

Division of Workers' Compensation
and
NJ Council on Safety and Health

ETHICS

May 2019

Ethics - Recent Developments

CAA Docket 01-2017 – Geo Fence



Ethics - Recent Developments

CAA Docket 01-2017 – Geo Fence



CAA Docket 01-2017 – Geo Fence

- RPC 7.3(b)(5) prohibits unsolicited “direct” contact
- Adjacent Pop Ups are OK – Not Direct

Ethics - Recent Developments

CAA Docket 01-2017 – Geo Fence

- BUT.....

CAA Docket 01-2017 – Geo Fence

- BUT – Can't significantly interfere
- Can't require use to watch Ad to get to Content

Ethics - Recent Developments

CAA Docket 01-2017 – Geo Fence

- BUT.....

CAA Docket 01-2017 – Geo Fence

- BUT – Rule 7.3(b)(1) not if physical or mental state could affect judgement

Ethics - Recent Developments

CAA Docket 01-2017 – Geo Fence



Ethics - Recent Developments

CAA Docket 01-2017 – Geo Fence

- BUT.....

CAA Docket 01-2017 – Geo Fence

- Rule 7.3(b)(4) unsolicited direct w/in 30 days of mass-disaster
- **IS** substantial equivalent of direct – even if on side

Advisory Opinion 732 – Referrals

- June 21, 2017 Opinion
- Legal Zoom
- Rocket Lawyer
- AVVO Advisor
- AVVO Legal Services

