The Kentucky Bar Association
Workers' Compensation Law Section
presents:

2025 KBA Workers' Compensation Law Section Mid-Winter Meeting & CLE Seminar

This program has been approved in Kentucky for 12 CLE credits including 3 Ethics credits.

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2025 KBA Workers' Compensation Law Section Mid-Winter Meeting & CLE Seminar

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Mid-Winter Meeting & CLE Seminar
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PRESENTER BIOGRAPHIES

Wayne C. Daub
Wayne C. Daub Law Office
Louisville, KY

Wayne Daub practices law in Louisville, where he represents claimants in workers' compensation and Social Security disability actions. He received his undergraduate degree from the University of Kentucky and his J.D. from the University of Louisville Louis D. Brandeis School of Law. Mr. Daub has been selected for *Super Lawyers* in the area of workers' compensation since 2007. He is a member of the Kentucky Bar Association and its Workers' Compensation Law and Appellate Advocacy Sections.

James Douglas Holliday
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Hazard, KY

Doug Holliday is a solo practitioner in Hazard, where he focuses his practice on workers' compensation, Social Security disability, and Federal black lung. Mr. Holliday was previously a partner at Cooper, Gullett, Combs & Holliday from 1977-1990. He received his B.B.A. from Eastern Kentucky University and his J.D. from Northern Kentucky University Salmon P. Chase College of Law. Mr. Holliday is admitted to practice before the U.S. Court of Appeals, Sixth Circuit, and the U.S. District Court for the Eastern District of Kentucky. He is a member of the Kentucky Justice Association, the American Association for Justice and the American and Kentucky Bar Associations. Mr. Holliday also served as a member of the U.S. Army from 1969-1971.

Bonnie Hoskins
Hoskins Law Offices
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Bonnie Hoskins graduated from the University of Kentucky with Honors and High Distinction then studied at the Centre for Renaissance Studies in Oxford, England before entering the University of Kentucky College of Law. While attending law school, she served as a member of UK's National Moot Court Team. Ms. Hoskins has primarily practiced administrative law specializing in workers' compensation defense. She clerked with Kentucky's Special Fund while in law school and then practiced with the Special Fund for a short time after completing her law degree. In 1987, she joined Bennett Clark in Stoll, Kennon & Park's workers' compensation defense practice. In 2001, Ms. Hoskins founded Hoskins Law Offices PLLC, a workers' compensation defense practice which she still manages today. She is a contributing author to the University of Kentucky's *Workers' Compensation Desk Book* and is a former Chair of the Kentucky Bar Association Workers' Compensation Law Section. Ms. Hoskins has presented at more than 50 local, state, and national continuing legal education seminars. She has also published numerous outlines and articles in continuing education publications. Currently, she serves as vice-president of KWCEA and is a member of the Workers' Compensation Hall of Fame Nominating Committee.

James R. Martin II
Morgan & Morgan
Lexington, KY

James Martin's legal career has been dedicated to the intricacies of workers' compensation law, reflecting his unwavering expertise and commitment in this specialized area. He completed his bachelor's degree at the University of Kentucky in 1999 and earned his J.D. from Northern Kentucky University Salmon P. Chase College of Law in 2002. Throughout his professional journey, Mr. Martin has primarily focused on handling workers' compensation cases, showcasing his extensive experience and deep understanding of this complex legal realm. Before joining Morgan & Morgan, Mr. Martin spent five years representing injured individuals in workers' compensation matters, demonstrating his dedication to advocating for the rights of those in need. Prior to that, he served as a staff attorney for the Kentucky Department of Workers' Claims, gaining invaluable insights into the regulatory aspects of workers' compensation law. Additionally, his previous experience representing employers in workers' compensation claims provides him with a comprehensive perspective, having worked on both sides of these legal issues. Mr. Martin is a member of the Kentucky and Florida Bar Associations. Outside of his legal practice, he cherishes spending time with his family. He is happily married to Jennifer McVay Martin, and together they are proud parents to two children, Connor and Reagan.

Thomas W. Moak
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Thomas Moak is a partner at Moak & Nunnery, PSC in Prestonsburg, where his areas of practice include general civil litigation, personal injury, workers' compensation, social security, federal black lung, family law, and mediation. Mr. Moak began clerking for the Special Fund while attending law school. He began private practice in 1985 focusing primarily on workers' compensation and has maintained an active private practice with various firms and partnerships up to the present. He has also served as assistant Commonwealth attorney and domestic relations commissioner in Floyd County. Mr. Moak received his undergraduate degree from Western Kentucky University and his J.D. from the University of Kentucky J. David Rosenberg College of Law. He is a member of the Kentucky Bar Association and is admitted to practice before the U.S. District Court, U.S. Court of Appeals, and the U.S. Supreme Court.

Stephanie D. Ross
Reminger Co., LPA
Fort Mitchell, KY

Stephanie is a shareholder in Reminger's Fort Mitchell office. Her insurance defense practice is focused on representing employers and carriers in a wide range of matters arising out of workers' compensation, including employee claims, coverage disputes, UCSPA proceedings, medical fee disputes, and subrogation actions. Ms. Ross is regarded as a talented appellate advocate, a role founded on her strong writing skills and experience as a staff attorney for Kentucky's Workers' Compensation Board. Often called on to handle appeals of adverse decisions in large or complex claims, she has successfully briefed numerous cases before Kentucky's Workers' Compensation Board, Court of Appeals and Supreme Court. Ms. Ross frequently presents on workers' compensation issues to a variety of professionals, including insurance adjusters and risk managers. As Chair of the Workers' Compensation Section of the Kentucky Bar Association in 2011-2012, Ms. Ross collaborated with the Young Lawyers Division to produce a free program

of continuing education for workers' compensation professionals at four different venues across the state. She received a 2017 OARS award from Westfield Insurance Company, in recognition of her successful resolution of claims in a cost-effective and creative manner. Ms. Ross received her B.A. from the University of Kentucky and her J.D. from the University of Kentucky J. David Rosenberg College of Law.

Samantha Steelman
Ferreri Partners, PLLC
Louisville, KY

Samantha Steelman recently joined Ferreri Partners, PLLC. Over the course of the past 20 years, she has practiced primarily in the areas of workers' compensation and domestic relations. An experienced litigator, Ms. Steelman is skilled in the development and execution of strategic plans that are mindful of her clients' goals. She enjoys solving challenging issues and figuring out the most efficient and effective way to litigate cases and navigate through difficult challenges. She strives to provide practical advice and guidance by leveraging her extensive background in organizational leadership and administrative oversight. Prior to being in active practice, Ms. Steelman worked in government relations and association management. Some of her responsibilities included overseeing the daily operations of a multi-association management firm, creating and managing human resources policies and data technology efforts for a multi-office professional services firm, and organizational restructuring for the non-profit sector. She received her B.A., *cum laude*, from Marietta College, her J.D. from Northern Kentucky University Salmon P. Chase College of Law, and her M.A. from Regent University. Ms. Steelman is a member of the Kentucky Bar Association and serves as Chair of the KBA Workers' Compensation Law Section.

EVERYDAY HEADACHES FROM THE PLAINTIFF'S BAR FOR BOTH SIDES OF THE AISLE

James R. Martin II

Kentucky workers' compensation plaintiff attorneys often meet a variety of challenges which can result in daily headaches and stress. The challenges typically fall into one of four principal areas: 1) client's knowledge, understanding, and expectations; 2) adjuster/defense counsel actions; 3) subrogation claims; and 4) miscellaneous novel issues.

I. COMMON ISSUES WITH CLIENTS

A. Client Misunderstanding of Benefits

While each side of the "Vs" has its advantages and disadvantages, clients misunderstanding what benefits are provided under the Kentucky Workers' Compensation Act is the biggest headache for plaintiff attorneys. While working as a defense counsel I was generally able to assume that my client contact, the adjuster, at least knew the basic principles of Kentucky workers' compensation claims. Sometimes, however, I found out this was not true, but I would say 95 percent do. On the other hand, in 95 percent of cases, a plaintiff's attorney almost always has to start from the beginning when a new client calls. On average this new client overview of the Kentucky workers' compensation system takes about 30 minutes from start to finish. So, as you can imagine, this takes an enormous amount of time each year. For example, on average I have approximately 250 new cases come through in a year; at 30 minutes a call this takes up to 125 hours a year just in explaining the basics of the Kentucky workers' compensation system.

Clients also have unrealistic expectations about the benefits they can receive or the timeline for resolution. Whether it being from TV, the internet, or family or friends, everyone seems to come in with unrealistic expectations of their claim value. Educating clients on the limitations of workers' compensation benefits (*e.g.,* no pain and suffering damages) is crucial. This is the most common question a plaintiff's attorney gets asked and yelled at about.

B. Non-Cooperation: "You Can Lead a Horse to Water, but You Can't Make It Drink"

Plaintiff attorneys may struggle when clients do not provide complete medical histories, necessary documentation, or prompt updates. Unlike the attorney, the pre-litigation or litigation of a claim is not always the plaintiff's priority. They may still have a family that depends on them for care and a job that is necessary to pay for the roof over their head and to put food on the table. Remember, injured workers are also people who must continue to live in order to survive.

C. Return-to-Work Issues

Often one of the last client related headaches is about return-to-work issues. I can probably count on one hand the number of clients I have had over the last 10 years who haven't asked "will me returning to work hurt my workers compensation claim?" While it's fairly stereotypical, a large percentage of injured workers, prior to their workplace injury, live paycheck to paycheck. Thus, when they get TTD benefits at an even less amount the financial crunch it puts on their lives is

significant (even though the TTD benefits they receive have not been taxed). Thus, when said benefits are terminated or their claim is ready for resolution, a large number of injured workers are concerned with not only going forward but also how to get out of the hole being injured has dug them into.

II. COMMON HEADACHE ISSUES WITH ADJUSTERS/DEFENSE COUNSEL

A. Delays and Denials

One of plaintiff attorneys' biggest gripes/headaches is the delay in treatment or further TTD benefits pending an IME. While it is undisputed that an adjuster/ defense counsel has a right to obtain an IME at any time per KRS 342.205, I believe that suspending benefits pending the same run afoul with a multitude of provisions of the Kentucky Workers Compensation Act, including KRS 342.040. I support that payment of TTD must continue until said IME report is received and any medical benefits which have been sent for pre-authorization must still either be approved or undergo the UR process.

Aggressive denial of claims, often citing pre-existing conditions or arguing injuries are unrelated to work, is a frequent hurdle. Just because plaintiff was involved in a MVA 30 years ago or a football injury when they were 16 does not constitute a good faith basis for denying a claim as pre-existing or unrelated. Furthermore, unless there is regular, consistent, or significant medical treatment in the five to 10 years prior to the workplace injury, an IME also does not form a good faith basis for denying a claim.

B. Discovery Tactics

Defense attorneys may demand extensive discovery, including detailed medical and employment records, which can be burdensome to gather and may intimidate clients. This is a common one that I also see often. I would remind all my defense counsel colleagues that pursuant to 803 KAR 25:010 §7(1)(a) plaintiff is not required to provide more than a 20-year employment history (which could not be submitted at all if an affidavit is submitted that the plaintiff is not seeking a PTD). Likewise, per 803 KAR 25:010 §7(1)(b) a plaintiff does not have to provide more than a 15-year medical history in general and only beyond that date for treatment regarding the same body part claimed to be injured.

Surveillance or social media evidence usage by the adjuster/defense counsel are also a headache for plaintiff's counsel. However, unless the surveillance video shows significant violations of restrictions, alleged inabilities, or moderate periods of time wherein the plaintiff is appearing normal, I don't get worked up over it. I would remind all that even the most injured plaintiffs still have to survive in this world and can't stop doing everything. No treating doctor tells their patient to go home and die or sit in a chair/lay in a bed for 24 hours per day, seven days per week, 365 days per year. To suggest otherwise is ludicrous.

C. Negotiation and Settlement Challenges

Defense counsel may offer lowball settlements, forcing attorneys to prepare for trial or mediation. This I believe is one of the most frustrating parts of the settlement process in both pre-litigation and litigated claims. Let me be clear that on compensable claims there are amounts that plaintiff attorneys will not go below in settlement negotiations. For example, I recently had an accepted pre-litigation claim with surgical implantation of two plates, 10 screws, no removal. After obtaining an IME, there was little if any permanent impairment. In fact, I believe the IME doctor gave 2 percent for pain as the plate was on the injured worker's left wrist (dominant hand) and he complained of pain every day while writing during his return to work. The opening offer from the adjuster was $250 with meds open only. I'll be quite honest, while I did present it to my client, I did not and will not recommend that settlement to my client. No matter what, medical benefits would remain open on any decision by my client and even if the adjuster did get a 0 percent impairment rating (which he did) and even if the judge awards the 0 percent, the value of the right to reopen is worth more than $250, and it will cost the adjuster more than that to take the case to a hearing.

Another headache for plaintiff attorneys is settlement offers with little if any compensation for buyout of future medical benefit. Gone are the days of $100 for buyout of future medical benefits. It takes less than one doctor's visit or PT visit to make this impracticable.

Lastly, one of the most recent headaches that has come up is defense counsel requesting a waiver of spousal benefits. About 99.9 percent of the time a plaintiff attorney does not represent the spouse as they have not entered into a fee agreement with the spouse for legal representation. Essentially by asking for this waiver, defense counsel is asking for plaintiff's counsel to do work for which they are not being compensated. In Kentucky, the attorney-client relationship in workers' compensation claims is defined by the same principles that govern all areas of legal practice, guided by the Rules of Professional Conduct (SCR 3.130).

Remember the attorney-client relationship is typically established through an express agreement where an attorney agrees to provide legal services and the client consents. Every plaintiff attorney will have one signed by either the injured party or a personal legal representative (guardian, conservator, or court appointed administrator of an estate) but most times a spouse has not signed any agreement and thus is not a client of the attorney.

In workers' compensation cases, this often begins with a signed fee agreement or a clear understanding of the attorney's role. Again, this is often the case with the injured worker but not his/her spouse.

In workers' compensation claims, an attorney must file a Form 110 (Settlement Agreement) or Form 101 (Application for Resolution of Claim) with the Kentucky Department of Workers' Claims to formally represent a claimant. This ensures that the relationship is documented within the workers' compensation system. I would point out that nowhere on the Form 110 does the Department of Workers Claim have a signature line for the "spouse."

Under Kentucky's workers' compensation system, spousal benefits are addressed in KRS 342.730(3), which outlines death benefits for dependents when an injured employee dies due to a work-related injury or illness. These benefits are typically intended for surviving spouses and dependent children, and I believe they are not something that an injured employee can settle directly because they only exist upon the worker's death. Furthermore, I believe that an injured worker also cannot settle benefits that are meant for a spouse under KRS 342.160, as those rights also do not vest in the employee but rather in the surviving spouse upon the worker's death.

Settlements on Form 110 in Kentucky workers' compensation are limited to claims and benefits directly owed to the injured employee (*e.g.,* indemnity benefits, medical benefits, etc.).

While in the case of *Holt Brothers Min. Co. v. Fisher*, 255 Ky. 418, 74 S.W.2d 469 (1934), it was held that where the widow of deceased employer executed a compensation agreement with the employer, signed by the widow and not the dependent children, such agreement was deemed valid by the Workers' Compensation Board, since the power of the widow to apply for it and receive benefits on behalf of her minor children carried with it power to execute such agreement on their behalf. That case was decided back on June 19, 1934, and I believe that the current judiciary would require at least a review to ensure the minor children's best interests were being taken into consideration before approval of such agreements.

III. SUBROGATION LIEN VALUATION

In Kentucky, workers' compensation subrogation refers to the right of an insurance company (typically the employer's workers' compensation insurer) to recover money paid to an injured worker for medical bills, wage replacement, and other benefits in the event that the worker successfully pursues a third-party personal injury lawsuit. When the worker wins a personal injury lawsuit or settlement against a third party (someone other than their employer), the workers' compensation insurer can seek to recover the amount it paid in benefits.

A. How to Calculate Workers' Compensation Subrogation Amounts in Kentucky

1. Determine the total workers' compensation benefits paid.

   The first step in calculating subrogation is to determine the total amount of workers' compensation benefits that the insurance company has paid to the injured worker. This includes: medical expenses; all payments made by the workers' compensation insurer for medical treatment; temporary total disability (TTD) benefits; payments made to the injured worker for lost wages while they are temporarily unable to work; permanent partial disability (PPD); if applicable, payments for long-term disability resulting from the injury; permanent total disability (PTD); in extreme cases, workers may be entitled to long-term compensation for total disability; and vocational rehabilitation costs, if the insurer has paid for vocational retraining.

2. Identify the third-party settlement or judgment.

The next step is to identify the total amount of money the injured worker received from the third-party lawsuit. This includes: any settlement amount the worker receives from the responsible party (*e.g.,* another driver, manufacturer, property owner); and any jury verdict or judgment that the worker is awarded. This amount can include both economic damages (such as medical bills, lost wages, etc.) and non-economic damages (like pain and suffering).

3. Calculate the subrogation lien.

In Kentucky, the workers' compensation insurer is entitled to recover a portion of the third-party settlement or judgment, but Kentucky law provides for certain protections for the injured worker. The key legal provisions are found in KRS 342.700. Here's how the subrogation lien is typically calculated:

a. Step 1: Subrogation Lien Amount.

The workers' compensation insurer has a right to be reimbursed for the amount of benefits paid (medical, TTD, PPD, etc.), subject to a proportional reduction to account for the worker's attorney fees and costs. The formula is usually as follows:

Subrogation Lien = Compensation Benefits Paid / Total Personal Injury Settlement

b. Step 2: Proportional Reduction for Attorney Fees and Costs.

Kentucky law allows the worker to deduct reasonable attorney fees and litigation costs before calculating the insurer's share of the recovery. The workers' compensation insurance company can only recover a percentage of the settlement after the worker's attorney fees and costs are subtracted. This means that if the worker is represented by an attorney and the attorney's fee is, for example, 33.33 percent of the settlement, the subrogation lien is calculated based on the net recovery (the amount left after attorney fees and costs are deducted).

Example: Let's assume the worker received a $100,000 settlement from a third party. The workers' compensation insurer has paid $60,000 in benefits. The worker's attorney fees are 33.33 percent, or $33,333. Litigation costs are $5,000.

i. Step 1: Net Recovery.

Net recovery to the worker = $100,000 - $33,333 (attorney fee) - $5,000 (costs) = $61,667.

ii. Step 2: Proportion of Subrogation.

a) The workers' compensation insurer can recover $60,000 of its paid benefits, but only after accounting for the attorney's fee and costs.

b) The proportion of the settlement the insurer is entitled to is based on the amount the insurer paid versus the total settlement:

Workers' Compensation Paid\Total Settlement = 60,000/100,000 = 0.6

iii. Step 3: Apply the Proportion to the Net Recovery.

Subrogation lien = 0.6 × $61,667 = $37,000.

The insurer's lien would be $37,000, meaning the insurer would recover this amount from the settlement, and the worker would receive the remainder.

4. However, this does not take into consideration worker's right to keep some of the settlement.

Under Kentucky law, KRS 342.700(1)(b), the injured worker is entitled to keep a portion of the settlement to compensate for their pain and suffering, and for the attorney's work in securing the settlement. This means that the insurer cannot recover more than the amount it paid in benefits after accounting for the worker's costs and attorney fees.

B. Where the biggest fight/headache occurs in subrogation claims is that there is always a dispute as to how much of any PI award or settlement is for pain and suffering. There are three general methods used by plaintiff attorneys in making this determination in pre-litigation or pre-jury verdict cases.

1. Multiplier method.

The multiplier method is one of the most common ways to calculate the value of pain and suffering. In this approach, you start with the economic damages (such as medical bills, lost wages, and other out-of-pocket expenses) and apply a multiplier to determine the non-economic damages (such as pain and suffering).

2. Per diem method.

The per diem method assigns a dollar value to each day that the claimant suffers from pain and suffering. This method is more difficult to apply and requires subjective judgment about how much each day of pain and suffering is worth.

3. Using a legal settlement range.

   In many cases, attorneys or insurance companies will use their experience to determine a range of pain and suffering based on the case. For example, they may estimate that pain and suffering should be 30-50 percent of the total economic damages. This is particularly useful in cases where there are multiple factors to consider, and a clear multiplier or per diem rate is difficult to establish.

While the workers' compensation insurer has a right to subrogation, there is often room for negotiation. If the worker's attorney can show that the recovery is insufficient to cover both the subrogation lien and the worker's damages, the parties may agree to reduce the lien amount.

IV. MISCELLANEOUS NOVEL ISSUES

While writing this presentation, the thought of AI and other new and developing technology gave me a headache, and I thought I should touch base on it as well.

Please be advised that while this is a new and upcoming technology, that does not mean it is completely the Wild Wild West. The Kentucky Bar Association (KBA) and the Kentucky Supreme Court have already recognized the growing role of artificial intelligence (AI) in legal practice and issued guidance for attorneys to ensure ethical compliance when using AI tools.

Generally speaking, the KBA and the Kentucky Supreme Court have suggested that there are certain key issues that need to be taken into consideration and which could become headaches for the plaintiff attorney if not followed while contemplating or using AI.

First, we must always remember and follow Kentucky Supreme Court Rule 3.130(1.1) which requires competence in everything that we do. Thus, plaintiff workers' compensation attorneys, and defense attorneys for that matter, must stay informed about advancements in AI, as failing to utilize available technology could be considered a breach of their duty of competence under Rule 1.1. This includes understanding how AI tools function, their risks, and their benefits.

Next it appears that if plaintiff and defense attorneys are going to start using AI, the KBA and the Kentucky Supreme Court have suggested that routine use of AI for legal research generally does not require client disclosure. However, if AI use involves sharing confidential information with third-party vendors, the cost of the AI tool is charged to the client, or court rules mandate it, lawyers must obtain informed consent and explain the implications of using AI. Remember in Kentucky the term "must" is generally interpreted by court, including the Kentucky Supreme Court, as imposing a mandatory obligation.

Lastly, lawyers must ensure that AI tools do not compromise client confidentiality. This includes vetting AI vendors' data handling practices, using anonymized inputs, and avoiding unnecessary exposure of client information. This is one where I personally do not have the technical expertise to understand how AI works but it would keep me up late at night if I were using AI. For example, if I were to use AI to draft a response brief, I have no idea where that AI is, where that information is stored, or who has access to it.

This guidance is outlined in the Kentucky Bar Association's Ethics Opinion E-457, issued in 2024, which provides a roadmap for ethical AI integration in legal work. It aligns with broader national standards emphasizing the need for competence, transparency, and safeguarding client information. *See* KBA E-457, which follows in full.

KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-457

Issued: March 15, 2024

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rule and comments, SCR 3.130 before relying on this opinion.

Subject: **The Ethical Use of Artificial Intelligence ("AI") in the Practice of Law**

Question #1: **Like other technological advances, does an attorney have an ethical duty to keep abreast of the use of AI in the practice of law?**

Answer: **Yes.**

Question #2: **Does an attorney have an ethical duty to disclose to the client that AI is being used with respect to legal matters entrusted to the attorney by the client?**

Answer: **No, there is no ethical duty to disclose the rote use of AI generated research for a client's matter unless the work is being outsourced to a third party; the client is being charged for the cost of AI; and/or the disclosure of AI generated research is required by Court Rules.**

Question #3: **If the effect of an attorney's use of AI reduces the amount of attorney's time and effort in responding to a client matter must the lawyer consider reducing the amount of attorney's fees being charged the client when appropriate under the circumstances?**

Answer: **Yes.**

Question #4: **May an attorney charge the client for expenses related to using AI in the legal practice?**

Answer: **If the client agrees in advance to reimburse the attorney for the attorney's expense in using AI, and that agreement is confirmed in writing, then yes, the attorney may charge for those expenses. However, similar to the lawyer's cost of general overhead expenses, the costs of AI training and keeping abreast of AI developments should not be charged to clients.**

Question #5: **If an attorney utilizes AI in the practice of law, is the attorney under a continuing duty to safeguard confidential client information?**

Answer: **Yes.**

Question #6: Does an attorney using AI have an ethical duty to review court rules and procedures as they relate to the use of AI, and to review all submissions to the Court that utilized Generative AI to confirm the accuracy of the content of those filings?

