Ethical Obligations in Workers' Compensation Claims: Advice for Lawyers, Claims Examiners, Nurse Case Managers, and Vocational Rehabilitation Providers

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What sets forth ethical obligations?

- Workers' Compensation Act
 - § 39-71-105, MCA
- Case law
 - Marcott v. Louisiana Pacific Corp., 275 Mont. 197, 911 P.2d 1129 (1996)
- Professional codes of ethics
- For lawyers, Montana Rules of Professional Conduct

Case law

- Marcott v. Louisiana Pacific Corp., 275
 Mont. 197, 911 P.2d 1129 (1996)
- Cases in which WCC has assessed a penalty and/or attorney fees
- Cases in which WCC has sanctioned attorney under ARM 24.5.306(2)(i)

More than just following statutes, rules, and codes . . .

"Ethics is knowing the difference between what you have a right to do and what is right to do."

Justice Potter Stewart

Investigating and fairly evaluating the facts

Marcott v. Louisiana Pacific Corp., 275
 Mont. 197, 911 P.2d 1129 (1996)

Mistakes in medical records and IME reports

Floyd v. Zurich Am. Ins. Co. of Ill., 2017

MTWCC 4



Communications with Claimants

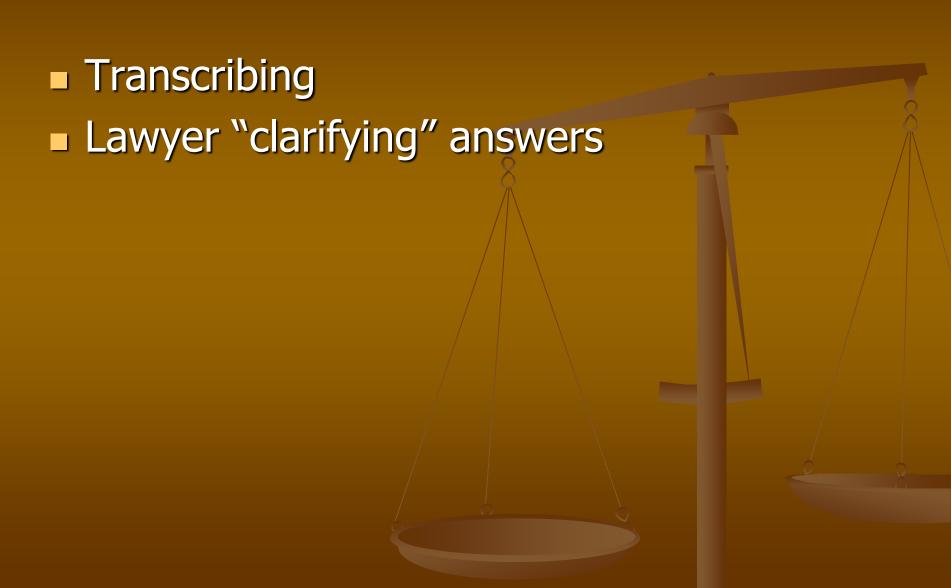
Gryttenholm v. Fremont Industrial Indemnity Co., 2002 MTWCC 24

Misleading, at best . . .

Examples:

- "Dr. Doogie Howser is known as the best orthopedic surgeon in the state."
- "If I had a herniated disk, Dr. "Hawkeye" Pierce is the doctor I would go to for treatment."
- "Dr. Frasier Crane specializes in shoulder injuries."

Recorded Statements



Medical Records

Complete?

Floyd v. Zurich Am. Ins. Co. of Ill., 2017 MTWCC 4

- Relevant?
 - If the claimant has a shoulder injury, does the WCC need to know all of the details of her hysterectomy?

Letters to Physicians

- Slanted?
 - Kastella v. Plum Creek, 1995 MTWCC 54
 - Davis v. Credit General, 2000 MTWCC 48
 - Kramer v. MCCF, 2008 MTWCC 48
 - Engle v. Hartford, 2013 MTWCC 27
- Misleading?

Ex Parte Contacts with Treating Physicians

 Malcomson v. Liberty Northwest, 2014 MT 306, 376 Mont. 306, 339 P.3d 1235

Vocational Rehabilitation

- Leastman v. Liberty Mutual, 1999 MTWCC 2
- Crowell v. State Comp. Insur. Fund, 1999 MTWCC 27
- Careful assessment of claimant and labor market?
- Accurately set forth claimant's abilities?
 - Claimant "is proficient at Microsoft Office."
- Qualified? Competitive?
 - "I'll admit that I just pulled that JA out of my file cabinet."
 - Claimant "has prior experience running a POS system."