Ethics - Recent Developments

Advisory Opinion 732 – Referrals



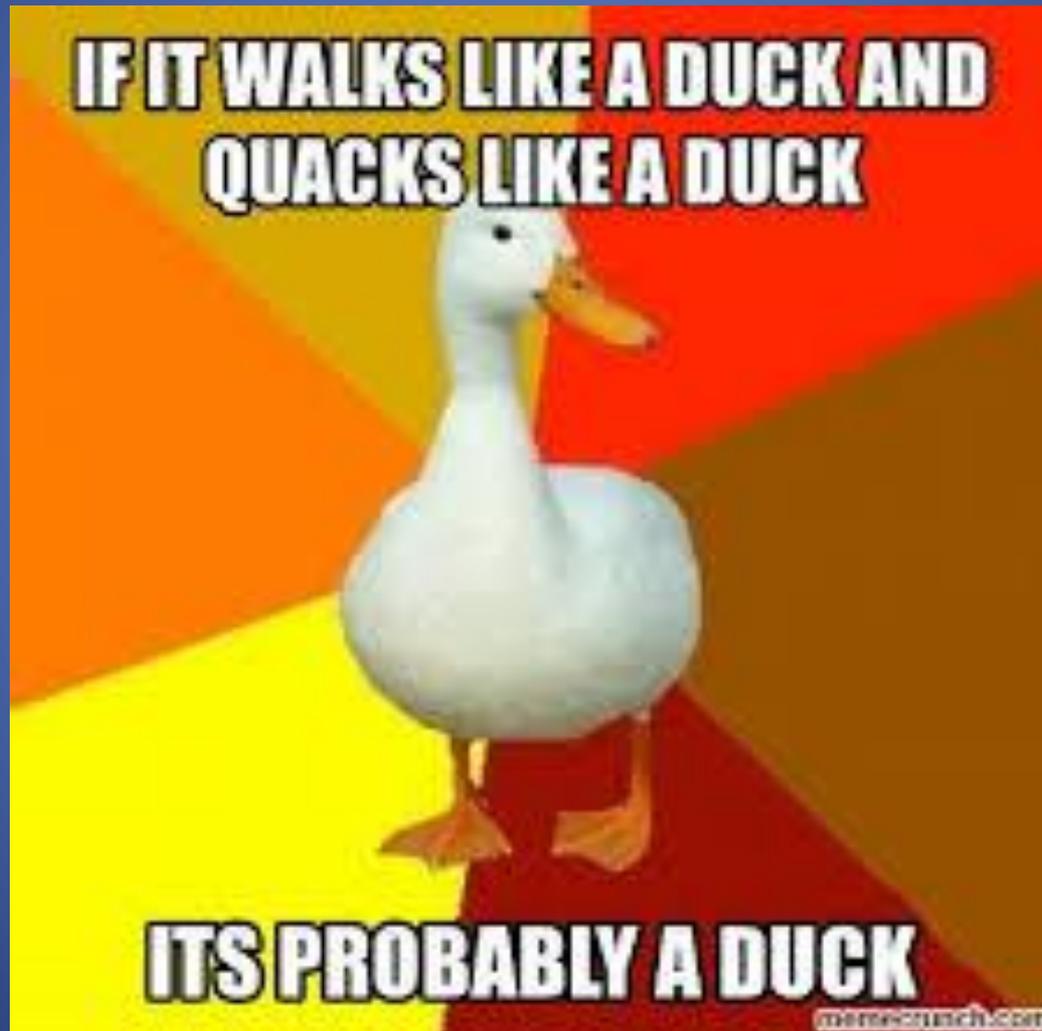
Ethics - Recent Developments

Advisory Opinion 732 – Referrals

- Legal Zoom
 - Monthly Subscription Fees to Consumers Charged by LZ
 - Unlimited 30 Min Consults
 - Additional Services at “discount”
- Rocket Lawyer
 - Monthly Subscription Fees to Consumers Charged by RL
 - “Free” 30 Min Consults
 - Additional Services at a discount

Ethics - Recent Developments

Advisory Opinion 732 – Referrals



Ethics - Recent Developments

Advisory Opinion 732 – Referrals

RPC. 7.3(e)(4)

Legal Services Plan

These Are Not Registered

Advisory Opinion 732 – Referrals

- AVVO Advisor
 - Consumer pays flat fee for 15 minute consult with L
- AVVO Legal Services
 - Consumer pays flat fee for fixed project