Answer: Yes.

Question #7: Does an attorney serving as a partner or manager of the law firm that uses AI, and/or supervising lawyers and/or nonlawyers in the law firm who are using AI, have an ethical responsibility of ensuring that policies and procedures regarding AI are in place, and that training has taken place to assure compliance with those policies?

Answer: Yes.

REFERENCES

SCR 3.130 [Kentucky Rules of Professional Conduct] 3.130(1.1) & cmt. (2) & (6); (1.4); (1.5(a) & (b)); (1.6); (1.8); (1.9(c)(1)); (3.1); (3.3); (4.1); (5.1(b)); (5.8); and (8.4).

Cases:

In re Burghoff, 374 B.R. 681 (Bankr. S.D. Iowa 2007) 374 B.R. 681; *Mata v. Avianca, Inc.*, 2023 U.S. Dist. LEXIS 108263, 2023 WL 4114965 (S.D.N.Y. June 22, 2023).

Ethics Opinions

KBA E-446 (2018); KBA E-403 (1998); KBA E-427 (2007); KBA E-437 (2007); and KBA E-442 (2017); ABA Formal Ethics Op. 08-451 (2008); ABA Formal Opinion 93-370 (1993); N.C. Ethics Op. 2007-12 (2008); Ohio Ethics Op. 2009-6 (2009); Va. Ethics Op. 1850 (2010); Florida Bar Ethics Opinion 24-1 (2024).

Miscellaneous

"2023 Year-End Report of the Federal Judiciary" by John G. Roberts, Jr., Chief Justice of the U.S. Supreme Court; American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013*; President Joe Biden's Executive Order on the Safe, Secure and Trustworthy Development and Use of Artificial Intelligence dated October 22, 2023.

INTRODUCTION

Artificial intelligence ("AI") is defined as "... the use... of computer systems or machines that have some of the qualities that the human brain has, such as the ability to interpret and produce language in a way that seems human, recognize or create images, solve problems, and learn from data supplied to them…."[1] AI is now the latest form of technology that may revolutionize the practice of law. Whether AI is utilized by machine learning such as Google search, by deep

[1] *Cambridge English Dictionary* at "artificial intelligence."

learning with voice recognition systems named Siri or Alexa, or Generative AI[2] ("GAI") in applications known as ChatGPT, Google Bard or Microsoft Bing, the potential use of AI in the practice of law is unlimited.[3]

As with all technological advances, attorneys are challenged to meet lawyer ethical responsibilities when utilizing a new product and this applies to AI. Whether the attorney is researching relevant case law, reviewing documents, or drafting court pleadings, care must be taken that the attorney understands how AI works, how it may be used responsibly and in conjunction with the Supreme Court Rules of Professional Conduct.[4] As U.S. Supreme Court Chief Justice John G. Roberts, Jr., explained, "(A)ny use of AI requires caution and humility."[5]

The current Rules of Professional Conduct do not specifically address AI, but they do require an attorney to "...keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology."[6] While the use of AI continues to evolve, some of the suggested benefits of AI for lawyers are:

- Streamlining legal research to find relevant case law, statutes, and precedents more quickly;
- Reviewing and analyzing large volumes of documents and summarizing them;
- Automating repetitive tasks to reduce the requirement for extensive manual labor;
- Detecting deception in emails or documents;
- Predicting case outcomes and legal trends based upon historical data;

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[2] The term "generative" has been found to have two neural networks, a generator, and a discriminator, which are trained simultaneously through a competitive process. The generator creates new data, while the discriminator evaluates whether the generated data is authentic or not. This adversarial training process helps the generator improve over time, creating more realistic and convincing content. However, potential misuse comes into play because generative AI can be used to create deepfakes or other deceptive content.

[3] When ChatGPT was asked to explain how it functions and compares to other AI providers, ChatGPT answered, in general, as follows:
ChatGPT is based on Generative Pre-trained Transformer architecture and is trained using a diverse range of internet text but does not have specific knowledge about the details of individual documents or sources. Other AI providers use different architectures, training datasets, and methods. For example, Google's BERT (Bidirectional Encoder Representations from Transformers) focuses on bidirectional context understanding. Further, ChatGPT is designed for natural language understanding, making it suitable for conversational applications, and content generation. Other AI providers may offer a broader range of services, including image recognition, speech processing, and domain-specific applications. Finally, ChatGPT advises that it has options for users to fine-tune models for specific tasks, while other providers may offer more customization options, allowing developers to fine-tune models for specific use cases.

[4] SCR 3.130 *et seq.*

[5] "2023 Year-End Report of the Federal Judiciary" by John G. Roberts, Jr., Chief Justice.

[6] SCR 3.130(1.1), Comment (6).

- Expediting responses to client inquiries;

- Providing around-the-clock access to legal information and resources;

- Reducing legal expenses to the client due to accelerated research and document preparation.

Although the use of AI in the practice of law is relatively new, certain risks have already become apparent, including but not limited to:

- AI may struggle to grasp complex legal concepts which can produce inaccuracies and misinterpretations;

- AI models trained on biased data may perpetuate biases in the legal decision-making process;

- AI lacks transparency because of its use of AI algorithms which operate as "black boxes" making it difficult to understand how AI arrived at its conclusions;

- AI's generative training may result in the disclosure of confidential client information;

- AI may provide false information including citations to nonexistent legal "authorities;" and,

- AI may provide duplicative and/or irrelevant materials which may increase discovery production expenses.

The Ethics Committee has issued Ethics Opinions discussing the ever-changing environment of technology and its application to the Rules, and many of these Opinions are applicable to AI.[7] In addition to the guidance provided by these Opinions, we caution lawyers that before using an AI product they review the provider's privacy policies and its disclaimers in handling client and attorney information.

Due to the many concerns surrounding the impact AI has to the ethical requirements of lawyers, the Kentucky Bar Association formed a Task Force on Artificial Intelligence and the Task Force is considering a lawyer's responsible use of AI. Until the Task Force's work is completed, and years of usage have passed, lawyers should be mindful that it may be difficult or impossible to answer many questions regarding the ethical use of AI. Further, we do not address Kentucky's Advertising Rules which may come into play if a lawyer intends to advertise the use of AI because the Advertising Rules raise issues beyond the scope of this Committee's authority.

In the interim it is intended that this Opinion will provide some practical guidance while the Task Force explores multiple AI issues and whether amendments to the Rules of Professional Conduct are appropriate to address the unique applications a lawyer faces in the use of AI. The

[7] *See*, KBA E-446; KBA E-403; KBA E-427; KBA E-437; and KBA E-442. For example, in E-437 the Committee considered a new development in technology (cloud computing) and while the Opinion is not directly applicable to the use of AI, many of the Committee's comments would apply when a lawyer uses AI. The Committee opined that lawyers may use cloud computing but must follow the Rules with regard to safeguarding client confidential information, act competently in using cloud computing, properly supervise the provider of the cloud service, and communicate with the client about cloud computing.

following commentary is a review of what we today consider the most crucial ethical issues when using an AI tool; however, lawyers must be mindful to the future implications of using AI services and the Rules governing lawyer conduct.[8]

COMPETENCE

SCR 3.130(1.1) mandates that "(a) lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Two of the Supreme Court's Comments to the Rules elaborate on the scope of the competency requirement. The first point is Comment 2, as follows:

> A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. … Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

The second point is Comment 6, as follows:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Therefore, attorneys have a continuing ethical responsibility to maintain competence in their law practice, and reliance upon technology to do so is just another aspect of the competency requirement.

Indeed, for many years lawyers have used technology to not only attain competency in the practice of law, but also to maintain their competence by utilizing computer research resources, including Westlaw, LexisNexis, and Decisis, all of which are readily available. Internet research also provides an additional level of resources for an attorney to best serve their clients' needs. In addition, many lawyers are now required to take training in, and become competent in, the use of electronic filing in state and federal courts, as well as in most administrative proceedings.

Attorneys have already been using AI whether they realize it or not. "Spell check," "grammar search" and the auto correcting function on most emails employ AI, as do the Shephardizing functions of legal research tools. We are told that these functionalities only scratch the surface of what AI may be able to do for the practice of law in this ever-changing dynamic of the technological revolution. As with any new advance in technology, lawyers are expected to know how to use AI to maintain competence because, it is argued, it will allow lawyers to provide

[8] We remind lawyers that the ethical implications of using AI also apply to all of a lawyer's non-lawyer activities; specifically, "a lawyer is a lawyer is a lawyer" and the Rules of Professional Conduct apply to all of a lawyer's actions. SCR 3.130(5.8) ("Responsibilities regarding law-related services").

better, faster, and more efficient legal services, and at a reduced cost to the client. In the near future, using AI may become as commonplace as an attorney's current use of other technological systems which have now become an indispensable part of the practice of law.

There are many AI resources now available to the lawyer, and there is much discussion about what AI resources are on the horizon, therefore, as AI tools become more refined, and their use in the legal profession becomes more widespread, lawyers need to be aware that not using an available AI tool may constitute a failure to meet the lawyer's duty of attaining and maintaining competence under Rule 1.1. For example, legal research may be more comprehensive using an AI-generated function of computer research programs. At the same time, understanding how AI works, (a) may enable an attorney to better respond to an opponent's arguments or theories, or (b) better analyze the evidence presented by the attorney's adversary. In essence, the rapid development of AI poses challenges for attorneys to continuously update their knowledge base in order to maintain their competence.

COMMUNICATION

Consideration should be given to whether a lawyer has an ethical duty to advise the client that AI is being utilized in respect to their matters. SCR 3.130(1.4)[9] requires that a lawyer keep the client reasonably informed about the status of their matter, to promptly inform the client of any decision or circumstance which requires the client's informed consent, and to obtain the client's informed consent of such decision or circumstance. Further, the attorney is required to "reasonably consult" with the client about the means by which the client's objectives are to be accomplished.[10] The word "reasonably" is intended to preclude an interpretation that the lawyer would always be required to consult with the client when a particular act is impliedly authorized.[11] The Rule's Comments explain that the lawyer is to provide the client with sufficient information to participate intelligently in decisions concerning the means by which the client's objectives are to be pursued.[12] Thus, routine use of AI generated research in a client's matter does not in and of itself require specific communication to the client, unless the client is being charged for the cost of the research,[13] a third party service is being utilized to provide the AI

[9] 9 (a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[10] *See* SCR 3.130(1.4(a)(2)).

[11] *See* American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013*, at 77 (2013).

[12] SCR 3.130(1.4) Supreme Court Commentary at (3) and (4).

[13] *See* the portion of this opinion regarding "Lawyers' Charges for Fees & Expenses."

research, or if the disclosure of the use of AI generated research is required by Court or other rules.[14]

Moreover, it is clear from prior opinions that when an attorney employs third party providers, or outsources a client's work, that communication of the "means" by which a representation is to be accomplished requires that clients should be informed of such outsourcing.[15] If an outside AI service will be receiving information protected by the lawyer's duty of confidentiality under SCR 3.130(1.6), then obtaining client consent is required. Further, as discussed below, the attorney should also have an agreement with the client about who is responsible for paying the cost of such outsourced services.

LAWYER'S CHARGES FOR FEES & EXPENSES

As with other uses of technology, the lawyer's charging of fees and expenses to a client remains subject to the reasonableness standards of SCR 3.130(1.5(a) and (b)).[16] These standards provide the following two primary points in charging a client when the lawyer has used AI. First, a reduced fee may be appropriate when a lawyer obtains an expeditious on point response to the client's matter because in all cases a lawyer's fee must be reasonable. Accordingly, the attorney's charge for legal services must be adjusted to recognize the reduced legal work devoted to a client's matter when there is a successful result by virtue of using AI. Second, if there are expenses associated with the use of AI, then who will bear the cost of implementing AI services, such as paying for online usage, and/or reimbursing a third-party provider? If the client is to bear these expenses, then before the charge can be made, the client's written consent must first be obtained.

Regarding the attorney's billings for client services and expenses, the essence of Rule 1.5 and the Supreme Court's Comments to the Rule, require that a lawyer provide the client with

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[14] *See* the portion of this opinion regarding "Duty to Comply with Court Rules When Using AI."

[15] *See* ABA Formal Ethics Op. 08-451 (2008); N.C. Ethics Op. 2007-12 (2008); Ohio Ethics Op. 2009-6 (2009); Va. Ethics Op. 1850 (2010).

[16] (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.
(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

information about the lawyer's fees and expenses, and then render billing statements that adequately apprise the client as to the basis for the attorney's billing and how it has been determined. Advanced discussion with the client as to how AI expenses are to be paid are as necessary as the agreement with the client as to the basis or rate of the lawyer's fees. Ethics rules suggest that a written statement that confirms the terms of the engagement with the client "… reduces the possibility of misunderstanding."[17] If the lawyer intends to charge the client for AI expenses and the client agrees to pay these expenses, then the lawyer should explain, in writing and in advance, the anticipated cost of those expenses, the basis for the cost being billed, and the terms of payment.[18] There is an exception when the lawyer has regularly represented the client on an already existing basis, but with any changes in the billing procedure being communicated to the client.[19]

With regards to the time savings that an attorney using AI services may generate, an earlier ABA Formal Opinion[20] provided guidance which the attorney will continue to find helpful in determining the propriety of the lawyer's billing methods. The ABA Opinion explains that a lawyer is obliged to pass the benefits of economies on to the client. Thus, the use of AI programs may make a lawyer's work more efficient, and this increase in efficiency must not result in falsely inflated claims of time.

It should be obvious that lawyers may not charge a client for hours not actually spent on a client's matter. In the case of *In re Burghoff*,[21] the court found that the attorney's brief contained an extraordinary amount of research, and the attorney was directed to certify to the Court the author of two submitted briefs. The Court found that 17 of the 19 pages of one brief were verbatim excerpts from an article the lawyer found on the internet which had not been attributed to the article's author. The Court held, first, that it was a violation of the ethics Rules for an attorney to "…engage in conduct involving dishonesty, fraud, deceit, or misrepresentation … by committing plagiarism, …".[22] Further, the Court found that the attorney violated the ethics Rules by charging his client for 25.5 hours of legal work in preparing the briefs which was unreasonable given the actual labor invested in copying the article from the internet. Charging an unreasonable fee for "legal work" was also considered a form of attorney misconduct.[23]

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[17] *See* Comment (2) When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. It is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate, or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses, or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[18] *See*, SCR 3.130(1.5), Comments 2 and 3.

[19] *See*, SCR 3.130(1.5(a)&(b)).

[20] ABA Formal Opinion 93-370 (December 6, 1993).

[21] 374 B.R. 681 (Bankr. S.D. Iowa 2007), 374 B.R. 681.

[22] *Ibid*, at page 683.

[23] *Id.*

While the total impact and costs for AI remain unknown, lawyers must consider the ethical requirements of SCR 3.130(1.5); specifically, including the following:

- Costs incurred in learning about AI, in maintaining AI provided services, and keeping up to date with changes in its use, should be considered like any other continuing legal education expense, and a part of the lawyer's overhead.

- Lawyers charging their clients on an hourly basis cannot submit inflated bills for hours not actually spent on their case, and savings generated by using AI, like other technologies, should be passed on to the client.

- Lawyers may request that their client reimburse them for the costs incurred in using AI services, but only after first explaining the anticipated cost, and also obtaining the client's agreement to reimburse the attorney for the expense.

CONFIDENTIALITY OF CLIENT INFORMATION

There is no ethical duty more sacrosanct than the requirement that an attorney not reveal information relating to a client, or the fact of the attorney's representation of that client, without the client's informed consent. SCR 3.130(1.6) is clear: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted ..." under a specific exception to the Rule.[24] Additional Rules extend this nondisclosure duty to information provided to an attorney by a prospective client,[25] as well as to information obtained by the attorney in the representation of a former client.[26] The nondisclosure duty is broad, inasmuch as "(t)he confidentiality rule, for example, applies not only to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source."[27]

It is well known that "AI is making it easier to extract, re-identify, link, infer, and act on sensitive information about people's identities, locations, habits, and desires. AI's capabilities in these areas can increase the risk that a client's personal data could be exploited and exposed."[28] To prevent or reduce this risk of disclosure, the attorney must ensure that the use and the retention of confidential client information by an AI provider is secure and avoids confidentiality risks. In order to confirm the confidentiality of client information, the attorney should understand how

[24] Paragraph (b) to SCR 3.130(1.6) creates exceptions to the disclosure prohibition in those circumstances where the "... lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to secure legal advice about a lawyer's compliance with these Rules..." or (3) to establish a claim or defense on behalf of a lawyer and the client, or in defense of a criminal or civil charge made by the client against the lawyer, or "(4) to comply with another law or a court order."

[25] *See*, SCR 3.130(1.8).

[26] *See*, SCR 3.130(1.8(b)) and (1.9(c)(1)).

[27] *See*, SCR 3.130(1.6), Comment (3).

[28] President Joe Biden's Executive Order on the Safe, Secure and Trustworthy Development and Use of Artificial Intelligence dated October 22, 2023.

generative AI products are being used and then not input any client information that lacks reasonable and adequate security protections unless, of course, client consent is first obtained. Some generative AI products utilize inputted information or uploaded documents such as pleadings or contracts to train itself, or to share that information with third parties. Therefore, the attorney should review the "terms of use" of any AI product and the provider's disclaimers in order to understand whether the AI provider shares inputted information with a third party or will utilize the lawyer's inputted information for its own purposes.

Hence, an attorney should take care that any information inputted into a generative AI product does not identify the client or the nature of the representation. Historically, attorneys have relied upon hypotheticals to discuss legal or factual issues relating to a client's representation; however, the use of hypotheticals is only permissible as long as there is no reasonable likelihood that anyone will be able to determine who the client is or what the client matter involves.[29] The sophistication of generative AI which allows the attorney to have near-human conversations by asking questions with AI responding calls into question whether the use of a hypothetical can be disguised sufficiently to avoid confidential client information from being disclosed.

There are GAI systems that promise that the provider will not send a client's information off-site, or host or share third party content. If that promise is confirmed in writing, then it may be allowable to input the client's confidential information with that provider. However, it still may be difficult, or even impossible to determine whether client information has been kept confidential and once the information has been disclosed it has not yet been judicially determined whether sharing information with an AI program would render that information discoverable, and/or result in waiving claims of attorney-client privilege. Because these questions are currently unanswered, lawyers are advised to maintain a healthy dose of skepticism of AI programs and should proceed with caution.[30]

Two final points on this issue: first, if the attorney intends to utilize AI and is concerned that despite taking appropriate preventative measures confidential client information will be inadvertently disclosed, then SCR 3.130(1.6) allows disclosure of client information if the client gives "informed consent."[31] The attorney should discuss with the client the proposed use of AI, the applications of AI to be utilized, the risks and benefits of the AI product, and fully explain privacy concerns. With the informed consent of the client, the attorney should be able to meet this Rule's ethical obligations. We recognize there are some states that are considering ethics rules requiring clients to give advance permission before an attorney may use AI on their legal matters, but at this time Kentucky does not have any similar pending rules.

Second, using AI may expose a host of cybersecurity threats to the law firm, including phishing, social engineering, and malware. "We use ChatGPT differently than the way we use other types

[29] *See*, SCR 3.130(1.6), Comment (5).

[30] The words of President Reagan: "trust but verify" come to mind – this is what we need to do.

[31] *See*, SCR 3.130(1.0(e)) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

of searches, and therefore any vulnerabilities in ChatGPT become exacerbated and are much more likely to lead to the exposure of privileged information."[32]

DUTY TO COMPLY WITH COURT RULES WHEN USING AI

"A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (or) (2) fail to disclose to the tribunal published legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel..."[33] Accordingly, attorneys have an ethical duty to ensure that legal authorities presented to the Court are accurate. GAI tools are known to sometimes produce erroneous and often fictitious responses to inquiries that may seem credible, called "hallucinations." Attorneys who use AI provider services like ChatGPT have a responsibility to check their pleadings for accuracy in their references to both facts and legal citations. Citing non-existent judicial opinions, false quotes and fake citations in filings with the court have caused the judiciary to take notice, and in some instances the attorneys have been sanctioned for their inaccuracy and misleading pleadings. Two New York lawyers were recently sanctioned after the Court found they filed a brief that contained numerous fake, GAI case law citations, when they later failed to "come clean" with the Court about their use.[34] Since then several federal and specialty courts, and at least one state court, have adopted rules requiring attorneys using AI programs to review, and verify any computer-generated content, and then certify that fact to the courts with their filings.[35]

In light of the everchanging nature of AI and the adoption of different court practice rules,[36] attorneys are reminded that they are responsible to understand the court rules and procedures to competently represent a client in those courts in which they are practicing, including those rules related to AI.[37] The attorney should check, and keep abreast of any rules, orders or other court procedures implemented in the jurisdiction in which the attorney is practicing that may require additional certifications as it relates to filings prepared by utilizing GAI products.

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[32] Mark D. Rasch, lawyer, cybersecurity, and data privacy expert, quoted in "What cybersecurity threats do generative AI chatbots like ChatGPT pose to lawyers?", *American Bar Association Journal* (June, 2023).

[33] SCR 3.130(3.3(a)).

[34] *Mata vs. Avianca, Inc.*, 2023 U.S. Dist. LEXIS 108263, 2023 WL 4114965 (S.D.N.Y. June 22, 2023).

[35] U.S. District Court for the Eastern District of Texas. U.S. District Judge Brantley Starr of the Northern District of Texas is one of the first U.S. Judges to require lawyers to certify that they did not use AI to draft their filings without a human checking their accuracy. In addition, the United States Court of Appeals for the Fifth Circuit has pending a similar certification requirement, and notes that lawyers who misrepresent their compliance with this certification could be sanctioned and have their filings stricken of record.

[36] Utah has established rules concerning the use of GAI and restricts judicial officers and court employees to using ChatGPT (version 3 or 4); Claude.ai (Beta); and Bard (Experiment) for all court-related work.

[37] *See*, SCR 3.130(1.1).

If an attorney later discovers an inaccuracy, then the attorney is required to correct the inaccuracy, and to notify the Court of any misleading statements. Without a doubt, if the Court questions the attorney's filings that include fake cases, the attorney must be candid with the Court and explain the error. Failure to do so not only subjects the attorney to potential sanctions by the Court but may also result in disciplinary action for the attorney for noncompliance with the Rules.[38]

SUPERVISING ATTORNEYS' RESPONSIBILITIES WHEN USING AI

SCR 3.130(5.1) requires a partner in a law firm, as well as an individual lawyer who exercises managerial authority over others, to make "reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules." Lawyers who have direct supervisory authority over another lawyer are similarly responsible to ensure the other lawyer complies with the Rules.[39] Having policies and procedures relating to the use of AI in the law firm may reduce potential disclosure of confidential client information and ensure that generative AI is being used appropriately. "AI systems keep challenging old conceptions of things like security, privacy, and fairness. But at another level, they just reinforce existing best practices."[40] These issues were discussed in KBA E-446 relating to cybersecurity and confirmed that law firm partners, managers of attorneys, and any attorneys supervising other attorneys are required to ensure that all of the firm's attorneys, as well as nonlawyer assistants, employees, or independent contractors who are under their supervision, comply with the Rules of Professional Conduct. This requirement places an enhanced responsibility upon those managerial attorneys to prescribe policies and procedures to reduce the risk of disclosure of confidential information when using AI, as well as to explain the permissible uses, as well as the known risks of AI.

The following comments of Florida Bar Ethics Opinion 24-1 are appropriate to this topic:

> (A) lawyer must review the work product of a generative AI in situations similar to those requiring review of the work of nonlawyer assistants such as paralegals. Lawyers are ultimately responsible for the work product that they create regardless of whether that work product was originally drafted or researched by a nonlawyer or generative AI.
>
> Functionally, this means a lawyer must verify the accuracy and sufficiency of all research performed by generative AI. The failure to do so can lead to violations of the lawyer's duties of competence [Kentucky SCR 3.130(4.1)], avoidance of frivolous claims and contentions [Kentucky SCR 3.130(3.1)], candor to the tribunal [Kentucky SCR 3.130(3.3)], and truthfulness to others [Kentucky SCR 3.130(4.1)], in addition to sanctions that may be imposed by a tribunal against the lawyer and the lawyer's client.

