

**KENTUCKY BAR ASSOCIATION**

**Ethics Opinion KBA E-402**

Issued: September 1997

*Since the adoption of the Rules of Professional Conduct in 1990, the Kentucky Supreme Court has adopted various amendments, and made substantial revisions in 2009. For example, this opinion refers to Rule 1.6, which was renumbered and to Comment 21, which was deleted. The Code of Judicial Conduct, Canon 3B(4) has been renumbered and is now Canon 3B(7). Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.*

**Question 1:** Does compliance with the limitations on attorney fees under the new Workers' Compensation Law violate the KRPC?

**Answer:** Qualified No. See Opinion.

**Question 2:** Does compliance with the arbitrator's or ALJ's demands for information needed for approval of fees necessarily violate the KRPC?

**Answer:** Qualified No. See Opinion.

**Question 3:** Do the rules governing ex parte communications apply in proceedings before the Kentucky Department of Workers' Claims?

**Answer:** Yes.

**Question 4:** Is the new law in conflict with the KRPC and therefore unconstitutional?

**Answer:** The Committee is not authorized to issue advisory opinions on questions of law as distinguished from questions of ethics.

**References:** Kentucky Constitution Section 116; Ex Parte Auditor of Public Accounts, 609 S.W.2d 682 (Ky. 1980); Commissioner's Second Quarterly Report - Implementation of House Bill 1 (July 31, 1997), p. 5; KRSs 342.320. 342.429; SCRs 3.020 and 4.300; Code of Judicial Conduct Canon 3(4); Department of Workers' Claims - Guidelines for Communication for Workers' Compensation Specialists; KRPCs 1.1, 1.3, 1.6(b)(3) and Comment (21), 1.16, and 3.5(b) KBA E-297, E-331; ABA Formal Ops. 96-399 (1996) and 347 (1981); Montana Op. 960828; Charles Wolfram, Modern Legal Ethics (1986); Richard Flamm, Judicial Disqualification (1996); UKCLE, Workers' Compensation Reform in Kentucky (January 24, 1997).

## **OPINION**

### **Background**

A number of KBA members have requested opinions from the Ethics and Unauthorized Practice of Law Committees as a result of the recent (December 1996) changes in Kentucky's Workers' Compensation Law.

Pursuant to Section 116 of the Kentucky Constitution, the Kentucky Supreme Court is vested with exclusive jurisdiction over the regulation of the practice of law. See *Ex Parte Auditor of Public Accounts*, 609 S.W.2d 682 (Ky. 1980); Commissioner's Second Quarterly Report - Implementation Of House Bill 1, p. 5. For example, what is Unauthorized Practice of Law is defined in Supreme Court Rule (SCR) 3.020. In KBA U-52 the Unauthorized Practice Committee opined that KRS 342.320 (purporting to authorize non-attorney "workers' compensation specialists" to advise parties of their rights and obligations under the law and assist claimants in preparing claim applications) are in conflict with SCR 3.020 and are therefore invalid legislative intrusions into an area within the exclusive jurisdiction of the Supreme Court. The Court did not "authorize" the "practice" alluded to in KRS 342.320 and 342.329, and legislature did not have the authority to "authorize" it.

Similar arguments are now being presented to the Ethics Committee. Just as the Practice of Law is defined in SCR 3.020, the rules and regulations governing licensed practitioners are set forth in the SCRs. Among these SCRs are the Kentucky Rules of Professional Conduct (KRPC), which may be found at SCR 3.130. Some of the KRPC refer to other "law." For example, KRPC 1.6(b)(3) provides that "[a] lawyer may reveal [otherwise protected 'information relating to the representation of a client'] to the extent that lawyer reasonably believes necessary ... to comply with other law or court order." (Emphasis added) Comment (21) to KRPC 1.6 alludes to the fact that other provisions of law may obligate or permit a lawyer to provide information about a client to others, but a presumption exists that "other law" does not supersede the KRPC. Indeed, in the case of state legislation, the argument might be advanced that in light of the exclusive power of the Supreme Court, "other law" cannot supersede the KRPC. See *Ex Parte Auditor of Public Accounts*, *supra*.

It is conceivable that demand or limitations placed on licensed practitioners of law by the provisions of the KRS might present the practitioner with (1) question of professional ethics, and might, in some instances, suggest (2) questions regarding the constitutionality of a statute. It is proper for the Ethics Committee to address questions in the first category. The Committee must be cautious when it comes to opining on questions in the second category. The Committee has observed on many occasions that, unlike the Unauthorized Practice Committee, the Ethics Committee does not answer questions of law, hold forth on the constitutionality of legislation, or opine on the powers of particular government officers. See, e.g., KBA E-297 (1984).