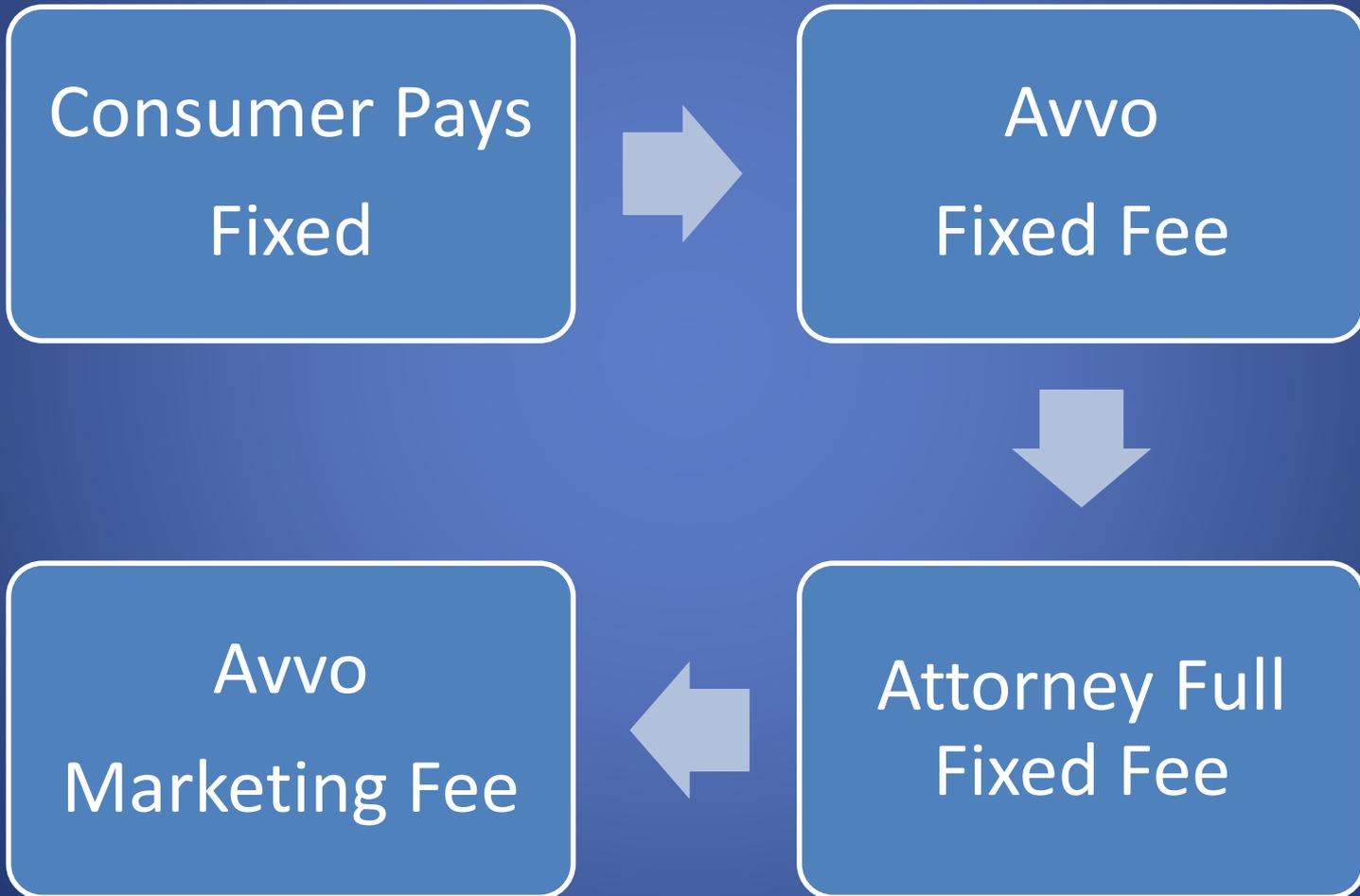
Ethics - Recent Developments

Advisory Opinion 732 – Referrals



Ethics - Recent Developments

Advisory Opinion 732 – Referrals



Advisory Opinion 732 – Referrals

- R.P.C 5.4(a) “a lawyer shall not share legal fees with a non lawyer”
- A lawyer may ethically pay the reasonable cost of advertising or public communication.

Advisory Opinion 732 – Referrals

- The service offered by Avvo is a lawyer referral program that does not conform to the RPC – NJ lawyers may not participate in the program

Advisory Opinion 732 – Referrals

- What can you do:
 - Place an ad on Avvo
 - Pay for leads (a set, flat amount for potential client inquiries regardless if results in retention as a client)

Ethics - Recent Developments

Notice to Bar – Committee of Advertising

- May 4, 2016
- Super Lawyers
- Rising Stars
- Best Lawyers
- Superior Attorney
- Leading Lawyer
- Top-Rated Counsel

Notice to Bar – Committee of Advertising

- Any basis for comparison to other attorneys must be:
 - Substantiated;
 - Bona fide: and
 - Verifiable

Notice to Bar – Committee of Advertising

- When referencing an award or grouping:
 - Description of standard or methodology;
 - Name of the comparing organization; and
 - The statement “No aspect of this advertising has been approved by the Supreme Court of New Jersey.”

Ethics - Recent Developments

Notice to Bar – Committee of Advertising



Ethics - Recent Developments

Notice to Bar – Committee of Advertising

- Jane Doe was selected to the 2016 Super Lawyers list issued by Thompson Reuters. A description of the selection methodology can be found at www.superlayers.com/about/selection_process_detail.html. No aspect of this advertisement has been approved by the Supreme Court of New Jersey.

Ethics - Recent Developments

Advisory Opinion 729 - Subpoena



Ethics - Recent Developments

Advisory Opinion 729 - Subpoena



Advisory Opinion 729 - Subpoena

- OAE opinion 10/30/15
- Service of SDT
- Not Allowed to threaten

Ethics - Recent Developments

Advisory Opinion 729 - Subpoena

- Authorized by Statute in WC

34:15-60. Subpoenas; witness fees; punishment for misconduct. The director, each deputy director and each of the referees shall have the same power as the Superior Court to issue subpoenas to compel the attendance of witnesses and the production of books and papers. The fees for the attendance of witnesses shall be such as are now provided for the attendance of witnesses in other civil cases, and shall be paid by the party arranging for the attendance of such witnesses. The subpoenas shall be authenticated by the seal of the department, and either party to any such proceeding may, without charge, secure subpoenas from the director, a deputy director or any referee. Misconduct on the part of any person attending a hearing, or the failure of any witness, when duly subpoenaed to attend or give testimony shall be punishable by the director, each deputy director and each of the referees, in the same manner as such failure is punishable by the Superior Court in a case therein pending.

