“Other People’s Money”, Prospective Clients, GALs, and “Is It Related?”

A Review of Recent Ethics Opinions

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Recent Developments in Professional Responsibility

Formal Ethics Opinions

Formal ethics opinion are adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530(4). But note that the Rule provides: "Both informal and formal opinions shall be advisory only;. . .”

- *Stengel v. KBA*, 162 S.W.3d 914 (Ky. 2005)

Lawyers' Obligations Regarding Client Funds Held by the Lawyer to Which Third Persons Claim An Interest

- **Subject:** What are the lawyer's obligations and the lawyer's permitted course of action when holding client funds to which a third party claims a legal or an equitable interest in the client funds?
- Examples:
  - **Medical provider services**
  - **Litigation funding client loan agreements**
  - **Common law and contractual subrogation claims**
  - **Federal and State statutory liens such as through the Center for Medicare Services**
  - **ERISA liens**
  - **Child support obligations**

"Other People's Money" SCR 3.130 (Rule 1.15)

- What is the lawyer's duty (what can the lawyer do) when the client says:
  - "Give me my money and I'll pay the lien" or
  - "Give me my money and forget about that lien"
  - "Just give me my money or you're fired."
- What is the Lawyer's Duty After the Client Discharges the Lawyer Over the Third Party Claim?

How Did We Get Here?

Prior to the 2014 Amendments, SCR 3.130 (Rule 1.15) generally followed the ABA Model Rule.

The Kentucky Rules of Professional Conduct Were Adopted by Supreme Court of Kentucky by Order 89-1, eff. 1-1-90.

How Did We Get Here?

SCR 3.130 (Rule 1.15) Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client, third person, or both in the event of a claim by each to the property. The separate account referred to in the preceding sentence shall be maintained in a bank which has agreed to notify the Kentucky Bar Association in the event that any overdraft occurs in the account. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

SCR 3.130 (Rule 1.15(b))-1990

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

SCR 3.130 (Rule 1.15(c))-1990

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

2009 Amendments

- (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client, or third person, or both in the event of claims by each to the property. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, third person, or both in the event of a claim by each to the property, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
- The KBA Ethics 2000 Committee Report contains the following discussion of the then proposed Rule 1.15 as compared to the Model Rule 1.15 at pp. 1-170-1-171:*(a) Language has been added to paragraphs (a), (b), and (c) of the Rule clarifying responsibilities when there is a claim by both a client and third party for funds held by a lawyer.*

2009 Amendments

(c) When in the course of representation a lawyer is in possession of funds or other property in which [two or more persons (one of whom may be the lawyer)] the lawyer and client claim interests and are not in agreement regarding those interests, the funds or other property in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or other property in [as to] which the interests are not in conflict [dispute].

2014 Amendments to Rule 1.15 Removed "Third Party" Duties

- Effective January 1, 2014, the Supreme Court of Kentucky amended SCR 3.130(1.15(b) & (c)) to delete references in Rule 1.15 to "third person" claims against client held funds.
  - Sections (b) and (c) of SCR 3.130(1.15) shall read:
- (b) Upon receiving funds or other property in which a client [or third person] has an interest, a lawyer shall promptly notify the client [,third person, or both in the event of claims by each to the property]. Except as stated in this Rule or otherwise permitted by law or by agreement with the client [third person, or both in the event of a claim by each to the property] a lawyer shall promptly deliver to the client [or third person] any funds or other property that the client [or third person] is entitled to receive and, upon request by the client [or third person], shall promptly render a full accounting regarding such property.

2014 Amendments to Rule 1.15 Removed "Third Party" Duties

(c) When in the course of representation, a lawyer is in possession of funds or other property in which [two or more persons (one of whom may be the lawyer)] the lawyer and client claim interests and are not in agreement regarding those interests, the funds or other property in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or other property in [as to] which the interests are not in conflict [dispute].

Order 2013-12, effective January 1, 2014 [Note: The bracketed and underlined language appears in the June 19, 2013 Supreme Court Rules Hearing presentation as the proposed amendment to SCR 3.130(Rule 1.15)].

