# *Lex and Verum*

Number XLIX
November 2013

## The National Association of Workers' Compensation Judiciary


# New Look, Same *Lex*

This November 2013 edition of the *Lex and Verum* is the fiftieth. The National Association of Workers' Compensation Judiciary began as a conversation in 2008 at the Workers' Compensation Institute in Orlando. There were questions as to the existence and quality of educational opportunities for workers' compensation adjudicators. A small group decided that there was a place for an organization dedicated to the education of workers' compensation adjudicators. The secondary function of the organization would be to encourage and promote collegiality among adjudicators.

The NAWCJ was incorporated in the spring of 2009, and the first Judiciary College was convened the next August. Following the inaugural College, the *Lex and Verum* debuted in September 2009. The first issue memorialized the Judicial College and recognized our Associate Members. It was six pages long. The *Lex* has changed over the course of the last four years, and now forty-nine issues have come and gone. The average length of the *Lex* has increased to about 30 pages. The variety of subjects has expanded, and the content of the *Lex* has been academically stimulating. We remain thankful to Workcompcentral for their contributions to the *Lex*. We have seen the NAWCJ led by three Presidents, Judges Lazzara, Lorenzen and Torrey. Each has contributed to the content of the *Lex*, and their writings and proofreading are very much appreciated.

We have grown as an organization, and hopefully as adjudicators. With the fiftieth issue this month, we are evolving again in our *Lex* format. It is hoped that this change will meet your approval, will perhaps be easier on the eyes, and perhaps more printer friendly for those who prefer a paper in the hand to an image on the screen.

We continue to seek your contributions. The *Lex* is distributed to about 1,000 commissioners, judges, deputies, hearing officers, and mediators throughout the country, each of whom is presented with intriguing and interesting disputes and conflicts. Why not take one of those intriguing situations and retool it as a short article on the state of the law in some regard in your jurisdiction? Such an article makes for interesting reading by your fellow adjudicators across the continent. Send your submissions to Judge Torrey (dtorrey@pa.gov) or judgelangham@yahoo.com.

# The Mediator: "Training For Sainthood"

**By: Hon. David Torrey[1]**

When Pennsylvania first allowed compromise settlements in 1996, the utility of mediation first became readily apparent. Mediation sessions gradually became popular. In 2006, meanwhile, the Pennsylvania Act was amended to follow that of Florida, with a provision for mandatory mediation. Now, mediation – in Pennsylvania conducted by *judges* – is an entrenched part of the standard practice.

Most of us in Pennsylvania have been the beneficiaries of a full week of IAIABC-sponsored mediation training. The education was superb, but the idea that most or all cases could or should compromise (in comp, the outcome, rightly or wrongly, of most mediation sessions), was a hard sell to the writer. I had, in this regard, been washed in the blood of the workers' compensation purists, who abhorred the idea of compromise in the first place: "Either the petitioner has a claim or he has not. The department was created to determine that question."[2] I always took that harsh admonition to heart.

For the lingering doubters like me, the American Bar Association has published an excellent book, *Stories Mediators Tell* (2012), the reading of which constitutes total immersion into the value of resolving disputes short of adjudication.

But don't let me restrict its benefits – this new text, written in part and edited by professional mediators Eric Dalton and Lela Love, is worthy of everyone's attention. Whether one is a mediator, lawyer, or claims adjuster, the reader will benefit from this delightful and readable book.[3]

*Stories Mediators Tell* is more than simply a collection of war stories. Instead, each account of a memorable mediation session concludes with a section called "further thoughts." Here, the authors set forth practical lessons to be learned from their real-life experiences. These lessons are spelled out unambiguously.

Most of the many stories in this book present dispute scenarios that transcend those of the typical workers' compensation case. Indeed, several illustrate the process of "transformative mediation," that is, the process whereby a dispute over rights or other interests can be accommodated by way of individuals coming to understand each others' points of view and needs. In these cases, it isn't "all about the money," as is usually the case in personal injury and workers' compensation.

Still, the methods by which these skilled mediators handle and assist in resolving these thorny disputes apply to the mediation of cases in general. Thus, understanding how mediators handled these complex situations can transfer to our more straightforward comp scenarios. The principles, skills, and mechanics of mediation are here on vivid display and are ready for transfer.

In fact, an oft-repeated teaching of the book is that there is no hard formula that fits every mediation. Perhaps the good old-fashioned horse-trading/shuttle diplomacy of the typical comp mediation may not fit in every comp case. One contributor asserts, in this spirit, "The easy truth about what mediators do is that each case is different and what the parties want or expect out of mediation is different in each case. A one-size-fits-all approach will not work and squeezes the life out of a flexible, fluid process."

Among the various accounts are two workers' compensation cases. The types of disputes here will be familiar to every comp lawyer. In the first case, claimant's counsel is depicted as being intractable (to the point of near-hysteria) over a fairly simple issue – that is, the adjuster's utter inability to regularly mail the claimant's check to the correct address. Counsel was so unbending that the mediator eventually moved to the seemingly thornier second issue which, unexpectedly, quickly resolved. That opening, in turn, made the first issue, to which the mediator wisely returned, resolve summarily.

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*Sainthood, continued from page 2.*

In the second case, the competing lawyers had, stiffly and formulaically, set forth their competing positions. The claimant, meanwhile, sat back and was not permitted to speak. She finally broke in, "letting it all hang out," and giving all a colorful rendition of her pain complaints and limitations. This spontaneous, seemingly sincere rendition of symptoms and limitations had a moving effect on the adjuster, who only *then* was moved to make a more reasonable offer.

The lessons to be learned here were (1) that one should never give up simply because one issue seems to cause intransigence; and (2) sometimes it is best for the party (claimant or employer) to speak for him- or herself.

All of the accounts – comp or other – are very entertaining. The contributors were obviously counseled to use all their creative writing skills to put together their narratives. I certainly enjoyed, for example, the mediation challenge posed in the hilarious story, "Cookie Monster." There, an inscrutably hostile plaintiff's lawyer, in an attempt to bully *the mediator*, proudly commandeered, for later consumption, her entire tray of cookies (meant to be shared by all during mediation breaks), and placed them into his document bag. The mediator, extending her mediator skills to the limit, had to remain impartial and solicitous to *everyone*, despite this churlish act of selfishness – and gluttony.

This story lends truth to yet another of the book's admonitions: "It has been said that the life of the mediator is one of training for sainthood."

My annotations have convinced me that the lessons to be learned from *Stories Mediators Tell* fall into three categories: (1) reflections on *principles* surrounding mediation; (2) considerations surrounding the *qualities* and *skills* of the successful mediator; and (3) hard advice on the *basic mechanics* of productive mediations. I'm still not convinced all comp cases should compromise settle, but here are significant quotes from these three categories:

APPENDIX

PRACTICAL LESSONS FROM
*STORIES MEDIATORS TELL*

I. Principles

A. ***Identifying points in common***. "Conflict resolution often involves breakdowns or gaps in relationships and communications and power imbalances that the legal system may be used to increase rather than resolve. Mediation tends to work best when it becomes a shared learning experience for those involved to build mutual respect and understanding. For that to happen, it sometimes helps for the mediator to look not

# New Mexico Judge Reappointed to Five-Year Term

With over 35 years of legal experience, Judge Woodard has practiced in the area of New Mexico workers' compensation law for more than 16 years. Since 2005 he has been a recognized Certified Specialist in Workers' Compensation law by the New Mexico Board of Legal Specialization. Judge Woodard came to the WCA from the law firm of Woodard and Associates, PC, as sole proprietor since 2004. Prior to that he was affiliated with Sturges, Houston & Sexton, PC. He has been the in-house counsel for CIGNA Insurance Companies. He earned his Bachelor of Undergraduate Studies degree in 1974 from the University of New Mexico, and received his Juris Doctorate Degree from the University of New Mexico School of Law in 1977.