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[38] *See*, SCR 3.130(8.4).

[39] *See*, SCR 3.130(5.1(b)).

[40] "What cybersecurity threats do generative AI chatbots like ChatGPT pose to lawyers?" by Matt Reynolds, *American Bar Association Journal* (June 2023).

The Committee does not intend to specify what AI policy an attorney should follow because it is the responsibility of each attorney to best determine how AI will be used within their law firm and then to establish an AI policy that addresses the benefits and risks associated with AI products. The fact is that the speed of change in this area means that any specific recommendation will likely be obsolete from the moment of publication. At the very least lawyers must take care to address the use of any form of AI, what risk is associated with it, and what steps can be taken to avoid release of client information. As a part of this process, it is appropriate to review the law firm's existing cybersecurity policies so as to take AI into consideration.

The establishment of policies and procedures to deal with AI is an important step in meeting a lawyer's ethical obligations but it is not the end of the lawyer's duties. "All lawyers must make sure that subordinate attorneys, interns, paralegals, case managers, administrative assistants, and external business partners all understand necessary data and security practices and the critical role that all parties play in ensuring the protection of client information."[41] Creating a culture of security and privacy of client information may be best attained through training everyone on the law firm's AI policies and focusing on human error and behavior. "Humans are … involved in more than 80% of data breaches, whether they've clicked on a phishing email or they've just done something stupid."[42]

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530. This Rule provides that formal opinions are advisory only.

[41] KBA Ethics Opinion E-446, quoting Drew T. Simshaw in the *American Journal of Trial Advocacy*.

[42] Sharon Nelson, president of Sensei Enterprises, as quoted in *ABA Journal*, *supra* at 4.

Statistics on Mental Health in the U.S. and Kentucky

1 in 5 U.S. adults experience mental illness each year.

1 in 20 U.S. adults experience serious mental illness each year.

746,000 adults in Kentucky have a mental health condition.

(That's more than 10x the population of Bowling Green.)

189,000 adults in Kentucky have a serious mental illness.

In February 2021, 43.6% of adults in Kentucky reported symptoms of anxiety or depression.

In Kentucky, 800 lives were lost to suicide in 2020.

(Compiled by NAMI - National Alliance on Mental Illness - February 2021)

How Mental Illness Impacts Individuals and Family

People with depression have a 40% higher risk of developing cardiovascular and metabolic diseases than the general population.

Mental health conditions increase risk for diabetes, heart disease, and stroke.

Mental health impacts psychological functioning, memory, problem solving, social interactions, self-esteem, and self worth.

33.5% of U.S. adults with mental illness also experienced substance use disorder in 2021 (1 in 15 U.S. adults experience both a substance use disorder and mental illness)

What is Mental Health?

Mental health is a state of mental well-being that enables people to cope with the stresses of life, realize their abilities, learn well and work well, and contribute to their community. It is an integral component of health and well-being that underpins our individual and collective abilities to make decisions, build relationships and shape the world we live in. Mental health is a basic human right. And it is crucial to personal, community and socio-economic development.

Mental health is more than the absence of mental disorders. It exists on a complex continuum, which is experienced differently from one person to the next, with varying degrees of difficulty and distress and potentially very different social and clinical outcomes. (World Health Organization www.who.int/news-room/fact-sheets/detail/mental-health-strengthening-our-response)

How Mental Health Impacts Our Professional Lives

Mental health impacts brain activity and cognitive functioning.

Mental health impacts cognitive processes such as perception, thinking, memory, reasoning, and problem solving.

Mental health causes sleep disturbances, fatigue, insomnia, headaches, gastric issues, muscle aches, and heart palpations.

(Health.clevelandclinic.org/why-mental-health-is-so-important)

Mental Health and the Rules of Professional Conduct

SCR 3.130 (Rule 1.1)- Competence

Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Mental Health and the Rules of Professional Conduct

SCR 3.130 (Rule 1.3) - Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

This includes zealous advocacy, professional discretion, and treating all parties in the legal process with courtesy and respect. This includes procrastination, meeting deadlines, and delay in communication.

Mental Health and the Rules of Professional Conduct

SCR 3.130 (Rule 1.4) - Communication

A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Why Attorneys Do Not Get Mental Health Treatment

Low perceived need for treatment (56% - general population of individuals with psychological issues)

"Attitudinal barriers" - Stigma of treatment or diagnosis

(This is especially prevalent in higher income brackets.)

Impact of being under a microscope if co-workers or colleagues are aware of condition

Impact on reputation or practice

Appearance of "not having it all together" - perceived as impaired or weak/incompetent

Professional consequences including disbarment

What Lawyers Need to Heal

Eliminate the stigma/Changing mindsets.

Establish preventative measures.

Be aware of signs and symptoms.

Know your resources.

Encourage colleagues who may be struggling.

(www.americanbar.org/news/abanews/aba-news-archives/2023/08/better-mental-health-legal-profession (August 5, 2023)

Everyday Practices for Improved Mental Health

Take care of physical health (eat well, exercise, meditation, yoga, positive mental/spiritual practices).

Practice gratitude.

Have a positive attitude.

Minimize negative thoughts or environments.

Develop a sense of purpose in life.

Communicate and connect with others.

Learn warning signs and coping skills.

Be kind to yourself and others.

Know when to let things go.

Injury must arise out of the work (causal origin) and also occur in the course of the work (time & place). Analysis of causal origin begins by answering whether the mechanism of injury was work-related, personal or neutral. Risk does not have to be peculiar to the employment in order to be work-related. Claimant must merely show that the risk, even if common to the public, was a risk of the employment.

Kentucky applies the "positional risk" doctrine, which brings injuries with a personal or neutral origin under the umbrella of coverage. Where employment places claimant in what turns out to be a dangerous place, the resulting injury is compensable even though the injury-producing mechanism was not work-related. The doctrine was adopted in Kentucky in *Corken v. Corken Steel Products, Inc.*, 385 S.W.2d 949 (Ky. App. 1965), a 1965 Court of Appeals case where a salesman was shot and killed by an unknown lunatic as the employee was getting into his car in between calls on customers.

In the case of falls, the positional risk doctrine is exemplified by the case of *Indian Leasing Co. v. Turbyfill*, 577 S.W.2d 24 (Ky. App. 1978), which held the employer liable for the death of the claimant when he had a heart attack but then fell from the top of a trailer. The "flat floor rule" holds the employer liable for increased injurious effects caused by the work environment in an otherwise idiopathic fall. An unexplained fall that occurs while working is presumed to be work-related (*Workman* presumption).

I. *VACUUM DEPOSITING, INC. V. DEVER*, 285 S.W.3D 730 (KY. 2009) – UNEXPLAINED FALL AT WORK PRESUMED TO BE WORK-RELATED

Dever is the biggest challenge to employers facing claims involving a fall at work with no apparent cause. In this case, the ALJ dismissed the claim brought by an employee who fell while walking through the break room at work. She did not know why she fell, but acknowledged she was accident prone and probably tripped over her own feet. She also mentioned the break room was frequently littered with trash, though there was no evidence that was the case on this occasion. Lastly, the employer speculated she fell on account of her 2" high heels. The ALJ found the claimant was not credible, and since there was no indication of a work-related cause for the fall, dismissed the claim. He felt it was more likely that "an element of clumsiness and instability of high heels" was to blame.

The Board reversed the ALJ, and the Court of Appeals and Supreme Court affirmed the Board. The appellate courts agreed with the Board that the fall was "unexplained," which implicates the *Workman* presumption of work-relatedness, shifting the burden to the employer to prove the fall was in fact due to a personal cause. Most importantly, they held that being accident prone and wearing high heels were not sufficient personal causes to bring the fall within the realm of idiopathic.

> The fact that the claimant's work did nothing to cause her fall was immaterial under *Workman*. The record contained no evidence that she suffered from a pre-existing disease or physical weakness that caused her to fall and no evidence that she was engaged in conduct when she fell that would take the injury outside Chapter 342. Nor did the record contain evidence that her footwear was inherently dangerous and inappropriate for

> work in the employer's offices. Like the Board and the Court of Appeals, we are convinced that evidence the claimant was clumsy and wearing high heels was not sufficient to prove that the cause of her fall was idiopathic.

The key to avoiding application of *Dever* is to avoid characterization of the fall as "unexplained" from the outset. If the cause of the fall is known and is not work-related, the case may be defended successfully.

II. *BRISBAY V. KENTUCKYONE HEALTH*, WCB 16-62626 (11/2/18) – IDIOPATHIC FALL CASE DISMISSED WHERE EVIDENCE OF PRE-EXISTING ACTIVE CONDITION

ALJ Dye dismissed a claim where the employee was descending stairs in the employee parking garage and felt a pop and then pain in her left ankle/foot. She did not fall but caught herself on the railing. She had undergone an MRI of the left ankle the day before and had a pre-existing partial tear. The ALJ found that the pop was the partial tear progressing to a full tear while descending the stairs of the parking garage. ALJ Dye went into a lengthy discussion about increased risk, where he reiterated the lack of evidence establishing KentuckyOne's parking garage stairs placed any more stress or strain on Brisbay's left ankle above and beyond what descending any other stairs would have caused. The ALJ reiterated Brisbay had an internal weakness, and her condition would have eventually occurred despite her KentuckyOne employment. The Board affirmed.

The language used by ALJ Dye can be very helpful where a fall occurs on the operating premises but while the employee is not engaged in the actual tasks of her work:

> The ALJ finds a risk distinctly associated with Brisbay's KentuckyOne employment did not cause her left ankle condition. Brisbay was a PICC nurse. Her job involved walking throughout the hospital, and inserting, as well as checking, PICCs. Brisbay's job, while treating patients, physically required: bending, twisting, turning, and some lifting. **Her left ankle condition, however, did not occur, while performing these activities. Instead, Brisbay's left ankle condition occurred, while simply walking down the parking garage's steps.** [emphasis added]
>
> Although Brisbay's job required walking, there is not any evidence it required repetitive stair use. There is not any evidence Brisbay's job required frequently going up and down stairs that would expose her to greater risk. There is not any evidence indicating how many times a day Brisbay used the stairs. There is not any evidence KentuckyOne required Brisbay to use the stairs, as opposed to an elevator. There is not any evidence KentuckyOne had an elevator, and, if so, whether it worked.
>
> There is not any credible evidence these stairs posed a distinct risk, or increased the risk Brisbay would sustain a left ankle injury. Brisbay did not trip, slip, loss[sic] her balance, stumble, or fall. She simply descended some stairs. There is not any evidence the stairs were defective. Although Brisbay testified the steps were "odd" and "kind of short," there is not any evidence the stairs' parameters and dimensions placed any added stress or strain on Brisbay's left ankle. That is – there is not any evidence the parking garage stairs placed any more stress or strain on Brisbay's left

> ankle above and beyond what descending any other stairs, either at her house or in the general public, would have caused.
>
> Brisbay did not testify she had difficulty descending these steps. She did not explain navigating these steps were[sic] more difficult than the ones at her house or in the general public. Again, Brisbay only indicated the steps were odd and short. The ALJ is not inferring, and finding, Brisbay's statement indicated Brisbay had difficulty navigating the stairs or their design placed additional stress or strain on her left ankle.
>
> Moreover, there is not any expert or lay evidence the stairs' design, dimensions, or parameters, placed added strain or stress on Brisbay's left ankle. There is not any evidence Brisbay was carrying any work items when the incident occurred. There is not any evidence Brisbay's job required her to descend the garage stairs in a non-normal manner – *i.e.* sprinting or rushing down them to get into the hospital to assist a patient.

III. *BLUEGRASS.ORG V. HIGGINS*, 2019 KY.APP.UNPUB.LEXIS 413, 2019 WL 2406377 (KY. APP. JUNE 7, 2019) – CLAIMANT WORKING FROM HOME, WALKING WHEN ANKLE ROLLED

ALJ Hajjar dismissed a claim by a case worker who was at home when she rolled her ankle and fell onto her knee. *The Board reversed.* Employee had been on her work cell phone speaking with a medical provider and had just hung up. She was walking to retrieve her purse in order to go to the provider's office to pick up documentation. She testified she did not misstep. She simply took two steps and rolled her ankle. The floor was even, and she did not slip or trip. There were no environmental contributing factors. ALJ Hajjar analyzed the case as a "coming and going" case, and concluded she was not on the operating premises of the employer or engaged in a service to the employer at the time of the fall. The ALJ also engaged in an "increased risk" type analysis, concluding the hazard was ordinary for a homeowner.

The Board reversed the ALJ, finding that the claimant was not in coming and going status at all, since she had clocked in through ADP and was simply working from home when she fell. The Board described her home as "the job premises." The Board remanded for the ALJ to consider the issue of whether the fall was idiopathic or work-related, since that issue had been preserved by the parties. The fact that the Board left it within the ALJ's discretion to find an idiopathic fall is encouraging. On the other hand, if there is no evidence the claimant had a pre-existing weakness in the ankle, we can probably expect the Board would reverse the ALJ if she again dismissed the claim, just as it reversed ALJ Davis in the *Vacuum Depositing v. Dever* case. If the Board was of the opinion that the incident *could not* be considered work-related, then it would have found the ALJ's course and scope analysis to be harmless error. In other words, unless there is some evidence establishing a pre-existing condition, we expect the employer will ultimately lose this case. The employer appealed the Board's reversal to the Court of Appeals, which affirmed the Board, finding the claimant "was engaged in a work activity" at the time of her fall.

IV. *RODRIGUEZ V. LFUCG*, WCB 11-87000 (9/5/14) – CLAIMANT WALKING WITH EQUIPMENT IN HER HANDS WHEN KNEE POPS, BENEFITS AWARDED ON APPEAL

ALJ Borders dismissed a claim where the employee was simply walking with some projector equipment in her hands and experienced a "pop" in her knee. *The Board reversed.*

ALJ Borders' discussion of *Devers*:

> In *Vacuum Depositing Inc. v. Devers*, 285 S.W.3d 730 (Ky. 2009), the Supreme Court noted that Prof. Larson explains an analysis of whether a workplace injury arose out of employment begins by considering the three categories of risk; 1). Risk distinctly associated with employment; 2.) Risk that are [sic] idiopathic or personal to the worker; and 3.) Risks that are neutral. Prof. Larson points out that this latter group involves an idiopathic or personal factor that would have resulted in harm regardless of the employment, such as a pre-existing disease or physical weakness, personal behavior, or personal mortal enemy.
>
> In this specific instance, after careful review of the lay and medical testimony, it is readily apparent that the Plaintiff's injury resulted from her pre-existing arthritic disease that was in existence in her knees due to her morbid obesity and would have occurred whether or not she was at work or not.
>
> The Administrative Law Judge found the Plaintiff to be a very credible witness and believes her when she said that her knee just simply popped and there was no traumatic event that occurred. In addition, Dr. Dome believes that her condition would have developed in spite of her "twisting" injury. The Administrative Law Judge finds that Plaintiff's incident that occurred at work was idiopathic or personal in nature and would have resulted in harm regardless of her employment. Therefore the Administrative Law Judge finds that Plaintiff's injury was idiopathic in nature and is therefore not an injury as defined by the Act.

The Board's discussion reversing the ALJ:

> Finally, the ALJ erroneously applied the law regarding an unexplained or idiopathic fall in the case *sub judice*. Simply put, there could not be either an unexplained or idiopathic fall since Rodriguez did not fall. She felt a pop in her knee and then leaned on the projector screen she was carrying until a chair was brought to her by a police officer with LFUCG.
>
> The ALJ found Rodriguez to be a very credible witness in concluding her knee popped in the course of moving various items of equipment. Rodriguez's testimony establishes that in the course of moving equipment she experienced a pop. Thus, her testimony and the medical evidence established she sustained an injury as defined by the Act. Consequently, the ALJ erred in determining whether the injury sustained at work was

idiopathic or unexplained, as the law relating to an idiopathic versus an unexplained fall is inapplicable.

V. *RICKY GILL V. SPECIAL METALS*, WCB 16-84522 (2/23/18) – CLAIMANT WALKING QUICKLY AND TURNING CORNER WHEN KNEE POPS, BENEFITS AWARDED

ALJ Pullin found a work injury where the employee was walking quickly, carrying samples, turning a corner, and felt a pop in his knee, falling. Meniscal tear. The ALJ was persuaded by claimant's testimony that his work duties and environment contributed to the twisting injury.

VI. *BETTS USA, INC. V. MURSKI*, 2011 KY.UNPUB.LEXIS 31, 2011 WL 1103950 (KY. MAR. 3, 2011) – CLAIMANT STANDING UP FROM KNEELING POSITION FEELS POP AND PAIN IN KNEECAP, BENEFITS AWARDED ON APPEAL

ALJ Justice dismissed the claim of a factory worker who underwent surgery for an osteochondral defect and patellar misalignment after feeling a pop and pain in her knee while standing up from a kneeling position at work. She had been cleaning machines throughout the factory during the holiday shutdown. There was no evidence of a pre-existing condition, and the Board reversed. The employer appealed to the Court of Appeals and Supreme Court, both of which affirmed the Board. The defense expert had testified that standing from a kneeling position may have caused a transient strain but was not the cause of a permanent aggravation of the claimant's pre-existing dormant degenerative condition, in contrast to the treating doctor's opinion. The Court noted that the defense expert had disregarded the fact the claimant had been engaged in extensive kneeling, crawling and crouching before she stood up, and in the absence of any evidence of another contributing cause, a finding of a permanent aggravation and not merely a temporary exacerbation was compelled.

VII. *OXMOOR AUTO GROUP*, WCB 16-90676 (3/8/19) – UNEXPLAINED FALL FOUND WORK-RELATED BASED ON MEDICAL PROOF DISCOUNTING THEORY OF SYNCOPE

ALJ Weatherby found a work injury where the claimant was found unconscious on the floor and evidence was conflicting as to the reason for the fall. Claimant had meniscal tear, and expert indicated that was consistent with a slip and fall, with a twisting mechanism of injury, as opposed to syncope, where the patient would more likely just fall forward or back, without twisting. Employer had argued the claimant fainted from marijuana use or Xanax withdrawal, but the ALJ rejected that theory. The Board affirmed the finding of compensability.

VIII. *MCINTOSH V. EAST KENTUCKY VETERANS CENTER*, WCB 11-79029 (10/26/12) – IDIOPATHIC FALL CASE DISMISSED WHERE THERE WAS EVIDENCE OF PRIOR FALLS AND RECENT SURGERY

ALJ Coleman dismissed a claim where the employee testified she was simply walking down a hallway when she fell. Form 101 indicated she slipped and fell, but the ALJ noted her own testimony indicated she did not slip or trip, but simply fell. Employer introduced evidence of prior problems in the knee, including recent surgery, with complaints of weakness and prior episodes of giving way, including multiple falls. The ALJ believed the

fall was more likely due to personal cause and dismissed the claim as idiopathic. The Board affirmed.

IX. *BRANDON REYNOLDS V. LAYNE CHRISTENSEN*, WCB 10-97734 (2/21/12) – IDIOPATHIC FALL CASE DISMISSED WHERE THERE WAS EVIDENCE OF PRIOR PROBLEM WITH HIP GIVING OUT

ALJ Joiner dismissed a claim where the employee testified he slipped and fell on plastic sheeting put down to protect the floor. Employee speculated he may have had paint on his shoe. Co-workers testified he was complaining about his hip "giving out" prior to the incident, and the ALJ concluded the fall was idiopathic due to progressive arthritis in the hip following an old injury and surgery. The Board affirmed.

X. *JASON SPARKS V. KEMPER HOME FURNISHINGS*, WCB 20-71248 (3/11/22) – CASE DISMISSED WHERE CLAIMANT WAS SIMPLY WALKING AT WORK WHEN FOOT POPPED, AND MEDICAL EVIDENCE RELATED THE POP TO PRE-EXISTING CAVOVARUS DEFORMITY OF FOOT

ALJ Naake acknowledged that case did not involve a fall, *per se*, but engaged in Larson's analysis of three categories of risk, adopted in the *Dever* fall case, and concluded claimant's condition was idiopathic and non-compensable. Medical evidence indicated his tendon ruptured spontaneously due to his pre-existing foot structure, and there was nothing about the work environment that contributed to the rupture. He was simply walking across an even surface with nothing in his hands. There was no evidence the work caused or accelerated the injury occurring. The Board affirmed.

Thus, we can see that if the employer is able to establish a pre-existing condition indicating a personal cause for the fall or injury, the Board generally will not disturb the ALJ's exercise of discretion in rejecting the claimant's testimony as to a work-related cause. In other words, these cases more often come down to a question of *medical* causation.

I. *CONSOL OF KENTUCKY, INC. V. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR*, 2024 WL 4563854 (4TH CIR. OCT. 24, 2024), NOT REPORTED IN FED. RPTR.

Consol petitioned for review of the Benefits Review Board's decision affirming the ALJ's award of benefits to claimant under the Black Lung Benefits Act (BLBA), 30 U.S.C. §901-944. Because claimant was unable to complete PFT studies due to his poor health, he could not establish total disability under 20 C.F.R. §718.204(b)(2)(i). He also could not establish total disability under §718.204(b)(2)(ii) or (iii). The ALJ considered his case under §718.204(b)(2)(iv), which examines whether "a physician exercising reasonable medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques" concluded claimant's respiratory or pulmonary condition prevents or prevented him from performing his usual coal mine work or comparable work. The ALJ held claimant met this burden via the treatment records and opinion of his treating physician. The ALJ found Dr. Alam's report and treatment notes reflected a reasoned medical judgment based upon medically acceptable clinical and laboratory diagnostic techniques that was sufficient to establish claimant was totally disabled from returning to his prior coal mining or comparable employment even in the absence of a PFT or ABG, meeting Department of Labor requirements. The Board affirmed, finding the ALJ's decision was supported by substantial evidence because Dr. Alam considered the objective medical testing and explained why the symptoms and treatment rendered claimant unable to work. The Fourth Circuit affirmed, finding the ALJ considered and analyzed relevant medical evidence, including contrary diagnoses, sufficiently explained his rationale, and permissibly credited Dr. Alam's opinion over contrary physician opinions. The ALJ also did not err in finding Consol failed to rebut the presumption of total disability. The Court also affirmed the Board's finding that Consol failed to prove a due process violation or that its liability should be transferred to the Black Lung Disability Trust Fund due to the time that elapsed between the filing of the claim and the ALJ's award of benefits.

II. *HAYES V. DIRECTOR, OWCP*, 2024 WL 4364765 (11TH CIR. OCT. 2, 2024), NOT REPORTED IN FED. RPTR.

Claimant's son petitioned for review of the Benefits Review Board decision affirming the ALJ's order denying his deceased father benefits under the BLBA. Cowin & Company moved to dismiss the petition for lack of jurisdiction. The Eleventh Circuit denied Cowin's motion to dismiss, holding it had jurisdiction over the petition. Under 33 U.S.C. §921(c), any person "adversely affected or aggrieved" by the Board's decision may petition the Court for review. The statute does not require the petitioner to be a party to the underlying Board proceeding. In this case, claimant's son has a financial interest in any unpaid benefits owed to his deceased father under the Act, and he was adversely affected and aggrieved by the Board's order affirming denial of benefits to his father.

