

ETHICAL CONSIDERATIONS IN THE WORKERS' COMPENSATION PRACTICE SELECTED TOPICS

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I. Introduction.

The present standards for ethical conduct by lawyers in North Carolina are found in the 1997 Revised Rules of Professional Conduct of the North Carolina State Bar. The North Carolina Supreme Court approved substantial revisions to these in February 2003. The present rules, including formal ethics opinions, are found in the 2009 Lawyer's Handbook published by the North Carolina State Bar. Each rule is followed by annotations of State Bar ethics opinions that apply or interpret the rule. These include Formal Ethics Opinions under the Revised Rules of Professional Conduct and ethics opinions adopted under the previous 1985 Rules of Professional Conduct. The ethics opinions adopted under the 1985 Rules are referred to using the abbreviation "RPC."

This discussion of ethical standards for workers compensation lawyers is based on these Revised Rules of Professional Conduct and applicable provisions of the Workers' Compensation Act and Rules of the North Carolina Industrial Commission.

Specific ethical standards also have been adopted for other participants in the North Carolina Workers' Compensation System. The full Commission is subject to the State Government Ethics Act, and Commission employees are subject to the Commission's own ethics policy. Standards for mediators are in the revised Standards of Professional Conduct for Mediators, which were adopted by the Supreme Court in 1998 and most recently revised in 2006. Professional standards for rehabilitation professionals can be found in the Code of Professional Ethics for Rehabilitation Counselors developed by the Commission on Rehabilitation Counselor Certification. A revised Code was adopted in June 2009 and is effective January 1, 2010.

II. Truthfulness in Statements to Others.

A lawyer is required to be truthful with others on behalf of a client. Rule 4.1 of the Revised Rules of Professional Conduct prohibits a lawyer from knowingly making a false

statement of material fact or law to a third person in the course of representing a client. The lawyer must have actual knowledge of the dishonest statement and the statement must be with respect to a material matter. Misrepresentations can occur by partially true but misleading statements or omissions. However, a lawyer generally has no affirmative duty to inform an opposing party of relevant facts.

The official comment for this Rule points out that whether a particular statement is regarded as one of fact can depend on the circumstances and “under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact.” Typically in this category are “estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim.”

The North Carolina Workers’ Compensation Act also provides for serious criminal penalties for fraudulent statements. G.S. § 97-88.2 of the Act punishes as a misdemeanor or felony, depending on the amount in issue, “any person who willfully makes a false statement or representation of a material fact for the purpose of obtaining or denying any benefit or payment, or assisting another to obtain or deny any benefit or payment under” the Workers Compensation Act. All participants in the system, employers, insurance representatives, injured employees, lawyers and physicians are subject to these penalties.

Section 97-88.3 of the Act specifically addresses penalties imposed on health care providers, in addition to those under 97-88.2. Substantial civil penalties are authorized for these providers who willfully or intentionally submit charges for services which are not furnished or fraudulently administering, providing, and attempting to collect for inappropriate or unnecessary treatment or services.

The Revised Rules of Professional Conduct also separately address the lawyer’s obligation of candor toward a court or hearing officer. Rule 3.3 of the Revised Rules provides that a lawyer “shall not knowingly make a false statement of material fact or law to a tribunal or fail to correct false statements previously made.” The Rule also provides that “a lawyer also shall not knowingly offer evidence that the lawyer knows to be false” and “shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal” when a witness called by the lawyer has offered material evidence and the lawyer later learns of its falsity. These obligations represent the special duties of lawyers

as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. While the lawyer has responsibility to present the client's case "with persuasive force," the lawyer must not allow the court or hearing officer to be misled by false statements of material fact or law or evidence that the lawyer knows to be false.

Applying these principles, in 2008 Formal Ethics Opinion 1, dated April 25, 2008, the State Bar ruled that a lawyer representing an undocumented worker in a workers' compensation claim "has a duty to correct court documents containing false statements of material fact and is prohibited from introducing evidence in support of the proposition that an alias is the client's legal name." The Opinion explains:

If the client's name is an issue of material fact in the workers' compensation action, then the lawyer has a duty to correct the filed court documents. The North Carolina Workers' Compensation Act applies to 'every person engaged in an employment under any appointment or contract or hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed.' N.C.Gen.Stat. § 97-2. Arguably, the fact that the lawyer's client is an undocumented worker would not affect the client's right to compensation under the Act. On the other hand, issues of credibility may affect the client's action. A determination of the materiality of the client's use of an alias in a workers' compensation action is a legal question outside the purview of the Ethics Committee.

