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CHERYL M. WOOD

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Ethical Considerations in Appearing Before the Board

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“Ethics is knowing the difference between what you have a right to do and what is right to do.”

Associate Justice Potter Stewart, United States Supreme Court

“Ethical behavior is doing the right thing when no one else is watching – even when doing the wrong thing is legal.”

Aldo Leopold, American author and ethicist

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Presentation Will Cover

Overview of Ethics Laws and Rules Applicable to:

- Attorneys
- Licensed Representatives
- Workers' Compensation Board Employees

Discussion of Ethics Issues

- Communication
- Confidentiality of Information
- Conflicts of Interest
- Legal Representative Fees and Withdrawal from Representation
- Gifts
- Conduct Before a Tribunal

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Overview of Ethics Laws and Rules Applicable to Attorneys, Licensed Representatives, and Workers' Compensation Board Employees

Ethics Laws and Rules Applicable to Attorneys

Rules of Professional Conduct

- Governs the conduct of all attorneys licensed to practice law in New York State, including attorneys who appear before and are employed by the Board.
- Codified at 22 NYCRR Part 1200
- “The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.” Scope, Paragraph [6]

Ethics Laws and Rules Applicable to Attorneys

Rules of Professional Conduct

- The purpose of the Rules of Professional Conduct (Rules) is to ensure professional competence and ethical conduct.
- The Rules set the minimum level of conduct which attorneys cannot fall below without being subject to disciplinary action.
- The Preamble, Scope, and Comments to the Rules have not been adopted by the Courts, so they do not set minimum standards attorneys must meet, but provide inspiration and guidance.

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Rules of Professional Conduct

Terminology

- **Rule 1.0 – Terminology**
 - Definitions of 24 terms
 - Includes terms such as: Differing interests (f); Firm or law firm (h); Informed consent (j); Matter (l); and Tribunal (w).

Client-Attorney Relationship

- **Rule 1.1 – Competence**
 - Requires an attorney to provide competent representation to a client, which requires the attorney to have the legal knowledge, skill, thoroughness and preparation necessary

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Rules of Professional Conduct

Client-Attorney Relationship

- **Rule 1.2 - Scope of Representation and Allocation of Authority Between Client and Lawyer**
 - Addresses the allocation of decision-making authority between the attorney and the client
 - Paragraph (g) makes clear that an attorney does not violate the Rules by being punctual, by avoiding offensive tactics, and by being courteous and considerate to everyone involved in the legal process
 - Standards of Civility
 - Standards of Civility For Proceedings Before The Workers' Compensation Board (<http://www.wcb.ny.gov/content/main/wclaws/wcb-std.jsp>)
- **Rule 1.3 – Diligence**
 - Requires an attorney to “act with reasonable diligence and promptness in representing a client”
 - Comment 1 – “A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. ... Notwithstanding the foregoing, the lawyer should not use offensive tactics or fail to treat all persons involved in the legal process with courtesy and respect.”

Rules of Professional Conduct

Client-Attorney Relationship

- **Rules 1.4 – 1.18 govern additional aspects of the attorney-client relationship, such as**
 - Communication – Rule 1.4
 - Fees – Rule 1.5
 - Confidentiality of Information – Rules 1.6, 1.9(c), and 1.18(c)
 - Conflicts of Interest – Rules 1.7 – 1.13, and 1.18(c) – (d)
 - Terminating Representation – Rule 1.16

Rules of Professional Conduct

Advocate

- The following Rules govern the obligations and limitations on a lawyer acting as an advocate.
 - Non-Meritorious Claims and Contentions – Rule 3.1
 - Delay of Litigation – Rule 3.2
 - Conduct Before a Tribunal – Rule 3.3
 - Fairness to Opposing Party and Counsel – Rule 3.4
 - Maintaining and Preserving the Impartiality of Tribunals – Rule 3.5
 - Advocate in Non-Adjudicative Matters – Rule 3.9

Rules of Professional Conduct

Communications with Persons Other Than Clients

- The following Rules focus on communications by attorneys with people other than clients.
 - Truthfulness in Statements to Others – Rule 4.1
 - Communication with Person Represented by Counsel – Rule 4.2
 - Communicating with Unrepresented Persons – Rule 4.3
 - Respect for Rights of Third Persons – Rule 4.4

