

Ethical Issues in Dividing Retirement Benefits in Divorce

Douglas County Bar Association Brownbag CLE, November 20, 2014

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Problems with qualified domestic relations orders are among the leading causes of disciplinary complaints against attorneys.

Although all aspects of professional conduct apply to dividing retirement benefits in divorce cases, a review of disciplinary cases before the Kansas Supreme Court and in other jurisdictions indicates that attorneys who divide retirement benefits in divorce cases should *pay particular attention* to their duties of competence, diligence, communication with clients, and their obligations when terminating representation.

Selected Rules and Comments From Kansas Supreme Court Rule 226 Kansas Rules of Professional Conduct

Rule 1.1 Competence - A lawyer shall provide competent representation to a client. Competent

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Mr. Barnhill has made CLE presentations on employee benefit law to the Douglas County Bar Association, the Kansas Bar Association, the Kansas Women's Attorney Association, the Kansas City Metropolitan Bar Association, the Wyandotte County Bar Association, and the Saline-Ottawa Counties bar Association. He has also made presentations on employee benefit administration to the IFEPP and the National Coordinating Committee on Multiemployer Plans.

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

Comment -Legal Knowledge and Skill

1. In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

2. A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. . . . 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.

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 elaborate treatment than matters of lesser consequence.

Presenter's Thoughts:

1. *Do you know all the relevant plans and the basic terms of the plans?*
2. *Do you know what kinds of plans you are dealing with? i.e. defined benefit or defined contribution plans? Private company or government plan? Qualified plan, IRA or annuity contract?*
3. *Have you provided for survivor benefits in the divorce decree and/or property settlement agreement? This is particularly important in federal employee retirement plans and military retirement pay.*
4. *Are you using the proper terminology?*

Rule 1.3 Client-Lawyer Relationship: Diligence - A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment 2. Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Comment 3. Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. . . .

Presenter's Thoughts:

1. *Did you draft the QDRO or other relevant order or document?*
2. *Did you draft a QDRO for each relevant plan?*
3. *Did you get pre-approval for each one?*
4. *Did you get all necessary signatures?*
5. *Did the court approve the QDRO?*
6. *Did you file the QDRO with the plan administrator?*
7. ***Did you get a qualification letter?***

Rule 1.4 Communication - (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

Comment 2. Adequacy of communication depends in part on the kind of advice or assistance involved. . . . The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

Presenter's Thoughts:

1. *Your client has probably never heard of a QDRO before. Have you explained what a QDRO is to your client?*
2. *Your client probably assumes QDROs are self-actuating or a matter of filling out and submitting a simple form. Have you explained to your client the actions necessary to obtain the QDRO?*

3. *Does your client have a clear understanding (explained in writing) about what you will or will not do to obtain the QDRO for your client?*
4. *Are you keeping your client timely advised about progress on the QDRO?*
5. *Did you give copies of all qualification letters and other communications from the plan administrator to the client?*

1.16 Client-Lawyer Relationship: Declining or Terminating Representation

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment 1. A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Presenter's Thoughts:

1. *Before you withdraw, either (a) you have obtained qualification letters for all the QDROs, or (b) you have communicated to your client that you are not doing the QDRO and you know your client's reasonable plans to effectuate any QDRO.*
2. *All items in No. 1 above have been clearly communicated to your client in writing.*

Review of Some Kansas Disciplinary Cases Involving QDROs

In the Matter of Ann Gottberg Soderberg, 298 Kan. 820 (2014)

Soderberg was retained in a divorce action in 1996. She prepared and filed a QDRO that didn't meet the requirements of the plan administrators. Staff counsel for the plan wrote Soderberg to inform her of the deficiencies and how to cure them, but Soderberg never responded. She withdrew as counsel for the client in 2000. In 2012, the client discovered that the QDRO had never been filed or approved. The client contacted Soderberg, who promised to review the matter and get back with the client. She never corrected or filed a QDRO or returned the client's later calls. Soderberg was suspended for 18 months and subject to a Rule 219 reinstatement hearing. In order to be reinstated, she has to ensure the deficient QDRO is corrected.

Violations of:

KRPC 1.3, diligence

KRPC 1.16(d), by failing to correct deficiencies of the QDRO before terminating her representation of the client.