Before taking any necessary remedial measures, the lawyer should advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the correction of the false statement in the filed court documents.

Materiality does not affect the lawyer's duty to refrain from offering false evidence in the future. Rule 3.3(a)(3) provides that a lawyer shall not offer any evidence that the lawyer knows to be false. Therefore, the lawyer would be prohibited from introducing any evidence in support of the proposition that the alias is the client's true name, including the client's own testimony. *See* RPC 33. If the client cannot agree to the lawyer's proposed terms of the continued representation, the lawyer must seek to withdraw from the action in accordance with Rule 1.16.

In a related quotation, in 2005 Formal Ethics Opinion 3, dated July 14, 2005, the North Carolina State Bar has ruled that it is unethical for a lawyer to threaten to report an opposing party or a witness to immigration officials to induce this person to capitulate

during settlement negotiations in a civil matter. The opinion reasons that the “threat to expose a party’s undocumented immigration status serves no other purpose than to gain leverage in the settlement negotiations for a civil dispute and furthers no legitimate interests in our adjudicative system. Therefore, a lawyer may not use the threat of reporting an opposing party or a witness to immigration officials.

III. Limitations on Communications With Commissioners and Hearing Officers.

Rule 3.5 of the Revised Rules of Professional Conduct defines the circumstances under which a lawyer may communicate with a judicial official. The official comment explains:

All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings, a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if unrepresented. Ordinarily, an oral communication by a lawyer with a judge or a hearing officer should be made upon adequate notice to opposing counsel or, if there is none, to the opposing party. The lawyer should not condone or lend himself or herself to private importunities by another with a judge or a hearing officer on behalf of the lawyer or the client.

In July 1999, in 98 Formal Ethics Opinion 13, the State Bar considered the propriety of employee’s counsel in a workers’ compensation claim copying a deputy commissioner with a letter written to defense counsel which implied that defense counsel had engaged in improper conduct in communicating with a physician and failing to respond to discovery. This State Bar’s opinion observed that “judicial official” in Rule 3.5 encompasses commissioners and deputy commissioners of the Industrial Commission. The opinion further observed that the right to written communication to a judicial official in Rule 3.5, provided the opposing party is copied simultaneously, must be read in conjunction with Rule 8.4(d) which prohibits conduct that is prejudicial to the administration of justice. The State Bar then went on to state:

The submission to a tribunal of formal written communications, such as pleadings and motions, pursuant to the tribunal's rules of procedure, does not create the appearance of granting undue advantage to one party. However, informal *ex parte* written communications, whether addressed directly to the judge or copied to the judge as in this inquiry, may be used as an opportunity to introduce new evidence, to argue the merits of the case, or to cast the opposing party or counsel in a bad light. To avoid the appearance of improper influence upon a tribunal, informal written communications with a judge or other judicial official should be limited to the following:

- 1) Written communications, such as a proposed order or legal memorandum, prepared pursuant to the court's instructions;
- 2) Written communications relative to emergencies, changed circumstances, or scheduling matters that may affect the procedural status of a case such as requests for a continuance due to the health of a litigant or an attorney;
- 3) Written communications sent to the tribunal with the consent of the opposing lawyer or opposing party if unrepresented; and
- 4) Any other communication permitted by law or the rule or written procedures of the particular tribunal.

In 2001, commenting on this opinion, defense lawyer Henry Byrum then advised: "Attorneys should not take for granted that it is permissible to copy the Industrial Commission on correspondence with an opposing party. . . . Commissioners and deputy commissioners are judicial officers, and copying them with regular correspondence to opposing counsel should generally be avoided, unless there is some specific legal basis for the same."

