Ethics Opinion
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QUESTION PRESENTED: What, if any, obligation does an attorney who represents a workers' compensation claimant in procuring a lump sum award, have to insure that the funds are disbursed in the manner presented to the Division of Workers' Compensation and which was approved by the Division of the Court?

ANSWER: The attorney must not participate or aid in improper expenditure or knowingly mislead the court regarding the intended use of the funds. *See* analysis.

ANALYSIS: This question may be governed by Model Rule 1.2(d) (Scope of Representation) and/or Model Rule 3.3 (Candor toward the Tribunal).

Rule 1.2 Provides:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but the lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist the client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Rule 3.3 provides in part as follows:

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;
(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.

Rule 1.2(d) (comment 9) provides that the lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. Further, a lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but discovers is criminal or fraudulent.

It appears to the committee that a lawyer would violate 1.2(d) if he knew that the client had no intention of using lump sum money in the manner represented to the Court and the Division, particularly if the client is using the money for other purposes. Certainly the lawyer should not continue to represent or assist the client in using money in ways other than as represented when the lawyer learns that the client has changed his plans.

Rule 2.2, Candor to the Tribunal, is more directly applicable to this inquiry. In essence, the Rule prohibits making false statements to a tribunal or failing to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. This rule exists without regard to disclosure of confidential information (Rule 1.6) and, in fact, is the only

mandatory disclosure provision in the Rules. The debate on Rule 3.3 reveals that there was very strong sentiment that courts should not be misled.

The Rule requires that the lawyer not knowingly mislead the tribunal. Knowingly is defined as ". . . actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances." (Terminology section, Model Rules of Professional Conduct). The fact question then becomes whether, under the circumstances, the lawyer knew that the money would not be used as represented. The Rule also prohibits a false statement or failure to disclose material facts. Surely the reason for a lump sum request is material. Rule 3.3(b) provides that, "The duties stated in paragraph (a) continue to the conclusion of the proceeding." Nevertheless, conduct after trial could provide insight into what the lawyer knew or intended during the proceeding.

Rule 3.3(4) provides that an attorney may not:

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

This rule could be applicable if the attorney submits documentation or other evidence to justify a lump sum when he knows that it is false or misrepresents the situation. The phrase ". . . reasonable remedial measures" includes the responsibility to disclose the existence of a client's deception to the court.

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