III. *APOGEE COAL CO., LLC V. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR*, 112 F.4TH 343 (6TH CIR. 2024)

Arch Resources and Apogee Coal Company (Arch) filed a petition requesting Sixth Circuit review of the Benefits Review Board's decision affirming the ALJ's finding that Arch is the liable insurer for claimant's benefits claim under the BLBA. The Sixth Circuit denied Arch's

petition for review. On the last day of claimant's employment at Apogee Coal Company, it was self-insured through its owner, Arch Resources. Arch later sold Apogee and its federal black lung liabilities to Magnum Coal Company, which were later transferred again to Patriot Coal Company. When claimant filed for benefits, the district director named Apogee, self-insured through Patriot, as the potentially liable operator and issued a notice of claim stating such. The Department of Labor (DOL) then named Patriot as the presumptive insurer on the schedule for submission of additional evidence (SSAE). Two months later, Patriot was dissolved in bankruptcy. The DOL thereafter issued Bulletin 16-01 instructing that Arch should be notified as the liable insurer for Patriot's claims pending before the district director that originally fell under Arch' previous self-insurance regardless of its later transfers. Claimant's claim fell under the Bulletin's guidance because Arch was Apogee's self-insurer on his last day of work. The district director issued a second notice of claim and an SSAE naming Arch as Apogee's insurer. Arch responded to the district director contesting its designation as a liable party on the claim but failed to submit or request evidence or name any liability witnesses by the 90-day deadline in May 2016. The district director issued a proposed decision and order (PDO) ordering claimant's benefits to be paid from Arch's self-insurance. The matter was assigned to an ALJ, who denied Arch's motions to hold the case in abeyance pending collateral litigation and to extend the discovery period. In June 2019, the ALJ denied Arch's motion to transfer liability to the Black Lung Disability Trust Fund and named Arch as the insurer on claimant's awarded benefits. The Board affirmed, and Arch petitioned the Sixth Circuit for review. The Court denied Arch's motion to expand the record, holding neither equity nor the Federal Rules of Appellate Procedure favor its motion. It rejected Arch's argument that the BLBA's liability evidence rules impermissibly empower district directors to perform the ALJ's evidentiary gatekeeping role in violation of the Administrative Procedures Act. In addition, the ALJ's application of the liability evidence rules was neither arbitrary nor capricious. The Court also rejected Arch's argument that the ALJ improperly found it liable for claimant's claim because holding it accountable after Apogee's sale violates principles of corporate separateness and the distinctions between self-insuring operators and those using commercial insurance. Arch was responsible for showing it was not the liable party, which it failed to do within the 90-day deadline outlined in the BLBA and accompanying regulations. The Court also held Bulletin 16-01 did not require notice and comment rulemaking and rejected Arch's argument that it did not receive adequate notice that it was named as Apogee's carrier.

IV. *APOGEE COAL CO., LLC V. DIRECTOR, OWCP*, 2024 U.S. APP. LEXIS 24655 (6TH CIR. SEPT. 30, 2024)

The Sixth Circuit awarded attorney's fees in the amount of $6,525 to counsel for respondent David M. Howard. *See* 33 U.S.C. §928(a), (c); *Eifler v. Peabody Coal Co.*, 13 F.3d 236, 238-39 (7th Cir. 1993).

V. *CONSOL PA COAL COMPANY V. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS*, 2024 WL 4210533 (3D. CIR. SEPT. 17, 2024), NOT REPORTED IN FED. RPTR.

The ALJ found claimant to be totally disabled due to a respiratory or pulmonary condition and awarded him benefits under the BLBA. The Benefits Review Board affirmed the decision, and Consol petitioned the Third Circuit for review. The Court denied Consol's petition for review. It rejected Consol's argument that two of the ALJ's factual findings were not supported by substantial evidence, that the ALJ did not consider all relevant evidence

in compliance with applicable law, and that claimant did not establish entitlement to benefits. Claimant proved all four requirements under 20 C.F.R. §718.20-204, and the ALJ's findings of pneumoconiosis and total disability were supported by substantial evidence.

VI. *CONSOL OF KENTUCKY, INC. V. ADAMS*, 2024 WL 4132404 (4TH CIR. SEPT. 10, 2024), NOT REPORTED IN FED. RPTR.

Consol of Kentucky petitioned the Fourth Circuit for review of the Benefits Review Board's order affirming the ALJ's decision granting claimant's request for modification and awarding benefits under the BLBA. Consol argued the ALJ's finding that claimant suffered from a totally disabling respiratory impairment was not supported by substantial evidence. The Court denied Consol's petition for review. The parties stipulated claimant had at least 27 years of underground coal mine employment, and the ALJ found he had a totally disabling respiratory impairment based on his physician's opinion and treatment records. The ALJ did not err in invoking the 15-year presumption that claimant was totally disabled due to pneumoconiosis. While the physician did not discuss the exertional requirements of claimant's last coal mine job, her opinion showed he had a severe respiratory impairment and physical limitations that would prevent him from returning to his prior job entailing heavy manual labor. In contrast, the other physicians noted claimant's prior job required heavy labor but failed to explain how he could return to such a strenuous level of work given his mild to moderate respiratory impairment. The Court held the ALJ's finding of total disability was supported by substantial evidence and denied Consol's petition for review.

VII. *HARMAN MINING CORPORATION V. BARTLEY O/B/O BARTLEY*, 2024 WL 3874676 (4TH CIR. AUG. 20, 2024), NOT REPORTED IN FED. RPTR.

Harman Mining Corporation and its insurer petitioned for review of the Benefits Review Board's decision and order affirming the ALJ's decision awarding miner and survivor benefits to claimant's spouse under the BLBA. The Fourth Circuit denied the petition. It rejected Harman's argument that the district director violated its due process rights when deciding it was the responsible operator. Harman had notice of the claims and an opportunity to contest its liability before the district director. It had access to the same Social Security earnings the district director considered and could have used it and the evidence it later sought to introduce before the ALJ to contest its liability at the proper time. Instead, it waited almost two years after the district director issued the SSAE to contest liability. In addition, the ALJ did not err in finding Harman failed to rebut the presumption that claimant's totally disabling respiratory impairment was due to pneumoconiosis. The Court agreed with the Board that any error by the ALJ in calculating claimant's smoking history was harmless. The ALJ did not err in discounting the opinions of Drs. Fino and Rosenberg because they failed to acknowledge the difficulty in determining the exact cause of claimant's totally disabling respiratory impairment due to his numerous health impairments. While they each found claimant's respiratory impairment was caused exclusively by conditions unrelated to coal dust, neither physician persuasively explained how they were able to conclude that coal dust exposure did not contribute to claimant's respiratory impairment. Dr. Green, however, found claimant's respiratory impairment was caused by many factors, including long exposure to coal dust.

VIII. *APOGEE COAL COMPANY V. OFFICE OF WORKERS' COMPENSATION PROGRAMS*, 113 F.4TH 751 (7TH CIR. 2024)

The ALJ assigned responsibility for claimant's widow's survivor benefits under the BLBA to Apogee Coal Company, claimant's last employer. The Benefits Review Board affirmed. Both found that Arch Resources, Apogee's former parent corporation, is responsible for paying the benefits on Apogee's behalf. The Seventh Circuit granted Arch's petition for review, vacated the Board's decision and remanded with instructions that the benefits be assigned to the Black Lung Disability Trust Fund. It found neither the ALJ nor the Board identified any provision in the BLBA or its implementing regulations that justify holding Arch liable for Apogee's benefits obligations. The Court noted it thoroughly reviewed the ALJ's decision and not one of the regulations therein discussed or cited can be read in isolation or combination to support the premise that self-insuring parent corporations are legally obligated to pay all black lung benefits that accrue against their subsidiaries during the period of self-insurance, regardless of when the claim is filed. The Court also noted its decision is at odds with the Sixth Circuit's decision in *Apogee Coal Company, LLC v. Director, Office of Workers' Compensation Programs* (*see* Section III *supra*). Finally, the Seventh Circuit noted the limited scope of its decision that the ALJ and Board failed to justify their conclusions that Arch can be compelled to satisfy Apogee's black lung liability. "That the Department of Labor has yet to articulate a basis for liability in cases like this one does not mean that no such basis exists…. In future black lung cases, the Director can press additional arguments for the rule it advocates."

IX. *HERITAGE COAL CO., LLP V. DIRECTOR, OWCP*, 2024 U.S. APP. LEXIS 20808, (6TH CIR. AUG. 16, 2024)

The Sixth Circuit awarded attorney's fees in the amount of $2,319 to counsel for respondent William R. Fogle.

X. *HITT V. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR*, 2024 WL 3825211 (4TH CIR. AUG. 15, 2024), NOT REPORTED IN FED. RPTR.

Claimant petitioned for review of the decision and order of the Benefits Review Board affirming the ALJ's decision denying his claim for benefits under the BLBA. The ALJ found claimant failed to prove he is totally disabled by a pulmonary or respiratory impairment. As such, she did not consider the other elements of his claim. The ALJ found claimant failed to prove total disability under 20 C.F.R. §718.204(b)(2)(i), (ii), or (iii). Those findings were not challenged on appeal. The ALJ also considered the claim under §718.204(b)(2)(iv), finding that while claimant's medical records reflected he had reported respiratory symptoms to his physicians and was receiving some treatment, they failed to establish he was totally disabled due to his respiratory symptoms. The Fourth Circuit affirmed. The ALJ analyzed all the medical evidence and thoroughly explained her rationale for concluding that evidence failed to show claimant was totally disabled due to pulmonary or respiratory impairment. The ALJ also considered claimant's testimony regarding his ability to return to coal mining or comparable work, but that lay testimony cannot support a finding of total disability without the requisite medical evidence.

XI. *SUNNYSIDE COAL COMPANY V. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR*, 112 F.4TH 902 (10TH CIR. 2024)

Sunnyside Coal Company petitioned for review of the Benefits Review Board's decision and order affirming the ALJ's decision awarding benefits to claimant under the BLBA. The Tenth Circuit denied the petition. The Court rejected Sunnyside's argument that claimant did not qualify for the rebuttable presumption in 30 U.S.C. §921(c)(4) because he was not underground for at least 15 years and was therefore required to show the conditions of his above-ground employment were substantially similar to the conditions of an underground coal mine. For purposes of the rebuttable presumption, "coal mine" means an area of land and all structures, facilities, machinery, etc. placed upon, under, or above the surface of such land by any person. 30 U.S.C. §802(h)(2). The Court held that Congress's use of the preposition "in" within the rebuttable presumption provision does not preclude above-ground miners working in an underground coal mine from qualifying for the presumption without a showing of substantial similarity. In this case, claimant proved he was employed for 15 years or more in one or more underground coal mines. The ALJ did not err in finding claimant was totally disabled based on his arterial blood gas studies and the medical opinions of Drs. Gagon and Farney. In addition, the Court agreed with the ALJ's findings that Sunnyside failed to disprove legal pneumoconiosis or establish that no part of claimant's respiratory disability was due to coal dust.

XII. *PEABODY COAL COMPANY V. DIRECTOR, OWCP*, 2024 U.S. APP. LEXIS 19920, (6TH CIR. AUG. 7, 2024)

The Sixth Circuit awarded attorney's fees in the amount of $1,661.25 to counsel for respondent Barry F. Hunter.

XIII. *HOBET MINING COMPANY V. WORKMAN*, 2024 WL 3633574 (4TH CIR. AUG. 2, 2024), NOT REPORTED IN FED. RPTR.

Workman filed a BLBA claim in 2015. His last coal mine employment was for Hobet Mining Company, owned and self-insured through Arch Resources. After Workman's employment ended, Arch sold Hobet to Patriot Coal Company, which went bankrupt in 2015. The DOL informed Hobet, self-insured through Arch, that it was a potentially liable operator for Workman's claim in April 2016. Arch contested liability but did not submit any evidence to the district director. The ALJ awarded benefits to Workman and found Hobet, self-insured through Arch, to be the responsible operator. The Board affirmed the ALJ's decision and denied Arch's motion for reconsideration. Arch petitioned the Fourth Circuit for review, which it denied. The Court found substantial evidence supported the ALJ's finding of liability. Arch demonstrated no defect in any of the procedural rules governing the submission of evidence or in how the ALJ applied those rules to it. The Court noted that in other cases covered by the same regulations, Arch successfully developed and introduced liability evidence, and its failure to do so in this case cannot be attributed to a flaw in the regulations.

XIV. *HERITAGE COAL CO., LLC V. DIRECTOR, OWCP*, 2024 U.S. APP. LEXIS 17168 (6TH CIR. JULY 12, 2024)

Heritage Coal and carrier Peabody Energy Corporation petitioned for review of the Benefits Review Board's decision affirming the ALJ's order awarding benefits to claimant's

daughter on behalf of his estate on his claim under the BLBA. In the instant action, petitioners moved to voluntarily dismiss and remand the petition, and Torain moved for attorney's fees. The Sixth Circuit entered an order granting the motion to voluntarily dismiss and remanded the matter back to the district director for initiation of payment under the parties' settlement agreement. The Court granted the motion for attorney's fees in the amount of $1,642.50.

XV. *CONSOL PA COAL COMPANY V. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR*, 2024 WL 3325702 (3D CIR. JULY 8, 2024), NOT REPORTED IN FED. RPTR.

Consol PA Coal Company petitioned for review of the Benefits Review Board's decision affirming the ALJ's award of disability benefits to claimant under the BLBA. The Third Circuit denied the petition. It rejected Consol's argument that the rebuttable presumption should not apply to claimant because the ALJ erroneously concluded he had 15 years of qualifying mine employment. The Court found there was substantial evidence on the record considered as a whole to show claimant was regularly exposed to coal dust and his four years of driving a coal truck constituted qualifying coal mine employment. Consol also argued the ALJ erroneously concluded it failed to rebut the presumption by improperly relying on the preamble to the BLBA's implementing regulations. However, Consol failed to exhaust the issue by raising it before the Board, and the Court did not consider it.

XVI. *PEABODY COAL CO. V. DIRECTOR, OWCP*, 2024 U.S. APP. LEXIS 16652 (6TH CIR. JULY 8, 2024)

Peabody Coal petitioned for review of the Benefits Review Board's decision affirming the ALJ's award of benefits to claimant's wife for her deceased husband's BLBA claim. Petitioners moved to voluntarily dismiss the appeal, noting all parties agreed dismissal was appropriate because their settlement agreement resolved all issues on appeal. The Sixth Circuit granted the motion to voluntarily dismiss and remanded to the district director for initiation of payment under the settlement agreement.

XVII. *PEABODY COAL CO. V. DIRECTOR, OWCP*, 2024 U.S. APP. LEXIS 16378 (6TH CIR. JULY 3, 2024)

Peabody Coal petitioned for review of the Benefits Review Board's decision affirming the ALJ's award of survivor's benefits pursuant to the BLBA. Petitioners moved to voluntarily dismiss the appeal, noting all parties agreed dismissal was appropriate because their settlement agreement resolved all issues on appeal. The Sixth Circuit granted the motion to voluntarily dismiss and remanded to the district director for initiation of payment under the settlement agreement.

XVIII. *AMERICAN ENERGY, LLC V. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR*, 106 F.4TH 319 (4TH CIR. 2024)

American Energy petitioned for review of the Benefits Review Board's award of black lung benefits to claimant's surviving wife. Claimant, who was a long-time cigarette smoker, worked for coal mines on and off for over 12 years. American Energy disputed the cause of his impairment. The ALJ found claimant's totally disabling chronic obstructive pulmonary condition arose from his coal mine employment and awarded benefits based on findings

of legal and clinical pneumoconiosis. The Board affirmed the award based only on the finding of legal pneumoconiosis. American Energy argued the ALJ applied the wrong legal standard, flipping the burden of proof by finding it had not proven that claimant's lung disease was not at least partially due to coal dust exposure. The Fourth Circuit held the ALJ applied the wrong legal standard in determining claimant had legal pneumoconiosis. The ALJ discredited the legal pneumoconiosis opinions of American Energy's physicians that smoking alone caused claimant's respiratory impairment as inconsistent with the preamble to the BLBA's implementing regulations. However, the BLBA and its regulations place the burden of proving pneumoconiosis on the claimant. American Energy had no duty to prove that coal dust exposure did not cause claimant's impairment. Rather, it was claimant's wife's burden to prove that coal dust exposure was the cause. The ALJ erred in requiring American Energy's physicians to explain why coal dust exposure was not a cause of claimant's impairment. The Court noted the ALJ's award of benefits was also based on his findings of clinical pneumoconiosis. However, the Benefits Review Board did not consider clinical pneumoconiosis as a basis for affirming the ALJ's award of benefits. Affirming the Board's decision on an alternative ground not actually relied upon by the Board is prohibited under the *Chenery* doctrine. As such, the Fourth Circuit was unable to deny American Energy's petition based upon the ALJ's clinical pneumoconiosis finding. The Court granted American Energy's petition for review and vacated and remanded the Board's order awarding black lung benefits for proceedings consistent with its opinion.

XIX. *E. ASSOCIATED COAL, LLP V. DIRECTOR, OWCP*, 2024 U.S. APP. LEXIS 15412 (6TH CIR. JUNE 25, 2024)

The Sixth Circuit awarded attorney's fees in the amount of $770 to counsel for respondent Jess H. King.

XX. *PEABODY COAL CO. V. QUISENBERRY EX REL. POWERS*, 2024 U.S. APP. LEXIS 15338 (6TH CIR. JUNE 24, 2024)

Peabody Coal petitioned for review of the Benefits Review Board's decision affirming the ALJ's award of benefits to the executor of claimant's estate on his BLBA claim. Petitioners moved to voluntarily dismiss the appeal and remand the petition, noting all parties agreed dismissal was appropriate following their settlement agreement resolving all issues on appeal. The Sixth Circuit granted the motion to voluntarily dismiss and remanded to the district director for initiation of payment under the settlement agreement.

THE LEGACY OF *WONDERFOIL, INC. V. RUSSELL*[1] AND *FARLEY V. P&P CONSTRUCTION, INC.*[2] – WIN, LOSE OR DRAW?

Lori V. Daniel

I. *WONDERFOIL, INC. V. RUSSELL*

The Plaintiff suffered a work injury on 11/10/14 (he was actually president and owned a 1 percent share of the company, although this fact did not come into play here). There was no first report of injury, and the carrier apparently wasn't made aware of the occurrence. No medical expenses were paid. Plaintiff filed a claim on 9/16/16. The Defendant contested the claim on the basis of causation, work-relatedness, injury as defined by the act and liability for contested or disputed medical expenses and potential medical dispute issues, but acknowledged the occurrence of an injury and that no medical bills had been paid.

It was stipulated at the BRC on 2/7/17 that the Plaintiff suffered a work-related injury, and that unpaid or contested medical expenses were in issue. In a status report on 3/23/18, the Plaintiff indicated he was attempting to gather all outstanding bills, and on 5/14/18, he submitted a Notice of Unpaid Medical Expenses with bills attached containing dates in 2014 and 2015.

The hearing was held on 3/27/18. Wonderfoil argued under KRS 342.020(4) that the Plaintiff's bills were to have been submitted within 45 days, and the filing was therefore untimely. The ALJ agreed, stating the Plaintiff (as a non-medical provider) would have had 60 days to submit expenses, and the filing was long after that.

The ALJ was overturned by the Board, which stated the 60-day rule applies only after an interlocutory decision or after a final award/settlement. The Court of Appeals deferred to the Board. The Supreme Court held on appeal that there was no obligation to submit medical bills until 45 days after the filing of the claim application, so the 60-day rule does not apply pre-litigation. Further, there are other provisions of the law (discussed below) that would obligate the Plaintiff to submit the bills during the pendency of the litigation. As such, the Court held that 803 KAR 25:096(11) logically applies to post-litigation cases.

To the employer or carrier: the deadline to timely pay medical bills doesn't start to run until the ALJ formally deems the claim compensable.

As part of the claim: if there is compliance under other regulations, the bills would already be before the ALJ, even if not submitted to the employer or carrier.

803 KAR 25:010(7)(2):

> (e) Within forty-five (45) days of the issuance of the Notice of Filing of Application, the parties shall file a notice of disclosure, which shall contain:

[1] 630 S.W.3d 706 (Ky. 2021).

[2] 677 S.W.3d 415 (Ky. 2023).

. . .

> 7. For plaintiff, all known unpaid bills to the parties, including travel for medical treatment, co-pays, or direct payments by plaintiff for medical expenses for which plaintiff seeks payment or reimbursement. Actual copies of the bills and requests for reimbursement shall not be filed but shall be served upon opposing parties if requested;

803 KAR 25:010(13)(9):

> (a) The plaintiff shall bring to the BRC copies of known unpaid medical bills not previously provided and documentation of out-of-pocket expenses including travel for medical treatments. Absent a showing of good cause, failure to do so may constitute a waiver to claim payment for those bills.

Wonderfoil suggests that requiring compliance with the regulations avoids unfair surprise to the employer or carrier that might otherwise be the result of the Plaintiff not being required to submit bills until the claim is deemed compensable. Filing of a claim application triggers the deadlines for presenting the bills and out of pocket expenses. The court in *Wonderfoil* points out that Plaintiff's failure to meet the statutory deadlines to submit the bills and expenses was not raised as an issue, noting that this could well have led to a different result.

803 KAR 25:096:

> Section 11. Request for Payment for Services Provided or Expenses Incurred to Secure Medical Treatment.
>
> (1) If an individual who is not a physician or medical provider provides compensable services for the cure or relief of a work injury or occupational disease, including home nursing services, the individual shall submit a fully completed Form 114 to the employer or medical payment obligor within sixty (60) days of the date the service is initiated and every sixty (60) days thereafter, if appropriate, for so long as the services are rendered.
>
> (2) Expenses incurred by an employee for access to compensable medical treatment for a work injury or occupational disease, including reasonable travel expenses, out-of-pocket payment for prescription medication, and similar items shall be submitted to the employer or its medical payment obligor within sixty (60) days of incurring of the expense. A request for payment shall be made on a Form 114.
>
> (3) Failure to timely submit the Form 114, without reasonable grounds, may result in a finding that the expenses are not compensable.

Takeaways: For the Plaintiff – always be ready to provide bills up front and at the BRC; perhaps set up a system for periodic checks with the Plaintiff about bills during the pendency of the claim.

For the Defendant: Always request copies of bills in discovery pursuant to regs as extra backup; be ready to challenge Plaintiff's failure to submit bills with Notice of Disclosure and prior to BRC rather than using the 60-day rule.

II. *FARLEY V. P&P CONSTRUCTION*

The *Farley* case involves the submission of medical bills by the provider under KRS 342.020(4), which requires providers to submit bills within 45 days of initiating treatment and every 45 days thereafter. The Court found that there was no wiggle room in this statutory provision, and no basis for interpreting the 45-day rule as inapplicable prior to a decision, whether pre-litigation or during the pendency of the claim. Even though the Court made it clear in *Wonderfoil* that the employer/carrier was not obligated to pay bills prior to a compensability ruling, the requirement for submission still applies.

Farley takes a tougher stance with providers. One possible reason is that providers aren't necessarily parties to the action, and don't have the same timeline as the Plaintiff and Defendant. Their involvement dates from initial treatment forward. Billing departments should be more familiar with the requirements than the average Plaintiff. These obligations also appear to be closely aligned with health insurance carriers' submission requirements.

KRS 342.020:

> 4) In the absence of designation of a managed health care system by the employer, the employee may select medical providers to treat his injury or occupational disease. Even if the employer has designated a managed health care system, the injured employee may elect to continue treating with a physician who provided emergency medical care or treatment to the employee. The employer, insurer, or payment obligor acting on behalf of the employer, shall make all payments for services rendered to an employee directly to the provider of the services within thirty (30) days of receipt of a statement for services. The commissioner shall promulgate administrative regulations establishing conditions under which the thirty (30) day period for payment may be tolled. The provider of medical services shall submit the statement for services within forty-five (45) days of the day treatment is initiated and every forty-five (45) days thereafter, if appropriate, as long as medical services are rendered. Except as provided in subsection (7) of this section, in no event shall a medical fee exceed the limitations of an adopted medical fee schedule or other limitations contained in KRS 342.035, whichever is lower. The commissioner may promulgate administrative regulations establishing the form and content of a statement for services and procedures by which disputes relative to the necessity, effectiveness, frequency, and cost of services may be resolved. [Emphasis added]

It is notable that the statute provides for the Commissioner to promulgate regulations to establish conditions under which the 30-day period for payment may be tolled. The same indication is not present regarding the 45-day rule – the only leeway there is in outlining the form and content of a statement for services.