The Commission's present Rule 609(6) was adopted in response to the State Bar's formal ethics opinion and tracks much of its language. Rule 609(6), therefore, provides:

(6) In all cases where correspondence relative to a case before the Industrial Commission is sent to the Industrial Commission, copies of such correspondence shall be contemporaneously sent by the same method of transmission to the opposing party or, if represented, to opposing counsel. Written communications, whether addressed directly to the Commission or copied to the Commission, may not be used as an opportunity to introduce new evidence or to argue the merits of the case, or to cast the opposing party or counsel in a bad light, with the exception of the following instances:

- (a) Written communications, such as a proposed order or legal memorandum, prepared pursuant to the Commission's instructions;

(b) Written communications relative to emergencies, changed circumstances, or scheduling matters that may affect the procedural status of a case such as a request for a continuance due to the health of a litigant or an attorney;

(c) Written communications sent to the tribunal with the consent of the opposing lawyer or opposing party if unrepresented; and

(d) Any other communication permitted by law or the rules or procedures of the Commission.

At no time may written communications, whether addressed directly to the Commission or copied to the Commission, be used as an opportunity to cast the opposing party or counsel in a bad light.

Unlike the formal ethics opinion, Commission Rule 609 governs the conduct of employers, insurers and injured employees as well as their lawyers in communicating with commissioners and deputy commissioners.

Speaking at a June 1999 education program, Industrial Commissioner Bernadine Ballance observed that the State Bar's 98 Formal Ethics Opinion 13 has resulted in "a heightened awareness that if Rule 3.5 restricts *ex parte* communication flowing from attorneys to the Commission, it can also be interpreted as restricting *ex parte* communications initiated by the Commission."

IV. Prohibition on Communication with Represented Opposing Parties.

A leading defense lawyer phrased the fundamental principle as follows: "Once an attorney – client relationship has been established, a lawyer has the right to expect and demand that no one speak to the client about the subject of the representation without the attorney's permission."

Rule 4.2 of the Revised Rules of Professional Conduct incorporates this principle. The rule provides:

(a) During the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. It is not a violation of this rule for a lawyer to encourage his or her client to discuss the subject of the representation with the opposing party in a good-faith attempt to resolve the controversy.

The Industrial Commission has incorporated this principle in Commission Rule 614(1) to prohibit communications by a party or a party's representative with the opposing party who is represented by a lawyer. The Commission rule states that "no direct contact or communication concerning contested matters may be made with a represented party by the opposing party or any person on its behalf, without the attorney's permission except as permitted by law or Industrial Commission Rules."

An employer or insurer that is represented by a lawyer falls within the protection of Rule 4.2 of the Revised Rules. Rule 4.2 prohibits communication with an employee of a employer or insurer who supervises, directs or consults with the company's lawyer concerning a matter or has the authority to obligate the company with respect to a matter. However, consent of the employer's lawyer is not required to communicate with a former employee who did not participate substantially in the company's legal representation in the particular matter. Generally, the lawyer for an injured employee is permitted to communicate *ex parte* with a "rank and file" employee of a represented adverse party.

In 97 Formal Ethics Opinion 2, dated January 16, 1998, the State Bar ruled specifically that "a lawyer may interview an unrepresented former employee of an adverse represented organization about the subject of the representation unless the former employee participated substantially in the legal representation of the organization in the matter." The Opinion references an insurance adjuster who has participated substantially in the legal representation of the insurer as a person opposing counsel may not interview without the consent of the company's lawyer.

A lawyer is prohibited by Rule 4.2 of the Revised Rules from communicating with a represented person "through the acts of another." Applying this Rule and Rule 5.3, the State Bar has dealt in a workers' compensation context with the offer of evidence obtained during a private investigator's verbal communication with the opposing party known to be represented by a lawyer.

In 2003 Formal Ethics Opinion 4, dated July 25, 2003, the State Bar addressed evidence gained during a private investigator's verbal communication with an opposing party known to be represented. In this case, a defense lawyer hired a private investigator to watch the injured employee and instructed the investigator not to engage in conversation with the employee. The investigator nevertheless engaged the employee in a

conversation during the surveillance. The State Bar reiterated that the lawyer may not do through an agent what Rule 4.2 prohibits a lawyer from doing himself or herself. The State Bar declined to state an opinion on the admissibility of this evidence of the conversation but continued:

However, to discourage unauthorized communications by an agent of a lawyer and to protect the client-lawyer relationship, the lawyer may not proffer the evidence of the communication with the represented person, even if the lawyer made a reasonable effort to prevent the contact, unless the lawyer makes full disclosure of the source of the information to opposing counsel and to the court prior to the proffer of the evidence.

