immediately began enforcing the judgment.

Joe wondered why Widgetco's insurance company did not pay the judgment or defend Worker in the lawsuit, so he asked his girlfriend, who worked for the accounting firm that handled Widgetco's books, about it. The girlfriend told Joe that Widgetco's insurance company declined coverage because Worker was carrying hazardous materials in the truck and Widgetco was not licensed, authorized or insured for Hazmat transport. Joe now worried about workers compensation insurance, so he asked his girlfriend if Widgetco carried workers comp coverage. The girlfriend told him, "They just pay those things under the table."

Questions

1. Has Joe violated the RPC?
 - a. If so, which ones and how?
2. Has Joe breached the standard of care in his representation of Worker?
 - a. How could Joe have improved his representation of Worker?
 - b. What consequences might Joe be liable for as a result of his lax representation?

1-B

Joe is worried that the Worker's comp claim won't amount to anything if Widgetco doesn't have insurance, so he quickly files a lawsuit on behalf of Worker against Widgetco. He sends the lawsuit by mail to Widgetco but does not file it, and he fails to discuss his plan with Worker. Widgetco receives the suit in the mail and the next day files for bankruptcy protection. Worker is listed as a creditor, and the notice of bankruptcy filing is served on Joe. Upon receiving the bankruptcy notice Joe is angry and "retaliates" by filing Worker's lawsuit against Widgetco. Rather than put his own name on the lawsuit, however, Joe files the suit in Worker's name, *pro se*.

1. Has Joe violated the RPC by preparing and filing a lawsuit?
 - a. If so, which ones and how?
2. Has Joe breached the standard of care in his representation of Worker?

1-C

Widgetco shuts down, Worker is unemployed, and Joe is continuing to receive notices relating to Widgetco's bankruptcy. He does not send any of the notices to Worker, nor does he tell Worker he filed a lawsuit. Worker calls to find out the status of his comp claim and to find out when he will start to receive payments. Joe asks Worker to come into his office for a meeting. Worker complies, but before the meeting occurs Joe receives a motion for sanctions for violating the automatic stay that bars actions against a debtor. He fails to tell Worker about this.

Questions

1. What happens with the motion for sanctions in the bankruptcy case?
2. Who is responsible?
3. What if Joe tells Worker about it, and Worker approves the filing of the suit after the fact?

1-D

Assume that Widgetco had workers compensation coverage and did not file for bankruptcy protection, and assume that Joe timely and properly filed Worker's claim. Worker meets with Joe and tells him he needs to prevent his home from being foreclosed. Joe disclaims any knowledge of bankruptcy and refers Worker to a colleague in the same office suite as Joe. Worker hires the lawyer, Vincent Detnot, to immediately file a bankruptcy petition. Worker tells Detnot to get "whatever information you need from Joe." Detnot talks to Joe then files a bankruptcy petition for Worker. Joe fails to tell Detnot that Worker had a pending workers compensation claim, and Detnot, who does not do much bankruptcy work, does not identify the claim as an asset. Detnot also fails to list all of Worker's debts on the bankruptcy schedule, omitting over \$300,000 in unsecured debt from the schedules in his filing. Worker's bankruptcy petition is dismissed and no debt is discharged; three months later he loses his home in foreclosure. He finds a new attorney, Jones, to get advice about suing Joe.

1. Is Joe liable for Detnot's actions?
 - a. How and why?
 - b. What is the extent of his liability?
 - c. What is Detnot's liability exposure?
2. Would Joe be liable if Worker's bankruptcy was not dismissed but his workers compensation claim was compromised as a result of being omitted on the filing?
3. Did Joe or Detnot violate the RPC?
4. How could Joe have protected himself from liability?

Scenario 2

Mary is driving to a factory where she works on an automotive assembly line. The plant is enormous, and her employer's property sits on both sides of a busy US highway. Driving in heavy snow, Mary turns on her signal to turn into the plant's parking lot. Before she can make the turn into the lot, a snow plow owned by the employer and operated by an employee of the factory speeds out of another lot broadsiding Mary's car on the US highway and seriously injuring Mary. Mary hires an attorney, Smith, to pursue workers compensation benefits for her. Smith begins the process but then concludes that Mary was a

traveling employee at the time of the crash and that she was not entitled to compensation. Two years later Mary gets a second opinion. The second lawyer understands the conclusion regarding Mary's traveling employee status but suggests another option that by this time is too late to pursue.

Questions

1. What would the other option be?
2. What liability would Smith have for failing to tell Mary about the other option?
 - a. Does the standard of care for a reasonably careful attorney require Smith to tell Mary about the other option?
 - i. Is the answer the same if Smith tells Mary "My practice is limited to representing petitioners in workers compensation, exclusively?"

Scenario 3

Worker meets lawyer in a bar called No Regrets. Both are heavy drinkers and regular patrons. Lawyer usually waited until 4 pm to begin drinking, but Worker was known to start drinking soon after waking up on an almost daily basis, despite working full time. Worker was known to be "three sheets to the wind" by the time Lawyer would arrive at No Regrets. Lawyer often exaggerated his experience and embellished his abilities during periods of alcohol-fueled bravado. Nevertheless, Worker was impressed by Lawyer's claimed accomplishments and appreciated having someone he could boastfully call "my lawyer." He also appreciated Lawyer's willingness to buy a round of drinks. When Worker was hurt at work operating heavy equipment while intoxicated, he hired Lawyer to represent him in a workers compensation claim and in connection with criminal charges for driving his employer's backhoe on a county road while under the influence of alcohol. Lawyer charged Worker a non-refundable \$12,500 retainer, which Worker's mother paid by cashing in her 401(k), and began representing Worker. Lawyer knew Worker ignored cell phone calls and wasn't much for text or email, so Lawyer waited to discuss legal matters with Worker in person at No Regrets. Worker often slurred his speech and stumbled as a result of intoxication, but Lawyer continued to discuss legal matters with him. One afternoon, with Worker barely able to say the words needed to order another drink, Worker agrees to plead guilty to criminal charges and agrees to accept a miniscule offer to settle his compensation claim. Lawyer immediately communicates his client's acceptance of the terms with emails from his Smartphone to the ASA on the criminal case and to the Respondent's attorney. Shortly thereafter, Worker was told to leave No Regrets because he was "over served." Worker left without causing a scene. Two hours later, Worker's mother stops by No Regrets for a cocktail. She strikes up a conversation with Lawyer and soon learns that he represents her son, Worker. She asks Lawyer what is going on with Worker's cases and comments that Lawyer should be getting great results given the amount of money she paid him for the representation. Lawyer tells Worker's mother the status of the cases and explains that Worker told him to "get it over with."

Questions

1. Has Lawyer violated the RPC?

- a. How and why?
2. Are Worker's agreements enforceable?
 - a. Why/why not?
3. What should Lawyer have done under the circumstances?
4. How could Lawyer have better protected himself and Worker?

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