803 KAR 25:096:

> Section 6. Tender of Statement for Services. If the medical services provider fails to submit a statement for services as required by KRS 342.020(4) without reasonable grounds, the medical bills shall not be compensable.
>
> . . .
>
> Section 10. Patient Billing.
>
> ***(1) A medical provider may tender a statement for services to a patient once it has received:***
>
> (a) A written denial from the medical payment obligor; or
>
> (b) An opinion by an administrative law judge finding that the services were unrelated to a work injury or occupational disease.
>
> (2) The medical provider shall not bill a patient for services which have been found to be unreasonable or unnecessary by an administrative law judge, if the medical provider has been joined as a party to a workers' compensation claim or to a medical fee dispute and has had an opportunity to present contrary evidence.
>
> (3) The medical provider shall not bill a patient for services which have been denied by the payment obligor for failure to submit bills following treatment within forty-five (45) days as required by KRS 342.020 and Section 6 of this administrative regulation. [Emphasis added]

A. What about Overlap? If the Plaintiff Submits the Bill rather than the Provider?

KRS 342.020(4) states in pertinent part that ***the provider of medical services shall submit the statement for services*** within forty-five (45) days of the day treatment is initiated and every forty-five (45) days thereafter, if appropriate, as long as medical services are rendered. [Emphasis added]

803 KAR 25:096(5)(a) defines a "statement for services" for a nonpharmaceutical bill as "a completed Form HCFA 1500, or for a hospital, a completed Form UB-92, with an attached copy of legible treatment notes, hospital admission and discharge summary, or other supporting documentation for the billed medical treatment, procedure or hospitalization."

The onus is placed squarely on the provider, not the Plaintiff. Second, the requirement is that the bill be submitted with the appropriate completed form and be accompanied by the required documentation. A provider simply sending the bill to a Plaintiff does not satisfy either of these requirements, and this would appear to be an impermissible attempt to shift the obligation for securing payment to the Plaintiff. Moreover, the statute does not allow the provider to bill the Plaintiff directly in the absence of a written denial from the payment obligor.

B. If the Provider Submits to a Health Insurance Carrier instead of the Workers' Comp Carrier?

The next question is what happens if the provider simply ignores the workers' comp carrier and bills the treatment through health insurance? Here again, the provider is responsible for billing the correct party. As the *Farley* case points out, there is no wiggle room on the 45-day rule. The statute is unambiguous that providers have 45 days from the date of service to submit a statement for services to the employer/carrier with the appropriate form to request payment.

From the Plaintiff's standpoint, making sure that the provider is aware that this is a work injury and providing as much information as possible would seemingly be the best strategy.

C. Win

1. Plaintiffs, who won't be penalized for not timely submitting bills pre-litigation and won't be held liable for bills that the providers don't submit in a timely fashion.

2. Defendants, who won't be held responsible for paying bills that are not timely submitted by the providers.

D. Lose

1. Medical providers, to the extent that they have been able to collect payment in the past without complying with workers' comp law.

2. A potential loss for Plaintiffs due to a potential reduction in the provider pool. There are already a number of doctors who refuse to treat workers' compensation Plaintiffs, and this could make the problem worse (according to a Plaintiffs' attorney friend).

E. Lose or Draw

1. Health insurance carriers, who won't be able to recover from the workers' comp carrier for bills that they wrongfully paid.

2. But – the health insurance carrier has potential recourse against the provider in the form of a claim for reimbursement of payments wrongfully made.

I. INTRODUCTION

Older generations have traditionally complained about their perception of a weaker work ethic by successive generations. This dichotomy continues to exist and is perpetuated by social media. On April 9, 2019, the *U.S. News & World Report* noted 90 percent of students rated themselves as having proficient "professionalism and work ethic," while less than half of employers agreed. There is an old song with the refrain "what she said, what I heard."

Never lose focus of what we do. **WORKERS' COMPENSATION IS A NO-FAULT SYSTEM WHOSE PURPOSE IS TO TIMELY DELIVER INCOME, MEDICAL, AND VOCATIONAL REHABILITATION SERVICES TO TRULY INJURED AND DESERVING INDIVIDUALS IN AN EXPEDITED FASHION.** This is true whether you are an attorney or a claims professional and no matter your level of experience.

II. GENERATIONS DEFINED

GENERATION	YEARS	AGE RANGE
Baby Boomers	1946-1964	60-78
Gen X	1965-1980	44-59
Millennials	1981-1996	28-43
Gen Z	1997-2012	12-27
Gen Alpha	Early 2010s-2025	0-11

Granted, many younger professionals are the product of helicopter parenting, or the "everybody's a winner" "participation trophy" generation. However, such entitlement does not reflect reality, nor does it provide the tools necessary for successfully navigating job requirements.

It is not easy to become a successful attorney or adjuster. It is imperative for young professionals to develop habits setting them apart from the crowd. A system for prioritizing daily tasks and critical times is essential. It is also necessary to set realistic deadlines and allocate time and workflow to meet professional obligations. Likewise, necessary skills include effectively communicating and continuing to develop communications skills; build, cultivate, and nurture relationships; and embrace evolving technology. It is also important for older professionals to realize younger professionals have different priorities and value systems.

A BBC report from 2022[1] noted younger cohorts are often stereotyped as being lazy, entitled, or self-obsessed. This is nothing new. Older generations have complained about "kids these days" for centuries. Most likely older Roman Centurions complained about the work ethic and ability of younger Legionnaires. Older generations perceive that younger generations lack positive qualities because they do not fit into preconceived norms

[1] Bishop, Katie, "Are younger generations truly weaker than older ones?", BBC, February 23, 2022 *available at* https://www.bbc.com/worklife/article/20220218-are-younger-generations-truly-weaker-than-older-ones.

established in the past that are no longer relevant or have diminished relevance. By doing this, older people unconsciously compare who they are today to today's young people, giving the impression that today's youth is somehow on the decline, no matter the decade we are living in. What was important to a previous generation may not have the same significance for priority for younger generations.

That said there are certain rules, constants, or guidelines requiring adherence. It is necessary for the previous generation to emphasize, train, and mentor the younger generation to comply with certain standards. In this context, that would be in practicing law or adjusting claims. By the same token, it is equally important for the younger generation to be receptive to the training provided by the older generation. Ask questions, do the work, follow the law, follow the procedures.

Interestingly, that report states:

> Older generations might still suspect they're hardier than today's youth – but can this even be measured?
>
> Some experts think so. One 2010 study examined millennials graduating university between 2004 and 2008 showed that they had more traits associated with low resilience than people who graduated before 1987. Other research has demonstrated that neurotocism and a need for recognition have increased in younger generations, while one 2012 study suggested that youth are more self-centered than they were in the past.
>
> . . .
>
> "Prior generations were taught to repress instead of express, but for newer generations it's the other way around," says Dr. Carl Nassar, a mental health professional at LifeStance Health, who regularly works with adolescents and families struggling with generational divides. "That's caused a perceptual rift, with older generations seeing this expression as a sign of weakness, because they were taught that vulnerability is a weakness and not strength."
>
> Nassar believes that the trope of younger generations being weaker is largely anecdotal, and is based on a mismatch between how different generations express their problems, which could skew data on how resilient they really are. This is an idea echoed by Jennifer Robison, a senior editor at U.S. analytics and polling company, Gallup.

Each generation has had to deal with varying complexities, perceptions, and technologies. The issue is dealing with the now, and the realities of existing, coping, and operating in the present environment, not adherence to some dated aspirational ideal.

III. WORK ETHIC

Work ethic is a set of values guiding professional behavior, encompassing integrity, responsibility, quality, discipline, and teamwork. Work ethic is crucial for success as it drives productivity, fosters employee satisfaction, and enhances the company's reputation, thereby contributing to individual and organization achievements.

A. 5 Pillars of Work Ethic

1. **Integrity** – Be honest, ethical, and reliable in all professional dealings. It is about doing the right thing, even when no one is watching.

2. **Responsibility** – Take ownership of actions and decisions and be accountable for outcomes.

3. **Quality** – Strive for excellence and take pride in the work.

4. **Discipline** – Show commitment, perseverance, and self-control in goal achievement.

5. **Teamwork** – Work effectively with others to achieve common goals.

B. Top Work Ethic Skills Include:

1. Reliability.

2. Dedication.

3. Initiative.

4. Professionalism.

5. Adaptability.

6. Accountability.

7. Management.

EMPLOYEE/NEWER PROFESSIONAL SUGGESTIONS	**EMPLOYERS/OLDER PROFESSIONAL SUGGESTIONS**
• Personal accountability • Show up on time for work/appointments/ meetings • Manage time effectively to meet guidelines and complete projects • Develop effective work habits • Maintain a professional work image • Dress appropriately for proceedings, meetings, hearings • Always act with integrity • Understand the responsibility to the larger community • Take personal accountability • Learn from your mistakes • Effectively communicate	• Mentor/teach • Provide guidance/insight • Establish reachable goals • Effectively communicate • Provide reasonable compensation/rewards • Encourage/support • Embrace technology/innovation • Build teamwork – host team building activities • Regularly provide feedback • Train • Ask for employee opinions/feedback • Stay abreast of trends

Smart and talented alone does not equal success. As Wilford Brimley said in *Absence of Malice*, Columbia Pictures (1981), “He’s a pretty smart feller. I’m a pretty smart feller too. We’re all pretty smart fellers.” It is how gifts and talents are applied that matter. No one starts at the top. Success is only achieved through study, hard work, and initiative.

IV. LANGHAM BLOG POSTS

In two blog posts, *Generational Woes*, October 1, 2024, and *Infantilised*, September 19, 2024, Judge David Langham, the Deputy Chief Judge of Workers’ Compensation Claims in Florida, discusses generational differences. In *Infantilised*, Judge Langham makes the following observation regarding individual “truths” or beliefs versus fact and reality:

> Like it or not, there are many perspectives. Unfortunately or not, there has been too much accommodation to individual “truth.” The world of law has many opportunities for perspective, argument, and debate; the world of science, perhaps not so much. Everyone knows those two worlds meet often in litigation, and our challenge of deriving the correct answers will be challenged by this “truth” divergence. It will also impact a great array of workplace questions and concerns.

In *Generational Woes*, Judge Langham notes the following:

> So, I have mentioned before, the world will come to run on the proclivities and rules of the predominant groups. Boomerism will fade, but Gen X will likewise, and then the Millennials, and in time the Gen Z folks will see their influence sunset. It is nothing new, and it will persist.
>
> But, for now, it is important to fit the mold that is cast. And, unfortunately, Gen Z is not doing so well with the world they are entering. These folks began entering the workplace in earnest in 2015, but those who wanted college (2019) and professional school (2021-2022) a bit later. Many a law firm manager has lamented to me the challenges with Gen Z lawyers. I had one tell me "never again" in describing a bad Gen Z experience (she is close enough to retirement that she may be able to live by that promise).
>
> *Fortune* recently reported bosses are firing Gen Z grads. Some of these new employees only last for months. There is an appearance of diminishing employer patience and acceptance. There is some consensus that this "next generation" is simply not ready for the workforce. That reminded me of the old line introducing *Saturday Night Live* in the 1970s, when the cast was called the "Not Ready for Prime Time Players." It may be a fair comparison. Maybe Gen Z is just not yet ready? Many of those original SNL folks went on to do amazing and pervasive work.
>
> *Fortune* says that "bosses are no longer all talk." Terminations are happening at about 60% of employers. This impacts "some of the Gen Z workers they hired fresh out of college earlier this year." The "class of 2024" is becoming known for shortcomings. Are they new, or is the labor market just reaching a Great Panic recovery point where employers can afford to be more selective?

In that vein, one might reflect on the growing lack of sympathy for the telecommuting model and remote work. That will be in a future post.

Why are managers terminating Gen Zs? There is some generalization that they are "unprepared for the world of work" and "can't handle the workload." Managers cite challenges like being late to work and meetings often, not wearing office-appropriate clothing, (not) using language appropriate for the workspace. Educational institutions are reportedly seeking to engage in better preparation. But, while that may benefit coming graduates, it does not help those already in the workforce (or striving to be). For those, unfortunately, there will be hard economic lessons. There is nothing quite as sobering as being fired. Try it sometime if you doubt me.

The solution is complex. There will be those who learn from the present and evolve. Others will continue to struggle. This is multifaceted. Employers will have to up their game on mentoring, coaching, and training. They alone can fill the voids they perceive in the workers already hired. They alone can develop, convey, and enforce workplace culture. If they fail, they will face the ongoing expense of a cycle of hire, train, fail, fire, repeat.

V. ADDITIONAL TIPS

Below is a list of suggested tips. This list is not exhaustive, and not all will apply to every individual or situation and are listed in no particular order. Remember we deal with real clients with real issues. As Ben Franklin observed, "it takes many good deeds to build a positive reputation, and only one bad to lose it."

- Be organized, consistent, and focused
- Get work done timely (avoid requests for extensions if at all possible)
- Seek guidance
- Develop priorities
- Research
- Understand the issues
- Learn the medicals
- Thoroughly investigate
- Communicate
- Ask for clarification
- Develop a network
- Reach out to peers
- Keep up with case law
  - Supreme Court decisions
  - Court of Appeals decision
  - Workers' Compensation Board Opinions
- Read and understand KRS Chapter 342
- Read, understand, and follow the regulations
- Keep up with statutory and regulatory changes
- Study
- Set realistic goals
- Develop a plan at the outset of the claim, and adapt as necessary
- Do the work

- Be conscientious
- Get involved with legal, civic, and other organizations
- Listen to client needs and concerns
- Communicate with the client
- Show up regularly and be on time for work
- Do not abuse flexible schedules
- Listen and follow instructions and feedback
- Be willing to learn
- Be kind
- Be dignified
- Do not take yourself too seriously
- Do not be lazy
- Concentrate and provide quality work
- Display a positive, can do attitude
- Complete work timely
- Stay on task without supervision
- Put forth consistently good effort without excessive breaks
- Work hard even when tired or unsupervised
- Complete assigned tasks and be available for additional work
- Hone your skills
- Use grammar properly
- Proofread and edit your work
- It's not personal
- Be professional and don't take the bait
- Be prepared at mediations, and have authority for settlement
- Seek interaction
- Seek training opportunities
- Look at and meet requirements
- Manage, evaluate, and practice cases
- Maintain situational awareness
- Beware of social media
- Be aware of nonverbal communication
- Do not act rashly
- Never forget the business of law is people

REMEMBER, IT AIN'T ABOUT YOU.

LAWYER WELL-BEING: ENHANCING RESILIENCE WHILE MAINTAINING AN ETHICAL PRACTICE

Yvette Hourigan, J.D., CEAP, Director, Kentucky Lawyer Assistance Program

I. INTRODUCTION

As lawyers, you have survived an unprecedented time for our modern practice of law. Sheltering at home; closed schools; courthouses shut down; Zoom-everything. It was like nothing this generation had ever faced. As we move past this pandemic, new stressors confront us. The legal profession has some of the highest rates of mental health disorders of any profession. We self-report higher rates of depression, anxiety, and substance use disorder than almost any other profession. How do we manage these new stressors in what was already a profoundly stressful profession? What must we consider and what must we change in order to stay mentally well and improve our resilience?

II. BACKGROUND

Over the past few years, significant media attention has been given to the high levels of distress and increasing rates of mental health concerns occurring within the legal profession. Stories of lawyer addiction and suicide have been addressed on CNN's *Legal View with Ashleigh Banfield*,[1] written about in *USA Today*,[2] in *The Huffington Post*,[3] and published in ABA publications.[4]

The most recent data was collected from a ground-breaking statistical survey of attorneys circulated nationally by the American Bar Association Commission on Lawyer Assistance Programs (COLAP) in conjunction with the Hazelden Betty Ford Foundation. The results, published in the *Journal of Addiction Medicine* in January/February 2016,[5] shocked our entire profession. For years it had been reported that lawyers had higher rates of depression and addiction than the general population. That supposition was based primarily on data from 1992 (in a survey of 1,200 Washington state lawyers – not exactly a cross-section), and a 1990 John Hopkins study on the mental health of professionals.[6] Some of the data previously relied on was even older than that. The Hazelden Betty Ford study provided accurate and current statistical data on rates of addiction and impairment extracted from the responses of 13,000 lawyers from across the country.

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[1] https://www.cnn.com/2014/01/19/us/lawyer-suicides/index.html, accessed April 12, 2018.

[2] https://www.usatoday.com/story/news/nation/2013/06/03/lawyer-suicides-concern-colleagues/2383627/.

[3] https://www.huffingtonpost.com/don-mcnay/the-hall-of-fame-and-dead_b_5560781.html, https://www.huffingtonpost.com/don-mcnay/dead-lawyers-and-dying-yo_b_3598528.html, accessed April 12, 2018.

[4] https://www.americanbar.org/groups/lawyer_assistance/task_force_report.html, https://www.forbes.com/sites/pauladavislaack/2017/08/15/lawyer-well-being-creating-a-movement-to-improve-the-legal-profession/#1fbdaf034d1e.

[5] https://journals.lww.com/journaladdictionmedicine/Fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental.8.aspx.

[6] "Occupations and the Prevalence of Major Depressive Disorder," 32 *Journal of Occupational Medicine* 1079 (1990).

In a nutshell, the results of the study provided the following statistics:

- Lawyer rates of addiction are between three (3) to five (5) times higher than the general population;

- Lawyer rates of depression are over four (4) times higher than the general population.

III. THE COVID-19 PANDEMIC AND LAWYER IMPAIRMENT

The COVID-19 pandemic negatively impacted mental health worldwide in the general population. Elevated levels of adverse mental health conditions, substance use, and suicidal ideation were reported by U.S. adults throughout the pandemic. From March 2020 through June 2020, the prevalence of symptoms of anxiety disorder was three times higher than those reported in 2019 (25.5 percent versus 8.1 percent), and prevalence of depressive disorder was four times higher than reported a year previously (24.3 percent versus 6.5 percent). Between August 19, 2020, and February 1, 2021, the percentage of adults with symptoms of an anxiety or depressive disorder increased significantly from 36.4 percent to 41.5 percent (so pre-pandemic the general population went from 6.5 percent to 41.5 percent in March 2021). In about the same time frame, significant increases were observed in the percentages of adults who reported experiencing symptoms of anxiety disorder (from 31.4 percent to 36.9 percent) which means since before the pandemic, the anxiety rates rose from 8.1 percent to 36.9 percent in the general population.

A majority of adults (61 percent) reported experiencing undesired weight changes since the start of the pandemic with more than 42 percent reporting gaining more weight than they intended. The average weight gain was 29 pounds. Two in three (67 percent) of Americans are sleeping more or less than they wanted.

Lawyers – who already have anxiety and depression levels three to four times greater than the general population and consistently have “short sleep” – suffered extraordinarily with this added stress and anxiety.

IV. THE STRESS OF PRACTICING LAW

First of all, what is this thing “stress”? *Stress* may be defined as anything in our environment that knocks our bodies out of their homeostatic balance. The stress response is the physiological adaptations that ultimately reestablish balance. It’s a bigger deal than we thought. Recently, scientists have been focusing on the connection between stress and anxiety and the role they play in producing and maintaining depression. For a high-stress profession like practicing law, this link is alarming and should cause great concern.

What’s the long-term effect? “If stress is chronic, repeated challenges may demand repeated bursts of vigilance. At some point the vigilance becomes overgeneralized leading us to conclude that we must always be on guard – even in the absence of stress. And thus the realm of anxiety is entered.” Dr. Robert Sapolsky, *Lawyers with Depression, The Stress Depression Connection*, May 11, 2008, www.lawyerswithdepression.com.

> Stress went on too long in my own life as a litigator. I had, indeed, entered the realm of anxiety. For me, this anxiety felt like I had a coffee pot brewing

> twenty-four/seven in my stomach. I became hypervigilant, each of the files on my desk felt like ticking time-bombs about to go off. Over time, the litigation mountain became harder to climb as the anxiety persisted over a period of years.
>
> Dan Lukasik, *Lawyers with Depression*

Unfortunately, if the chronic stress begins to seem insurmountable, it gives rise to helplessness. This helplessness may be so generalized that the person is unable to accomplish tasks they could actually master. Tasks such as preparing a simple motion, returning phone calls, and moving their cases forward can begin to feel like they require a monumental amount of effort. Moreover, helplessness is a pillar of depressive disorder. It becomes a major issue for lawyers because we ARE the helpers; it's quite foreign and unnatural for us to experience periods of helplessness. In fact, it's frightening, and we are resistant to ask for help.

Studies are showing that the presence of co-morbid anxiety disorders and major depression is very common and according to some studies, as high as 60 percent. This may shed light on why the depression rates for lawyers are so much higher than everyone else's. We work in a chronically anxious and stressful state. *Lawyers with Depression, The Stress Depression Connection*, May 11, 2008, www.lawyerswithdepression.com.

Over time, this type of chronic anxiety causes the release of too much of the fight-or-flight hormones, cortisol and adrenaline. Research shows clearly that prolonged release of cortisol damages areas of the brain that have been implicated in depression, the hippocampus (involved in learning and memory), and the amygdala (involved in how we perceive fear). *Id.*

Scientists believe that depression may originate in the hippocampus and the amygdala. As such, the chronic stress and strain on the hippocampus and the amygdala caused by the over-saturation of cortisol and adrenaline during periods of prolonged stress may be what causes the development of depression in an otherwise healthy brain.

Depressive disorders are among the most common mental health disorders in the United States. They are characterized by a sad, hopeless, empty, or irritable mood, and somatic and cognitive changes that significantly interfere with daily life. Major depressive disorder (MDD) is defined as having a depressed mood for most of the day and a marked loss of interest or pleasure, among other symptoms present nearly every day for at least a two-week period.[7] Just like with substance use disorders, the rates of mental health disorders (including but not limited to depression, chronic stress and anxiety) are much higher within the legal profession, than the general population.

According to SAMHSA, 6.6 percent of adult Americans experienced a major depressive episode (MDE).[8] Lawyers' higher stress levels (which scientists are now identifying as one of the roots of higher rates of depression and substance abuse) may have their genesis in the adversarial nature of the practice of law. There are very few professions whose core of work is completely adversarial.

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[7] *See* http://www.samhsa.gov/disorders/mental.

[8] *See* http://www.samhsa.gov/disorders/mental.

The 2015 Hazelden study reveals that the percentages of lawyers with mental health concerns are even higher than previously thought. The statistical information previously relied upon was a 1990 Johns Hopkins University study which identified lawyers as having depression at a rate 3.6 times higher than non-lawyers, who shared the same socio-demographic traits.[9] The Hazelden study quantifies lawyers as actually suffering from depression at a rate of 28 percent, or almost 4.5 times that of the general population.[10] Approximately 61 percent of the study acknowledged concerns with high levels of anxiety during the course of their career, and 46 percent – *almost half* – reported having experienced depression during the course of their career.[11] Finally, and perhaps most chilling is the fact that almost 12 percent admitted having suicidal thoughts at some point over the course of their career.[12]

One still-reliable finding of the 1990 Johns Hopkins study is that in all graduate-school programs in all professional fields, the optimists outperformed the pessimists – except in one profession. The *only* exception was among law students, where pessimists outperformed optimists.[13] This is logical when you consider that pessimism is an asset for attorneys. Pessimism creates skepticism about what our clients, our witnesses, opposing counsel, and judges tell us, as well as assisting us in effectively questioning interpretations of the law. Pessimism inspires lawyers to anticipate the worst, and thus prepare for it. Benjamin Disraeli, former Prime Minister of the United Kingdom said that "I am prepared for the worst, but hope for the best." He probably learned this while training as a solicitor (he ultimately abandoned the law). But pessimism is bad for your health: it leads to stress and disillusionment, which makes us vulnerable to depression.[14]

In addition to the character traits and other stressors which may decrease the good mental health of lawyers (perfectionism, pessimism, financial insecurity, etc. . . .), Britain's Medical Research Council established a clear link between longer work hours and depression.[15] In the study, the white collar workers who put in 11 hour workdays had a 2.5 times higher likelihood of developing a major depressive episode (MDE) than the employees who

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[9] Benjamin, GA, Darling E, Sales B. "The prevalence of depression, alcohol abuse, and cocaine abuse among United States lawyers." *International Journal of Law and Psychiatry*, 1990;13:233-246. ISSN 0160-2527.

[10] *Id*.

[11] Forward, Joe, "Landmark Study: U.S. Lawyers Face Higher Rates of Problem Drinking and Mental Health Issues", *State Bar of Wisconsin Journal*, Live 2, https://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=89&Issue=2&ArticleID=24589.

[12] Krill, PR, *et al, supra,* 50.

[13] Benjamin, GA, *et al*, *supra*.