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only at what problems, conflicts, interests and priorities there are among the parties and their representatives, but also how a respected mutual perspective might help bridge those gaps and increase receptivity and motivation to reach a mutually beneficial agreement."

B. ***The principle of loss aversion***. Loss aversion is "the concept that people ordinarily will go to much greater length to avoid a loss than they will to achieve a gain." In this spirit, "Most people are averse to conflict and, given the choice, will pick any option that keeps them from having to confront another person." "Don't," accordingly, "let the heat of the dispute distract the quest for resolution. No matter how much anger and angst the parties may feel about the dispute they face, deep inside most would generally prefer striking a deal over facing a fight – all they need is a path to get them there without losing face."

II. Skills

A. ***Importance of listening and of securing information.*** "One of the mediator's greatest tools is information, and the art and science of mediating requires (on a good day) that the mediator knows not only how to mine and absorb information, but also if, when, and how to use the information obtained."

"Obviously, developing skills as an active and empathetic (not sympathetic) listener is critical for any mediator in any mediation. It can't be reiterated enough that information is the most valuable tool of the mediator, without which most of the other tools in the mediator's 'toolbox' are useless. A good rule: ask, ask, ask; listen, listen, listen."

B. ***Importance of thinking outside the box.*** "A mediator who sees his role as limited and narrowly defined cannot see the infinite possibilities that are available. A mediator that is open-minded, creative, and without boundaries sees more possibilities." In this same sense, "Not all mediations lend themselves to, or require, creative solutions, but the mediator is remiss for not watching for such openings and noting them in the event that at some point they seem worth exploring."

C. ***Ability to grain the trust of the parties.*** "Once you've gained the trust of the participants, they are usually glad to share their stories. And, once you've heard their stories, there is usually something that reveals not only the reasons that they were not fully able to communicate their issues, which led them into the dispute in the first place, but the ways in which they can improve their communication and thus achieve a satisfying resolution." …. "Good mediators must have a quality that invites openness if they are going to get into deeper discussions with people, discussions beyond settlement offers of money alone."

D. ***Getting the parties to see all sides and long distance.*** "Mediators as 'game changers': experienced mediators understand that their role goes far beyond a kind of mere shuttle diplomacy. The parties and their counsel often have a myopic view of not only the process but also the subterranean issues that must be addressed before any meaningful progress can be made. Mediators must be constantly attuned to the dynamics and must continually hone their skills (and intuition) in order to alter the game when it benefits the parties in the process. The red flags that a mediator must be watching for include out-of-control hostility, anger, and other destructive (and self-defeating) behavior by the parties and/or the participating representatives, legal and otherwise."

E. ***Educating the parties.*** "It is often the task of the mediator to better instruct the parties about the mediation process and, mostly through skillful questioning, to obliquely impart some negotiation skills that fit into moving the process forward."

F. ***Need for flexibility.*** "Mediating is about helping the people in front of us to understand the choices they have available to them and to assist them in making those choices. The decision about how deep to go and how much healing people desire is up to them. So, essentially, mediators must come equipped for dealing with different levels of resolution, and ultimately the parties decide what sort of agreement they want."

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*Sainthood, continued from page 4.*

III. Mechanics

A. ***Ambience of the mediation setting***. "Be attentive to the physical and emotional needs of those attending the mediation. Little things count. Always try to provide the physical and emotional comfort required; without these needs being met, they transform into unspoken anger, hostility, or resentment." …. "The proper 'food, comfort, and convenience' surrounding the mediation can make a big difference. In one case [a mediator] mediated, 'a comfortable conference center, the convenience to the plaintiffs, the amenities of the lunch room, and the good food had a subtle and positive effect.'"

B. ***Mediation is a dynamic process.*** "Things morph, change and distort as the process evolves. A skilled mediator develops a set of instruments to measure, weigh, or dissect – as the situation dictates – the problem to resolution (or as close to it as possible)."

C. ***Importance of caucus sessions.*** "Achieving comfort with personal disclosures in joint sessions, as opposed to caucus sessions, rarely happens in [a] limited span of time."

D. ***Listening to attorney accounts; Benefit of advance preparation.*** "When attorneys are involved, always listen carefully to their concerns and their issues, whether those concerns are with the opposition, the process itself, or with their own clients. ... I believe that a best practice in any mediation is to attempt to talk to the key players by telephone days before the actual mediation. There are things to be learned that can often allow the mediator to plan a more viable process and to have a certain foreshadowing of difficulties that might be inherent in the dynamics of the particular situation."

E. ***The proper number of parties at mediation.*** "In a multi-defendant case, one mediator decided not to have all parties at the mediation. In his view, it is important to make a principled decision regarding whom to invite

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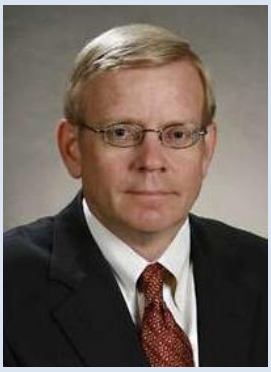
# NAWCJ President Dave Torrey Honored



The Workers' Injury Law and Advocacy Group (WILG) honored Judge Torrey at its October, 2013 meeting in West Palm Beach, Florida. Judge Torrey was presented the Esther Weissman Eternal Optimism Award. In presenting the honor, in recognition of "innumerable contributions to WILG's *Workers' First Watch* magazine," Milwaukee attorney Tom Domer noted:

> David Torrey's extraordinary scholarship on all aspects of Workers' Compensation warrants this special recognition by WILG. I know of no other single scholar whose research, writing, publication and public speaking on workers' compensation parallels his prolific production. As an editor of Workers' First Watch, we marvel at his commitment and passion for topics related to Workers' Compensation.

The International Association of Accident Boards and Commissions (IAIABC) presented Judge Torrey with the Frances Perkins Award and he was recognized for his "dedication to innovation and progressive leadership in workers' compensation." The IAIABC recognized that Judge Torrey has adjudicated claims at the Pennsylvania Department of Labor and Industry for twenty years, and that he has distinguished himself as a scholar of workers' compensation law across the United States. His authorship of works for the American Bar Association, Pennsylvania Bar Association, National Association of Workers' Compensation Judiciary, and IAIABC, among others, has helped advance understanding and knowledge about important legal principles and issues shaping workers' compensation policy.

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to the session, and 'whom to leave home.' In such mediations, 'crowd control can become an issue in a complex multi-party case. It is not economical or productive to have a large number of people with little to add sitting in conference rooms while the real players work....'"

F. "***The power of deadlines.***" In one story, the mediator, after an extended session with no give on either side, advised the parties that the building would soon *close*. This action seemingly prompted a resolution. On this point, "you never know how close you are to helping parties find release. In one way, I believe the phenomenon is related to loss aversion. Suddenly, parties to a mediation realize that they are about to lose their chance of moving on in a positive way; and, at that point, closure emerges." Here, obviously, the deadline existed.