Ethics - Recent Developments

Advisory Opinion 729 - Subpoena

- Procedure in the WC Rules

12:235-3.12 Conduct of formal hearings

(r) Forms of subpoena, bearing the seal of the Department, shall be made available at all district offices. A party may prepare a subpoena and authorize its service, in accordance with the New Jersey Rules of Court, in the name of the Judge of Compensation assigned to the case, to compel the attendance of witnesses and the production of books and papers and such other items as shall be subject to production. However, the return date of such subpoena will be the date of the workers' compensation proceeding instead of the date of deposition referred to by the New Jersey Rules of Court. A copy of the subpoena shall also be provided to the Judge of Compensation whose name appears on the subpoena.

Ethics - Recent Developments

Advisory Opinion 729 - Subpoena

- The Right Way

1:9-3. Service

A subpoena may be served by any person 18 or more years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named together with tender of the fee allowed by law, except that if the person is a witness in a criminal action for the State or an indigent defendant, the fee shall be paid before leaving the court at the conclusion of the trial by the sheriff or, in the municipal court, by the clerk thereof.

Ethics - Recent Developments

Advisory Opinion 729 - Subpoena



Ethics - Recent Developments

Advisory Opinion 729 - Subpoena

RPC 8.4. Misconduct. It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

Ethics - Recent Developments

Advisory Opinion 729 - Subpoena

The Committee does not find that the threat is a “false statement” under *Rule of Professional Conduct* 4.1(a), but it hereby provides notice to the bar that the language misstates what the immediate consequences are for the recipient of a mailed subpoena. Going forward, lawyers who intentionally include such language in mailed subpoenas, threatening the recipient with sanctions for noncompliance, may be violating *Rule of Professional Conduct* 8.4(c) (conduct involving misrepresentation).

Ethical Obligations

Rule 3.4 – Fairness to Opposing Party



Ethical Obligations

Rule 3.4 – Fairness to Opposing Party

- RPC 3.4. Fairness to Opposing Party and Counsel
A lawyer shall not:
 - (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused;

Ethical Obligations

Rule 3.4 – Fairness to Opposing Party



Rule 3.4 – Fairness to Opposing Party

- Reasonably believe will supported by admissible evidence
- Asserting personal knowledge of facts
- Stating personal opinion of credibility of witness

Ethical Obligations

Medical Treatment and Records



Ethical Obligations

Medical Treatment and Records

- 34:15-128.4 ..., in any case of an individual seeking workers' compensation from an employer, it shall be unlawful for the employer, the workers' compensation insurance carrier of the employer, a health care provider treating or evaluating the individual in connection with the case, or a third party in the case, or their agents, to withhold from the individual any medical information they have regarding that individual which is requested by the individual...

Ethical Obligations

Medical Treatment and Records

- Rule 4:10(d)(1)

Discovery of communication between attorney and expert of facts and data considered by the expert in rendering the report.

VIDEO Surveillance

Ethical Obligations

Medical Treatment and Records

- Rule 4:10(d)(4)

A party shall not seek a voluntary interview with another party's treating physician unless that party has authorized the physician, in the form set forth in Appendix XII-C, to disclose protected medical information.

Ethical Obligations

Medical Treatment and Records

Appendix XII-C (new)

**AUTHORIZATION TO RELEASE PRIVATE HEALTH CARE INFORMATION
AND FOR VOLUNTARY INTERVIEW**

TO: _____ RE: _____

_____ DOB: _____
_____ SS#: _____

I hereby authorize you to disclose my protected health information to and to participate in a voluntary interview with:

In defending against the lawsuit I have filed against _____, the defendant is entitled to seek to interview witnesses with relevant information. Your participation in any such interview is entirely voluntary. You have the right to have my attorney present at the interview.

You may disclose protected information reasonably related to the medical condition I have placed in issue by my lawsuit. That condition relates to:

This authorization may be revoked by me at any time, and expires 120 days from the date I execute the authorization as indicated below. If you have questions relating to the scope of this authorization, you may contact your own attorney or my attorney:

Patient signature: _____ Date: _____

[Note: Form adopted as Appendix XII-C July 27, 2006 to be effective September 1, 2006.]

Ethical Obligations

Medical Treatment and Records

- Stempler v. Speidell, 100 N.J. 368 (1985)
- Not a WC case, but similar interests
- Defense seeking ex-parte interview with claimant's treating doc.
- Balance Patient-Physician privilege, physician's professional obligation of confidentiality and a defendant's right to discover facts about case / treatment.