Maintaining the Integrity of the Profession

- The following Rules address professional misconduct of lawyers.
 - Reporting Professional Misconduct – Rule 8.3
 - Misconduct – Rule 8.4

Ethics Laws and Rules Applicable to Licensed Representatives

Workers' Compensation Law

- § 24-a
Authorizes individuals licensed by the Board to appear on behalf of a claimant before the Board with regards to claims for benefits under the WCL
- § 50 (3-b) & (3-d)
Authorizes individual licensed by the Board to appear on behalf of self-insurers, group self-insurers, or insurance carriers before the Board with regards to claims for benefits under the WCL

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Ethics Laws and Rules Applicable to Licensed Representatives

Regulations

- 12 NYCRR 302-1.9 – Conduct
 - Requires licensed representatives to observe the rules and regulations of the Board, and the failure or neglect to do so is sufficient cause for invoking disciplinary proceedings
- 12 NYCRR Subpart 302-2 – Rules of Conduct
 - § 302-2.1 – Duty to his client
 - § 302-2.2 – Duty to board and referees
 - § 302-2.4 – Compensation, commissions and rebates
 - § 302-2.5 – Preparation, punctuality and expedition
 - § 302-2.6 – Candor and fairness
 - § 302-2.8 – Unauthorized practices and intermediaries
 - § 302-3.9 – Misconduct generally

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“No responsibility of government is more fundamental than the responsibility of maintaining the highest standards of ethical behavior by those who conduct the public business. There can be no dissent from the principle that all officials must act with unwavering integrity, absolute impartiality and complete devotion to the public interest. This principle must be followed not only in reality but in appearance. For the basis of effective government is public confidence, and that confidence is endangered when ethical standards falter or appear to falter.”

John F. Kennedy

Special Message to the Congress on Conflict-of-Interest Legislation and on Problems of Ethics in Government.

April 27, 1961

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Ethics Laws and Rules Applicable to Board Employees

- Public Officers Law § 74
- Public Officers Law § 73
- Regulations of the Joint Commission on Public Ethics (JCOPE)
- Workers' Compensation Board Ethics Policies
- Workers' Compensation Board Administrative Law Judge Code of Judicial Conduct
- Advisory Opinions issued by JCOPE

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Public Officers Law § 74: Code of Ethics

This law forms the foundation of the ethics laws for State employees, and is the basis for determining if a potential conflict of interest exists, especially with respect to areas of concern such as gifts and outside activities

- The Code of Ethics is intended to prevent State/Board employees from using their official position or authority to benefit themselves or others
- The Code addresses actual conflicts of interest, as well as the appearance of a conflict
- The Code embodies the guiding principles of impartiality, confidentiality, stewardship of State resources, and integrity
- Public Officers Law § 74 applies equally to all Board employees

Public Officers Law § 74: Code of Ethics

The General Rule: Public Officers Law § 74(2)

New York State officers and employees, shall not ...
“have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his or her duties in the public interest.”



Standards of Conduct

Public Officers Law § 74(3)(a)-(i)

The Code of Ethics contains nine Standards of Conduct which aim to prevent conflicts of interest

- **Impartiality** – requires employees to maintain an independence of judgment when performing his/her State job (§ 74[3][a])
- **Confidentiality** - requires employees to understand the types of information that may be shared with colleagues and members of the public, as well as not disclosing confidential information to benefit yourself or someone else (§ 74[3][b] & [c])

Standards of Conduct

Public Officers Law § 74(3)(a)-(i)

- **Misuse of Position / Resources** - prevents employees from securing unwarranted privileges or favors for themselves or others based on their State job, and from utilizing the States resources for their own personal use. (§ 74[3][d])
- **Integrity Standards** - requires employees to avoid situations in which it may appear they could be influenced or would attempt to influence someone else, and to conduct themselves in a manner that does not raise suspicion among the public that they are personally benefits from their official positions. (§ 74[3][f] & [h])

Standards of Conduct

Public Officers Law § 74(3)(a)-(i)