G. ***Is everybody happy?*** "I am struck by how helpful it is to remain upbeat, even to be funny (when there are appropriate opportunities), to maintain a lightness of being, and to resist becoming as unhappy as the parties are."

H. ***The helpful comment***. "[I am always careful] to provide a key observation or two to help [the disputing parties] see a different perspective, and to allow adequate time and space for them to arrive at their own solutions."

I. ***Final advice.*** "A good mediator needs to recognize when to disappear, too."

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[1] President, National Association of Workers' Compensation Judiciary; Workers' Compensation Judge, Pittsburgh, PA. Adjunct Professor of Law, University of Pittsburgh School of Law. ***Contact***: DTorrey@pa.gov.

[2] WALTER F. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION, p.194 (1936).

[3] You can order your copy at http://apps.americanbar.org/abastore/index.cfm?pid=5100020&section=main&fm=Product.AddToCart.

"Judges are not like pigs, hunting for truffles buried in briefs."

- Judge Richard Posner,
*United States v. Dunkel*,
927 F.2d 955, 956 (7th Cir. 1991)

# 2013 All Committee Conference Southern Association of Workers' Compensation Administrators

The Southern Association of Workers' Compensation Administrators will gather for their 2013 All Committee Conference at the King and Prince Resort, at St. Simons Island, Georgia, November 12-15 2013. Plans are underway for an interesting and diverse program of committee meetings. The seven standing SAWCA committees are Adjudication, Administration and Procedures, Claims Administration, Management Information Systems, Medical and Rehabilitation, the Regulator's Roundtable, and Self Insurance and Insurance. These committees consider and discuss the various aspects involved with regulating the workers' compensation industry across the South, and across the nation.

"Uninsured, Insolvent & Safety Nets"

SAWCA's 2013 All Committee Conference opens with a distinguished panel of regulatory professionals as they explore their role in dealing with the uninsured, under-insured, various types of bankruptcies, insolvency pools, and guaranty trusts. Join Kentucky Commissioner Dwight Lovan as he welcomes Karl Aumann (Maryland), Deneise Lott (Mississippi), Jack Reale (Georgia), and Kimberly Boehm (Georgia Insolvency Pool) to the panel for a candid and revealing discussion on the thought process, issues and concerns involved in their decisions when companies fail to meet their obligations to fund their workers' compensation claims.

***Wednesday November 13***

*General Session: "All Kinds of Safety Nets" 9:00am - Noon*

*"Lights, Camera, Action - Hollywood Comes To The ACC" Georgia's thriving film industry is the focus as we go behind the cameras and discover not only why Georgia has become the Hollywood of the South but just "how do they do those amazing things"...Who Wants Popcorn?*

*"Uninsured, Insolvent and Safety Nets" Kentucky Commissioner Dwight Lovan moderates a distinguished panel of regulatory professionals as they explore their role in dealing with the uninsured, under-insured, various types of bankruptcies, insolvency pools, and guaranty trust funds. See above.*

*Committee Meetings*: 2:00pm - 5:00pm
*Administration & Procedures Committee*
*Self-Insurance & Insurance Committee*

***Thursday November 14***

Committee Meetings: 9:00am - Noon
*Medical Rehabilitation Committee*
*Claims Administration Committee*
*Convention Lunch Noon*

Committee Meetings: 2:00pm - 5:00pm
*Management Information Systems*
*Adjudicator's Roundtable*
Coffee, Cordials & Confections 8:30pm - 10:00pm

***Friday November 15***

*Farewell Breakfast 8:00am*
*General Session Convention Wrap-up 9:00am - 11:00am*
*Committee Reports & Adjourn*

***Contact Gary Davis for Information. Call 859-219-0194***
***email gary.davis@sawca.com or visit www.sawca.com***
*Call 800-342-0212 for Hotel Reservations*

# Nanomaterials:

# The Asbestos of the Future?

By: Hon. Ellen Lorenzen

Very few consumers give a great deal of thought to the types of materials that go into products they purchase, such as sunscreen, computers or tennis rackets. And it is the rare patient indeed who would question the composition of medicine (s)he is taking or the method by which the drug will be delivered into her/his bloodstream. But the workers employed in the industries manufacturing sunscreen, computers and tennis rackets as well as numerous other products and the workers employed in the industries manufacturing the raw materials that go into the component parts of sunscreen, computers and tennis rackets need to be aware of what materials they are handling because of potential safety and health risks. Uninformed employers and workers make poor decisions which lead to workers' compensation claims and litigation.

There is much time and effort being devoted today to the issue of whether workers in industries manufacturing radically new and different materials referred to as nanomaterials and workers in the industries exposed to components containing nanomaterials are exposed to serious health risks akin to shipyard workers in World War II or felters in Victorian England. And the insurance industry is now contemplating the future cost of workers' compensation coverage for those employees.

What are nanomaterials? What are the risks associated with them? How does the insurance industry properly evaluate and plan for those risks?

Nanomaterials are defined as engineered (meaning not occurring naturally or as the by-product of a manufacturing process) particles of material with one dimension between one and 100 nanometers in size.[1] A nanometer is one billionth of a meter or one billionth of 39.37 inches. For comparison purposes a typical strand of hair is 75,000 nanometers in diameter.[2] There are many types of such materials being made and they are currently used in the automotive, chemical, construction, cosmetics, electronics, energy, engineering, environmental engineering, food and beverage, household uses, medicine, sports, textiles and military defense industries.[3] Many more are under development and study.

Why are such materials being used? It is not just a question of small being better. The properties exhibited by nano-size particles can differ radically from those exhibited by larger sized particles of the same material or chemical composition. Many have increased capacity to conduct electricity. Some can increase the effectiveness of antimicrobial agents. Some increase the strength of the material to which they are added.[4] A quick visit to the internet will reveal numerous manufacturers' websites touting the advantages of the substances they engineer, atom by atom.[5]

What are the health risks associated with the manufacture and use of nanoparticles and nanomaterials? The answer is, unfortunately, that no one really knows what effects each different material will have on people. But scientists are beginning to develop some ideas with respect to some of them, by studying their effect on animals (rats, mice and pigs), as well as on human cells in vitro (meaning, in a living culture but not inside the body). NIOSH and the CDC have issued several publications over the last few years addressing the results of research which they have sponsored and it is apparent that certain health risks are being identified, as well as safety measures which should be taken. Some specific releases referred to in this article are listed in the endnotes for in depth reading[6] but in general, NIOSH and the CDC have reached a few conclusions.

Nanomaterials can enter the body through inhalation, ingestion or contact with skin; the particles are that small. Once there, those particles can be carried through the blood stream to various organs of the body and penetrate into the interior of individual cells. Research studies performed on mice which inhaled carbon

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nanotubes showed that pulmonary inflammation and fibrosis occurred with these particles to the same degree or worse than with comparable inhalation of identical masses of ultrafine titanium dioxide, carbon black, crystalline silica and asbestos. In vitro studies showed that carbon nanotubes were more genotoxic (meaning they had potential to damage genetic information within a cell) than those other substances, leading to the concern that long-term, low-dose exposure to carbon nanotubes may cause cancer of the epithelial cells of the lungs. It has been shown that carbon nanotube fibers caused more changes in mesothelial cells than asbestos fibers. Other studies in animals have shown that nanoparticles in the lungs can migrate to other organs of the body and that nanoparticles are more biologically active than larger sized particles of comparable mass. The risk of adverse health effects is thought to be more significant in the production of the nanotubes that go into the components of the finished product, than in the use of assembling the finished products. However, if assembling requires sanding, drilling or spraying, then the nanoparticles may be dispersed into the air and thus be in workers' breathing space.