In the Matter of J. Gregory Swanson, 288 Kan. 185 (2009)

Swanson was retained in a divorce action in 2003. He never prepared or filed a QDRO, which the client discovered in late 2004. Swanson did not respond to the client's repeated phone calls. In April of 2005, the client filed a complaint with the Disciplinary Administrator's office, and Swanson prepared and filed the QDRO a week after that. In his brief for the disciplinary hearing, Swanson refused to take full responsibility for the failure to prepare the QDRO, stating that the Court never specifically ordered him to do so. Swanson had other complaints against him as well; he was suspended for 2 years.

Violations of:

KRPC 1.1, competence

KRPC 1.3, diligence

KRPC 1.4, communication

In the Matter of Patrick S. Bishop, 285 Kan. 1097 (2008)

Bishop was retained to prepare and file a QDRO in 1995. Over the next 11 years, he provided false excuses and told his client he was "working on it." At the formal complaint hearing, Bishop offered to pay the fee associated with having another lawyer prepare and file the QDRO. Bishop was indefinitely suspended from the practice of law in the state of Kansas.

Violations of:

KRPC 1.1, by failing to provide requisite thoroughness and preparation necessary to follow through with approval of the QDRO by plan administrators.

KRPC 1.3, by lacking diligence in his representation of the client over 11 years and never producing the QDRO.

KRPC 1.4(a), by failing to keep the client reasonably informed.

KRPC 8.4(c), by making numerous false representations to his client.

In the Matter of Amy R. Mitchell, 280 Kan. 656 (2005)

Mitchell was retained in a divorce action in 2002. She prepared a QDRO in 2003 that was rejected by the plan administrators. She never took any other action or responded to any of her client's attempts to contact her regarding the QDRO. The client filed a complaint and retained two different attorneys to attempt to make contact with Mitchell. She never responded to any communication. Mitchell had other complaints before the board, she was subject to a 1 year suspension, and 2 years of supervised probation.

Violations of:

KRPC 1.1, competence and thoroughness

KRPC 1.4, communication

**Review of Some Disciplinary & Malpractice Cases
From other Jurisdictions Involving QDROs**

Lawyer Disciplinary Board v. Veneri, 524 S.E.2d 900 (W.Va. 1999)

Veneri failed to inform the court or opposing counsel that a QDRO had been altered while in his office. Both parties mistakenly assumed Veneri's client had only one retirement plan through his employment. In reality, there were two – a defined benefit plan maintained solely by employer contributions and a 401(k) Thrift and Investment Plan (TIP). The opposing counsel drafted the QDRO and forwarded it to Veneri's office for approval. The proposed QDRO provided for the division of the TIP benefit plan. Veneri turned over the document to the tax specialist at his firm for review. The tax specialist examined the order of the court (which made no specific mention of the TIP plan) and agreed with the client that the TIP was not to be included in the QDRO. The tax specialist whited-out the words "Thrift and Investment Plan" and typed the words "Corporation Retirement Plan."

Veneri was not notified of the change. Upon return from the tax specialist, Veneri signed the QDRO, as did opposing counsel and the Court. The plan administrator rejected the QDRO because the benefit plan was not properly described (because there were two and not one). Upon this rejection, the tax specialist's alteration was discovered by opposing counsel and a contempt petition was filed against Veneri. Subsequently, an ethics complaint was filed by the opposing party. He was publicly admonished and charged with costs.

Violations of:

Rule 8.4(d), conduct prejudicial to the administration of justice.

Neville v. Solomon, No. CV 065001808S, Superior Court of Connecticut (2007)

Solomon was retained in Plaintiff's divorce action in 1992-1993. Pursuant to the order, Solomon's client was to receive 20K from her ex-husband's retirement account by QDRO. The funds were to be paid to the client when she reached the age of fifty-five. Solomon prepared and filed the QDRO in 1993, and it was rejected by the plan administrator and returned to Solomon for necessary revisions. Solomon never completed the revisions or refiled the QDRO, and did not inform his client of the rejection. Solomon subsequently retired. When the client, years later, attempted to claim the funds, she was informed that no QDRO was on file and that the ex-husband's funds had been seized by the IRS for failure to pay taxes. The client filed a petition for damages against Solomon alleging fraudulent concealment, CUPTA violations, legal malpractice and breach of contract. In the trial court decision on Solomon's motion to strike, the court held that the client had actionable claims for all counts but the CUPTA violations.