Ethical Obligations

Medical Treatment and Records

- Defense should provide P's counsel with reasonable notice of the time and place of the proposed interview.
- Supposed to use the special authorization
- Key is interview is “entirely voluntary”
- Does it / Should it apply in light of Section 15?

Ethical Obligations

Medical Treatment and Records

AMA report 2004 Council on Ethical and Judicial Affairs

1. Doc should decline adverse testimony unless consent by patient or ordered by Court.
2. When legal case makes opponents of patient and treating physician it is appropriate to transfer care

Ethical Obligations

Legal Fees and Costs

- Voluntary Tenders Section 64(c).
- Petitioner's Counsel entitled to full fee after establishment of Attorney-Client relationship in writing.
- Carriers can still save the money, but must do so before relationship is created.

Ethical Obligations

Legal Fees and Costs

- RPC 1.5

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by law or by these rules. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Ethical Obligations

Legal Fees and Costs

- N.J.S.A. 34:15-64

d. All counsel fees of claimants' attorneys for services performed in matters before the Division of Workers' Compensation, whether or not allowed as part of a judgment, shall be first approved by the judge of compensation before payment.

Ethical Obligations

Legal Fees and Costs

Sharing under RPC 1.5

- (e) Except as otherwise provided by the Court Rules, a division of 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, by written agreement with the client, each lawyer assumes joint responsibility for the representation; and
 - (2) the client is notified of the fee division; and
 - (3) the client consents to the participation of all the lawyers involved; and
 - (4) the total fee is reasonable.

Ethical Obligations

Legal Fees and Costs

- IMO Bolson, DRB 12-148 (11/7/12)
 - Censure by consent
 - Paying “forwarding fees”
 - Sampling showed that over a 6 years, 131 cases.
 - Analysis that he was not a Certified attorney

Ethical Obligations

Legal Fees and Costs

- Rule 1:39-6 – Certified Attorneys

(d) Division of Fees. A certified attorney who receives a case referral from a lawyer who is not a partner in or associate of that attorney's law firm or law office may divide a fee for legal services with the referring attorney or the referring attorney's estate. The fee division may be made without regard to services performed or responsibility assumed by the referring attorney, provided that the total fee charged the client relates only to the matter referred and does not exceed reasonable compensation for the legal services rendered therein. The provisions of this paragraph shall not apply to matrimonial law matters that are referred to certified attorneys.

Ethical Obligations

Legal Fees and Costs – Sec. 64

- “Evaluating Physician”
- \$600 for Report
- \$400 for a court appearance testimony
- “Treating Physician”
- \$450 (now \$600) for Report
- \$2,500 for testimony on relationship, RTW and NFT
- Not Specifically Limited to Petitioners

Ethical Obligations

Legal Fees and Costs

- N.J.S.A 15:15-64
- c. A fee shall be allowed at the *discretion* of the judge of compensation when, in the official's judgment, the services of an attorney and medical witnesses are necessary for the *proper presentation* of the case.

Ethical Obligations

Legal Fees and Costs

- **34:15-28.2 Powers of judges of compensation.**
If any employer, insurer, claimant, or counsel to the employer, insurer, or claimant, or other party to a claim for compensation, fails to comply with any order of a judge of compensation or with the requirements of any statute or regulation regarding workers' compensation, a judge of compensation may, in addition to any other remedies provided by law:

Ethical Obligations

Legal Fees and Costs

- a. Impose costs, simple interest on any moneys due, an additional assessment not to exceed 25% of moneys due for unreasonable payment delay, and reasonable legal fees, to enforce the order, *statute or regulation*;
- b. Impose additional fines and other penalties on parties or counsel in an amount not exceeding \$5,000 for unreasonable delay, with the proceeds of the penalties paid into the Second Injury Fund;
- c. Close proofs, dismiss a claim or suppress a defense as to any party;

Ethical Obligations

Legal Fees and Costs

- d. Exclude evidence or witnesses;
- e. Hold a separate hearing on any issue of contempt and, upon a finding of contempt by the judge of compensation, the successful party or the judge of compensation may file a motion with the Superior Court for enforcement of those contempt proceedings; and
- f. Take other actions deemed appropriate by the judge of compensation with respect to the claim

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