Social media

- In all professional functions a lawyer should be competent, prompt and diligent. Competence implies an obligation to keep abreast of changes in the law and its practice, including the risks associated with relevant technology."
- Are you aware of what is out there?

Investigating Social Media

■ *T.B. v. State Fund*, 2015 MTWCC 18



Allied Concrete v. Lester, 736 S.E.2d 699 (Va. 2013)

- Wrongful death case arising out of death of 25year-old wife
- Husband sent Facebook message to defense attorney, which gave the defense attorney access to all parts of the husband's Facebook page, including those that husband thought were private
- Discovery requests seeking screen prints of the Facebook page

Allied Concrete v. Lester, continued . . .



Allied Concrete v. Lester, continued

Before seeing the photos, paralegal sent husband to client instructing him to clean up" his Facebook page because "we don't want any blow ups of this stuff at trial."

After seeing the photos, paralegal sent an email telling him to delete the photos because, "We do NOT want blow ups of these pics at trial so please, please clean up your Facebook and myspace!"

Allied Concrete v. Lester, continued

Husband deleted Facebook page

He reactivated page, but deleted the photos

Allied Concrete v. Lester, continued

- Jury awarded \$6+ million, BUT
- Plaintiff sanctioned \$180,000 and Plaintiff's attorney sanctioned \$542,000, which covered the costs for the defendant's experts to recover the photos and because attorney arguably tried to hide paralegal's emails from judge
- Plaintiff's attorney settled the ethics complaint against him by agreeing to a suspension of his law license for 5 years.

Making Decisions

Hernandez v. ACE USA, 2003 MTWCC 31



Attorney Fees

- Claimants
- Insurers

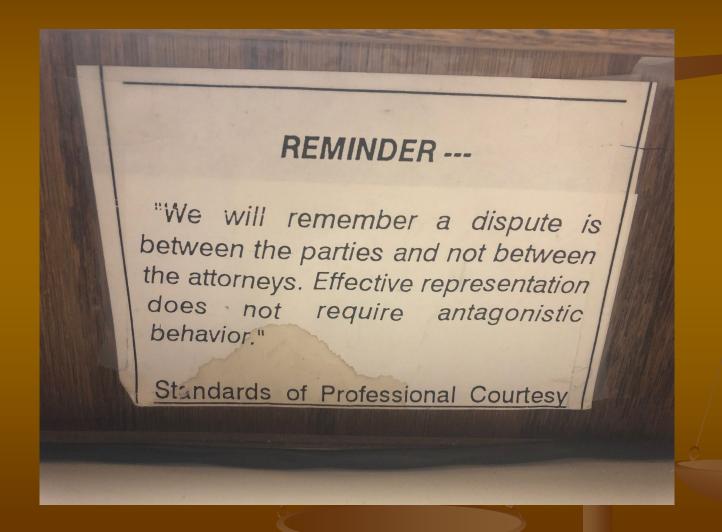


Lawyer as Witness

Taylor v. State Fund, 1994 MTWCC 106



Attorneys



Candor with Opposing Parties

Mavity v. Champion International, 1995
 MTWCC 27

Professional attorney?

- "I will not stipulate to anything with you. Time and again, you have proven that you cannot be trusted."
- The document was not "in" the file.
- Those who live in glass houses should not throw stones
 - Late filings
 - "He is misrepresenting the facts."
 - "I hate to tattle "

Candor with the WCC

Conoco v. Williams, 2003 MTWCC 15

Beaulieu v. Human Dynamics Corp., 2004

MTWCC 65

Candor to the WCC, continued

- ARM 24.5.306(2)(h)
- But, other arguments are in the gray area
 - "Your honor, I am not aware of any case from this Court or the Montana Supreme Court holding [ABC]."
 - "I am not familiar with that case."
 - "The court did not say that specifically, but that is the holding if you read between the lines."

Witnesses

- Affidavits
 - "I didn't read the this before I signed it. That is not true."
- Prepared?
 - "How did you get this?"
- Coached?

And scene!



What's my line?



Questions?