### **Regarding Questions 1 and 2**

The new law sets maximum fees for the plaintiff's counsel, for services rendered in securing the award, and for services rendered in successful and unsuccessful appeals. The old

law also limited the fees of the claimant's counsel. Such fees had to be approved by the Board, and the Claimant's counsel could not collect any additional fees from the plaintiff. Such unapproved fees would have been "illegal" as that term was used in former DR 2-106(A). "[I]n administrative proceedings such as those before worker compensation commissions ... the point of the commission's setting the fee is to protect workers against excessive fee charges [which would come out of the amount recovered]. "Charles Wolfram, Modern Legal Ethics 524 (1986).

As Professor Wolfram notes, "[a] long tradition exists in American law of legislation limiting the amount of legal fees or prohibiting their payment altogether. ... Few decisions have accepted arguments that statutory limitations on fees infringe on the inherent power of courts to regulate the legal profession." *Id.* at 522, text and note 79. On the other hand, to our knowledge the Kentucky courts have not yet considered the "inherent power" argument in the context of fee limitations. But compare *Ex Parte Auditor of Public Accounts*, *supra*. Such a challenge to the new law may be entertained in a court.<sup>1</sup>

What has given rise to the current controversy is a new twist in the law - KRS 342.320(8), which provides that attorney fees for lawyers representing employers are subject to approval by an arbitrator or ALJ in the same manner as prescribed for the fees plaintiff's counsel and are subject to the same maximums at each level, not to exceed the amount set by the attorney client contract.

Question 1 is suggested by the argument of inquiring counsel that "the limitation on the amount that may be expended by an employer for counsel is [a] restriction on a client's ability to defend itself in a claim brought against it<sup>2</sup> and [a] limitation ... imposed upon counsel who ... have ethical obligations unrelated to the amount of the fee."

Of course, litigation budgets are limited in a variety of contexts. In some states attorney fees in medical malpractice cases are limited by laws because of wishful thinking that limits on fees will bring down insurance premiums.<sup>3</sup> In ordinary accident and insurance litigation the defense budget is often limited by the insurance carrier for reasons of the "bottom line." See KBA E-331 (1988) (ethical implications of restricted budget for the defense in an individual case.) Taxpayers are also concerned with "bottom line." In Kentucky the defense budgets of

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<sup>1</sup> [Chairman's editorial note] The Ethics Committee approved this opinion by an 11 to 2 vote. Two members felt that we should tackle the "inherent power" question. The minority suggested that KRPC 1.5 is not simply a prohibition of excessive fees; that it is the only rule that may be applied to fees, and that legislative limits on fees that add to or "conflict with" KRPC 1.5 are therefore unconstitutional. The majority of the Committee felt that this was a decision on a question of law that should be left to the courts.

<sup>2</sup> In the context of workers' compensation claims, it might also be thought that the limitations on plaintiffs' fees could have an impact on the extent or quality of the representation.

<sup>3</sup> We express no opinion on whether this is sensible policy or whether the Kentucky Courts would rule that such limits are permissible under the Kentucky Constitution (or whether statutory limits are opposed to limits set forth in a court rule or court imposed fee schedule would collide with the "inherent power" to the Supreme Court).

public defenders are limited, and a public defender may not accept additional fees. KRS 31.250 (the rationale of KRS 31.250 may be to insure “indigence” or prevent exploitation, or both); KBA v. Unnamed Attorney, 769, S.W.2d 45 (Ky. 1989). The ethical obligations of legal services lawyers facing significant reductions in funding were discussed in ABA Formal Opinions 96-399 (1996) and 347 (1981). What is different about the new provisions in KRS 342.320(8) is that employers can afford to pay fees above the legislative limit and presumably don’t need “protecting.”

Leaving aside questions of law and policy, limitations on fees can raise questions of ethics. Regardless of the fee being paid, the lawyer has an obligation to prepare adequately and to provide competent representation. KRPC 1.1 and 1.3. If budgetary restrictions or the adequacy of the fee impact adversely on the lawyers’ ability to fulfill his or her obligations, then the lawyers may be permitted or required to decline the representation or withdraw from it. See KRPC 1.16.

Aside from these observations, it is not clear how the Ethics Committee can provide a satisfactory response to the argument that the fee maximums restrict the ability of employers to defend themselves. Unless we depart from our long-standing policy of not answering questions of law, we can only observe that the question of whether the limitation on defense fees is illegal, unconstitutional, otherwise invalid may be presented to a court of competent jurisdiction.<sup>4</sup> We are not prepared to say that poorly paid lawyers will necessarily violate the KRPC, or that the KRPC permit or require clients to pay fees in excess of the legislated limits or justify noncompliance with the new law.

Question 2 is suggested by the argument of counsel that “information required to be submitted by an employer’s attorney in affidavit form for approval of the fee to be charged” may result in the disclosure of information relating to the representation of the client which may be within the attorney-client evidentiary privilege or the ethical constraints of KRPC 1.6. The types of information alluded to by the requestor-lawyers include “interim billings sent to insurance carriers” itemizing activities performed and summarizing communications between lawyer and client, information reflecting “patterns of defense” that may be followed in future cases, the identity of “persons contacted for information,” “sources of information investigated but not utilized,” and the rate and basis of charges which the client may consider to be sensitive market information.”<sup>5</sup> It is suggested that such detailed information must be set forth in the affidavit seeking approval of the fee or the lawyer will receive no fee, and that such detailed information will then be made part of the public record. It is also noted that the statute assumed that an hourly rate will be charged, when “this is not necessarily the case.” All of this adds up to the proposition that compliance with the statute and collection of a fee will necessitate violations of KRPC 1.6.