Dayton Bar Assn. v. Ellison, 118 Ohio St.3d 128 (2008)

Ellison was retained in a divorce action in 1997. The QDRO Ellison submitted to the plan administrator was rejected at least twice before the client's ex-wfe (holder of the benefit plan) filed

bankruptcy. Then the ex-wife rolled the 401(k) into another retirement plan, and both Ellison and opposing counsel informed the court that “they” would soon file a QDRO to divide the property. Ellison never followed through with obtaining the QDRO. According to Ellison, she “spent hours and hours on it, but kind of gave up because everything was a problem.”

Ellison was suspended from the practice of law for one year, but the suspension was stayed on the condition she serve a one year probation. Requirements of her probation included mandatory continuing education classes and an assigned attorney to monitor her practice.

Violations of:

(Ohio) DR 6-101(A)(3), neglecting an entrusted legal matter.

Cleveland Bar Assn. v. Clavner, 788 N.E.2d 1065 (Ohio, 2003)

Clavner was retained in a divorce action in 1998, and completed a QDRO that was rejected by opposing counsel as not in compliance with applicable requirements. Clavner agreed to redraft the QDRO, but she never re-submitted it to the employer. Over the next 2 – 3 years, she promised her client she would complete it, but never did. Indefinite suspension and costs.

Violations of Ohio Rules:

DR 1-102(A)(4), engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation;

DR 6-101(A)(3), neglecting an entrusted legal matter;

DR 7-101(A)(1), failure to seek a client’s legal objectives;

DR 7-101(A)(2), failure to carry out a contract for employment;

DR 7-101(A)(3), causing client damage or prejudice.

Churchill v. WFA Economics Corp., 655 N.W.2d 505 (Wis.App. 2002)

This is an action where an attorney who drafted a deficient QDRO sued for defamation. Attorney Churchill was contracted to draft a QDRO in a divorce proceeding by Attorney Lingle. After it was completed, Lingle forwarded it to opposing counsel, who submitted it to Defendant WFA for review. In a letter between WFA and opposing counsel, a WFA employee made the following statements:

“An experienced and knowledgeable QDRO drafter would know this”

“Paragraph 5 is yet another area that demonstrates Attorney Churchill’s lack of knowledge and expertise in drafting QDROs”

“As we have seen in many other QDROs drafted by Attorney Churchill over the years, this one falls short of the requirements of a comprehensive, logical, legal document.”

Opposing counsel returned the QDRO, along with the letter, to Lingle for necessary revisions. Lingle showed the letter to Churchill, and Churchill filed suit against WFA alleging that the statements were defamatory.

The trial court found for Churchill, but the decision was reversed on appeal because the court held the statements to be substantially true and held the defendants were entitled to an absolute privilege because the statements were made in the course of a judicial proceeding.

Office of Disciplinary Counsel v. Golden, 778 N.E.2d 564 (Ohio 2002)

Golden was retained in a divorce action in 1996, in which she was required to prepare and file a QDRO. She neglected to do so for 3 years. During this time, Golden falsely told the client the QDRO had been filed, that she had to sue the plan administrator to enforce the QDRO, and that “proceedings were underway,” when that was not the case. To cover up all the lies, Golden made 22 personal payments to the client in three years, all the while explaining the proceeds were from the pending litigation.

Golden was retained in another divorce action in 1997, and those proceedings required her to complete a QDRO in order to transfer funds from an IRA to the client. She never filed the QDRO but kept telling the client she had.

For the two QDRO complaints among other charges, Golden was suspended from the practice of law. Reinstatement was contingent upon medical proof of competence to return the practice of law. Also, she had to pay all costs.

Violations of Ohio Rules:

DR 1-102(A)(4), engaging in conduct prejudicial to the administration of justice

DR 1-102(A)(6), engaging in conduct that adversely reflects on her ability to practice law;

DR 5-103(B), advancing financial assistance to a client;

DR 7-101(A)(3), causing client damage or prejudice;

DR 7-102 (A)(3), concealing that which an attorney is required by law to reveal.