The lawyer could ethically use evidence gained through the investigator's visual observations of the injured employee since "visual observation is not a direct contact or communication with a represented person and does not violate Rule 4.2(a).

Chief Deputy Commissioner Wanda Blanche Taylor commented in a 2004 paper on this ethics opinion. She observed:

It is important to note that this opinion does not rule that the information gained by the investigator while speaking to the plaintiff is admissible, merely that it is not unethical for defense counsel to proffer the evidence. Defense counsel may only ethically proffer this evidence if he or she makes full disclosure of the source of the information to opposing counsel and to the Court prior to the proffer of the evidence.

Upon defense counsel's disclosure of the source of the information to opposing counsel and the Court, it appears that the court (or in this case the Commission) is free to determine that such evidences is inadmissible due to the method by which it was obtained.

. . . .

Query: In addition to the issue of contacting directly and without permission a plaintiff who is represented, this ethics inquiry raises questions regarding the dishonest and perhaps fraudulent behavior of the investigator. How does the workers' compensation fraud statute N.C.G.S. § 97-88.2 impact on the investigator's action as well as the actions of the employer, carrier and defense attorney?

It should be noted that compliance with the ethics rules does not necessarily protect a person from penalties be they civil or criminal.

V. Restriction on Communication with Treating Physicians.

The basic principle is that in the absence of consent by the employee, the defendants, employer or insurer, and their lawyer may not communicate with the employee's treating physicians except as specifically authorized by use of "the recognized methods of discovery" in the Workers' Compensation Act and in the Commission's rules.

The employer and insurer and their lawyer thus may communicate with a treating medical provider with the written consent of the injured employee. In addition, since September 2005, Section 97-25.6 of the Workers' Compensation Act provides for access by the employer or insurer to material records of the treating physician and by specific questions promulgated by the Commission to determine medical information necessary to administer the workers' compensation claim. Section 97-25.6 of the North Carolina General Statutes and the Commission's memoranda and questionnaire, adopted in November 2005, which may be used by employers and insurers are attached. Also in appropriate cases, the Commission may by order provide for the taking of a pretrial deposition from a physician or the release of necessary documents or information which is not otherwise obtainable under the Commission's rules. N.C. Gen. Stat. §§ 97-25.6 and 97-80.

In Salaam v. N.C. Department of Transportation, 122 N.C. App. 83, 468 S.E.2d 536 (1996), the North Carolina Court of Appeals held that the Supreme Court's decision in Crist v. Moffatt which prohibited *ex parte*, non-consensual contact with the plaintiff's treating physician in a medical malpractice action, applied equally in workers' compensation cases. The Court of Appeals thus ruled in Salaam that the Industrial Commission erred in admitting into evidence the deposition of the injured employee's surgeon because the defendant's lawyer had engaged in an *ex parte* conversation with the surgeon prior to the deposition. The Salaam decision noted that "the Crist Court appears to have established a prophylactic protection against non-consensual *ex parte* communications." 122 N.C. App. at 88, 468 S.E. 2d at 539.

The principle is summarized by the Supreme Court in Crist:

In summary, the gravamen of the issue is not whether evidence of plaintiff's medical condition is subject to discovery, but by what methods the evidence may be discovered. We conclude that considerations of patient privacy, the confidential relationship between

doctor and patient, the adequacy of formal discovery devices, and the untenable position in which *ex parte* contacts place the nonparty treating physician supersede defendant's interest in a less expensive and more convenient method of discovery. We thus hold that defense counsel may not interview plaintiff's nonparty treating physician privately without plaintiff's express consent. Defendant instead must utilize the statutorily recognized methods of discovery. . . .

Crist v. Moffatt, 326 N.C. 326, 336, 389 S.E.2d 41, 47 (1990) (emphasis added).

The Court in Crist was careful to emphasize that it did "not intend by this holding to discourage consensual informal discovery." *Id.*

The year following the Salaam decision, on October 24, 1997, the North Carolina State Bar issued RPC 224 addressing communication with a treating physician in a workers' compensation claim. This State Bar "Opinion prohibits the employer's lawyer from engaging in direct communications with the treating physician for an employee." The text of this opinion follows:

Communications with Treating Physicians

Opinion prohibits the employer's lawyer from engaging in direct communications with the treating physician for an employee with a workers' compensation claim.