- **Financial conflicts** – requires employees to abstain from personal investments that conflict with their official duties, and avoid transactions with any entity in which they may have a direct or indirect financial interest. (§ 74[3][e] & [g])
- **Business with the State** – State employees are restricted from contracting for work and/or providing goods and services to entities that are licensed or regulated by their agency. (§ 74[3][i])

Public Officers Law § 74: Code of Ethics

Violations – Public Officers Law § 74(4)

- For violations of Public Officers Law § 74(3)(a), (b), (c), (d), (e), (g), & (i) JCOPE can impose civil penalty of up to \$10,000, and the value of any gift, compensation, or benefit received as a result of the violation
- For violations of any part of Public Officers Law § 74, the Board is empowered to impose disciplinary action, which may include fines, suspension, or termination

Public Officers Law § 73

Covers

- Outside Activities – POL § 73(2), (3), (4), (7), & (7-a)
- Gifts – POL § 73(5)
- Post-employment Restrictions – POL § 73(8)
- Nepotism – POL § 73(14) & (15)

Applies to Board employees, except those who are unpaid or per diem officers

Violations of these sections provide for a civil penalty of up to \$40,000 and the value of any gift, compensation, or benefit received

Discussion of Ethics Issues:

- Communication
- Confidentiality of Information
- Conflicts of Interest
- Legal Representative Fees and Withdrawal from Representation
- Gifts
- Conduct Before a Tribunal

Communication

Laws and Rules:

- Rules of Professional Conduct
 - Rule 1.4 – Confidentiality of Information
 - Governs an attorney’s duties to communicate meaningfully with clients.
 - Comment 1 – “Reasonable communication between the lawyer and the client is necessary for the client to participate effectively in the representation.
 - This rule requires an attorney to promptly comply with a client’s request for information, or if a prompt response is not possible, to acknowledge receipt and advise when a response may be expected.
 - Client telephone calls should be returned promptly.

Communication

Laws and Rules:

- Rules of Professional Conduct
 - Rule 4.1 – Truthfulness in Statements to Others
 - Requires a lawyer to be truthful when dealing with others on a client’s behalf.
 - Rule 4.2 – Communicating with Person Represented by Counsel
 - Referred to as the “no-contact” or “anti-contact” rule.
 - Paragraph (a) prohibits a lawyer who is representing a client in a matter from communicating (or causing another to communicate) about the matter with any other party the lawyer “knows” to be represented by counsel unless the lawyer either obtains the consent of the other party’s lawyer or is authorized by law to do so.

Communication

Laws and Rules:

- Rules of Professional Conduct
 - Rule 4.2 – Communicating with Person Represented by Counsel (con't)
 - Paragraph (b), creates an exception to the “or cause another to communicate clause of Rule 4.2(a), by allowing a lawyer to advise a client to speak with a represented party (unless the other party is legally incompetent), provided the lawyer gives “reasonable advance notice” to the other party’s lawyer.
 - Rule 4.3 – Communicating with Unrepresented Persons
 - Prohibits a lawyer acting on behalf of a client from stating or implying that the lawyer is objective or neutral (“disinterested”) or from giving legal advice to an unrepresented person, other than to secure counsel.

Communication

Laws and Rules:

- Rules of Professional Conduct
 - Rule 4.4 – Respect for Rights of Third Persons
 - Prohibits a lawyer, while representing a client, from using methods of obtaining evidence that embarrass, harm, or violate the rights of a third party, and requires a lawyer who is representing a client to “promptly notify the sender” that the sender has inadvertently sent documents to the lawyer.
- Ethics Advisory Opinions
 - NYSBA Ethics Op. 1144 (1/29/2018)
 - NYSBA Ethics Op. 846 (10/27/2010)

Communication

Laws and Rules:

- Rules for Licensed Representatives
 - Rule 302-2.1 – Duty to his client
 - Requires licensed representatives to make complete and accurate disclosures to their clients of the facts and questions of law in their cases, comply with the law, and fairly advise their clients of the merits of their cases.
 - Rule 302-2.2 – Duty to board and referees
 - Requires licensed representatives to conduct themselves at all times in the same orderly manner as required of lawyers.