A "study" of the effects of exposure to nanoparticles in the workplace in living humans was unintentionally conducted in China in 2009, where 7 women, ages 18 to 47, were diagnosed with pulmonary inflammation, pulmonary fibrosis and foreign-body granulomas of the pleura after workplace exposures lasting 5 to 13 months. The symptoms of the exposure were shortness of breath and excess fluid build-up around the lungs.[7]

NIOSH arranged over 40 workplace investigations at research facilities, plants and manufacturing sites from 2004 to 2011 in effort to identify the types of nanomaterials being considered for commercialization, the potential for worker exposure associated with the manufacturing processes, both in creating the nanomaterials and using those materials in the processing of manufacturing, and the basis for risk management guidance. Through these investigations and additional studies, NIOSH determined which job tasks increase workers exposure to nanoparticles: working with nanomaterials in liquids without protection, such as gloves; working with nanomaterials in liquids during processes where a high degree of agitation is involved, such as pouring or mixing; generating nanoparticles in enclosed systems; handling powers of nanomaterials while weighing, blending or spraying them; maintenance on equipment used to produce nanomaterials and cleaning up spills and waste material containing nanomaterials; cleaning dust collection systems; and machining, sanding and drilling materials containing nanoparticles. However NIOSH has not been able (yet) to determine what measurement techniques should be used to monitor workplace exposure because most current techniques and instruments measure mass and chemistry of larger particles and these aspects of the materials in nano-size may be less important than the size, shape, surface area and surface chemistry or activity of the particles. Difficulty in measuring exposures arises because many existing measuring techniques and instruments may not capture such small particles and some of the equipment which can measure airborne nanoparticles is not yet commonly available outside of research facilities.

For the present, NIOSH is recommending the use of high-efficient particulate air (HEPA) filters and vacuum cleaners and wet wiping methods, as well as prohibiting consumption of food and drinks in areas where

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# Governor Beshear Appoints Two, Reappoints Four

Kentucky Governor Beshear has appointed J. Gregory Allen as an administrative law judge in the Department of Workers' Claims. He was formerly an attorney with Riley & Allen P.S.C. The Governor also appointed R. Roland Case, of Pikeville. Judge Case was formerly an attorney with Case Law Office.

Governor Beshear also reappointed the following four administrative law judges to four year terms effective Jan. 1, 2014

* J. Landon Overfield, of Henderson
* John B. Coleman, of Pikeville
* Robert L. Swisher, of Lexington
* Jeanie Owen Miller, of Owensboro.

# Governor Steve Beshear Reappoints Kentucky Commission Chair Michael Alvey

Michael Alvey is the President-Elect of the National Association of Workers' Compensation Judiciary, and serves on our Board. On October 11, 2013, the Kentucky governor reappointed Chair Alvey for another four-year term to commence January 5, 2014.

Chair Michael W. Alvey received his Bachelor's degree from Western Kentucky University, and his J.D. from the University of Kentucky College of Law. Admitted to the Kentucky Bar in 1988, Chair Alvey practiced primarily defending workers' compensation, federal black lung and personal injury claims. On November 13, 2009 Chair Alvey was appointed to serve as Chair of the Kentucky Workers' Compensation Board effective January 5, 2010. Chair Alvey was recently appointed to the board of directors of the National Association of Workers' Compensation Judiciary, Inc.

Chair Alvey retired from the Kentucky Army National Guard in 2000 where he served nearly 21 years as an armor officer and is a graduate of the Armor Officer Basic Course and Armor Office Advanced Course.

Chair Alvey resides in Owensboro, Kentucky where he has been involved in various church and civic activities as well as working with youth sports including both coaching and officiating.

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nanomaterials are being handled, providing hand-washing facilities, and providing facilities for showering and changing clothes. Respirators may be necessary when these measures do not adequately prevent exposures. NIOSH admits that there are no current occupational exposure limits for nanoparticles, although there may be such limits for larger particles of similar composition. However, the existing exposure limits may not be health protective for nanosized particles, both because the nanoparticles are so much smaller and because they may react chemically and biologically in ways that are vastly different from their larger counterparts. Similarly, NIOSH recommends gloves and protective clothing but warns there is no data yet to know if existing clothing will prevent nano-sized particles from coming into contact with skin.

All this uncertainty regarding the actual health risks and the way in which to measure exposure has created difficult issues for workers' compensation carriers which need to decide how to set rates for insuring both manufacturers of nanomaterials and manufacturers incorporating such materials into finished products to use in the marketplace by consumers, health care providers and businesses. An additional difficulty for the insurance industry is that no one knows how many workers are involved in these industries.

Gen Re, an international company well known for its underwriting of commercial lines reinsurance, has been warning of the insurance risks involved in workers' compensation coverage of nanoparticle industries for several years. In May 2011 GenRe published an article by Charlie Kingdollar entitled "Nanotechnology—An Exposure on the Minds of Workers' Compensation Underwriters and Claim Executives?" At that time Mr. Kingdollar estimated there were over 1000 small nanotechnology firms with fewer than a dozen employees and an unknown number of larger companies with 25 to 50 companies. He pointed out that many Fortune 500 companies have nanotechnology divisions. He noted that matters were complicated by the fact that there were thousands of different nanomaterials being produced and each was different in size, electrical charge on the surface and function. Further each was manufactured differently. He thought there were as many as 50,000 different

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*Nanomaterials, continued from page 10.*

types of carbon nanotubes alone. As noted above, inhalation of carbon nanotubes is at least as bad as inhalation of asbestos and may be worse.

A year later, Mr. Kingdollar was writing once again for Gen Re but had little additional data regarding the number of employees in nano-technology industries and little new information about known risks of exposure or how to manage those risks. Said Mr. Kingdollar, "One might have hoped that after more than a decade of occupational exposure to a variety of nanomaterials, regulatory agencies would be well on their way to addressing these issues. Clearly, they are not." Mr. Kingdollar reported on a survey prepared by the University of California-Santa Barbara in which 62% of the 45 companies surveyed did not monitor worker exposures and less than 50% required their employees to wear a personal protective gear. Of those who did, 30% required only a dust mask. Further 30% of the companies did not follow NIOSH recommendations in the methods used to clean up spills and only 46% of the companies had health/safety programs specific to nanomaterials. These companies used or manufactured a variety of nanomaterials, including nanosilver, titanium dioxide, silica, zinc oxide, carbon nanotubes and gold. Most recently (September 2013), Mr. Kingdollar wrote again, saying "Gen Re believes that exposure to nanomaterials is one of the most significant emerging issues facing the Property/Casualty Insurance industry."

