SOME ETHICAL CONSIDERATIONS IN THE PRACTICE OF WORKERS' COMPENSATION

Let's talk some about two attorney's ethics rules, namely:

RPC 3.3 – A lawyer's obligation of candor toward the court
and
RPS 3.4 – A lawyer's obligation to be fair to his adversary

(And thus in particular, how can one be a zealous advocate while still being an ethical attorney?)

RPC 3.3 states in part: A lawyer shall not knowingly make a false statement of material fact or law to a tribunal, shall not fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a fraudulent act by the client, and shall not offer evidence that the lawyer knows to be false.

RPC 3.4 states in part: A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document having potential evidentiary value, and shall not make frivolous discovery requests or fail to make reasonably diligent efforts to comply with legally proper discovery requests.

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Here are some scenarios we may encounter:

1. "Hip-pocketing" medical records: if your adversary sends a Demand for Medical Information, is it permissible to send some but not all of the medicals, that is, is it permissible to omit one or more treating reports which are less than favorable to your If you do omit some, and those omitted medicals come to light during the course of trial, what are the ramifications for you?

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2. A case is about to settle and the respondent's attorney asks the petitioner's attorney what the status of the third party action is. The petitioner's attorney says it was dismissed, and the case went through without a section 40 credit. Actually, the third party action was dismissed, but on a stipulation of dismissal and release – the petitioner in fact received a $50,000 settlement in his third party action. Was the petitioner's attorney representation ethical or unethical?

   What is the respondent's remedy in such a situation and what are the ramifications for the petitioner's attorney?

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3. Your client slipped and fell sustaining a tear of his meniscus which required surgery and a shoulder sprain for which he had six weeks of PT. You send your client to Dr. A, who estimates disability at 30% leg. After seeing Dr. A's report, you send your client to Dr. B, who estimates disability at 45% leg plus 25% partial total.

   Q1: Is it permissible to send your client to a second expert if you don't like the first report?

   Q2: If you do so, are you obligated to disclose it?

   Q3: Can the respondent request a second evaluation if it's not happy with first one?

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4. You're trying to get a good section 20 settlement in a case denied by the respondent. If the outstanding medicals you are aware of total, say, $5,000, is it an appropriate negotiating strategy to represent to the respondent's attorney that they total, say, $10,000?

5. Your file contains several statements from co-workers of the petitioner which state that the petitioner told them he injured himself at home. You believe these statements, but you know that the co-workers are long gone and you would not be able to produce their testimony if the case were to go to trial. At the conference of the case, how, if at all, may you argue against compensability based on these statements.

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6. After filing a claim petition, you obtain information which leads you to believe that your client's injury did not happen at work; how does this affect how you can handle the case?

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7. Your client had a back injury in a motor vehicle accident 10 years ago and collected $10,000 from her lawsuit, but she claims her back was just fine until her work accident last year, and in fact she didn't tell either of the evaluating doctors about her prior back accident. Should you disclose the fact of your client's prior accident and injury to your adversary?

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8. The insurance carrier advises you that you have authorization for 20% partial total, which the petitioner would accept. Must you offer the 20% or can you offer less than that, say, 15% or 17 ½%?

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9. The petitioner's attorney demands 25% and the case is probably worth 25%, but you can get authorization for only 20%. Rather than go to trial, the petitioner agrees to take the 20%, and you tell the petitioner's attorney "I'll make it up to you on the next case." Is that okay?

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10. It looks like a case may be headed to trial because the respondent has denied the petitioner's claim that her heart attack was caused by extreme stress on the job.

    Q1: Can the petitioner attorney contact his client's boss to get a statement about the working conditions?

    Q2: Can the petitioner's attorney send an investigator to speak with the boss?

    Q3: Can the Petitioner herself contact the boss?

    Q4: Is the answer to Q3 different based on whether the petitioner decided herself to go speak with the boss or if she went to speak with the boss only after the petitioner's attorney told her to do so?