Communication

Laws and Rules:

- Rules for Licensed Representatives
 - Rule 302-2.6 – Candor and fairness
 - Requires licensed representatives to perform their written and oral communications punctually, and communicate with represented adverse parties through their legal representatives.
 - This is similar to Rule 4.2
- Workers' Compensation Law and Rules
 - § 13-6 – provides that, "... the improper influencing or attempt by any person improperly to influence the medical opinion of any physician who has treated or examined an injured employee, shall be a misdemeanor."

Communication

Laws and Rules:

- Workers' Compensation Law
 - § 137 (1)(b) & (c) govern contact with Independent Medical Examination (IME) examiners.
 - 12 NYCRR 300.2
- Subject Numbers and Guidance
 - Subject Number 046-309 – Return to Work
 - Subject Number 046-124 – Rights and Responsibilities of Parties to a Claim when Communicating with Treating Health Care Professionals and IMEs
 - Communication Guidelines

Communication

Laws and Rules:

- Decisions
 - Matter of Rochester Business Alliance, 2011 NY Wrk Comp 70511177
 - Matter of Xinos Construction Corp., 2014 NY Wrk Comp G0429794
 - Matter of Consolidated Edison, 2018 NY Wrk Comp G1174228
 - Matter of Womens Fire Systems Cor, 2018 NY Wrk Comp G1764944
 - *Matter of Knapp v Bette & Cring, LLC*, 166 AD3d 1428 (2018)

Confidentiality of Information

Laws and Rules:

- Rules of Professional Conduct
 - Rule 1.6 – Confidentiality of Information
 - Rule 1.9(c) – confidential information of former clients
 - Rule 1.11(c) – confidential government information acquired when attorney was a public employee
- Public Officers Law § 74(3)(b) & (c)
- WCL § 110-a

Confidentiality of Information

Laws and Rules:

- Rules of Professional Conduct
 - Rule 1.6 – Confidentiality of Information
 - Considered the most important rule in the Rules. A Lawyer's duty of confidentiality contributes to the trust that is the hallmark of the attorney-client relationship.
 - Paragraph (a) prohibits a lawyer from knowingly revealing confidential information or using such information to the disadvantage of a client or for the advantage of the lawyer or third person unless:
 - Client gives consent
 - Implied authority to advance best interest of client
 - Permitted pursuant to 6 exceptions in Rule 1.6(b).

Confidentiality of Information

Laws and Rules:

- Rules of Professional Conduct
 - Rule 1.6 – Confidentiality of Information (con't)
 - Paragraph (a) also defines “confidential information” as “information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. ‘Confidential information’ does not include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the legal community or in the trade, field or profession to which the information relates.”
 - Paragraph (b) sets forth when a lawyer may reveal or use confidential information to the extent the lawyer reasonably believes necessary.

Confidentiality of Information

Laws and Rules:

- Rules of Professional Conduct
 - Rule 1.6 – Confidentiality of Information (con’t)
 - Paragraph (c) obligates a lawyer to use reasonable care to prevent the inadvertent, or unauthorized disclosure or use of, or unauthorized access to, confidential information.
 - Rule 1.9(c) – Duties to former clients
 - Prohibits a lawyer from using confidential information of a former client protected by Rule 1.6 to the disadvantage of the former client, except when permitted or required by the Rules, or when the information has become generally known.
 - Rule 1.18(b) – Duties to Prospective Clients
 - Even when attorney-client relationship ensues, a lawyer shall not use or reveal information learned from the prospective client.

Confidentiality of Information

Laws and Rules:

- Public Officers Law § 74 (3)(b) & (c)
 - § 74(3)(b) prohibits State/Board employees from accepting employment or engage in professional activities that will require him/her to disclose confidential information obtained by reasons of his/her State/Board job.
 - 74(3)(c) prohibits employees from disclosing confidential information to benefit themselves or others.
 - Unlike in the Rules for Professional Conduct, confidential information is not defined in the Public Officers Law, rather what information is confidential is determined by the agency.
 - It is the responsibility of Board employees to know what information is confidential.