Inquiry #1:

Employee was injured in a work-related accident. Attorney A represents Employee in his workers' compensation claim. Attorney X represents the employer. Employee's treating physician is Dr. Care. May Attorney X contact Dr. Care privately, without the consent of Employee or Attorney A, to discuss Employee's medical treatment?

Opinion #1:

No. See *Salaam v. N.C. Department of Transportation*, 122 N.C. App. 83, 468 S.E.2d 536 (1996), disc. rev. improvidently granted, 345 N.C. 494, 480 S.E.2d 51 (1997) (applying the holding in *Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41 (1990), to adversarial proceedings before the Industrial Commission and recognizing the public policy interests in protecting patient privacy in light of the adequacy of formal discovery procedures).

A second opinion, RPC 180, dated July 21, 1994, ruled that a lawyer may not passively listen while the opposing party's non-party treating physician comments on his or her treatment when the opposing party does not consent.

The Court of Appeals has had the opportunity on a number of occasions since its decision in Salaam to review decisions from the Industrial Commission applying the prohibition against employer and insurer non-consensual contact with a treating physician. In Evans v. Young-Hinkle Corp., 123 N.C. App.693, 474 S.E.2d 152 (1996), the Court of Appeals held that the Industrial Commission erred when it denied a motion by the injured employee for an order prohibiting *ex parte* contact between defense counsel and the treating physician and when it failed to strike the testimony of this physician “tainted by improper conduct.” In Porter v. Fieldcrest Cannon, Inc., 133 N.C. App. 23, 514 S.E.2d 517 (1999), without the injured employee’s consent, defense counsel sent a letter to the employee’s treating physician asking for an opinion on the employee’s condition. The Court of Appeals held that only the portion of the physician’s deposition testimony related to the *ex parte* communication was to be excluded in this particular case because the Rule otherwise “would punish the plaintiff for the improper conduct of the defendant.” While Salaam and Crist involved oral communications, the Court confirmed in Porter that the rule in these cases also extended to written communications between an employer and a treating physician.

In Terry v. PPG Industries, Inc., 156 N.C. App. 512, 577 S.E.2d 326 (2003), the Court considered the admissibility of testimony and records from a treating physician after the employer’s safety manager, without the injured employee’s consent, met with the physician and showed him a videotape of the injured employee walking. The Court of Appeals ruled that the Commission properly struck the parts of the treating physician’s deposition testimony and the medical records of the employee that occurred after the *ex parte* contact. The Court of Appeals in Mayfield v. Hannifin, 174 N.C. App. 386, 621 S.E.2d 243(2005) held that the Commission properly excluded, under Salaam, the opinions of a treating physician after defense counsel sent the physician by facsimile a letter prior to a medical examination. The letter to the treating physician was copied to the employee’s lawyer but the communication was without the consent of the employee or employee’s lawyer.

In Davis v. City of New Bern, 189 N.C. App. 723, 659 S.E.2d 53(2008), an adjuster talked with the treating physician, who suggested to the adjuster that surveillance be

conducted to assess the validity of the employee's symptoms. The Court ruled that the Commission properly excluded from the evidence the testimony from this physician.

Generally rehabilitation professionals may communicate with a treating physician as long as the communication is in compliance with the Industrial Commission's Rules for Utilization and Rehabilitation Professionals. However, a rehabilitation professional who is acting as an agent of the employer or insurance carrier is subject to the same prohibition against non-consensual, *ex parte* communication, as the employer or insurer itself. See Jenkins v. Public Service Co. of N.C., 134 N.C. App. 405, 412, 518 S.E.2d 6, 11 (1999), *rev'd on other grounds*, 351 N.C. 341, 524 S.E.2d 805 (2000).

VI. Conduct of Commission Discovery.

All of the parties in the North Carolina workers' compensation system have a strong interest in conducting discovery consistent with the Commission's rules and professional and ethical standards. By doing so, the parties advance a just resolution of disputed issues while minimizing costs to themselves and the Industrial Commission's resources. The North Carolina Workers' Compensation Act, in fact, mandates that the Commission's "processes, procedure, and discovery" shall be "as summary and simple as reasonably may be." N.C. Gen. Stat. § 97-80.

Discovery in workers' compensation claims, therefore, is considerably more streamlined than typical discovery in a civil action.