Current SCR 3.130 (Rule 1.15(b))

(b) Upon receiving funds or other property in which a client has an interest, a lawyer shall promptly notify the client. Except as stated in this Rule or otherwise permitted by law or by agreement with the client a lawyer shall promptly deliver to the client any funds or other property that the client is entitled to receive and, upon request by the client, shall promptly render a full accounting regarding such property.

Current SCR 3.130 (Rule 1.15(c))

(c) When in the course of representation a lawyer is in possession of funds or other property in which the lawyer and client claim interests and are not in agreement regarding those interests, the funds or other property in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or other property in which the interests are not in conflict.

“Other People’s Money”

- “Give me my money and I’ll pay the lien” or
- “Give me my money and forget about that lien” or
- “Just give me my money or you’re fired.”

Current SCR 3.130 (Rule 1.15(b))

(b) Upon receiving funds or other property in which a client has an interest, a lawyer shall promptly notify the client. Except as stated in this Rule or otherwise permitted by law or by agreement with the client a lawyer shall promptly deliver to the client any funds or other property that the client is entitled to receive and, upon request by the client, shall promptly render a full accounting regarding such property.

Complying with Rule 1.15 and Lien Obligations

- A lawyer follows the Rules of Professional Conduct by disbursing client funds to the client as instructed by the client.

- Rule 1.15(b) only directs the lawyer to ". . . promptly deliver to the client any funds or other property that the client is entitled to receive. . . ."

Complying with Rule 1.15 and Lien Obligations

- Rule 1.15 does not require the lawyer to deliver funds or property to the client to which the client is not entitled to possess due to a common law or statutory claim or lien, particularly if by making the distribution the lawyer could become personally liable

Comment 1 to Rule 1.15

- "A lawyer should hold property of others with the care required of a professional fiduciary."

- "All property which is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts."

Comment 2 to Rule 1.15

- The lawyer may have a claim to the funds held as well as third parties.
- "The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration."

If Discharged By The Client

- SCR 3.130 (Rule 1.16) provides:
- (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 or expense that has not been earned or incurred.

Net Result

- "In sum, a lawyer would not violate the Rules of Professional Conduct by satisfying common law, statutory, or other enforceable lien claims or obligations from funds held in the lawyer's trust account so as to insure that the lawyer is not held personally liable for the client's obligation."
- "In these circumstances the lawyer would be well advised to seek a determination from a court or other tribunal of the validity and amount of the lien or other legal obligation affecting the client's funds before disbursing the funds."

Net Result

"The Rules of Professional Conduct address only the ethical duties of an attorney in Kentucky, not the substantive law on liens, subrogation claims, client contracts, ERISA liens, Medicare/Medicaid issues, or child support claims or liens, etc.

The legal viability of those types of claims must be assessed by the lawyer on a case-by-case basis. It would be appropriate for lawyers to consider, when preparing their engagement letters, adding a provision explaining the lawyer's legal obligations in disbursing client funds."

Ethics Opinion KBA E-455

- How does a potential client who confers with a lawyer about hiring the lawyer to represent the potential client in a matter become the lawyer's Prospective Client, and what are the ethical ramifications to the lawyer and the lawyer's present, and future clients?
- SCR 3.130 (Rule 1.18)

Who Is a "Prospective Client"

- A person comes into your office with a potential claim, or
- You receive a call from an existing client carrier about representation of an insured, or
- Your conflicts check reveals a surprise connection, or
- You're suing an estate (or other entity) and your intake folks field a potential claim call from an estate beneficiary (or entity owner).

Who Is a “Prospective Client”

- Was the potential client acting in good faith to acquire legal advice or was the potential client’s actions an attempt to disqualify the lawyer?

How does a potential client become a “prospective client”?

- A lawyer’s ability to enter into a lawyer-client relationship with a prospective client is limited primarily by three Rules of Professional Conduct:
  - SCR 3.130(1.7), Conflict of Interest: Current Clients,
  - SCR 3.130(1.9), Duties to Former Clients,
  - SCR 3.130(1.10) Imputation of conflicts of interest: general rule.

Rule 1.18.
Duties to prospective client.

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

Rule 1.18.
Duties to prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

Rule 1.18.
Duties to prospective client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

Rule 1.18.
Duties to prospective client.

