

Workers' Comp Malpractice Headaches

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Workers' compensation consistently ranks as one of the top 10 areas of law in generating legal malpractice claims. Approximately three to five percent of all legal malpractice claims each year involve a workers' compensation matter. The vast majority are brought against lawyers who represent petitioners. This month's article will focus on two of the major causes of professional liability for the workers' compensation practitioner: scope of representation disputes and missed deadlines.

Scope of representation problems

A surprising one-third of all workers' compensation claims are based on disputes about the scope of the lawyer's representation. Scope of representation issues often come up in the workers' compensation context because when an employee is injured, third party causes of action and other legal issues often arise. The related legal matters may range from potential products liability and medical malpractice claims to retaliatory discharge, ADA, or social security benefit problems. That is why petitioner attorneys must clearly define the parameters of their representation. The following examples illustrate the problem.

Headache No. 1: Products Liability and the PTA. Client is injured at work while driving a forklift for Employer. Lawyer agrees to represent Client in her worker's compensation claim against Employer and has Client sign the standard attorney representation agreement required by the Illinois Industrial Commission.

Lawyer eventually obtains a \$25,000 settlement on Client's behalf. Client discusses her settlement with several parents at a PTA meeting. One of them



Workers' comp lawyers are cursed with a special set of headaches. The remedy? Follow this advice.

suggests that Client should have brought a products liability claim against Forklift Manufacturer. After further investigation, Client discovers that the statute of limitations date for filing a products liability claim has expired. Client sues Lawyer claiming that he should have filed a products liability complaint on Client's behalf.

Lawyer is stunned by the allegation; he concentrates his practice solely on workers' compensation matters and never broached other legal issues with Client. In Lawyer's mind, the scope of his representation was clear. Conversely, Client believed that Lawyer would deal with any and all legal issues arising out of the work-related injury.

Headache No. 2: The Unremembered Suggestion. Lawyer files an application of adjustment on Client's behalf for a wrist injury. Because Client has previously undergone three surgeries on his

wrist, Lawyer suggests that Client consider bringing a medical malpractice claim against his doctors. Client is reluctant to sue his medical providers and instructs Lawyer not to pursue the medical malpractice claim.

After two years and one more surgery on the wrist, Client receives what he considers to be an unsatisfactory workers' compensation award. Client calls Lawyer the next day and asks her to file a medical malpractice claim on Client's behalf. The

statute of limitations period for the medical negligence claim has expired. Client does not remember his previous conversation with Lawyer and sues Lawyer for failing to bring an action against the doctors on a timely basis. Lawyer has no documentation in her file to support her version of the events.

Headache No. 3: Phone Consult Pitfall. Client is injured when his arm is caught in a piece of machinery at work. Lawyer files a workers' compensation claim on Client's behalf. Client requests that Lawyer investigate the possibility of a products liability action against the manufacturer of the machinery.

Lawyer has only a limited knowledge of products liability matters and therefore reviews the facts of Client's case over the telephone with two products liability attorneys. Without reviewing any documentation, both experts tell Lawyer that the statute of limitations deadline for the products liability action has run. Based solely on the telephone calls, Lawyer informs Client that the products liability claim is no longer viable. As a result, Client does not pursue a claim against the manufacturer.

In fact, the statute of limitations for the products liability claim had not run.

Client eventually consults with a second lawyer who sues the first lawyer for failing to file suit against the machinery manufacturer.

A three-step scope-of-representation headache remedy. There are several steps that workers' compensation attorneys who represent petitioners can take to avoid similar headaches. If you practice exclusively in the workers' compensation area and do not handle the myriad of other legal issues that may be connected to the work-related injury, limit the scope of your representation both orally and in writing.

First, orally explain to the client that he or she should seek the advice of other counsel regarding issues such as social security benefits or causes of action the client may have against additional parties with respect to the incident.

Second, always confirm this conversation in a brief letter to the client. You may want to attach a list of lawyers who concentrate in products liability, medical negligence, employment law, and social security matters, among others. If you refer the client to a specific attorney, write a confirmation letter to both the client and the referred attorney. Remember, however, that you remain legally liable for the matter if you accept a referral fee.

