

Assessment of Public Comment on Proposed Regulations

The Workers' Compensation Board Chair (Chair) and The Workers' Compensation Board (Board) received approximately 46 formal written comments. Approximately 14 of those were form letters.

The Board received several comments requesting that any language which vests the Board with the authority to determine whether an attorney has violated the New York Rules of Professional Conduct be removed from the regulation. The Board has clarified the regulations to indicate that failure to obtain approval of a Workers' Compensation Law Judge prior to ceasing representation of a claimant will be considered the basis for a referral for a violation of the New York Rules of Professional Conduct.

The Board received several comments indicating that the regulations do not provide attorneys and claimants with a clear understanding as to the calculation of fees, making it difficult for counsel to clearly advise clients as to what their legal representation will cost. The regulation has always required an attorney to advise a claimant as to the services rendered and the time spent on a case. The proposed regulation did not change this requirement. Accordingly, no change to the regulation has been made.

The Board received several comments concerned that the degree of detail required in the fee application will violate the attorney-client privilege or require submission of attorney work product. The fee application does not require an attorney to describe legal advice or add any details of his or her legal relationship with a client so as to jeopardize the attorney-client privilege. Simple descriptions as to the services performed will suffice. Accordingly, no change to the regulation has been made.

The Board received a few comments requesting that the threshold for submission of a fee request be raised to \$6,000 instead of \$1,000. The Board also received one comment requesting the threshold be raised to \$5,000. The Board feels raising the threshold to \$1,000 is sufficient and therefore no change to the regulation has been made.

The Board received multiple comments asking that the requirement that the claimant's signature on the fee application be removed. The Board also received several comments stating the requirement that the attorney submit a written explanation as to why the client's signature was not obtained is too burdensome. The Board does not feel this requirement is too burdensome. An attempt to secure the claimant's signature should be made, but if an attorney is unable to do so they may submit a written explanation as to why the signature was not obtained. This statement does not have to be long; it must merely provide a sufficient explanation. Accordingly, no change to the regulation has been made.

The Board received a comment asking that the qualifier "must" in section 300.17(d)(3) be modified to account for cases in which the claimant advises an attorney that they will not be present at a hearing less than 10 days prior to the hearing. The prior version of the regulations had this language in and it remained unchanged in the proposed regulations. Accordingly, no change to the regulations has been made.

The Board received a comment requesting that the regulation be revised to provide that where a fee application is submitted at a hearing at which the claimant is not present, a copy of the application shall be mailed to the claimant, proof of service filed with the Board, and payment of the fee shall be withheld until either: (1) the expiration of 10 days from the date of service; or (2) submission of a copy of the fee request signed by the claimant. The Board already has a sufficient process in place for how fee applications are submitted and fees paid. Accordingly, no change to the regulation has been made.

The Board received a number of comments objecting to the attorney fee being based on documentation of “time spent” as opposed to the quality of the representation and the nature and extent of the result achieved. Several comments stated the proposed regulation’s focus on “time spent” ignores the contingency fee arrangement of Workers’ Compensation cases. The Board also received a comment stating the language used regarding the itemization of services is vague, and as such it will be difficult for a Workers’ Compensation Law Judge to objectively interpret what is a sufficient itemization. The regulation has always required an attorney on an application for fees to indicate the time spent for the services rendered. The proposed regulation did not change this requirement. Accordingly, no change to the regulation has been made.

The Board received multiple comments opposed to the requirement that a fee request be itemized as to services performed in the time since any prior fee request was submitted, arguing that the attorney’s work throughout the entire case should be considered and that the inability to associate a particular interim fee with a specific time or task is inherent in the system. The Board received a comment requesting that the regulation be modified to allow an attorney to submit all work performed since the beginning of the case with a statement as to why any prior fee did not fully and fairly compensate the attorney for the work performed to that point. The fee application provision in the regulation is in line with how most attorneys currently bill clients. Accordingly, no change to the regulation has been made.

The Board received several comments indicating the use of the term “unbecoming” in section 300.17(f) is vague and subjective and should be removed. The determination of what constitutes unbecoming or unethical conduct will be made on a case-by-case basis dependent upon the facts and circumstances. Any disagreement with the interpretation of “unbecoming” in a specific case may be handled through an appeal of that decision. Accordingly, no change to the regulation has been made.

The Board received multiple comments concerned that the regulation was issued without consultation with the relevant legal community. The proposed regulation was subjected to a comment period during which the public, including the relevant legal community, could voice any concerns or suggestions regarding the regulation to the Board. Accordingly, no change to the regulation has been made.

The Board received multiple comments asking that the regulations be revised to provide attorneys with the option to receive notifications from the Board electronically instead of requiring electronic notice. The Board also received a comment asking that the regulation include language which would allow an attorney to request notices by regular mail if he or she

experiences problems with the electronic mailbox. The language of the regulation states that the Board “may require” electronic notices to be received, allowing for potential exceptions if necessary. Additionally, this requirement would only apply to those individuals who already have the available technology to access a client’s electronic case folder. Accordingly, no change to the regulation has been made.