[14] Toshihiko, Maruta, *et al.,* "Optimists vs Pessimists: Survival Rate among Medical Patients over a 30-Year Period," *Mayo Clinic Proceedings*, Volume 75, Issue 2, 140-143.

[15] Virtanen M., Stansfeld S.A., Fuhrer R., Ferrie J.E., Kivimäki M. (2012), "Overtime Work as a Predictor of Major Depressive Episode: A 5-Year Follow-Up of the Whitehall II Study." *PLoS ONE* 7(1): e30719.doi:10.1371/journal.pone.0030719.

worked only seven to eight hour days.[16] There was a link between long work days even after the researchers took things into account such as level of support in the workplace, job strain, alcohol use, smoking, and chronic physical disease.[17] The study indicated that the overworked junior and mid-level employees appear to be more prone to depression than the people at higher levels, which finding supports the Hazelden study's results that junior associates and entry-level attorneys have the highest rates of depression (employees under 30 showed depression rates of 32 percent).[18] The takeaway is that regardless of age, and ignoring every other contributing factor (*i.e.,* increased rates of addiction, poor health habits, and increased rates of depression), many lawyers are *still* 2.5 times more likely to develop depression than those who work less than 11 hours a day as a result of the long hours. And lawyers work longer hours than most any other profession.

V. IS THERE A SOLUTION?

The best news for lawyers (the new ones and those who have been practicing for years) is that there are some fairly simple changes we can make in our lifestyles at any age, which can be transformative for us, and can result in tremendous improvements in our mental, physical, and brain health. They'll also help improve our resilience. This is the opportunity to take steps to do something different. We don't have to accept the status quo that generations of lawyers before us have accepted. We have been given a do-over as we begin again. This isn't just for younger lawyers. Middle-aged lawyers, those "baby boomers" who are quickly aging into the "silver tsunami" are following suit – not just to improve physical health, but to maintain mental acuity – and the conversation of how to improve our lives as lawyers and return to the space of actually enjoying the practice of law is growing.

This new normal will be significantly improved for us if we make the decision to change our course, and not only demand a better quality of life, but actually take action to make it happen. Improving our lifestyle habits and incorporating healthy practices as we return to work have everything to do with the quality of service we perform for our clients. All of the research and scientific studies indicate that we will perform better when we incorporate the 3M's into our lifestyle: Movement, Mindfulness, and Meditation.

A. Movement

Exercise makes you smarter. The Harvard Health Blog reports that regular exercise changes the brain to improve memory and thinking skills. In a study done at the University of British Columbia, researchers found that regular aerobic exercise, the kind that gets your heart and sweat glands pumping, appears to boost the size of the hippocampus, the brain area involved in verbal memory and learning. Remember that the hippocampus and the amygdala are the areas of the brain damaged by chronic stress. It's been proven that exercise helps reverse that

[16] *Id.*

[17] *Id.*

[18] Krill, P.R., *et al, supra,* Table 3, 49.

damage and helps maintain better brain health. Exercise lowers stress, decreases anxiety and depression, reduces negative mood, enhances positive mood, and decreases the likelihood of developing depression and diabetes. It can decrease high blood pressure and even helps people quit smoking.

Physical exercise, in and of itself, is stress relief. Exercise increases the brain's concentrations of norepinephrine, a chemical that can moderate the brain's response to stress. Biologically, exercise seems to give the body a chance to practice dealing with stress. It forces the body's physiological systems – all of which are involved in the stress response – to communicate much more closely than usual. The cardiovascular system communicates with the renal system, which communicates with the muscular system. And all of these are controlled by the central and sympathetic nervous systems, which also must communicate with each other. This workout of the body's communication system may be the true value of exercise; the more sedentary we get, the less efficient our bodies in responding to stress.

It's not true that the only way to benefit from exercise is to perform at 90 percent of our heart rate. As perfectionists, we think that we start everything somewhere near everyone else's finish line. In truth, any movement at all can help save your life. Just stick with it, no matter how slow the start. The key is to start. Now is the time. Scottsdale real estate and tax attorney Stanley Bronstein, who described himself as "a heart attack waiting to happen," has written about his own journey of life-threatening habits while practicing law which resulted in his weighing 367 pounds. At age 50, Bronstein decided to reinvent himself. It all started by taking a walk. Now, six years later and at half of his original weight, Bronstein promotes walking, (not running) for lawyers. Slow walking. Bronstein says, "I'm as steady as a snail." The movement itself is the key, says Bronstein.

In addition, exercise also results in a mentally stronger state now and it may also stave off diseases like Alzheimer's and dementia. In 2014, Finnish scientists published their data showing that being physically active during middle-age can prevent the onset of dementia later. The scientists involved in this study suggest that leisure-time physical activity (LTPA) performed at least twice a week yielded maximum neuroprotective effects for people across ages, sex, and varying degrees of genetic susceptibility. It is interesting to note that the cognitive benefits of LTPA in mid-life subjects have lower risk of developing dementia and Alzheimer's disease in their old age than those who do not exercise. Oddly, the cognitive benefits of LTPA in mid-life were most prominent in overweight and obese persons. It can be assumed that most of these individuals led sedentary lives up until then.

Excellent books outlining how exercise makes us smarter, staves off degenerative brain disorders, and causes us to live longer, are *Younger Next Year*, and *Younger Next Year for Women*, both written by a New York City trial lawyer in his 70s and his cardiologist. They will inspire you to look at your body, your longevity, and your quality of life in a whole different way and will make you want to move.

B. Mindfulness

There has never been a better time to begin the practice of mindfulness. Nowadays, mindfulness and meditation are often used to mean the same thing, which can be confusing, but not everyone is clear about what "mindfulness meditation" is and how it differs from either of the above. Both are pathways to well-being and peace of mind. What is the difference between mindfulness and meditation?

Mindfulness is being aware. It's noticing and paying attention to thoughts, feelings, behavior, and everything else. Mindfulness can be practiced at any time, wherever we are, whoever we are with, and whatever we are doing, by showing up and being fully engaged in the here and now. That means being free of both the past and future – the what ifs and maybes – and free of judgment of right or wrong – the I'm-the-best or I'm-no-good scenarios – so that we can be totally present without distraction. Mindful meditation means "paying attention in a particular way: on purpose, in the present moment, and non-judgmentally." It was first introduced into the legal profession in 1989 when Jon Kabat-Zinn, Ph.D., Director of the Center for Mindfulness in Medicine, Health Care and Society in Boston conducted a program for judges. Since judges must pay attention to everything going on in the courtroom, they wanted to learn meditation to reduce stress and have a "systematic way of handling one's own intrusive thoughts and feelings."

Mindfulness is the awareness that arises when we non-judgmentally pay attention in the present moment. It cultivates access to core aspects of our own minds and bodies that our very sanity depends on, says Jon Kabat-Zinn, from *The Unexpected Power of Mindfulness Meditation*. Mindfulness, which includes tenderness and kindness toward ourselves, restores dimensions of our being. These have never actually been missing, [it's] just that we have been missing them, we have been absorbed elsewhere. When your mind clarifies and opens, your heart also clarifies and opens.

According to Dr. Kabat-Zinn, who has studied mindfulness for more than 35 years, practicing mindfulness is actually a form of meditation. The "non-judgmental" part of mindfulness allows us to simply be a part of. One of this author's favorite quotes is that "things are neither good nor bad, they simply are." William Shakespeare wrote it in *Hamlet*, Act II, Scene 2, as "for there is nothing either good or bad, but thinking makes it so." Flash forward a few hundred years, and in the TV show *Mad Men*, Don Draper reminded a client that "change is neither good nor bad, it simply is."

When we allow ourselves to look at our lives, our circumstances, our clients, our families, and the effects of COVID-19 NOT in the realm of judgment, but just as they are, we eliminate the noise our head makes trying to classify, affirm negative thinking, and pigeon-hole the information into categories and nice, neat boxes. In truth, things simply are. Our perspective defines the circumstance, and we get to choose what that is . . . good or bad, or nothing at all.

You've heard about the "glass half full" versus the "glass half empty" personalities. That's the difference between an optimist (half full) and a pessimist (half empty). Since lawyers are trained to think pessimistically, and indeed we excel as lawyers

using pessimistic thinking, we are typically “glass half empty” folks. But what if you looked at the glass and it just was? It was neither good (half full) nor bad (half empty); it was simply a glass with liquid in it. That doesn’t change one single thing about the glass or what’s in it or how much. What it does do is free your mind to simply accept that there’s a glass with some liquid in it and you don’t have to judge whether that’s good or bad. Period. It completely removes the business of evaluating, labeling and then trying to extrapolate what’s next or what the labels (“good” and “bad”) mean in the situation.

This mode of non-judgmental thinking provides tremendous freedom for your busy lawyer brain and allows you to simply observe and accept. This is vastly different from the critical thinking we learned in law school, and that we carry into every moment of our daily law practice and even after we end our workday. It allows our brain a “breather,” if you will, from all of the critical thinking and judgment we necessarily exhaust our brains with on a daily basis. It is a peaceful moment for our mind.

Mindfulness is simply awareness, something you don't have to practice for 20 minutes at a time. You can be mindful anywhere, anytime and with anyone you like. "You and I sitting here having a conversation, you know, the thought might cross one of our minds, 'Well, when are we going to get down to meditating?'" Jon says. "The fact is, we are." The other gift mindfulness brings to all those who practice it, but which seems an especially important gift for lawyers, is that by its very nature it takes us out of our tomorrows and our yesterdays and demands that we focus on the only thing we truly have, the now. As lawyers, we live by calendars. We ruminate on past losses (more so than past wins). Our past and our future are so jumbled together that the “now” becomes lost.

Eckhart Tolle’s words, in his number one best seller *The Power of Now: A Guide to Spiritual Enlightenment*, almost seem as if they were written for lawyers:

> All negativity is caused by an accumulation of psychological time and denial of the present. Unease, anxiety, tension, stress, worry – all forms of fear – are caused by too much future, and not enough presence. Guilt, regret, resentment, grievances, sadness, bitterness, and all forms of nonforgiveness are caused by too much past, and not enough presence.

Judge Jeremy Fogel, Director of the Federal Judicial Center, has written about the important role of mindfulness in assisting judges in “slowing down one’s mental processes enough to allow one to notice as much as possible about a given moment or situation, and then to act thoughtfully based on what one has noticed.” In the 1990s, the Ninth Circuit U.S. Court of Appeals mediators attended training on mindfulness. In the time since its inception in the late 1980s and now, many law firms and law schools have started providing mindfulness training for law students and lawyers.

C. Meditation

Mindfulness folds into meditation, which folds back onto mindfulness. Mindfulness and meditation are mirror-like reflections of each other: mindfulness supports and

enriches meditation, while meditation nurtures and expands mindfulness. Where mindfulness can be applied to any situation throughout the day, meditation is usually practiced for a specific amount of time. But what is meditation? *Merriam-Webster* defines meditation as follows:

> *Intransitive verb*
>
> 1: to engage in contemplation or reflection.
>
> 2: to engage in mental exercise (such as concentration on one's breathing or repetition of a mantra) for the purpose of reaching a heightened level of spiritual awareness.
>
> *Transitive verb*
>
> 1: to focus one's thoughts on: reflect on or ponder over.
>
> 2: to plan or project in the mind: intend, purpose.

At its very essence, meditation is the process of quieting the mind in order to spend time in thought for relaxation or religious/spiritual purposes. The goal is to attain an inner state of awareness and intensify personal and spiritual growth. In practice, meditation involves concentrated focus on something such as a sound, image, or feeling. Meditation is also referred to as dhyana in Sanskrit.

As lawyers, we think, think, and think. We contemplate, we ruminate, and we "focus on." We are trained problem-solvers. What we don't seem to know how to do, and what may not come naturally to us, is the process of contemplating and focusing our thoughts not on problem-solving, but on the present thing, and only one thing (for example our breath), with an actual goal of calming our mind, and making it be still and quiet. Sounds difficult, doesn't it? It is, at first. But meditation is a practice. Just like the practice of law. In law we're always learning and building upon that knowledge. Meditation is the same way. *International Shoe v. Washington*, 326 U.S. 310 (1945) made absolutely no sense to us on the first day of law school. But after completing law school, you can dissect most facts presented to you and apply the law to them in a fairly well-reasoned and knowledgeable fashion, and *International Shoe* makes perfect sense. The same is true for the practice of meditation.

The first stage of meditation is to find a focal point or method of focusing in order to free oneself from distractions. Some methods of focusing include:

Sound: Repeating a mantra, phrase or other sound.

Visualizing: Picturing an object with eyes closed, such as a lotus flower or the energy points in the body (chakras).

Gazing: Looking at an actual object with eyes open. Candles, flowers or pictures are common objects used in gazing.

Breathing: Observing the breath and what it feels like – the sensations – as it travels in and out of the body.

The primary methods of meditation are Focused Attention (FA) meditation and Open Monitoring (OM) meditation. Focused Attention is focusing on a chosen object in a sustained fashion. Open Monitoring meditation involves non-reactively monitoring the content of experience from moment-to-moment, primarily as a means to recognize the nature of emotional and cognitive patterns. The two types of meditation are often combined either in a single session or over the course of the practitioner's training.

There is unequivocal evidence, through objective testing tools like MRIs and other brain scan tools, that there are structural differences and higher gray matter density in the lower brainstem of patients engaged in the long-term practice of meditation. This evidence has been published in multiple medical and scientific journals and can be found on credible medical websites (*e.g.,* the Mayo Clinic), that mindfulness and meditation can literally change your brain. "Recent research provides strong evidence that practicing non-judgmental, present-moment awareness (a.k.a. mindfulness) changes the brain." Meditators demonstrate superior performance on tests of self-regulation, resisting distractions and making correct answers more often than non-meditators. They also show more activity in the anterior cingulate cortex (ACC), which is a structure located inside the forehead, behind the frontal lobe.

Extensive practice involving sustained attention can lead to changes in brain structure. Through studying the brains of Tibetan monks (a study that the Dalai Lama himself encouraged and then recruited the monks for), scientists found that over many hours of meditation (*i.e.,* a sustained practice), the long-term practitioners had altered the structure and function of their brains.

A great starting-point for a lawyer who wants to learn the practices of mindfulness and meditation can be found in lawyer/meditator Jeena Cho's book, *The Anxious Lawyer: An 8-Week Guide to a Joyful and Satisfying Law Practice through Mindfulness and Meditation* (American Bar Association, 2016). It's a step-by-step process of introducing mindfulness and meditation into your daily regimen. There's also a website (listed in the resources section of this article) which allows you to participate in the practices of mindfulness and meditation over the course of eight weeks.

Mindfulness meditation helps us make better complex decisions, which is what we, as lawyers, are paid to do. We extricate our clients from complex problems. Any modality that improves our ability to do so should be immediately incorporated into our daily practice. "Einstein said that we can't solve our problems from the level of thinking that we were at when we created them," says Marianne Williamson. "A different level of thinking doesn't mean just a different emphasis in our thinking, or a more loving kind of thinking. It means what he said, a different level of thinking, and, to me, that is what meditation is. Meditation changes us, as it returns us to our right mind."

Right here, right now, as we navigate these troubled waters, our "right mind" is exactly where we need to be. Returning to a "new normal" may be anything but

normal, but with a few changes, we can rise to the occasion and improve our mental and physical health going forward.

VI. THE ETHICAL ASPECT OF IMPAIRMENT ISSUES

There have been a number of studies which link impairment to breaches of ethical duties, and the resultant disciplinary actions. “It has been estimated that between forty (40%) and seventy-five per cent (75%) of the disciplinary actions taken against lawyers involve practitioners who are chemically dependent or mentally ill.” But can chronic anxiety and stress cause you to be “impaired” or “mentally ill”? The answer is “yes,” they can.

Besides leading to hopelessness and depression, which chronic stress and anxiety absolutely do, profound mental stress, chronic anxiety, and repeatedly long workdays can cause our thinking and our responses to become less sharp and even muddled at times. These stressors will actually diminish our ability to make good complex decisions which, of course, is at the very heart of what we do all day, every day.

Studies prepared in Oregon and in Louisiana found that 80 percent of their states' client security fund (escrow) cases involved chemical dependency, gambling, or mental health issues. In 2005, the Illinois Attorney Registration and Disciplinary Commission reported that (all) impairments accounted for a disproportionate share of program awards. And finally, in Illinois, between 1998 and 2005, 28 percent of all attorneys disciplined were found to be impaired, and 37 percent of claims against the Illinois Security Fund stemmed from attorneys with impairment. At least anecdotally, I have observed much higher levels of impairment where unethical conduct is involved. Lawyers are not slackers or thieves by nature.

So how can we recognize where we might be treading into the dangerous waters of impairment and/or unethical behaviors? The rules are pretty clear about what our duties are as lawyers in the realm of decision-making and the practice in general. The areas in which Kentucky and other bar associations see the highest level of complaints are not coincidentally the three areas in which the impaired attorney will have the greatest struggle. Specifically: communication, competence, and diligence.

Pursuant to Supreme Court Rule 3.130(1.4) **Communication**:

> (a) A lawyer shall:
>
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Pursuant to Supreme Court Rule 3.130(1.1) **Competence**:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comments: Thoroughness and Preparation

(5) Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. *See* Rule 1.2(c).

Maintaining Competence

(6) To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

And, pursuant to Supreme Court Rule 3.130(1.3) **Diligence**: “A lawyer shall act with reasonable diligence and promptness in representing a client.”

The top three client complaints, across all states, are communication (lack thereof); competence (being unprepared); and diligence (not moving the case). All three of these are impacted by an overly stressed or depressed brain. It can feel impossible to pick up the phone to call a client when you’re in the middle of a major depressive episode. The same is true about being prepared, when all you really want to do is to escape the chaos of your practice. And finally, it’s all but impossible to remain diligent when you can’t even decide how to solve the problems of the case, don’t have your trial strategy, or just can’t concentrate long enough to figure out how to move forward. All of these issues arise as a result of an overly anxious and stressed brain, and it can be all but impossible to recognize it in yourself.

Supreme Court Rule 3.130(8.3) relates to “Maintaining the Integrity of the Profession.” Rule 8.3 is entitled: **Reporting Professional Misconduct**.

> (a) A lawyer who **knows** that another lawyer **has committed a violation** of the Rules of Professional Conduct **that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness** as a lawyer in other respects, shall inform the Association's Bar Counsel. [Emphasis added]
>
> (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall report such violation to the Judicial Conduct Commission.
>
> (c) A lawyer is not required to report information that is protected by Rule 1.6 or by other law. Further, a lawyer or a judge does not have a duty to report or disclose information that is received in the course of participating in the Kentucky Lawyer Assistance Program or Ethics Hotline.
>
> (d) A lawyer acting in good faith in the discharge of the lawyer's professional responsibilities required by paragraphs (a) and (b) or when making a voluntary report of other misconduct shall be immune from any action, civil or criminal, and any disciplinary proceeding before the Bar as a result of said report, except for conduct prohibited by Rule 3.4(f).
>
> (e) As provided in SCR 3.435, a lawyer who is disciplined as a result of a lawyer disciplinary action brought before any authority other than the Association shall report that fact to Bar Counsel.
>
> (f) A lawyer prosecuting any member of the Association who has been arrested for or who has been charged by way of indictment, information, or complaint with a felony or Class A misdemeanor shall immediately notify Bar Counsel of such event.
>
> (g) As provided in SCR 3.166(2), a lawyer prosecuting a case against any member of the Association to a plea of guilty, conviction by judge or jury or entry of judgment, shall immediately notify Bar Counsel of such event.

The duty to report unethical behavior, as set forth in Supreme Court Rule 8.3, frequently called the “snitch rule,” requires a lawyer to inform the office of disciplinary counsel when they know of ethical violations. The same rule requires attorneys to report judges to the Judicial Conduct Commission for misconduct.

The rule is very specific about what is required to trigger the reporting requirement. First, the lawyer must **know** that unethical conduct has been committed. It doesn’t say that you think, you heard, or you guess unethical conduct was committed. You must **know**. Second, not only must you know that unethical conduct was committed, but it must be unethical conduct **that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness**. If you leap these two hurdles, then the reporting requirement is triggered.

If you are uncertain as to whether your information triggers the reporting requirement, before you report an attorney for unethical conduct, it is prudent for you to first call the Ethics Hotline, and run the scenario, in hypothetical format, through the Ethics Hotline. The information discussed with the Ethics Hotline is not subject to disclosure nor does it fall under the reporting requirement. Further, under (c) there is no requirement for a KYLAP volunteer or employee (in Kentucky it is prohibited from being reported) to report unethical conduct learned through the course of assisting a lawyer or judge while participating in an approved lawyer assistance program.

Remember that if you have knowledge that requires reporting the matter to disciplinary counsel due to an attorney's impairment, that is not the same thing as calling KYLAP and reporting the information. The two entities (Office of Bar Counsel and the Kentucky Lawyer Assistance Program) are two wholly separate entities that do **not** share information. If you call KYLAP about a colleague who has committed unethical conduct because of an impairment, you have done a wonderful thing for that attorney. But you have not satisfied the reporting requirement (to your disciplinary committee) of Rule 8.3. KYLAP is prohibited from reporting the misconduct to discipline. What you can do by notifying KYLAP, however, may save your friend's life and/or career. That's the greatest gift you can give to your colleague.

VII. CONCLUSION

It's true that the way we look at our lives and our practices will never be the same after a global pandemic. But we can begin practices that will help us adapt to the changes that we all inevitably face each day for the rest of our lives. Create resilience. Physical exercise and mindfulness meditation improve your physical and mental health and improve resilience. Both help to decrease the impact of stress on your body, allow you to manage anxiety better, lower blood pressure, and improve a number of other stress-related psychosomatic symptoms. We need that now more than ever.

Eckhart Tolle said, "It is not uncommon for people to spend their whole life waiting to start living." Don't let that be you! After the pandemic, all of our lives, everything around us was either halted, modified, or otherwise changed. Yes, you're going to be working hard, but you can also work hard at being well. Don't wait to take care of physical and mental health "when things lighten up" or when "it gets easier." It has been proven to us time and again that it doesn't get easier. But it certainly gets different. Many of your work stressors moving forward will be familiar to you, but there will absolutely be new challenges, too. We've already experienced many of them. We must begin living in the now and take better care of these amazing vessels (our bodies and brains) that have served us so well thus far. In doing so, we will be better lawyers, better family members, and better community members. If we take better care of ourselves, both physically and mentally, we will feel better, we will practice better, and we will BE better. Every day we have a new opportunity to choose to improve ourselves and our lives. We don't have to go back to exactly how things used to be. We need not accept the status quo of the way things were. We can reduce or even eliminate the high rates of alcoholism, depression, suicide, and overall discontent with our law practices and our lives.

The new normal is yours to create. By exercising, eating better, moderating alcohol intake, practicing mindfulness, meditating, staying in the now, and exploring our spirituality, we increase our resilience and can write a new narrative for our lives as lawyers. We can experience joy, peace, and happiness in our practice. We don't often hear lawyers

describing those experiences in their practices. Maybe we have never experienced them. But things can change. In the oft-quoted words of Mahatma Gandhi, “be the change you wish to see in the world.”

VIII. OTHER RESOURCES (ARTICLES)

https://www.americanbar.org/groups/lawyer_assistance/well-being-in-the-legal-profession

https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/lawyer_well_being_report_final.pdf

https://www.abajournal.com/news/article/law-firms-came-dangerously-close-to-losing-a-quarter-of-their-associates-in-2021

https://www.abajournal.com/voice/article/how-i-learned-to-find-work-life-balance-during-the-pandemic

https://www.abajournal.com/news/article/30-of-these-lawyers-would-like-to-work-fewer-hours-those-most-dissatisfied-are-younger-and-female

https://www.abajournal.com/news/article/20-of-surveyed-corporate-lawyers-were-highly-exhausted-and-68-of-that-group-wanted-to-switch-jobs

https://www.abajournal.com/magazine/article/how-to-integrate-well-being-throughout-your-organization

https://www.abajournal.com/news/article/what-does-it-take-to-retain-female-lawyers-in-criminal-justice-aba-task-force-identifies-solutions

https://www.abajournal.com/news/article/survey-finds-decline-in-lawyer-well-being-particularly-for-early-career-respondents

Definition of "injury" at KRS 342.0011, as amended in 1996 with the last sentence intended to prevent "mental/mental" claims:

> "Injury" means any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings... "Injury"... shall not include a psychological, psychiatric, or stress-related change in the human organism unless it is a direct result of a physical injury.