It can be easily concluded that there are a huge number of completely different types of new materials being manufactured and used throughout the world. It can be easily concluded that the health risks of making some of these materials, using them in making other products, installing them in the workplace, maintaining them in the workplace and disposing of them in the workplace are being studied. It can easily be concluded that, based on early studies, inhaling at least some of these particles is a bad idea, although no one has any idea of how much must be inhaled or over what period of time they must be inhaled before ill effects are felt. It is possible to go to www.futuremedicine.com and read a publication called Nanomedicine which has been available since June 2006 if one wishes to read reports of study after study about the effects of particular types of nanomaterials. Or one can read various studies at NIOSH's science blog. It can be hoped that standard methods of ventilation and the wearing of protective garb will mitigate the onset or extent of those effects and that industry will adopt recommended safety precautions once those precautions are known. It can be hoped that testing methods targeted at nanoparticles will be developed (one test designed to study the risk of fire associated with some particles was abandoned because the test equipment kept catching fire due to the increased conductivity of the material being tested). But what cannot be easily concluded at this time is whether any of feared risks of exposure will lead to significant numbers of workers' compensation claims because to the best of this writer's knowledge and research, no such claims have been made or, if they have, the cases have not led to reported litigation. If and when such cases arise, it is to be hoped that there will be definitive research studies which would produce reliable medical opinions based upon reliable data so that workers' compensation judges can make correct factual determinations. But for now, the risk of exposure to nanomaterials is a great unknown.

*Continued, Page 12*

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*Nanomaterials, continued from page 10*

These materials may lead to a tidal wave of litigation years after exposure as materials containing asbestos did or they may simply serve as fuel for articles.

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[1] "Approaches to Safe Nanotechnology," NIOSH. DHHS Publication No. 2009-125, March 2009.
[2] "Nanotechnology, The Plastics of the 21st Century," Guy Carpenter & Co., 2006.
[3] Ibid.
[4] "Introduction to Nanomaterials," A. Alagarasi, http://www.nccr.iitm.ac.in/2011.pdf
[5] Try http://www.bluenanoinc.com/nanomaterials/why-use-nanomaterials.html or http://www.lockheedmartin.com/us/what-we-do/emerging/nanotechnology.html
[6] "Filling the Knowledge Gaps for Safe Nanotechnology in the Workplace," NIOSH, DHHS Publication No.2013-101, November 2012; "Nanotechnology," Centers for Disease Control and Prevention, 4/24/13; "Approaches to Safe Nanotechnology," NIOSH, DHHS Publication No. 2009-125, March 2009.
[7] "Exposure to nanoparticles is related to pleural effusion, pulmonary fibrosis and granuloma," Y. Song, X. Li and X. Du, European Respiratory Journal, 8/29/09.

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* Ellen Lorenzen was an all-lines adjuster until she attended Stetson College of Law where she graduated in 1978. She has practiced as in house counsel, defense and claimant's work. She was appointed a Judge of Compensation Claims by Governor Bush, and has been reappointed since. She has been Board Certified in Workers' Compensation since 1988 and has been a Board Certified Circuit Civil Mediator since 1994. Judge Lorenzen is a past-President of the NAWCJ, and serves on the board of Tampa Jewish Family Services. She is also involved with the Friends of 440.

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Dr. Sanford Silverman
More Depth on the Pain Management Practice and Challenges

# The Frequency of Injury, an Update from NCCI

The National Compensation Claims Institute (NCCI) released an update report in September. Frequency is studied as it is perceived as reflecting the results of safety efforts in the American workplace. It is not, however, an absolute measure of the volume of accidents or the safety of the marketplace. It is a measure of the volume of accidents that are reported. Therefore, the report's recognition that frequency is decreasing is potentially encouraging news. That is, if the volume of accidents is truly decreasing. However, it is possible that the injuries are still occurring, but other market influences are suppressing the reporting of injuries. Anecdotally, there is some feeling that employees in this job market are reluctant to seek benefits. The fear of the "workers' compensation" label has arguably always been present to some degree. The argument now is that because of the job market, the detriments of that label are perceived by some population of the injured as outweighing the benefits. Some also argue that there is just so long an injured worker can wait to file a claim.

The Update Report notes that "lost-time claim frequency declined by 5% in Accident Year 2012." They also note that the "the Great Recession of 2007–2009 was the most serious and long-lasting economic contraction since the Great Depression," and that the economy itself has "considerable influence" on the frequency analysis. The Update Report repeatedly notes that the recession is over and that "we have emerged from the recent recession." This conclusion may or may not be consistent with the overall trends in the national economy, but notably unemployment remains significant in most or many geographic regions. Over the almost twenty-year period 1990 through 2009, NCCI reports that injury rates decreased about 57%; the average decrease was over 4% annually in this time period. Notably, there were years in which frequency did not follow the trend, 1994 and 1997. Increases in those two years bucked the trend, but were nominal at .3% and .5%. In 2010, the frequency increased 3.8%, only to be followed by decreases again in 2011 and 2012.

NCCI says that there are three recessionary, or general economic, factors that "significantly" effected the volume of reported workers' compensation claims. These were changes in industry mix, changes in work hours, and changes in the premium audit process. Therefore, the actuaries adjusted the claims frequency figures for these factors during the recession but concluded that "the recessionary adjustments applied to the 2010 and 2011 changes in frequency are no longer necessary."

An anomaly was also mentioned regarding small claims. The NCCI notes that "There is evidence of an influx of small lost-time claims in 2010." They acknowledge a suggestion from the marketplace that some workers "fearful of losing their jobs, may have postponed filing workers compensation claims but became less hesitant to file claims as the economy began to show signs of modest improvement." This is congruous with the mention above that the label of "workers' compensation" is seen by some employees as a potential detriment. NCCI notes that this may be an influencing faction but cautions that "the extent to which this phenomenon has occurred is unclear and cannot be confirmed by NCCI, it may have contributed to the observed increase in claim frequency in 2010."

The severity of the claims is also worthy of consideration. The Update Report portrays both indemnity and medical claims costs for the period 1991 through 2012. Both have been increasing, but they are not necessarily congruous. The Indemnity Claims costs demonstrate a fairly consistent upward trend between 1993 and 2008. Since that time, those costs have been reasonably consistent at an average of $22,200 in 2008 and $22,400 in 2012. The medical costs per lost-time claim however have been very consistently increasing since 1993. While the annual rate of increase has fluctuated, the costs have risen in each of the years since 1993. The report notes "the underlying drivers of medical costs are still present and remain a concern."

"Industry mix" is a term referring simply to the types of work in which Americans are engaged. The Update Report analyzes trends in broad categories of work such as manufacturing, contracting, office/clerical, goods/

*Continued, Page 14.*

*Frequency, continued from page 12.*

services, and miscellaneous. These subdivisions are then tracked in terms of the payroll dollars that were paid within each category, in each of the recent years. This analysis shows that during the study period 2007 through 2011, manufacturing payroll declined over 11% and contracting declined almost 23%. There was a modest 2% increase in office/clerical and a 1% increase in miscellaneous. These were the only categories to have any aggregate increase over the 5 year comparison. This may be significant as it demonstrates that much of the unemployment or underemployment that was, or still is, the recession was in industries in which we might expect either more frequent or more serious injuries, writing purely in generalization.

Consistent with that generalization, NCCI concludes that the industry mix change did impact frequency. The report illustrates the most significant decreases in frequency, for policies expiring in 2007 versus those in 2011, were in the manufacturing and contracting sectors. That is not to say the frequency in those industry categories was not significant. Frequency remained significant in both sectors, but the frequency did decrease markedly in each. Intuitively, less payroll in those industries suggests less activity (jobs or projects or both) and intuitively with the decrease in opportunities for work comes a concomitant decrease in the volume of work injuries.

The severity of injuries also changed with the 2007-2011 adjustments in industry-mix according to the Update Report. Counter-intuitively, however, the severity of injuries actually increased during the study period. Manufacturing is up almost 24%, goods/services up almost 19%, and contacting and office/clerical each up about 16%.