Rule 3.4 of the Revised Rules of Professional Conduct requires the lawyer not to disobey or advise a client to disobey an obligation under the rules of a court or commission. This rule specifically enjoins a lawyer "in pretrial procedure" not to:

- (1) make a frivolous discovery request
- (2) fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party, or
- (3) fail to disclose evidence or information that the lawyer knew, or reasonably should have known, was subject to disclosure under applicable law, rules of procedure or evidence, or court opinions.

The official comments to this rule observes that this paragraph,

makes it clear that a lawyer must be reasonably diligent in making inquiry of the client, or third party, about information or documents responsive to discovery requests or disclosure requirements arising from statutory law,

rules of procedure, or caselaw. “Reasonably” is defined . . . as meaning ‘conduct of a reasonably prudent and competent lawyer.’ . . . When responding to a discovery request or disclosure requirement, a lawyer must act in good faith. The lawyer should impress upon the client the importance of making a thorough search of the client’s records and responding honestly. If the lawyer has reason to believe that a client has not been forthcoming, the lawyer may not rely solely upon the client’s assertion that the response is truthful or complete.

The comments to this rule also observe that the adversary system contemplates fair competition, secured, in part, by “prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.”

The Commission is not governed generally by the rules of civil procedure in its discovery procedures. Discovery in workers’ compensation is governed by Section 97-80 of the Act and Industrial Commission Rules 605, 606 and 607. Rules 605 and 607 were revised by the Commission in 2000 for the purpose, in Executive Secretary Tracey Weaver’s words, “to require more of a cooperative effort between the parties in agreeing to extensions of time to file discovery responses, contacting each other to ascertain the other’s position, and tailoring discovery requests to the disputed issue at hand rather than servicing broad, canned discovery in each case.” The purpose, in short, was to fulfill the General Assembly’s mandate that “discovery” shall be “as summary and simple as reasonably may be.”

Rule 607 authorizes informal discovery of medical and employment documents by written request of a party and Rule 605 authorizes discovery by service of interrogatories consistent with the limitations stated in this rule. Pretrial depositions and “additional methods of discovery as provided by the North Carolina Rules of Civil Procedure may be used only upon motion and approval by the Industrial Commission or by agreement of the parties.” N.C.I.C. Rule 605(3)

Commission Rule 607 provides:

Upon written request, any party shall furnish, without cost, the requesting party a copy of any and all medical, vocational and rehabilitation reports, employment records, Industrial Commission forms, and written communications with medical providers in its possession, within 30 days of the request, unless objection is made

within that time period. This obligation exists whether or not a request for hearing has been filed. This obligation is a continuing one, and any such reports and records which come into the possession of a party after receipt of a request pursuant to this Rule shall be provided to the requesting party within 15 days from its receipt of these reports and records.

Upon receipt of a request, an insurer or administrator for an employer's workers' compensation program shall inquire of the employer concerning the existence of records encompassed by the request. (emphasis added)

The scope of interrogatories is considerably narrower than permitted in civil action discovery. Written interrogatories may be served after the filing of a claim. They are limited to 30 in number, including sub-parts, and may relate only to matters which are not privileged and which are relevant to an issue presently in dispute or which the requesting party reasonably believes may later be disputed. A party, however, may serve an interrogatory to obtain "verification of facts relating to an issue presently in dispute." The "signature of a party serving interrogatories constitutes a certificate by such person that he or she has personally read each of the interrogatories, that no such interrogatory will oppress a party or cause any unnecessary expense or delay, that the information requested is not known or equally available to the requesting party and that the interrogatory relates to an issue presently in dispute or which the requesting party reasonably believes may later be in dispute." N.C.I.C. Rule 605(2).

A motion to compel discovery under Rule 605 and Rule 607 must "represent that informal means of resolving the discovery dispute have been attempted in good faith and state briefly the opposing party's position or that there has been a reasonable attempt to contact the opposing party and ascertain its position." This rule thus requires the parties to communicate with one another and make an effort to resolve the discovery dispute prior to filing a motion with the Commission.

VII. Separate Representation Required for Death Benefit Claimants With Conflicting Interests.

Rule 1.7 of the Revised Rules of Professional Conduct prohibits generally a lawyer from representing multiple clients in a proceeding if "the representation of one client will

be directly adverse to another client.” The clients, however, may consent to this representation when “the representation does not involve the assertion of a claim of one client against another client in the same” proceeding.