The Board received comments stating the rule providing for the complete forfeiture of any attorney fee for failure to file a notice of substitution or withdrawal is unduly harsh and asking in such cases for counsel to be awarded a fee based on quantum meruit with an appropriate downward adjustment for any irregularity of service, taking into consideration all applicable facts and circumstances. The Board disagrees that this is unduly harsh and accordingly no change to the regulation has been made.

The Board received a comment asking for there to be a comment period on the prescribed format for withdrawal of representation before it becomes mandatory. There was a public comment period on the proposed regulation outlining the process for withdrawal. No change was made to the regulation.

The Board received a comment stating that receiving proper and timely authorization for an attorney to withdraw in a matter whereby the attorney may have a conflict of interest with a client can run afoul to Rule 1.7 as the attorney would be charged with representation of the injured worker until so released. The Board will work to address requests to withdraw as quickly as possible so as to avoid any situations where there may be a conflict of interest. Accordingly, no change to the regulation has been made.

The Board received comments stating the regulations make no provision for payment with regard to the extensive amount of work performed that does not result in a monetary payment to a claimant. An attorney has always been required to indicate services rendered and time spent when requesting a fee. This remained unchanged by the proposed regulation and accordingly no change the regulation has been made.

The Board received a comment stating that there is no provision for the regulation of attorney fees that insurance companies can pay defense firms and that these fees should be regulated. The Board has no authority under 300.17 to regulate these types of fees and therefore no change to the regulation has been made.

The Board received a comment asking for additional language to be added to 300.17(b)(2) stating that when an attorney has been discharged by a client the attorney has no further obligation to the client. The regulation addresses the process for withdrawing from representation. Anything beyond that may be addressed by the Rules of Professional Conduct. Accordingly, no change to the regulation has been made.

The Board received a comment asking that the OC-400.1 and supporting documents be filed for in an “in camera” analysis and no longer be viewable by parties adverse to the injured worker. The regulatory amendment does not change any provisions with respect to viewing of forms by parties of interest. Accordingly, no change to the regulation has been made.

The Board received a comment asking for clarification under 300.17(b)(2) as to under what circumstances the Board will deny the request to withdraw from representation. This will be determined on a case-by-case basis based on the specific facts and circumstances of each case. Accordingly, no change to the regulation has been made.

The Board received a comment recommending the Board move to a standard that follows an established method in disability related cases and move toward a standard of presumptive reasonableness of a percentage in the award (recommended 15%) of attorney fees in cases involving a certain amount of benefit and suggested 10 times the ongoing weekly benefit rate for fees on classification. It was suggested that routine appearance fees should be at the discretion of the judge handling a particular hearing. The proposed regulation did not change how fees are calculated. Accordingly, no change to the regulation has been made.

The Board received comments stating there is a discrepancy between the punitive measure of reducing a potentially substantial attorney fee to \$450 as a penalty for ministerial errors in contrast to lesser penalties for improper attorney conduct. There is no provision stating a fee will be reduced to \$450. Nor is it a penalty. The regulation provides that “[n]o fee shall be awarded to a claimant's attorney or licensed representative unless the attorney or licensed representative has complied with the requirements of this section,” thus permitting the Board to grant a fee based on the allowable amounts for oral fee applications. A fee may also be reduced or denied based upon failure to sufficiently itemize services or time spent on services. Accordingly, no change to the regulation has been made.

The Board received comments stating that it will not achieve its goals of conserving valuable judicial and administrative resources if the regulations regarding fees are unduly burdensome and thereby quell representation. The Board does not feel the proposed changes to the regulation are unduly burdensome. Rather, the Board feels these proposed changes were clarifying and necessary. As such, no change to the regulation has been made.

The Board received a comment asking that detailed decisions as to fees be provided so there will not be inconsistent decisions. Each fee determination will be made on a case-by-case basis based upon the fee application and the facts and circumstances of the case. Accordingly, no change to the regulation has been made.

The Board received a comment stating an attorney should not be constrained from ending their representation when necessary. The Board feels it is in the best interest of all parties to be formally informed of when an attorney is requesting to withdraw from representation and that such request should have a valid basis. This is consistent with withdrawal protocols in place in other administrative and judicial tribunals. Accordingly, no change to the regulation has been made.

Changes to the Regulations:

- Section 300.17(b)(2) has been amended to clarify that failure to obtain approval prior to ceasing representation, when a notice of substitution has not been filed, will be a basis for a referral for a violation of the New York Rules of Professional Conduct.

- Section 300.17(d)(3) a typo was corrected so the sentence now reads “attorney or licensed representative” instead of “attorney of licensed representative.”
- Section 300.17(g) the word forthwith was deleted.