This report provides insight on the decreasing frequency from a variety of perspectives. There are graphs to illustrate the frequency decrease comparing voluntary market employers (those who can obtain workers' compensation insurance in the market) to those who obtain coverage through an involuntary state process, such as an assigned risk pool. There are comparisons of frequency change based on the size of the employer, measuring size by payroll and by insurance premium. There are comparisons of frequency as between the severity of the injury itself, from fatality claims to temporary total claims.

This interesting report is available at
https://www.ncci.com/documents/WC_Claim_Freq-2013.pdf

What is a moderate interpretation of the text? Halfway between what it really means and what you'd like it to mean?

- U.S. Supreme Court Justice Antonin Scalia

# Sullivan to Join Texas Division of Workers' Comp as Deputy Commissioner

The Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC) announced that Kerry D. Sullivan will join the agency as Deputy Commissioner for Hearings, effective Sept. 3, 2013.

Prior to joining the TDI-DWC, Sullivan spent most of his professional career with the State Office of Administrative Hearings (SOAH), where he served as general counsel and as an administrative law judge. Sullivan was also appointed SOAH's first master administrative law judge and held other management positions at the agency.

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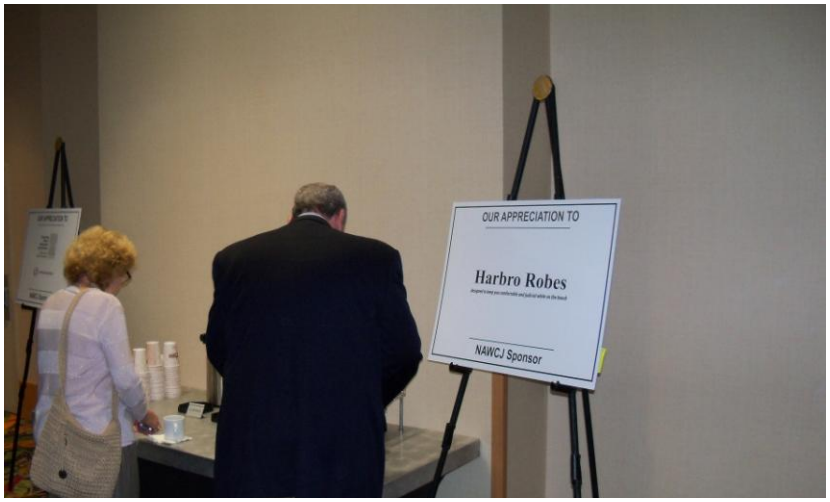
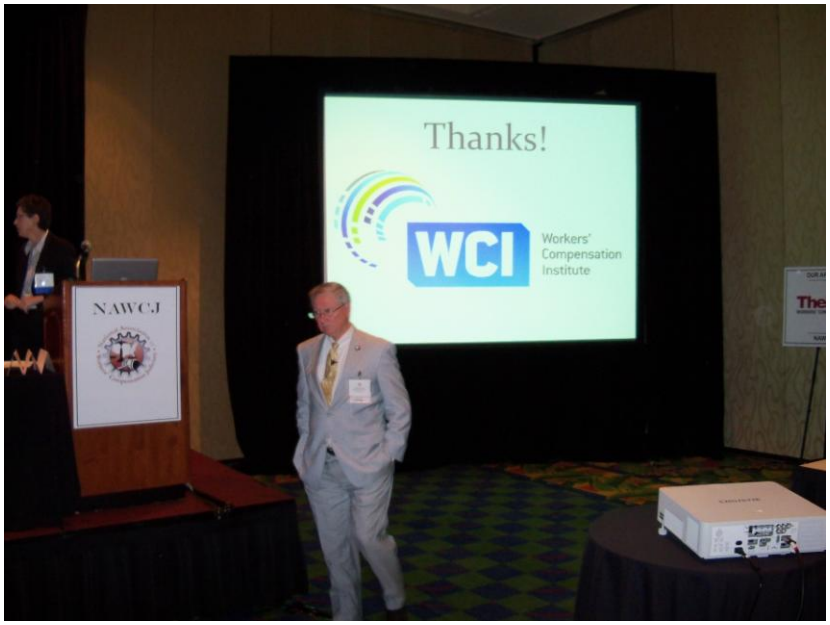



Our thanks to Harbro Robes, beverage break sponsor of Judiciary College 2013

A distinguished panel from Oklahoma, Georgia, Louisiana, Pennsylvania and Virginia addressed comparative law at Judiciary College 2013.


Thanks to our partner, the Workers' Compensation Institute, for all they do to promote and support the NAWCJ!

From the Pages of workcompcentral

# Rate of Drug Overdose Deaths Highest in Appalachia and Southwest

The rate of drug overdoses in West Virginia was the highest in the nation in 2010 and doubled in 29 states between 1999 and 2010, according to a report released earlier this month by the Trust for America's Health. The nonprofit research group reported that states in Appalachia and the Southwestern U.S. logged the most drug overdose deaths per 100,000 people. The report, financed with support from the Robert Wood Johnson Foundation, notes that a majority of the deaths were due to prescription drug abuse.

"Prescription drug-related deaths now outnumber those from heroin and cocaine combined, and drug overdose deaths exceed motor vehicle-related deaths in 29 states and Washington D.C.," the trust reported. "Misuse and abuse of prescription drugs costs the country an estimated $53.4 billion a year in lost productivity, medical costs and criminal justice costs."

The group reported that West Virginia logged 28.9 drug overdose deaths for every 100,000 people in 2010 – up 605% from 1999. Three other states – New Mexico, Kentucky and Nevada – reported more than 20 deaths per 100,000 residents in 2010. North Dakota recorded the lowest death rate in 2010, at 3.4 deaths per 100,000 people. Drug overdose deaths doubled in 29 states between 1999 and 2010, tripled in 10 other states and quadrupled in West Virginia, Kentucky, Iowa and Indiana, according to the report.

The report, based on data supplied by the National Alliance for Model State Drug Laws, the National Center for Health Statistics and other groups, calls for strengthening the nation's prescription drug-monitoring programs, better educating health care providers on the dangers associated with addictive painkillers and increasing the availability of the "rescue drug" naloxone, to counteract overdoses.

The trust reported that 16 states – Colorado, Delaware, Kentucky, Louisiana, Massachusetts, Minnesota, Nevada, New Mexico, New York, North Carolina, Ohio, Oklahoma, Rhode Island, Tennessee, Vermont and West Virginia – now require doctors to check their Prescription Drug Monitoring Programs (PDMPs) at some point when prescribing controlled substances. Eight of those states – Kentucky, Massachusetts, New Mexico, New York, Ohio, Tennessee, Vermont and West Virginia – require health care providers to check the database before they initially prescribe or dispense controlled substances and at designated points in time thereafter. In all, nearly every jurisdiction in the U.S. – excluding Missouri and the District of Columbia – has passed PDMP legislation.

"While nearly every state has a prescription drug-monitoring program to help identify 'doctor shoppers,' and problem prescribers and individuals in need of treatment, these programs vary dramatically in funding, use and capabilities," the trust said in a summary of the study. The study ranks states based on medical-provider

*Continued, Page 17*

*Drug Overdose Rate, continued from page 16.*

education, substance abuse treatment, use of PDMPs, identification requirements and "Good Samaritan Laws," which provide immunity from criminal prosecution or mitigation of sentences for individuals seeking help for themselves or others experiencing an overdose.