In 2001 Formal Ethics Opinion 6, the State Bar addressed specifically circumstances in which a lawyer has a conflict of interest, which may not be waived, in representing family members on claims for a deceased employee’s workers’ compensation death benefits under N.C. Gen. Stat. § 97-38.

The State Bar stated that a lawyer may not ethically represent the child and the stepchild of a deceased employee in claims for death benefits since the lawyer cannot represent the interests of the child unless he or she advocates against compensation for the stepchild. The interests of the child and stepchild of the deceased employee are opposed because the child has an interest in maximizing the benefits payable by elimination of the claim of the stepchild on the basis that the stepchild was not substantially dependent on the deceased employee at the time of death. The stepchild qualifies as a dependent only “if substantially dependent upon the deceased employee at the time of death.” Winstead v. Derreberry, 73 N.C.App. 35, 326 S.E.2d 66(1985). There is such a direct conflict of interest here that the conflict may not be waived by a *guardian ad litem* for the children.

VIII. Standards for Counsel Fees.

The collection of an attorney’s fee for representing an injured employee cannot be “clearly excessive” and must be approved by the Industrial Commission.

Rule 1.5 of the Revised Rules of Professional Conduct prohibit a lawyer from making an agreement for or from charging a “clearly excessive fee.” The factors set out in Rule 1.5 of the Revised Rules to be considered in determining whether a fee is “clearly excessive” include:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;

- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

Rule 1.5 of the Revised Rules also requires that a contingent fee agreement be in writing and state the method by which the fee is to be determined and the expenses for which the client will be liable.

A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party.

Fees for lawyers providing services under the Workers' Compensation Act also are "subject to the approval by the Commission." N.C. Gen. Stat. G.S. § 97-90(a). This requirement, in practice, has been restricted to fees for legal services for representing an injured employee.

Section 97-90(c) of the Workers' Compensation Act requires a lawyer, if there is a fee agreement, to file this agreement with the Commission. "If the agreement is not considered unreasonable, the hearing officer or Commission shall approve it at the time of rendering decision." If the agreement is found to be unreasonable, reasons for this "shall be given and what is considered to be reasonable fee allowed." When a lawyer is dissatisfied with the fee allowance, the lawyer may file a notice of appeal within five days to the full Commission which shall "determine whether or not the attorney's agreement as to a fee or the fee allowed is unreasonable." If dissatisfied with the decision of the full Commission, the lawyer may file an appeal within ten days of receipt of the full Commission's decision to a senior resident superior court judge. This judge can then determine in his or her discretion "the reasonableness of said agreement or fix the fee."

The statute directs the Commission, in determining the allowance of a lawyer's fee, to review the record to determine the services rendered. The factors which may be considered "in allowing a reasonable fee include, but are limited to, the time invested, the amount involved, the results achieved, whether the fee is fixed or contingent, the

customary fee for similar services, the experience and skill level of the attorney, and the nature of the attorney's services.”

Rule 1.5 of the Revised Rules of Professional Conduct references several State Bar ethics opinions with principles pertinent to whether a lawyer's fee is “clearly excessive.” In RPC 35, dated January 15, 1988, the State Bar ruled that a lawyer generally may not charge an enhanced contingent fee to collect “med-pay benefits” since there was no significant risk that the insurance company will refuse payment of these claims. Thus, “there is generally no justification for extraordinarily high fees where there is no risk of nonpayment. In order for such contingent fees to be reasonable and therefore permissible, there must exist at the time the agreement is made some real uncertainty as to whether there will be a recovery.” The Bar noted that it “is not unethical for the attorney to make some reasonable charge for services rendered in regard to the collection of such claims” but that an elevated contingent fee would be unreasonable “to the extent that it bears no relation to the cost to the attorney of providing the service or the value of the service to the client. The same analysis would apply to other types of claims with respect to which liability is clear and there is no real dispute as to the amount due the claimant, such as claims for health insurance benefits and life insurance proceeds.”