I. PHYSICAL INJURY

Lexington-Fayette Urban County Government v. West, 52 S.W.3d 564 (Ky. 2001)

A suspect assaulted West, a police officer, with a knife. West continued working, and he became increasingly symptomatic with PTSD following additional work-related incidents. The Court said his condition was the result of a series of traumatic incidents that began with the assault. It held that a "physical injury" is an event that involves physical trauma, without regard to the type of harmful change that results. The employer had attempted to minimize West's encounter with the suspect, saying the officer only had scratches and abrasions. But the Court said, "We view an incident... in which a police officer and suspect are scuffling and rolling on the ground as an event that involves physical trauma, in other words, a physically traumatic event." It went on to say that only the first in a series of traumatic events must have physical rather than mental trauma.

II. PROXIMATE CAUSE DIRECT RESULT

A. *Coleman v. Emily Enterprises, Inc.*, 58 S.W.3d 459 (Ky. 2001)

The question was whether there is a distinction in the definition of injury between these highlighted portions: "... any work-related traumatic event or series of traumatic events which is the **proximate cause** producing a harmful change in the human organism ... "Injury"... shall not include a psychological, psychiatric, or stress-related change... unless it is a **direct result** of a physical injury." Coleman's psychological injury allegedly stemmed from his employer's failure to pay for medical care. In a 5-2 decision, the Court said Coleman had proven his anxiety and depression directly resulted from the physically traumatic back injury. The dissent said: "While Coleman's work-related injury may have been the proximate cause of his neurosis..., it is uncontested that the direct cause of his neurosis was not the injury but the insurance company's refusal to pay..."

B. *Kubajak v. Lexington-Fayette Urban County Government*, 180 S.W.3d 454 (Ky. 2005)

A police officer developed PTSD from a series of exposures to gruesome crime scenes. The work relatedness of the condition was not disputed. In another 4-3 decision, the Court said Kubajak had not shown the requisite "physical injury" – a

"physically traumatic event" – to be entitled to compensation. The dissent would read "physical injury" to include physical trauma to another, which Kubajak had witnessed.

C. *Ryan's Family Steakhouse v. Thomasson*, 82 S.W.3d 889 (Ky. 2002)

There is no psychological claim in this case, but, as in *White* below, it can be cited in the context of these cases for the proposition that a physical trauma need not involve an impact from an outside force; it may involve physical exertion. Thomasson's injury resulted from working in an awkward position. Ryan's unsuccessfully argued that the 1996 amendment to the definition of injury, with the requirement of a "traumatic event," required a physical force to be compensable.

III. CONTACT REQUIREMENT

A. *Richard E. Jacobs Group, Inc. v. White*, 202 S.W.3d 24 (Ky. 2006)

An off-duty police officer working as a security guard had an encounter with a suicidal suspect. He was forced to shoot the man, and afterwards his skin came in contact with the man's blood and body fluids while trying to save his life. He was not permitted to clean himself for a period of time and feared contracting a communicable disease. He developed PTSD. He did not suffer any scratches or abrasions like the officer in *West*. In another 4-3 decision, the Court said the incident was a physically traumatic event and compensable. "There is no requirement that a physically traumatic event must cause physical harm as well as the mental harm for which compensation is sought." Citing *Thomasson*, the Court said "Performing CPR and first aid on an individual with multiple gunshot wounds clearly requires physical exertion. Therefore, it constitutes a physically traumatic event for the purpose of KRS 342.0011(1), and any mental harm that directly results is compensable." The dissent focused on the admitted lack of any physical injury, and the fact White had argued that his "physical injury" was his contact with bodily fluids, not the physical exertion the majority cited to find a physical injury.

B. *Kentucky State Police v. McCray*, 415 S.W.3d 103 (Ky. App. 2013)

This is the last reported case citing *West*, and the only Court of Appeals decision in this section. A police officer shot a man who had threatened him with a gun; he developed PTSD. The ALJ dismissed on grounds that the officer suffered no physical injury. The Board vacated on grounds that an injury does not require physical contact, and that the officer had suffered a "work-related traumatic event." The Court reversed, saying *Kubajak* was on point and required dismissal. A concurrence said, "it is high time for Workers' Compensation to... similarly abandon the physical impact rule. It is a patent disgrace to have to deny recovery to McCray."

IV. CAUSATION

Kenton County Sheriff's Department v. Rodriguez, 2020 WL 7395176 (Ky. Dec. 17, 2020)

This case is included here as the most recent reported case to cite *West*; it is unpublished. A police officer fell on ice getting out of his cruiser and suffered various injuries. His claim

additionally alleged PTSD, the symptoms of which began years prior from various shootings, altercations, exposures, etc. The ALJ agreed Rodriguez had PTSD, but said it was unrelated to the fall that was the subject of the claim. In a 2-1 decision, the Board remanded, finding that the ALJ erred by assuming the PTSD had to be the result of the fall to be compensable. The Court of Appeals affirmed, and the Supreme Court agreed: "The ALJ failed to fully address whether prior physically traumatic events may have caused Rodriguez's PTSD." Even though the Form 101 was specific to the slip-and-fall, the Court found the allegation that "'plaintiff also claims PTSD recently diagnosed with prior physical injury precursors' ... was sufficient to put KCSD on notice that Rodriguez was alleging multiple physically traumatic events as possible causes of his psychological injury," which predated the slip and fall.

V. OBJECTIVE EVIDENCE

A. *Gibbs v. Premiere Scale Company/Indiana Scale Co.*, 50 S.W.3d 754 (Ky. 2001)

An "injury" must be supported by "objective medical findings," defined at KRS 342.0011(33) as "information gained through direct observation and testing applying objective or standardized methods." The Court here said documentation by means of diagnostic tools such as a CT scan, EEG, or MRI is not necessary. Instead, "a wide array of standardized laboratory tests and standardized tests of physical and *mental function* is available to the medical practitioner ... We know of no reason why the existence of a harmful change could not be established, indirectly, though information gained by direct observation..." (at p. 762, emphasis added.) As an example, the Court cited "[i]nformation gained through standardized psychological testing, which is commonly introduced in workers' compensation claims to demonstrate both the existence and the severity of a wide variety of psychological symptoms and mental deficits."

B. *Staples, Inc., v. Konvelski*, 56 S.W.3d 412 (Ky. 2001)

A falling box struck Konvelski. She was subsequently treated for thoracic outlet compression, plus depression and PTSD. A psychiatrist diagnosed the mental conditions under the DMS III. The psychiatrist testified he had not performed MMPI or other such standardized testing because those were typically necessary only when a case is "absolutely bewildering." The psychiatrist said Konvelski's condition was caused by the work-related injury and its financial consequences. The Court upheld the finding that the condition was a direct result of the physical injury. It held that while there must be objective medical findings in order for a harmful change to be compensable, causation does not have to be proven by objective medical findings. The Court noted the medical evidence reflected Konvelski's complaints of psychological symptoms, the doctors' direct observations of those symptoms, and the results of their testing, all of which supported the conclusion that there was a psychological component to the injury.

VI. NATURE OF INJURY

Kentucky Employers Safety Ass'n v. Lexington Diagnostic Center, 291 S.W.3d 683 (Ky. 2009)

Health care worker had blood splattered in her eye. Carrier balked at additional testing, arguing that an exposure has the potential to harm but does not constitute an injury until objective medical findings show a harmful change. The Court said: "Being splattered in the face and eye with foreign blood or other potentially infectious material is a traumatic event for the purposes of KRS 342.0011(1). The presence of blood in the eye constitutes an exposure as defined in 29 C.F.R. §1910.1030(b), which shows a harmful change in the human organism..."

VII. TESTIMONY UPON WHICH AN ALJ MAY RELY

Time Warner Cable, Inc. v. Smith, 635 S.W.3d 82 (Ky. 2001)

If a psychological condition is alleged, an additional medical report establishing the presence of a mental impairment or disorder is required. 803 KAR 25:010 §7(d)3.

In litigation, medical evidence can be introduced by report from a physician. KRS 342.033. "Physician" includes a psychologist. KRS 342.0011(32).

AMA Guides incorporate Social Security factors such as:

- ability to perform activities of daily living;
- social functioning;
- concentration, persistence and pace;
- deterioration in work or work-like settings.

VIII. JOINDER IS MANDATORY

A claimant "shall join all causes of action against the named employer which have accrued and which are known, or should reasonably be known to him or her. Failure to join all accrued causes of action will result in such claims being barred under this chapter as waived by the employee." KRS 342.270(1).

Slone v. Jason Coal Co., 902 S.W.2d 820 (Ky. 1995):

The Court ruled that Slone could not raise a psychiatric condition on a motion to reopen because he failed to present it during the original claim. The condition was not newly discovered evidence because he knew of the condition prior to resolution of the original litigation. The Court noted that the mental condition became manifest before or during the initial award and was not new or a change, which was different from *Fischer Packing Co. v. Lanham*, 804 S.W.2d 4 (Ky. 1991), where Lanham's psychological diagnosis was made after the original claim concluded and thus supported a reopening. The Court there cited *Larson's Workmen's Compensation Law*, §81.33(b): "... if the first award was based solely on physical symptoms, and if a neurotic condition superimposes itself later, this is obviously a change enough itself."

The mere presence of psychological symptoms prior to settlement is insufficient to reject a claim for a specific psychological diagnosis on reopening if the claimant had not been told by a medical expert that the condition was work related. Claimant is not required to self-diagnose. *Brunswick Bowling League v. Sims*, 2009 WL 3526494 (Ky. Oct. 29, 2009); *Pepsi Cola v. Butler*, 2008 WL 1850581 (Ky. Apr. 24, 2008); *Ford v. Keener*, 2004 WL 1176259 (Ky. App. May 28, 2004).

IX. MEDICAL BENEFITS MAY STILL BE OWED IF PSYCH CLAIM NOT PLED

A. *Coleman v. Emily Enterprises, supra*

An ALJ made an award for permanent impairment for a physical injury. Coleman had not made a claim for psychological impairment but did convince the ALJ he suffered from work-related anxiety and depression as a result of his physical injury and was thus awarded medical benefits. The Court upheld the award of medical benefits in the form of medications to treat the work-related depression. *Coleman v. Emily Enterprises, Inc.*, 58 S.W.3d 459 (Ky. 2001).

B. *General Electric Co. v. Turpen*, 245 S.W.3d 781 (Ky. App. 2006)

Turpen's psychological claim did not manifest until three years after the settlement of her claim. GE argued that the motion to reopen for a psychological condition should have been barred for lack of notice – Turpen's knowledge of the work relatedness of her diagnosis occurred 16 months before she filed the motion to reopen. The Court held hers was not a new injury but an alleged change of disability under KRS 342.125. The notice requirements for an original action under KRS 342.185 do not apply to reopenings.

X. FILE CLAIMS AS SOON AS VIABLE – *SLONE V. JASON COAL CO.*, 902 S.W.2D 820 (KY. 1995)

A. Example:

Plaintiff at the end of his deposition says, "Oh by the way..."

Plaintiff has a list of medications that includes Zanax, Zoloft, Celexa.

Note the dissent in *Jones v. Owensboro Mercy Health Systems,* 2005 WL 635046 (Ky. Mar. 17, 2005), which stated it is not reasonable to expect a lay person to arrive at a clinical diagnosis of depression to trigger a claim when the medical professionals have not offered an opinion regarding a diagnosis or causation.

B. *Transportation Cabinet v. Poe*, 69 S.W.3d 60 (Ky. 2001)

An ALJ awarded total disability benefits to Poe, finding the work-related disability equally resulted from physical and psychological conditions. The ALJ did not adopt a psychological impairment rating because there was none in the record – the Fourth Edition of the *AMA Guides* does not specify numerical ratings. The Cabinet thus argued that because Poe could not establish a "permanent disability rating" under KRS 342.0011(36), the award could not include the psychological injury. The Court said that argument was "unreasonable" and contrary to KRS

342.0011(1), which recognized a psychological injury. It said that if a psycho-logical condition produces medical restrictions, is work-related, and is a direct result of the same traumatic event for which an impairment rating has been assigned, an ALJ has the discretion to deem the condition compensable when making a finding of total disability; no specific impairment rating was required.

C. *Knott County Nursing Home v. Wallen*, 74 S.W.3d 706 (Ky. 2002)

The Court extended *Poe* to cases of permanent partial disability. An ALJ awarded PPD benefits based on physical and psychiatric impairment. As in *Poe*, the employer argued that the claimant could not prove his case because he could not prove the requisite impairment rating because there was no provision for numerical ratings in the Fourth Edition of the *AMA Guides*. However, the Court said that although the *Guides* have not used percentage impairment since 1988, it is apparent from KRS 342.0011(1) that the legislature intended for psycho-logical or psychiatric harmful changes to be considered an injury if sufficiently proven. Thus, "... we conclude that when a mental injury is at issue, an Administrative Law Judge is authorized to translate a Class 1-5 AMA impairment into a percentage impairment for the purposes of determining the worker's disability rating and calculating income benefits." (Although not stated in either *Poe* or *Wallen*, the "translation" into a specific impairment comes from reference to the last edition to assign numbers – the Second Edition.)

Cumulative Trauma Claims: General Overview

Cumulative trauma injuries are generally the result of long periods of time with excessive physical labor or repetitive actions that are often associated with excessive and repetitive vibration, constant and repeated line activity or poor workplace ergonomics. This can also include "occupational injuries" such as hearing loss.

Definition by Statute:

KRS 342.0011(1) – (1) "Injury means any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings"

Employer responsibility for injuries occurring "over time"

The last employer at the time of the "last injurious exposure" is usually liable for the entire injury/impairment/disability.

- This is true even if the last employment lasted just days or months.
- This is not true in federal black lung claims but varies by standing case law per Court.

If the last employer can show that a portion of the injury/impairment was actively disabling prior to the claimant's date of hire, can employer prove a carve-out if there is evidence of a prior injury and permanent impairment rating? (*Hale v. CDR Operations, Inc.*, 474 S.W.3d 129 (Ky. 2015)

The Special Fund's liability has shifted back to the employer since the 1996 amendments. Disability that results from arousal of a prior dormant condition by a work-related injury remains compensable under 1996 amendments. (*McNutt Construction/First General Services v. Scott,* 40 S.W.3d 854 (Ky. 2001); prior apportionment *Southern Kentucky Concrete Contractors, Inc. v. Campbell*, 662 S.W.2d 221 (Ky. App. 1983).

Notice of Cumulative Trauma Definition

KRS 342.185(3)

The right to compensation under this chapter resulting from work-related exposure to cumulative trauma shall be barred unless notice of the cumulative trauma injury is given within (2) years from the date the employee is told by a physician that the cumulative trauma injury is work-related. An application for adjustment of claim for compensation with respect to the injury shall have been made with the department within two (2) years after the employee is told by a physician that the cumulative trauma is work-related. However, the right to compensation for any cumulative trauma injury shall be forever barred, unless an application for adjustment of claim is filed with the commissioner within five (5) years after the last injurious exposure to the cumulative trauma.

Notice of Cumulative Trauma vs. Acute injury - Differing Perspectives

A claimant has two years from the date he is told by a physician that he has an injury that was caused by cumulative trauma at work to both notify his employer and file his claim.

- Acute injuries require notice: "as soon as practicable after the happening thereof."
- Cumulative Trauma requires notice 2 years after the claimant has formal notice as advised by a physician without having to notify the employer.
- Views from both sides:
- Plaintiff - How is the cumulative trauma notice requirement reconcilable?
- Plaintiff - What is statutory requirement for notice if Plaintiff continues to work?
- Defendant - Is bringing a cumulative trauma claim a "second bite at the apple" when the Plaintiff has a weak acute injury claim or to circumvent notice issues?
- How does it posture the claim when the first "notice" by a physician is when the Plaintiff is sent to an IME by his counsel?
- What are the advantages/disadvantages to each side when there is no prior "notice" to Employer before the ARIC is filed?

Cumulative Trauma - Statute of Repose

The right to compensation for any cumulative trauma injury shall be forever barred unless an application for adjustment of claim is filed with the commissioner within five (5) years after the last injurious exposure to the cumulative trauma.

- Plaintiff v. Defendant perspective - Does this give an unfair advantage of years of unknown treatment, other possible non-work related exposure and natural aging process issues and the fact that the Plaintiff is no longer performing the prior job for years before filing a claim?
- How does this impact the theory that if you take away the precipitating factors (i.e., work activity) the condition should resolve vs. the damage already being done?

Current Trends with Cumulative Trauma Issues

Cases in the 2020s -

- Nearly all of these cases do not end in a favorable decision for the employer.
- Is it permissible for the ALJ to rely on a note from a non-physician "provider" like a nurse or therapist?
- (*Ford Motor Co. v. Duckworth*, 615 S.W.3d 26 (Ky. 2021))
- Is the fact that the Plaintiff "may" have been advised by a physician or provider enough to trigger the statute of limitations time?
- Who has the burden of proof of notice - Does the Defendant have to prove that the Plaintiff had notice vs. acute injuries where the Defendant has to prove the Plaintiff did not give notice?

Current Trends with Cumulative Trauma Issues

Claimant claims severe osteoarthritis, underwent bilateral total knee arthroplasties. Found compensable. LFUCG challenged arguing that the definition of injury in KRS 342.0011(1) required work-related trauma that is the proximate cause of a harmful change… argued that claimant had nothing more than age-related changes. Supreme Court disagreed, reaffirming *Haycraft v. Corhart Refractories Co.*, 544 S.W.2d 222 (Ky. 1976).

(LFUCG v. Gosper, 671 S.W.3d 184 (Ky. 2023))

Current Trends with Cumulative Trauma Issues - You be the ALJ

Scenario 1:

Claimant alleged injuries to have been caused by cumulative trauma to his cervical spine, left elbow, right knee, and left knee. He was a laborer for the city and on the injury date, he was carrying tree limbs when he slipped and fell going down an embankment.

What is work-related?

City of Hazard v. Lawson, Board Opinion (April 5, 2024)

Current Trends with Cumulative Trauma Issues - You be the ALJ

Scenario 2:

Claimant worked in EKY coal mines and alleged acute injury to her back as a result of a fall at work. She also alleged cumulative trauma to back from the 1980s until manifestation date in 2014.

What is work-related?

Smith v. Bledsoe Coal Co., 2019 Ky. App. Unpub. LEXIS, 2019 WL 1977221 (Ky. App. May 3, 2019)

Current Trends with Cumulative Trauma Issues - You be the ALJ

Scenario 3:

Claimant worked as garbage man who alleged injury after a slip and fall, claiming injury to his lumbar spine and left knee.

What is work-related?

Apple Valley Sanitation, Inc. v. Stambaugh, 2021 Ky. App. Unpub. LEXIS, 2021 WL 2021819 (Ky. App. May 21, 2021)

Current Trends with Cumulative Trauma Issues - You be the ALJ

Claimant worked manual labor in an underground coal mine for nearly a decade. He allegedly sustained acute injury to right shoulder after lifting a battery and alleged cumulative trauma to neck, shoulders, right knee, and left knee.

What is work-related?

Energy v. Renfrow, 2023 Ky. App. Unpub. LEXIS, 2023 WL 2335287 (Ky. App. March 3, 2023)

KRS 342.197 provides that no employee should be harassed, coerced, discharged, or discriminated against in any manner whatsoever for filing or pursuing a lawful claim under this chapter.

KRS 342.197 goes on to define certain unlawful practices.

KRS 342.197(3) has remedies which include injunctive relief in circuit court, actual damages, costs, and a reasonable attorney fee for the attorney of record.

Legislative Intent: The purpose of enacting this statute was to protect injured workers who are entitled to benefits. There is no requirement that a worker actually file a claim, only that one takes steps in support of a workers' compensation claim. *See Overnight Transportation Company v. Gaddis*, 793 S.W.2d 129 (Ky. App. 1990).

To establish a cause of action for a retaliatory discharge, the employee must show that they were engaged in a protected activity and that they were discharged. *See Willoughby v. GenCorp., Inc.*, 809 S.W.2d 858 (Ky. App. 1990).

Pursuant to KRS 342.197, the injured worker must demonstrate that the pursuit of a workers' compensation claim was a substantial and motivating factor but for which the worker would not have been discharged. *See First Property Management Corporation v. Zarebidaki*, 867 S.W.2d 185 (Ky. 1993).

The law provides strong protection for injured workers as outlined in *Overnight Transportation Company v. Gaddis*, 793 S.W.2d 129 (Ky. App. 1990).

Once the plaintiff establishes a *prima facie* showing, the burden shifts to the defendant employer to demonstrate a legitimate business reason for the termination similar to other discrimination claims as outlined in *McDonald Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The question as to whether the plaintiff was physically able to return to work at some point in time in the future goes to the question of damages and not liability. *See Dollar General Partners v. Upchurch*, 214 S.W.3d 910 (Ky. App. 2006) and *Colorama, Inc. v. Johnson*, 295 S.W.3d 148 (Ky. App. 2009).

Based on *Bishop v. Manpower, Inc. of Central Kentucky*, 211 S.W.3d 71 (Ky. App. 2006), hostility toward the plaintiff after requesting information as to how to file a workers' compensation claim is a strong indication that her pursuit of a workers' compensation claim was a substantial and motivating factor involving her termination.

Based on *Dollar General Partners v. Upchurch*, 214 S.W.3d 910 (Ky. App. 2006), the close temporal relationship between the injury and the termination can establish causation.

In Kentucky, the sooner an adverse action is taken to the protected activity, the pursuit of a workers' compensation claim, the stronger the implication that the protected activity caused the adverse action. *See Kentucky Department of Corrections v. McCullough*, 123 S.W.3d 130 (Ky. App. 2003) and *Dollar General Partners v. Upchurch*, 214 S.W.3d 910 (Ky. App. 2006).

See Overnight Transportation Company v. Gaddis, 793 S.W.2d 129 (Ky. App. 1990), where the employer terminated the injured worker before the injured worker was able to file a workers' compensation claim. The Court of Appeals held that injured workers who are pursuing a workers' compensation claim are engaged in a protected activity.

It is a jury question as to whether the pursuit of a workers' compensation claim was a substantial and motivating factor but for which the employee would likely not have been terminated. *See First Property Management Corp. v. Zarebidaki*, 867 S.W.2d 185 (Ky. App. 1993).

Stay away from federal court – be careful including other claims such as FMLA when filing wrongful discharge claims pursuant to KRS 342.197. *See Hackworth v. Guvan Heavy Equipment, Inc.*, 613 F. Supp.2d 908 (E.D. Ky. 2009).

342.197 Discrimination against employees who have filed claims or who have a diagnosis of coal-related pneumoconiosis – Civil remedies.

(1) No employee shall be harassed, coerced, discharged, or discriminated against in any manner whatsoever for filing and pursuing a lawful claim under this chapter.

(2) It is unlawful practice for an employer:

(a) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because such individual has been diagnosed as having category 1/0, 1/1, or 1/2 occupational pneumoconiosis with no respiratory impairment resulting from exposure to coal dust; or

(b) To limit, segregate, or classify his employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect his status as an employee, because such individual has been diagnosed as having category 1/0, 1/1, or 1/2 occupational pneumoconiosis with no respiratory impairment resulting from exposure to coal dust.

(3) Any individual injured by any act in violation of the provisions of subsection (1) or (2) of this section shall have a civil cause of action in Circuit Court to enjoin further violations, and to recover the actual damages sustained by him, together with the costs of the law suit, including a reasonable fee for his attorney of record.

Effective: October 26, 1987.
History: Amended 1987 (1st Extra. Sess.) Ky. Acts ch. 1, sec. 21, effective October 26, 1987. – Created 1984 Ky. Acts ch. 96, sec. 1, effective July 13, 1984.