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

- (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or;
- (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
- (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (ii) written notice is promptly given to the prospective client.

Rule 1.18.
Duties to prospective client.

- A person or entity becomes a “prospective client” by discussing with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter;
- However, not every communication with a lawyer, whether in-person or by electronic means, constitutes a “discussion” within the meaning of the Rule.

Prospective Clients

- If the potential client provides the attorney with confidential information that is significantly harmful to such person, then it is most likely that the person will become a prospective client
- A person who discloses or communicates information to a lawyer must have a *bona fide* intent of
  - retaining the lawyer
  - or a good faith intention to seek legal advice

KBA E-455 "Best Practices"

- Avoid the casual conversation, i.e., Church, ball games, on the street, etc.
- Tell the person to limit what is told until you agree to accept the representation.
  - Simple facts: type of case, names of persons involved, *etc*.
- Complete conflicts checks promptly.
  - E-455 provides a suggested "Conflicts Consultation Form"

KBA E-455 "Best Practices"

- Contact through a law firm's website
  - ABA Formal Opinion 10-457 (August 5, 2010)
- Warnings or cautionary statements on a lawyer's website can be designed to and may effectively limit, condition, or disclaim a lawyer's obligation to a website reader
- "We welcome e-mails, but do not send confidential information by e-mail."
- "Sending us e-mail does not create an attorney-client relationship. We do not have any obligation to keep information you send us confidential unless and until we check for potential conflicts of interest and agree to represent you."

KBA E-455 “Best Practices”

- Use of a professional answering service or of staff trained to field cold calls
- Have a list of predetermined questions which are designed to extract personal and case information so that the lawyer might assure that a potential client’s confidential information is not disclosed without first giving the lawyer the opportunity to do a conflicts check.

What is "significantly harmful" prospective client information?

- Rule 1.18(c) limits its application to those situations where a lawyer learns a potential client's confidential information that
  - (1) arises out of the same or a substantially related matter and
  - (2) is significantly harmful to the potential client.

ABA Formal Opinion 492 (June 9, 2020)

- Examples of "significantly harmful" information.
  - Exchange of views on settlement value & timing
  - Personal accounts of the event
  - Prospective client's strategic thinking
  - Sensitive personal information in dissolution matter
  - Prospective client's financial information

"Significantly Harmful" is Fact Specific and Subjective

- A mere conclusory statement of harmfulness is generally not enough to substantiate a party's position that the information disclosed is significantly harmful.
- For example, a party's statement that the information is "non-public" is not necessarily synonymous with confidential or privileged information because even information that is not generally available to the public can be discovered.
- Information cannot be significantly harmful to a prospective client if:
  - (1) it can be procured from an alternate source; or
  - (2) it is most likely to be revealed during discovery, which, of course, is what a court may need to consider as an item of information that is likely to be discovered.

Summary

- A prospective client is a person who consults a lawyer about the possibility of forming a client-lawyer relationship.
- SCR 3.130(1.18) governs whether the consultation limits the lawyer or the lawyer's firm from accepting a new client whose interests are materially adverse to the prospective client in a matter that is the same or substantially related to the subject of the consultation, even when no client-lawyer relationship results from the consultation.
- Further, a lawyer is prohibited from accepting a new matter if the lawyer receives information from a prospective client that could be to a prior prospective client in the new matter.
- Whether information learned by the lawyer could be significantly harmful is a fact-based inquiry.

Ethics Opinion KBA E-454

- Ethical Responsibilities of an Attorney as a Guardian *Ad Litem*
  - SCR 3.130 (1.1)
  - SCR 3.130 (1.4)
  - SCR 3.130 (1.6)
  - SCR 3.130 (1.14)
- *Morgan vs. Getter et al.*, 441S.W.3d 94 (Ky. 2014)

Ethical Responsibilities of an Attorney as a Guardian *Ad Litem*

- KRS 387.305 sets forth the duties of a GAL
- "(The GAL) is appointed to represent defendants who are under legal disability and is given the duty to 'attend properly to the preparation of the case' in their behalf...."
  - *Black vs. Wiedeman*, 254 S.W.2d 344, 346 (Ky. 1952)