Only New Mexico and Vermont received a ranking of 10 on a scale of 0 to 10. Kentucky, Massachusetts New York and Washington state received rankings of 9. Seventeen states received a score of 5 or less. South Dakota ranked at the bottom with a score of 2 out of 10. John Eadie, director of the Brandeis University PDMP Center for Excellence, said Friday the study reflects trends in drug overdoses that date back more than a decade. "As far back as 2000, when the prescription abuse epidemic began to become clear, Appalachia was where attention was originally focused," Eadie said. "Clearly, there has been a significant problem in that area with painkillers."

Sherry Green, executive director of the National Alliance for Model State Drug Laws, said West Virginia responded to prescription drug abuse in 2012 by requiring doctors to check the state's PDMP when first prescribing controlled substances for pain relief. She said Kentucky is the only state that is studying whether mandating that doctors check the database has reduced prescription drug abuse. She said no other states have studied the correlation between a doctor mandate and prescription drug abuse. She said the Alliance currently is matching the findings of the Trust for America's Health with a report released Oct. 14 by the National Safety Council, which called on 47 states to take immediate action to address issues involving the prescribing, monitoring, treatment and availability of opioid pain relievers.

The Safety Council reported that, for the first time since World War II, drug overdoses have replaced motor vehicle crashes as the leading cause of accidental deaths among Americans between the ages of 25 and 64. "Enough painkillers were prescribed in 2010 to medicate every American adult around the clock for one month," the Safety Council reported.

The Trust for America's Health reported that the number of people 12 years old or older abusing prescription drugs decreased from 7 million in 2010 to 6.1 million in 2011 because of ongoing efforts to control abuse. The group attributes a 2011 crackdown

*Continued, Page 18.*

# Illinois WC Commission Arbitrator Douglas Holland Dies at 56

Arbitrator Douglas Holland died unexpectedly at his home on Thursday morning. Holland passed away at the age of 56. Mary Small, first vice president of the Historical Society, told the paper that Holland had played a pivotal role in the expansion of the society's museum and oversaw renovations to other buildings that the society had acquired. Holland also planned and organized the society's fundraisers, which had become more successful under his tenure.

Eugene Keefe, a partner at Keefe, Campbell, Biery & Associates, told WorkCompCentral that Holland was a respected arbitrator who frequently urged lawyers to settle their cases during pretrial proceedings.

"Lawyers on both sides are very sad to hear this news, and very sad to see him pass," he said. "He is a well-regarded arbitrator. I would call him the father of the workers' comp pretrial. He was a guy that really pushed guys not to try cases, and to see if there was any common ground. He would try cases only if he couldn't get the two parties together, with all the wrangling they could do."

Keefe said that while others sometimes disagreed with Holland's approach, Holland was very successful at getting parties to resolve their cases without going to trial.

According to the Illinois Workers' Compensation Commission's website, Holland also was a member of the Commission Review Board, which investigates misconduct complaints against arbitrators and workers' compensation commissioners. Holland was the "elected downstate arbitrator representative" on the seven-member board.

*Drug Overdose Rate, continued from page17.*

on pill mills by the Florida Legislature and the launch of the state's PDMP that year to a decline in oxycodone-related deaths of more than 17%. But the study also concluded "the overuse of painkiller therapy to treat chronic pain conditions is becoming an epidemic in workers' compensation systems, with a growing reliance on prescription medications to treat injured workers."

The report cities an August 2009 study by the Washington State Division of Labor that found the volume of opioid prescriptions in the state workers' compensation system increased by 50% between 1999 and 2007. The study also found that:

- People in rural counties across the United States are about twice as likely to overdose on prescription drugs as those who live in cities. About 13% of teens living in rural areas reported nonmedical use of prescription drugs, compared to 11.5% of teens living in suburban areas and 10.3% of those living in cities.
- Men between the ages of 25 and 54 are twice as likely to die from a drug overdose as women, but the death rate from drug overdoses is increasing faster among women than men for the 25-54 age group.
- Cases of neonatal abstinence syndrome – a disease suffered by newborns exposed to prescription painkillers and other drugs in the womb – increased by 300% between 2000 and 2009.

The trust called for mandatory education requirements for health care providers but stopped short of recommending that states mandate that doctors consult their PDMPs. The group called for federal legislation to mandate national standards for data-sharing among the PDMPs in various states and to link PDMP records to electronic health records systems.

The study also calls for states to follow the lead of New York and Oklahoma and require pharmacies to update controlled substances data on a "real-time" basis. The trust also noted that real-time reporting faces "technical and organizational" barriers. Oklahoma requires pharmacies to upload data within five minutes of dispensing a controlled substance. New York defines real time as 24 hours within a controlled substance being dispensed.

The Alliance for Model State Drug laws, the Alliance of States with Prescription Drug Monitoring Programs and the American Cancer Society have recommended that states require the reporting of PDMP data within seven days of a controlled substance being dispensed. The study notes a warning from the PDMP Center of Excellence that, "as the delay increases, the window of opportunity for prescription fraud widens."

# Oklahoma Employers' Coalition Asks to Intervene in Suit

The Oklahoma Injury Benefit Coalition has filed a motion to intervene in the constitutional challenge against Senate Bill 1062. The coalition is attempting to intervene in the case of *Coates v. Fallin*, which contends that the state's latest workers' compensation reform bill, Senate Bill 1062, violates workers' due process rights. Employers created the coalition in 2011 to push for workers' compensation reforms, according to the coalition's website.

*Continued, Page 19*

*Drug Overdose Rate, continued from page 18.*

Gov. Mary Fallin signed SB 1062 into law on May 6, which replaces the Workers' Compensation Court with an administrative court system. The law also cut indemnity benefits and permits employers to opt out of the workers' compensation system. Lawmakers who had opposed SB 1062 during the legislative process filed the suit under a constitutional provision that allows the state Supreme Court to grant immediate review to new laws. The plaintiffs include state Sen. Harry Coates, R-Seminole, state Rep. Emily Virgin, D-Norman, and Rick Beams, the president of the Professional Firefighters of Oklahoma.

Other employers' groups have also filed motions to intervene in the suit, which if granted, would allow them to argue that SB 1062 is constitutional. The Oklahoma Chamber of Commerce, the Tulsa Regional Chamber and the Greater Oklahoma City Chamber have also filed motions to intervene in the suit.

The articles on Page 16-19 were reprinted with the permission of WorkCompCentral.com. The NAWCJ thanks WorkCompCentral for their support of this newsletter and the ideal of promoting professionalism and collegiality among the nation's workers' compensation adjudicators.

## THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY

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**HOW DID YOU LEARN ABOUT NAWCJ?** _____

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# Speaking Out Against a Judge Causes Attorney Issues; Criticizing the Disciplinary Commission Causes More

By: Dave Stafford

Indianapolis attorney and blogger Paul Ogden speaks his mind, sometimes to his disadvantage, he concedes. Now he could lose his law license because of things he wrote. But the outspoken Ogden isn't going quietly. He's instead going after the Indiana Supreme Court Disciplinary Commission, seeking to shift the inquiry from his email criticisms of a judge to what he claims is an abuse of the attorney discipline process. "I think they have a grudge against me," Ogden said. "I did touch the third rail … I criticized the Disciplinary Commission."