Third, clearly limit the nature of the engagement in a written fee agreement. This can be accomplished by adding language directly (and prominently) to the attorney representation agreement:

This agreement is limited to proceedings before the Industrial Commission. If client intends any appeal beyond the Industrial Commission, a new agreement must be executed. It is further agreed and understood by client that this agreement is only for representation of client by lawyer in regard to client's workers' compensation claim. There may be additional causes of action available to client in connection with the accident or injury that may be time barred if not pursued promptly. Client should therefore seek the advice of other counsel immediately if client intends to pursue additional claims.

(The Industrial Commission regularly accepts attorney representation agreements that contain similar language.)

Now let's suppose that the petitioner's attorney wants to handle, for example, a related social security mat-

ter for the petitioner, but not a potential products liability claim. In these circumstances, the same procedures should be followed to limit the scope of the lawyer's representation, including notice to the client to seek the assistance of other counsel on the legal aspects of the injury that the petitioner's attorney will not be handling.

On the other hand, if the client specifically instructs you not to pursue certain legal avenues, confirm the client's decision in a detailed letter. The letter should inform the client that he or she may be time-barred from pursuing additional remedies or causes of action at a later date. Finally, if you investigate an additional cause of action on behalf of the petitioner, but ultimately determine not to pursue it, send the client a nonengagement letter just as you would in any other circumstance.

Missed deadlines

The second frequent source of legal malpractice claims for workers' compensation lawyers is missed deadlines and appearances, as demonstrated in the following claims.

Headache No. 4: Calendaring Confusion. Client hires Lawyer to pursue a workers' compensation claim for carpal tunnel syndrome. Lawyer does not maintain an independent calendaring system to keep track of his workers' compensation claims. Rather, he relies on notices from the Commission to inform him of any older claims that have been inadvertently dismissed.

Sure enough, Client's claim is dismissed for want of prosecution when Lawyer fails to show up at a status call. Lawyer does not receive the Commission's notice of dismissal and therefore doesn't reinstate the case within 60 days.

Headache No. 5: Lost Appeal. Lawyer represents Petitioner before the Commission with respect to a claim for total disability. After the Arbitrator rules against Petitioner, Petitioner instructs Lawyer to appeal to the circuit court. Lawyer misses the appeal deadline and Petitioner's chance to appeal is lost.

Headache No. 6: Piles of Problems. Lawyer keeps all of her workers' compensation claims that have not yet been filed with the Industrial Commission in a special pile in her office. Rather than

use a calendar to monitor the statutes of limitations dates, she periodically reviews the pile and works on matters with impending limitation periods. Client's file is misplaced and consequently, an application for adjustment is not filed within the required time.

Get lasting relief from multiple calendaring. To reduce the likelihood of missing a critical deadline or appearance, workers' compensation practitioners should establish multiple calendaring systems and safeguards. First and most obviously, the statute of limitations deadline should be placed into a central calendaring system, along with several reminder or tickler dates prior to the statute's expiration.

Second, workers' compensation lawyers should establish a reliable method of keeping track of the status of their cases. It is not sufficient to rely on notices of dismissal from the Industrial Commission to keep you out of hot water. Instead, workers' compensation lawyers should monitor their own cases.

Many workers' compensation practitioners accomplish this goal by subscribing to a service that provides attorneys with daily listings of the status calls of the Industrial Commission arbitrators. Others have their attorneys or staff check the status call of each arbitrator to whom their cases are assigned on a weekly basis at the Commission's offices.

Third, workers' compensation lawyers should not rely on the good graces of arbitrators for any claim above the line (i.e., a claim that has been on file for over three years). It's risky business to assume that you will have two or three bites at the apple. Instead, if you cannot make a status call, send a letter of explanation requesting a continuance several days before the status date.

Fourth, have a system for automatically calendaring the appeal dates upon receipt of the arbitrator's decision. If you do not intend to appeal the matter, promptly send the client a letter advising him or her to retain another lawyer immediately. On the other hand, if you routinely handle appeals, establish a procedure for reviewing the master calendar on a firm-wide basis at the same time each day to ensure that

no appeal dates are missed.

Finally, we recommend that practitioners maintain at least a dual calendaring system. This means that every date should be entered in two separate but identical calendars. Lawyers who use computerized calendaring systems

are also advised to maintain a backup paper calendar to avoid complications from Year 2000 glitches (including the possibility of sporadic power outages).

In short, workers' compensation lawyers can substantially reduce the chances of a legal malpractice claim by

clarifying the scope of their representation in writing and instituting strict file review and calendaring procedures. Otherwise, all the Excedrin in the world won't cure the headaches in store for you.