Ethical Responsibilities of an Attorney as a Guardian *Ad Litem*

- Although not having the powers of a regular guardian, (the GAL) fully represents the infant and is endowed with similar powers for purposes of litigation in hand....
- The guardian ad litem is both a fiduciary and lawyer of the infant, and in a special sense, the representative of the court to protect the minor."
  - Black vs. Wiedeman, 254 S.W.2d 344, 346 (Ky. 1952)

A Guardian *Ad Litem* Cannot Serve Two Masters

- "(A) lawyer undertaking to serve in the hybrid role of attorney-for-the-child / advisor-to-thecourt is immediately confronted with a likely conflict between his or her duty to report to the court and the duties to maintain the child-client's confidences, Supreme Court Rule (SCR) 3.130-1.6, and not to act as both advocate and witness."
  - *Morgan vs. Getter et al.*, 441 S.W3d 94, 108 (Ky. 2014)

A Guardian *Ad Litem* and Diminished Capacity of the Client

- SCR 3.130 (1.14)
  - Rule 1.14 reminds GALs that a client may have a diminished mental capacity by virtue of minority, age, mental impairment or other reason which places the client at a risk of "... substantial physical, financial or other harm" unless some action is taken by the lawyer, and the client cannot act in his/her own interest. At that point, under this Rule, the attorney is entitled to take "reasonably necessary protective action" for the client.

Diminished Capacity of the Client

- Under Rule 1.14 the attorney is required to maintain a normal client-lawyer relationship with the client, and be guided by the wishes and values of the client to the extent known; the client's best interests, and to make the least restrictive intrusion into the client's decision-making process.

Diminished Capacity And Risk of Substantial Physical, Financial or Other Harm

- The attorney is authorized to take "reasonably necessary protective action" for the client with diminished capacity
- Rule 1.14 "impliedly authorizes" the attorney to reveal information about the client to the extent reasonably necessary to protect the client's interest.

Ethical Responsibilities of an Attorney as a Guardian *Ad Litem*

- Represent the interests of the client
- Maintain as normal an attorney/client relationship as possible
- May have to undertake protective measures if there is a risk of substantial harm to the client.
- Rule 1.14 sets out a progressive procedure.

KBA E-453 Confidentiality of Information for Former Government Officers or Employees

- May a former government officer or employee, in connection with a matter in which the lawyer substantially and personally participated, disclose information about that matter to third parties?
  - May the lawyer be a fact witness?
  - May the lawyer serve as an expert?

KBA E-453 Confidentiality of Information for Former Government Officers or Employees

- SCR 3.130 (Rule 1.11(a))
- Former government lawyer employee:
  - If the lawyer "participated personally and substantially as a public officer or employee,"
  - Then lawyer may not "represent a client in connection with the matter, unless the appropriate government agency gives informed consent, confirmed in writing, to the representation."

KBA E-453 Confidentiality of Information for Former Government Officers or Employees

- What constitutes personal and substantial participation in the same matter?
  - "direct participation by a government employee through a process of decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise."
  - "would include an exchange of confidential information in the form of planning and strategy, or discussions of potential witnesses to be called on the defendant's behalf, or avenues of investigation to be taken.

KBA E-453 Confidentiality of Information for Former Government Officers or Employees

- Compare SCR 3.130 (Rule 1.9(a)):
- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

KBA E-453 Confidentiality of Information for Former Government Officers or Employees

- Under Rule 1.11(a) the trigger for disqualifying a lawyer formerly employed by the government is personal and substantial participation in the same matter, as opposed to actual representation in the same or a substantially related matter.
- Rule 1.11(c) allows screening of the former government lawyer

KBA E-453 Confidentiality of Information for Former Government Officers or Employees

- Rule 1.11(c) "a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person"

KBA E-453 Confidentiality of Information for Former Government Officers or Employees

- Rule 1.9(c)(1) does not limit use of client information that has become "generally known."
  - Comment 9 to Rule 1.9 states: Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.
- See ABA Formal Opinion 479 (2017) commenting on "generally known".