Confidentiality of Information

Laws and Rules:

- Workers' Compensation Law § 110-a
 - Governs the confidentiality of Board records.
 - WCL §110-a(1)(a) Prohibits disclosure, redisclosure, release, dissemination or other publication by an officer, member, employee or agent of the Board to any other person of a workers' compensation record, except as set forth in the statute.
 - WCL § 110-a(1)(b)(i) defines "record" as "a claim file, a file regarding an injury or complaint for which no claim has been made, and/or any records maintained by the board in electronic data-bases in which individual claimants or workers are identifiable, or any other information relating to any person who has heretofore or hereafter reported an injury or filed a claim for workers' compensation benefits, including a copy or oral description of a record which is or was in the possession or custody of the board, its officers, members, employees or agents."

Confidentiality of Information

Laws and Rules:

- Workers' Compensation Law § 110-a
 - WCL § 110-a(2) sets forth to whom disclosure of Board records can be disclosed. Records can be disclosed to:
 - Employees of other governmental units if the information is necessary for the governmental unit to operate a statutorily authorized program or purpose.
 - Claimants and their attorneys
 - Insurance carriers, employers, SIF
 - Health insurers
 - Treating physician or other health care provider; and
 - Board employees of Board records when necessary to perform their official duties. This means that Board employees can only access and review claim files necessary to do their job.

Conflicts of Interest

Rules of Professional Conduct

- Rule 1.7 – Conflict of Interest: Current Clients
- Rule 1.8 – Current Clients: Specific Conflict of Interest Rules
- Rule 1.9 – Duties to former clients
- Rule 1.10 – Imputation of Conflicts of Interest
- Rule 1.11 – Special Conflicts of Interest for Former and Current Government Officers and Employees

Conflicts of Interest

Public Officers Law

- § 73
- § 74

Board Policy

- Prohibits a Board employee from having any involvement in, influencing of, or accessing a workers' compensation claim when the employee, a relative or relative-in-law of the employee, a person with whom the employee makes his/her home, or a friend of the employee is a party, or represents a party or any other entity that has an interest in the claim

Attorney Fees and Withdrawal

Fees

- **WCL § 24**
- **12 NYCRR § 300.17**
 - (f) "... Unbecoming or unethical conduct by an attorney or licensed representative may result in reduction or denial of a fee request. In no case shall the fee be based solely on the amount of the award."
- **Rules of Professional Conduct Rule 1.5 – Fees**
 - Prohibits attorneys from charging or collecting an excessive or illegal fee
 - Sets forth the factors to be used to determine if fee is excessive
- **Subject Number 046-943, Attorney Fees, May 17, 2017**
- **Case law**

Attorney Fees and Withdrawal

Withdrawal

- **Rules of Professional Conduct**
 - Rule 1.16 governs withdrawal under certain circumstances and requires a lawyer to decline some engagements
 - Rule 1.16(d) prohibits an attorney from withdrawing from representation without approval, when permission to withdraw from the tribunal is required by the rules of the tribunal
- **12 NYCRR § 300.17(b)(2)**
 - An attorney or licensed representation may withdraw from representing a claimant when: i) a notice of substitution has been filed; or ii) a completed withdrawal of representation has been filed with the Board and approved
- **Subject Number 046-976, Attorney/Licensed Representative Withdrawal, August 29, 2017**

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Gifts

Rules of Professional Conduct

- Rule 1.8(c)
- Rule 3.5(a)

Public Officers Law

- § 73(5)
- § 74

19 NYCRR 933

Board Policy

- Board employees cannot accept gifts from interested sources
- The Board does not accept gifts

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Conduct Before a Tribunal

Rules of Professional Conduct

- Rule 3.1 – Non-Meritorious Claims and Contentions
- Rule 3.2 – Delay of Litigation
- Rule 3.3 - Conduct Before A Tribunal
- Rule 3.4 Fairness to Opposing Party and Counsel
- Rule 3.5 Maintaining and Preserving the Impartiality of Tribunals

Workers' Compensation Law

- WCL § 23
- WCL § 25(3)(c) & (d)
- WCL § 114-a(3)(i) & (ii)

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Thank you

Questions?

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