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<sup>4</sup> See note 1.

<sup>5</sup> The amount of a fee or the billing rate is ordinarily not within the attorney-client privilege.

The Committee has examined the text of the statute [and accompanying administrative regulations] and finds nothing explicitly requiring counsel to include this degree of detail in billing records<sup>6</sup> or in a KRS 342.320(8) affidavit. The statute and regulations provide only that

A motion for allowance of defendant's attorney fee shall be filed as required by KRS 342.320. The motion shall be accompanied by an affidavit of counsel detailing the extent of services rendered and the time expended, the hourly rate and total amount charged, the date upon which agreement was reached for providing the legal services, and a certification of any amounts previously paid on the claim in question.

We agree that much of the information alluded to by the requestors should not be provided in the absence of a court order, and that providing it could run afoul of KRPC 1.6. However, in the absence of contrary evidence, we start with the assumption that the legislature did not intend to attempt an "override" of the attorney-client privilege or the ethical constraints of KRPC 1.6; and we believe that a sufficiently detailed account of the services provided can be supplied in affidavit form, sufficient to satisfy the arbitrator or ALJ, without including the sort of information alluded to.<sup>7</sup> In short, we believe that counsel should ordinarily be able to edit out most of the matter giving cause for concern and comply with the statute and KRPC 1.6. Compare Montana Op. 960828 (lawyer should not turn over detailed billing statements to a third party without "sterilizing" them to remove substantive information about the representation.) Counsel is obligated to assert any privileges for the benefit of the client. In any case in which information is improperly demanded, counsel should have an opportunity to obtain a legal ruling.

### **Regarding Question 3**

At the present time the Unauthorized Practice Committee has before it the question of whether a non-lawyer may serve as an arbitrator for the Department of Workers' Claims (the new law does not require an arbitrator to be an attorney.) Regardless of how that question is answered, the Ethics Committee will still be faced with the question put to us regarding *ex parte* communications. The question has come up because it has been reported to us that non-lawyers involved in the process engage in improper *ex parte* communications. That this may be, or at least may have been, a problem seems to be acknowledged in the Guidelines For Communications For Workers' Compensation Specialists.

KRPC 3.5 [Impartiality and decorum of the Tribunal] provides that a lawyer shall not ... (b) communicate *ex parte* with a [judge ... or other official] except as permitted by law .... The language of the rule "fits" adjudicatory or quasi-adjudicatory proceedings in the workers'

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<sup>6</sup> As one "hotline" member noted in discussing these requests for opinions, the concerned client might be able to moot many of the perceived problems by prescribing a new billing format that does not require so much detail. Compare Montana Op. 960828.

<sup>7</sup> The statute does assume that the defense lawyer will be charging an hourly rate. If that is not the case, it seems that the basis of the charge might be otherwise explained or justified. We are doubtful that the hourly rate or basis of the lawyer's charge will be recognized by the courts as protected information.

compensation system. The fact that the KRPC prohibits lawyers from engaging in ex parte communications has been offered as an additional justification for requiring arbitrators to be lawyers.

Judicial officers subject to the Code of Judicial Conduct shall not initiate or engage in ex parte communications. SCR 4.300, Code of Judicial Conduct, Canon 3(4). It is the Committee's understanding that the Judicial Ethics Committee does not feel that the Code of Judicial Conduct, and its own "jurisdiction" to opine, extends to the administrative forum. Cf. Code of Judicial Conduct: Compliance, SCR 4.300. Nevertheless, notions of fundamental fairness inherent in the concept of "due process" inform us that all participants in an adjudicatory process, whether they are "unauthorized practitioners" or "non-lawyer arbitrators, hearing officers, or ALJs," should also be subject to the same rules prohibiting ex parte communications. See generally Richard Flamm, *Judicial Disqualification*, Chapter 30 *Disqualification of Administrative Adjudicators*, Section 30.5.7 *Ex Parte Communications* (Boston; Little Brown & Co., 1996).

Non-lawyers as well as lawyers should consider ex parte communications to be prohibited in the context of adjudicatory or quasi-adjudicatory proceedings, and the Kentucky Department of Workers' Claims can and should make and enforce appropriate rules to that affect. The Ethics Committee must leave the legal and policy questions concerning unauthorized practice and the desirability of having only lawyers in certain roles in the Department of Workers' Claims to the Unauthorized Practice Committee.

#### **Regarding Question 4**

No further discussion is necessary.

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#### ***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 (or its predecessor rule). The Rule provides that formal opinions are advisory only.*