In RPC 141, dated October 23, 1992, the State Bar ruled “that an attorney's contingent fee in a case resolved by a structured settlement should, if paid in a lump sum, be calculated in terms of the settlement's present value.” The lawyer thus may collect immediately only the prescribed contingent percentage of the total settlement reduced to its present value. In RPC 196, dated January 13, 1995, the State Bar ruled that a lawyer may not charge a “clearly excessive fee” for legal representation even if the legal fee may be recovered from an opposing party. The fee still must be reasonable based on the factors set forth in Rule 1.5 of the Revised Rules. In RPC 231, dated October 18, 1996, the State Bar addressed whether a lawyer in a civil action may ethically collect a contingent fee on the reimbursement paid to the client's medical insurance provider in addition to a contingent fee on the gross recovery. The State Bar stated that at the conclusion of the representation, the lawyer should examine the factors now listed in Rule 1.5 of the Revised Rules to determine the reasonableness of the total fee. If collection of the additional fee renders the total fee clearly excessive in light of these factors, the lawyer

should reduce the fee paid by the client in an amount equivalent to the fee which would be charged for collecting the claim of the medical insurance provider.

In Industrial Commission Rule 409(7), the Commission has addressed specifically the circumstances in which a lawyer seeking fees for representing a claimant in an uncontested claim for death benefits. In these circumstances, the lawyer must file an affidavit or itemized statement in support of an award for his or her fees.

IX. The Medico Legal Guidelines.

Since 1956, the professional relationship of physicians and lawyers have been the subject of guidelines developed by a joint committee and adopted by the North Carolina Medical Society and North Carolina Bar Association. The current Medico Legal Guidelines were published in 2009 by these professional organizations.

On March 4, 2008, the North Carolina Industrial Commission adopted a portion of the Guidelines. The Commission's March 4, 2008 Minutes read:

In its continuing effort to foster relations between the medical and legal professions and per frequent discussion among Advisory Council members and the Industrial Commission in this regard, the Commission adopts the following portion of the Medico Legal Guidelines promulgated by a joint committee of the North Carolina Medical Society and the North Carolina Bar Association.

The relationship between a physician and an attorney should be based upon mutual respect, courtesy, and understanding. Medical testimony is generally indispensable in legal cases to prove or disprove the nature or extent of injuries or other legally relevant medical conditions. Therefore, when accepting a patient, a physician also accepts the incidental obligation to cooperate in any legal proceedings in which the patient may become involved. When attorneys make inappropriate or inconsiderate demands on physicians, they cause animosity between the professions. Without mutual cooperation by physicians and attorneys, their patients/clients become the unfortunate victim of professional ill will.

As a medical witness, the physician's role is to provide information, not to advocate a position. The attorneys serve as the advocates. The medical witnesses, the court, and the attorneys should show mutual respect and consideration to each other.

X. Standards Governing The Industrial Commission and Its Employees.

The Commission on October 10, 2008, adopted “as standards of conduct for Commissioners and Deputy Commissioners Canons 1, 2, and 3 of the North Carolina Code of Judicial Conduct, as amended January 31, 2006.” These standards are adopted by the North Carolina Supreme Court for the state’s judges. The three Canons address, in some detail, the obligations of a judge to uphold the integrity of the judiciary, to avoid impropriety and promote confidence in the integrity and impartiality of the judiciary, and to perform the duties of his or her office impartially and diligently.

Previously, on May 8, 2007, the Industrial Commission had adopted the following ethics policy applicable to all Commission employees.

Employees of the Industrial Commission shall not knowingly, directly or indirectly, ask, accept, demand, exact, solicit, seek, assign, receive, or agree to receive anything of value from any party with an interest in the Commission’s official duties.

[This does not include food or beverage for immediate consumption at public events nor registration fees, either waived or reduced, connected to educational meetings or conferences that the employee is authorized to attend.]

The conduct of members of the full Commission of the Industrial Commission also is subject to the ethical standards mandated by the State Government Ethics Act in Chapter 138A of the North Carolina General Statutes. This Act requires the public disclosure of financial and personal interests which could cause conflicts of interest between the official’s private interests and public duties. The Act also prohibits actions which will result in personal financial benefit, the solicitation or receipt of anything of value in return for being influenced in the performance of official responsibilities, and the disclosure of confidential information or use of non-public information in a way which would affect the official’s personal financial interest. This Act contains detailed definitions for the prohibited conduct.

XI. Conclusion.

The adherence to ethical standards of conduct by lawyers and other professionals in the North Carolina workers' compensation system is essential to the system's integrity and to the system's functioning properly to provide compensation for industrial injuries.