KBA E-453 Confidentiality of Information for Former Government Officers or Employees

- May a former government officer or employee serve as an expert witness in proceedings about a matter in which the lawyer did not substantially and personally participate, but which took place while he/she was a government officer or employee?
- Yes—Lawyer would be using general information about the governmental institution

Ethics Hotline SCR 3.530

(5) Both informal and formal opinions shall be advisory only; however, no attorney shall be disciplined for any professional act performed by that attorney in compliance with an informal opinion furnished by the Ethics Committee member pursuant to such attorney's written request, provided that the written request clearly, fairly, accurately and completely states such attorney's contemplated professional act.

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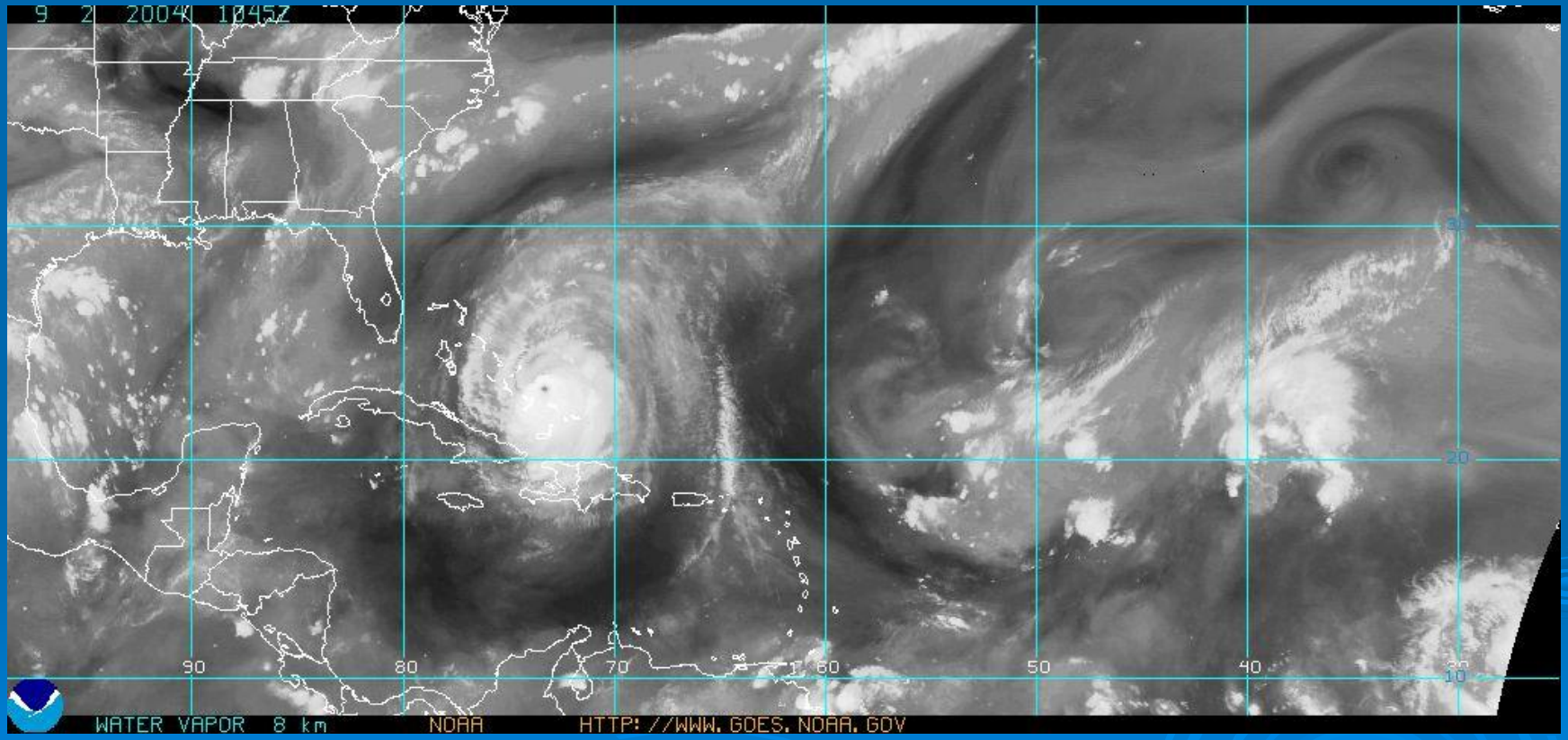
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