EMAILS FROM THE EDGE:
THE PITFALLS AND ETHICAL CONCERNS OF ELECTRONIC COMMUNICATION
Wayne Daub and Bonnie Hoskins

I. INTRODUCTION

A. The same ethical standards should be applied to electronic communications as an attorney would apply to an in-person contact, specifically honesty, accuracy, respect for privacy, confidentiality, and appropriate professional conduct.

1. **Accuracy:** Confirm that information shared electronically is accurate, truthful, and not misleading.

2. **Confidentiality:** Protect sensitive information by not sharing confidential details without proper authorization.

3. **Professional tone:** Maintain a respectful and professional tone, avoiding offensive language, slang, or personal attacks.

4. **Transparency:** Clearly identify yourself and your affiliation when communicating electronically.

5. **Respect for boundaries:** Recognize and respect boundaries in electronic communication.

6. **Prompt response:** Respond to electronic communications in a timely manner.

B. Maintain a professional code of ethics in electronic communication:

1. **Review company policies:** Familiarize yourself with the receiving organization's guidelines regarding electronic communication.

2. **Think before you send:** Carefully review your message before sending it to ensure it is professional and appropriate.

3. **Be mindful of tone:** Consider the potential interpretation of your words and avoid using overly casual language.

4. **Protect sensitive information:** Use strong passwords, encryption, and appropriate security measures to safeguard confidential data.

C. Examples of ethical concerns in electronic communication:

1. Sharing confidential or sensitive information without permission.

2. Using electronic communication to harass or intimidate others.

3. Deliberately misleading others through inaccurate information in electronic communication.

II. GENERAL PROVISIONS

The Florida Bar Association provides this instruction:

> Email is a quick and convenient way to connect with clients, colleagues, the court system, and opposing counsel. It is not a good substitute for face-to-face contact and telephone calls for interpersonal communication. Email messages may become part of a court record and may be subject to disclosure to third parties. Compose email messages in the same manner and with the same good judgment that you would employ for any other communication. Don't use email for any topic that needs to be explained or negotiated or will generate questions or confusion. Also, email should not be used for last minute cancellations of meetings or interviews and never for devastating news. If you need to deliver bad news, a phone call or meeting is preferable.

III. BEST PRACTICES

A. Never Leave the Subject Line Blank

Use a descriptive subject line that pinpoints for the recipient exactly why you are emailing. A clear subject line also allows for easy searches later. Don't hit "Reply" to an old message and send an email that has nothing to do with the previous one. Change the subject line when the content of the email chain changes.

B. Use a Salutation

Make no assumptions about the receiving party's gender. Your email greeting and signoff should be consistent with the level of respect and formality of the person you're communicating with. Write for the person who will be reading it: if the recipient is very polite and formal, use formal language. Be less formal for a recipient who tends to be more casual and relaxed. If you are uncertain about whether the recipient remembers you or will recognize your name and email address, include a simple reminder of who you are. Example: "I am emailing about the Smith case that we discussed at the CLE event on xx/yy/zzzz in Tampa."

C. Be Courteous

As with any other form of business correspondence, email messages should be written with courtesy and respect – two hallmarks of professionalism. Do not employ rude or facetious remarks that could be perceived as unethical, unprofessional, defamatory, or prejudicial (*see* Rule 8.4(d)).

D. Don't Use ALL CAPS

It can be read as shouting and makes your email difficult to read. Exclamation points and other indications of excitement such as emojis, abbreviations such as LOL, and ALL CAPS do not translate well in business communications. Omit them unless you know the recipient well. Humor easily can get lost in translation without tone or facial expressions. In a professional exchange, it's better to leave humor out of emails unless you know the recipient well. Tone is also easy to misconstrue

without the context of vocal cues, facial expressions, and body language. Avoid negative words such as “failure,” “wrong,” or “neglected,” and use “please” and “thank you.” Miscommunication can easily occur because of cultural differences, so tailor your message to the receiver’s background and how well you know them.

E. Edit Your Email

Do not ignore the basics of writing, punctuation, and spelling. Watch your tone. Avoid slang, jargon, and abbreviations. Be succinct without seeming rude. Create your message as a concise, stand-alone note, even if it is in response to a chain of emails. It is frustrating for recipients to scroll back through multiple emails to understand the issues. Be clear. Make sure it’s not a burden to read. Consider using bullet points or numbering. State the purpose of your email within the first two sentences.

F. Sign Your Email

Include information such as your telephone number, position, location, and email address. Different signatures for different recipients may be appropriate. For example, shorter signatures may suffice for email to internal colleagues. This provides the recipient, particularly external recipients, with information about you. The recipient should with able to reach you through the contact information in your email alone.

G. Appropriately Use “CC”

A “cc” (carbon copy) suggests that the message is for information only; no action is necessary on the part of the “cc” recipients. Send carbon copies only to those who need a copy. Before you click “Reply All” or put names on the “cc” or “bcc” (blind carbon copy) lines, ask yourself if the recipients really need the information in your email; if they don’t, why send it? Take time to send your messages to the right people.

H. Appropriately Use “BCC”

If you’re sending a message to a group of people, and you need to protect the privacy of your list, use “bcc,” otherwise, use “bcc” with caution.

I. Use Attachments for Long Text or Reports or When Special Formatting is Necessary

To keep the file size small, avoid unnecessary graphics (pictures and logos) and/or embedded multimedia. Most email servers accept attachments up to 10 MB, the general standard. Your email system may let you attach a document as large 25 MB, but that doesn’t mean the recipient can or will receive it. Large attachments can clog the recipient’s inbox and cause other emails to be returned to the sender. There are other ways to reduce a document’s file size, such as compressing images or selecting “reduce file size” when saving PDFs. If the attachment is still larger than 20 MB, consider using a secure file-sharing service. Give the attached files logical names so the recipient knows at a glance the subject and the sender. Example: “Smith contract – GB version 8-22-19.”

J. Add the Email Address Last

This ensures that you don't accidentally send an email before you have finished writing and proofing. Doublecheck your recipient list. Pay careful attention when typing a name from your address book on the "To" line. It's easy to select the wrong name, which can be embarrassing to you and to the person who receives the email by mistake. Email can be unforgiving. It is almost impossible to "recall" an email and doing so only calls more attention to the original message, your mistake, and your attempts to undo it.

K. Email Should Not Be Used to Resolve Conflict or to Say Things that Would Not Be Said in Person

L. Evaluate the Importance of Your Email

If you overuse the "High Importance" feature, few people will take it seriously. Instead, use descriptive subject lines that explain exactly what a message is about.

M. Your Mistakes Won't Go Unnoticed by the Recipients

Don't rely solely on spellcheckers. Read and re-read your email a few times before sending it. Example: You intended to type, "Sorry for the inconvenience" but you accidentally typed, "Sorry for the incontinence." Spellchecker will not correct that.

N. Keep Your Fonts, Colors, and Sizes Classic

Your emails should be easy for recipients to read. It's best to use 12- or 14-point type and an easy-to-read font such as Arial, Calibri, or Times New Roman. As for font color, black is the safest choice.

O. Keep Private Material Confidential

Assume that others will see what you write, so don't write anything you wouldn't want everyone to see. Email is dangerously easy to forward; it's better to be safe than sorry.

P. When Corresponding with a Judge about a Pending Case, Copy the Opposing Counsel (or Opposing Party if *Pro Se*) to Avoid *Ex Parte* Communications

IV. REPLYING TO EMAIL

Colleagues expect prompt responses to email questions. It is best practice not to leave the sender hanging. Depending on the sender and the nature of the email, responding within 24 to 48 hours is generally acceptable. If you cannot send a full response in a reasonable time, it is best practice to send a quick reply stating that you have received the message and give an estimate of when you will provide a more detailed response. If possible, you should reply to an email accidentally sent to you and especially if the sender is expecting a reply. Example: "I don't think you meant to send this to me, and I thought you should know so you can send it to the correct person." However, refrain from sending one-liners. "Thanks" and "Oh, OK" do not advance the conversation in any way. Consider putting "No Reply Necessary" at the top of emails if you don't anticipate a response.

A. An automatic response that says “Thank you for your email I will respond to you as soon as I can” is not helpful. Using one when you are out of the office – that tells when you will return or be able to respond – is.

B. It is also best practice to use “Reply All” only when necessary. Be careful when replying to a message that was sent by a bulletin board or automatic remailer. Your reply may be sent to the entire audience subscribing to the bulletin board.

C. As a matter of both courtesy and efficiency, include the original email when replying. It avoids confusion and making the sender search for the original message. Where your reply is relevant to only a portion of the original message, consider excerpting and including in your reply only the relevant portions.

V. RULES FOR EMAIL DISCUSSION GROUPS

Group discussions on listservs are meant to stimulate conversation, not create contention. Here are best practices for navigating the realm of listservs:

A. Do not post anything in a message that you would not want the world to see or that you would not want anyone to know came from you.

B. Be aware that advertising rules apply to commercial messages or promotional information regarding yourself or your firm that is posted on the listserv.

C. Do not post messages to all members of the list disparaging the system of justice or any individual who is a part of the system of justice.

D. Do not use a listserv to vent about the particulars of a case.

E. Do not post any information or other material protected by copyright without the permission of the copyright owner.

F. Do not challenge or attack others. Let others have their say.

VI. RESPONDING TO AN ANGRY EMAIL

As email has made it easier for people to communicate very quickly, it also has made it easier for people to forget about civility. How do you react when you are the recipient of an angry email? How do you keep the situation from escalating?

It is best practice to:

A. Step away from the computer. An angry email will usually trigger your own anger. Never reply to the email right away; it will only escalate the issue. Never send an angry email or give a flip response. Give your message thoughtful consideration before sending it. If you feel angry, put your message in the “drafts” folder and review it again later.

B. Identify the facts in the email. Does the writer have a reason to be angry? Did you say or do something that legitimately offended the person? Be objective.

C. Evaluate what the writer got wrong. Did the writer misinterpret a letter or get the wrong information?

D. Put yourself in the writer's shoes. What kind of response would you expect?

E. Understanding the writer's perspective will aid in your response.

F. Verify all the facts and fix what you can before writing back. Being able to state in your reply that you have already taken action will go a long way toward resolving the issue.

G. Begin your reply with positives. Explain where the writer was right and that you understand why the writer is upset. Explain what has been done to fix the problem and apologize if necessary.

H. Once you provide the positives, ease into explaining where the writer was wrong. Do not get emotional or confrontational. Avoid name-calling, placing the blame, and sarcasm. State your side of the issue. If it was a misunderstanding, try to interject that you understand what caused it.

I. Do not be afraid to give consequences. If the business relationship cannot continue, say so. Be straightforward so it does not sound like a threat. Don't make ultimatums if you cannot or will not follow through. Do not threaten to file a bar complaint or seek criminal prosecution.

J. Be respectful and civil, even if the writer failed to show you the same respect.

K. Think about how permanent emails are. They can be forwarded, printed and shared. Make sure you are prepared to stand by your words; do not write anything you might regret later.

L. Save records of the correspondence. It is easier to defend yourself later if you have proof.

VII. TECHNOLOGY CONSIDERATIONS OF EMAIL

A. When sending attachments, be aware that they may contain metadata that could disclose unwanted information to the recipient.

B. Attachments may contain malicious software code. Use scanning software for both outbound and inbound emails.

C. If you use email as a form of confidential communication, you should know the risks and be familiar with the options of sending secure/encrypted messages.

D. There is always a chance that your email may be intercepted. Many of these risks are mitigated if not entirely eradicated when using an encrypted email service.

VIII. REAL WORLD EXAMPLES

-----Original Message-----
From: Megan Thacker <mthacker@hoskinslawoffices.com>
To: Guess Who?
Sent: Friday, October 18, 2024 9:12 AM
Subject: Proposed Settlement Agreement
Attachment: Proposed Form 110 with attached impairment rating

Good morning,

The carrier has offered a settlement based on the impairment rating, paid in a lump sum. Please review the attached proposed settlement that Ms. Hoskins has prepared and advise if this is agreeable.

Thank you,

Megan Thacker
Paralegal to Bonnie Hoskins

From: Guess Who?
Sent: Friday, October 18, 2024 5:36 PM
To: Bonnie Hoskins <bhoskins@hoskinslawoffices.com>
Cc: Megan Thacker <mthacker@hoskinslawoffices.com>
Subject: FW: Proposed Settlement Agreement

Bonnie,

I received an email with the attached proposed settlement agreement from your paralegal.

I don't work with paralegals. No offense being directed, Also, I require the proposed Form 110 to be in Word and without the attachments that were included by your paralegal.

As such, please proceed with the scheduling of his deposition Via Zoom etc.

THANKS---

The key provisions of SCR 3.700 apply: Direct supervision of a paralegal by a licensed lawyer is required. A lawyer must ensure that a paralegal does not engage in the unauthorized practice of law.

From: Guess Who
Sent: Friday, October 18, 2024 11:13 AM
To: Bonnie Hoskins <bhoskins@hoskinslawoffices.com>
Subject: Fw: - Letter of Rep. & Settlement Counter-Demand

Dear Bonnie,

I saw you just entered your appearance in this case. You are past the 45-day period to file a Form 111 and Disclosures. I have filed Motions to preclude defenses/exclude witnesses.

Below, please find the counter-demand I sent to your adjuster on 8/15/24.

I look forward to hearing from you with regard to this counter-demand.

Guess Who

On Oct 18, 2024, at 1:52 PM, Bonnie Hoskins <bhoskins@hoskinslawoffices.com> wrote:

Guess Who, This file came to me late because the Claims Examiner was out of the office for a period of time due to the death of her husband. It appears that you made a settlement counteroffer on 8/15/2024 but did not advise her that you had filed a Form 101. Also, she says that she told you I would be handling this claim and you did not provide me with a copy of the Form 101.

Nevertheless, this was an accepted claim. Plaintiff has returned to her regular job without restrictions at an increased rate of pay. My client offered you the impairment rating assessed by the treating surgeon following her surgery, paid in a lump sum. We stipulated to all allegations that you made in the Form 101. What allegation do you seek to deem admitted?

Thanks, Bonnie

From: Guess Who?
Sent: Friday, October 18, 2024 2:01 PM
To: Bonnie Hoskins <bhoskins@hoskinslawoffices.com>
Subject: Re: Letter of Rep. & Settlement Counter-Demand

It's just my standard filing when a Defendant misses the 45-day deadline. Please find attached my Motion to Exclude the report of Dr. Grossfeld.

SCR 3.130(4.3) Dealing with unrepresented person

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person. The lawyer may suggest that the unrepresented person secure counsel.

Comment

(1) An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, *see* Rule 1.13(f). Unlike Rule 4.3 of the ABA Model Rules of Professional Conduct (2003), this Rule provides that under no circumstances shall a lawyer give legal advice to an unrepresented person.

(2) The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the suggestion to obtain counsel. Whether the discussion of the client's position impermissibly assumes the character of rendering legal advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and Comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the client's position as to the meaning of the document or explain the lawyer's view of the underlying legal obligations.

SCR 3.130(4.3)

Dear Guess Who:

Please see the email below that I received from my client setting out what we need for the MSA. Please forward the documents to me at your convenience.

Bonnie

Hi Bonnie,

Please see below. I cannot proceed with MSA procurement due to missing records. Please request updated records from PA for the period of 8/10/23 to present. The most recent office visit note in EDM appears to be from 8/9/23 (this is outside the 6-month window required for current records).

If the injured worker is no longer treating with WC providers, we need to obtain the following to proceed with the MSA:

- **Pharmacy listing for past 2 years (current within last 6 months)**
- **PCP records from 8/9/23 to present (current within last 6 months)**
- **Letter from all authorized providers confirming their last date of treatment. This letter must be current, on provider letterhead, signed and dated.**

Sam

From: Guess Who
Sent: Monday, August 19, 2024 6:07 AM
To: Bonnie Hoskins <bhoskins@hoskinslawoffices.com>;
Subject: Re- Records Needed

Bonnie, I have never had to obtain a letter from providers confirming a client's last date of treatment and I believe that obtaining such a letter is going to be a colossal pain in the ass.

Also, what do you need for the "pharmacy listing?" Just a list of pharmacies or a list of medications? I'm confused by that request.

Guess Who

From: Guess Who
Sent: Thursday, May 16, 2024 1:52 PM
To: Bonnie Hoskins bhoskins@hoskinslawoffices.com
Subject: RE: Restriction of NCM involvement

As you know, our firm represents Injured Worker with regard to the above workers' compensation claim. Please be advised that you are no longer authorized to have a nurse case manager (NCM) present during my client's medical appointments. The NCM's involvement is hereby restricted to the following:

_X_ The NCM may continue to contact medical providers by telephone in order to coordinate scheduling and obtain information, but the NCM is hereby explicitly prohibited from being present in the doctor's office or building, including the lobby, while my client is anywhere on the premises.

____ The NCM shall have no further contact whatsoever with my client or any of my client's medical providers.

Reason for restriction. The role of the NCM has been restricted because our office has received a report of the following information:

____ The NCM has interfered with or requested alteration of a doctor's recommendations.

____The NCM was present in the exam area while my client was in the exam area or otherwise compromised my client's privacy.

____ Unprofessional conduct by the NCM.

From: Guess Who?
Sent: Monday, October 21, 2024 8:55 AM
To: Bonnie Hoskins <bhoskins@hoskinslawoffices.com>
Subject: Fwd:

Bonnie,

I have attached a copy of a Medical Waiver and Consent Form, which contains what purports to be my client's signature. My client received a copy from his chiropractor. It's not his signature and he's extremely upset. His chiropractor brought it to his attention.

I demand that you look into this immediately.

Thanks.

Guess Who

From: Bonnie Hoskins
Sent: Monday, October 21, 2024 9:08 AM
To: Guess Who?
Subject: RE: Fwd:

Guess Who:

The Release was the one that was attached to the Form 101 that you filed. It is of record with LMS.

Thanks, Bonnie

SCR 3.130(1.3) Diligence

"A lawyer shall act with reasonable diligence and promptness in representing a client."

From: Guess Who
Sent: Wednesday, September 18, 2024 1:39 PM
To: My Client
Subject: Denny Goodman

We settled this case 2 years ago when Mr. Goodman passed away as a result of a work related MVA. Under the terms of the Settlement Agreement Mrs. Goodman was receiving the statutory benefit at the rate of $450. Per week. Sadly, Mrs. Goodman passed away last month. As she had no direct heirs, I have been named as the Executor of the Estate.

I reached out to someone from your office who advised that the check issued on 9/5/2024 to Ms. Goodman would need to be returned and could not be deposited into her estate account. Additionally, you stated that you believe that the benefits would end as of the date of death and there would be no future benefits payable since there were no other dependents.

This is incorrect. Under Kentucky law, benefits to a widow continue until the deceased would have reached age 70. In addition, her estate may be entitled to a death benefit.

Please reinstate benefits immediately and forward future checks made payable to the Estate of Janice Goodman and mail them to my office.

Sincerely,

Guess Who

SCR 3.130(1.1) Competence

“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

From: Bonnie Hoskins
Sent: Thursday, August 29, 2024 10:09 AM
To: My Client
Cc: Carla Brock <cbrock@hoskinslawoffices.com>
Subject: RE: Outstanding invoices, Previously billed: August 20, 2023, November 20, 2023, February 20, 2023, and May 20, 2023 Attached

On Sep 23, 2024, at 8:18 AM, My Client wrote:

Hi Bonnie,

You failed to include you’re your[sic] tax id number

Thanks!

From: Bonnie Hoskins <bhoskins@hoskinslawoffices.com>
Sent: Tuesday, September 23, 2024 9:09 AM
To: My Client
Cc: Carla Brock <cbrock@hoskinslawoffices.com>
Subject: Re: Outstanding invoices, Previously billed: August 20, 2023, November 20, 2023, February 20, 2023, and May 20, 2023 Attached

Tax ID: XX-XXXXXXX.

W-9 also attached

Sent from my iPhone

From: Bonnie Hoskins <bhoskins@hoskinslawoffices.com>
Sent: Thursday, October 24, 2024 11:30 AM
To: My Client
Subject: FW: Outstanding invoices for 6-12 months

Client, we have 3 invoices that have been outstanding for 6-12 months. I think I probably just need to write these off. But, I wanted to check with you first to see if you could pay these. I have 4 other invoices that are 90+ days old that I will send by separate email but I wanted to address these very old ones first.

Our Tax ID no. is XX-XXXXXXX

Thanks, Bonnie 859-229-7348

From: My Client
Sent: Thursday, October 24, 2024 12:21 PM
To: Bonnie Hoskins bhoskins@hoskinslawoffices.com
Subject: RE: Outstanding invoices 6-12 months

Can you please provide the Tax ID #?

SCR 3.130(1.5) Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

From: You Don't Know Him
To: Bonnie Hoskins <bhoskins@hoskinslawoffices.com>;
Sent: Monday, October 14, 2024 3:21AM

Good Afternoon, Counselor

I have received a copy of the Plaintiff's response to the 9/16/24 Notice of Hearing in this matter wherein he states that he will be filing a total of 34 Exhibits, which have been compiled into a single redacted PDF consisting of 189 pages. I could not open the attachment and I do not wish to review redacted copies. Please call my office and speak with my assistant to arrange to send the documents for my review in a non-redacted format that I can access.

Thank you,

You Don't Know Him

Please note that I work unusual hours and often travel abroad. I neither expect nor require an immediate response to this e-mail.

From: Bonnie Hoskins
Sent: Tuesday, October 29, 2024 10:15 AM
To: Guess Who
Cc: Megan Thacker <mthacker@hoskinslawoffices.com>; Greta Strait gstrait@hoskinslawoffices.com
Subject: Jason Rhones

Guess Who:

These are my calculations. Please check and let me know if you agree.

TTD benefits were paid at the rate of $955.32/week from 1/28/21-7/22/21 and from 6/8/23-6/21/23. We owe $54.81 per week from 10/7/19 through the present excluding those periods of TTD paid.

Past due benefits owed of 237 weeks $12,989.97.

This leaves 188 weeks remaining from and after October 31, 2024 through June 8, 2028.

Plaintiff's attorney fees have been approved in the amount of $4,658.00.

188 weeks discounted at 3.375% = 176.9579 weeks.

$4,658 divided by 176.9579 weeks = $26.32 per week.

$54.81 - $26.32 = $28.49 for 188 weeks from and after October 31, 2024 through June 8, 2028.

From: Guess Who
Sent: Friday, November 8, 2024 9:12 AM
To: Bonnie Hoskins <bhoskins@hoskinslawoffices.com>
Subject: Jason Rhones

Bonnie, I sent your calculations to JASON and he sent this back. Could you double check on things for me?

I tried responding to your email but apparently it didn't go through. I am not ok with Bonnie Hoskins math. I should not have my lost wages during surgery and recovery deducted from my settlement. I want a copy of all documents sent to me asap!!

Sent from my iPhone

To: Guess Who
Sent: Monday, November 11, 2024 9:12 AM
To: Bonnie Hoskins <bhoskins@hoskinslawoffices.com>
Subject: Jason Rhones

I don't think he understands. We did not deduct his lost wages during surgery and recovery from his settlement. I simply excluded those weeks from the 425 week total and extended the compensable period.

To: Guess Who
Sent: Monday, October 28, 2024 10:00 AM
Subject: Settlement Offer

My Client has authorized a Settlement offer of $50,000 + MSA.

I have copied and pasted her email below re: questions she needs answered.

Copied and Pasted from Client Email

From: My Client
Sent: Saturday, October 26, 2024 3:46 PM
Subject: TIME SENSITIVE settlement pricing
Importance: High

Attorney, Please make an offer of 50k for IND + MSA.
Please ask PA to advise re: the following:
1. Does IW have any Medicare Advantage Plans so we can address liens.
2. Are there any unpaid bills we need to address prior to settlement?
3. Is IW agreeable to professional management of MSA funds?
4. Is IW agreeable to reversion of MSA funds remaining at death to funding party?

Thank you!

(This is the part that the attorney could see on her screen when she hit select all, copy and paste. What follows is the remainder of the email that was copied and pasted to the email to Plaintiff Atty.)

Settlement Range:

$105,676.35 to $146,893.38

Target Value: $141,893.38 to resolve IND less the overpayment ($144,652.07-$23,939.61) plus the cost to fund the MSA as cash $21,126.91.

SCR 3.130(1.6) Confidentiality of information

“(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”