Ogden argues in a counterclaim filed last month against the Commission that the case against him violates his First Amendment right to free speech and that he's being targeted. He said the verified complaint filed against him in March arises from a grievance filed after he wrote an item critical of the commission in January 2011 on his "Ogden on Politics" blog. The item asserted that during a particular period of time, just three of about 400 disciplined attorneys worked at Indiana's 24 largest firms. "Within a few months, respondent was hit with his first grievance," Ogden said in his counterclaim.

One of two charges in the verified complaint against Ogden is that he violated Rule of Professional Conduct 8.2 by criticizing Hendricks Superior Judge David Coleman in emails Ogden sent opposing counsel in a concluded estate matter. Ogden wrote that Coleman "should be turned in to the disciplinary commission for how he handled this case. If this case would have been in Marion County with a real probate court with a real judge, the stuff that went on with this case never would have happened."

Ogden claimed, among other things, that the estate's value dwindled from about $1 million to almost nothing due to improper oversight. The commission charges that those and other statements were false or reckless, and that Ogden implied the judge "was either dishonest, or allowed others to be dishonest in the administration of the estate." Ogden, in response, defended his criticism and noted Coleman had been removed under a Trial Rule 53.1 "lazy judge" motion.

Coleman said Ogden's claims went far beyond protected speech. Coleman acknowledged he erred in failing to rule on a motion within 30 days, but he said Ogden made unfounded accusations about him in a case where three judges presided at various times. "One of the implications was that I was friends of the family, which I was not," Coleman said. "The implication was I somehow conspired with the executor to cheat some of the heirs out of the estate."

After Coleman received copies of the emails, he asked Ogden for an apology. "In 20 years on the bench, I have never had an attorney attack my integrity in writing in this manner," Coleman wrote. Ogden refused, citing his First Amendment rights in his reply. "I stand by my statements regarding how you handled this estate," Ogden wrote.

Coleman said an apology would have spared Ogden a disciplinary complaint. But Ogden said he stands on principle. "I believe strongly the only way things are going to change, particularly in this profession, is if people speak out for reform and advocate for change."

Disciplinary Commission Executive Director G. Michael Witte said he couldn't address details of Ogden's case, but said attorneys' speech is naturally more highly regulated.

"We're in a position where our speech is held to a higher standard because of the impact of that speech," Witte said. "Even outside of lawyer discipline, free speech is not absolute."

Witte said a hearing officer would be appointed to hear Ogden's counterclaim. Citing the commission's confidentiality rules, Witte declined to address whether the commission has handled prior counterclaims in discipline cases.

*Continued, Page 22.*

*Speaking out, continued from page 21.*

Indiana University Robert H. McKinney School of Law associate professor Margaret Tarkington has written on the intersection of the First Amendment and potential discipline.

Tarkington describes Model Rule of Professional Conduct 8.2 as "a trap for lawyers" in an article by that title published in the Association of American Law Schools Professional Responsibility Newsletter. She said the rule incorporates the Supreme Court of the United States standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964), that speech regarding a public official is protected unless it is made with actual malice – knowledge that it was false or with reckless disregard of whether it was false. Indiana's Rule 8.2 also follows the *Sullivan* line of cases, forbidding attorneys from statements about judicial officials "the lawyer knows to be false or with reckless disregard as to its truth or falsity."

"The vast majority of states interpret that rule as applied to the judiciary to mean something very different," Tarkington said. The standard for attorneys commenting on the judiciary she said is closer to, "If you say it, you'd better be able to prove it, which is not what the rule says, and it's probably unconstitutional. "It's almost as far away from a *Sullivan* standard as you can get," she said, noting it's not unusual for attorneys to be disciplined for judicial criticism.

Tarkington's article, "The Truth Be Damned," published in the 2009 *Georgetown Law Journal*, reviews numerous instances of such discipline. Provided details of the complaint against Ogden stemming from the email, Tarkington said it's important that the context wasn't in a judicial proceeding where the truth-seeking function of the justice system requires a higher level of accuracy in attorney statements. "He didn't even put it on his blog," Tarkington said. "An attorney should be able to talk about the judiciary in an email."

Tarkington argues that disciplining attorneys for speech presents dangers. "We have an elected judiciary and lawyers are the ones who know the most about how a judge acts, and (lawyers) best know the law that judges are supposed to follow," she said. "The problem is you've silenced all the people with knowledge. "You're basically shielding the judiciary from effective criticism by the people who know," Tarkington said, "and I think that's a really big problem."

The second charge in the complaint against Ogden concerns a letter he wrote to several Marion Superior judges. Ogden said the letter aimed to inform judges about an Indiana Supreme Court decision regarding asset distribution to the Common School Fund in civil forfeiture cases. The commission contends the letters are ex parte communications that violate Rule 2.9 and Rule 8.4(d). Ogden said he had no pending matters before the judges who received the letter, which he said also was copied to the attorney general, county prosecutor and others.

With his disciplinary case pending, Ogden filed an original action with the Indiana Supreme Court this month asking that a grievance filed against him in 1994 be dismissed. The commission responded that the grievance, which claimed Ogden made untrue statements about a then-magistrate in 1990, had been dismissed in 2008. The court dismissed the action, in which Ogden had also requested the court consider a statute of limitations and deadlines in discipline cases.

Ogden said he was never notified about the dismissal. Then-commission director Donald R. Lundberg, now a partner at Barnes & Thornburg LLP, said he couldn't speak to the particulars of the 1994 complaint, but said, "matters are not dismissed without notice." Ogden said a grievance active 14 years merits scrutiny. "As an attorney, I have a right to know what they're claiming, and they should not be allowed to let things linger for this period of time." Witte said he could not say how many pending grievances or complaints are more than a decade old, citing confidentiality. "Sometimes an investigation remains open for a long period of time where a statute of limitations doesn't prevent it from being closed," he said. "Every complaint has its own life and its own reasons for investigation or for holding in abeyance. … We go on a case-by-case basis."

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The foregoing was originally published in the May 22, 2013 *Indiana Lawyer* and is reprinted here with permission http://www.theindianalawyer.com/author?authorId=674.

# It's All About Expectations

By: David DePaolo

A theme emerged at the South Carolina Workers' Compensation Educational Association Conference that I just attended in Myrtle Beach, and it is a universal theme that we in the industry deal with daily with mixed results - the job of managing expectations.

Various people from different walks of the industry randomly commented without conscious coordination of their presentations on how much education needs to be a part of the workers' compensation claims process. And not just education for the injured worker - who of course needs a lot of hand holding through the entire ordeal as that person is thrust into the vast unknown with little say or control over the course of his or her claim life.

Employers need to be educated on how the process deals with the work injury, how important their participation is relative to the injured worker, the physician, the claims administrator and the impact of all of this on their premiums.

The commissioners talked about how expectations of carriers and administrators need to be managed, admitting that what goes on behind closed doors can be mysterious but is really for greater efficiency and management of the litigation.

Vendors providing services need their expectations managed so they can better understand why depositions might be set, or why their bills are going to be challenged.

Politicians think they're implementing one thing but get something different - we seem to see this in every reform that gets to the books.

Even governmental entities contracting with large consulting firms for new computing systems don't get what they think they're paying for.

When it comes to comp, everyone has some expectation which may or may not match reality, and may not match each other's expectations, which creates a whole lot of friction. These expectations can be exacerbated by the laws that are passed, by the regulations that are promulgated, by the complaints of special interests, by economic factors and ultimately by the social order (and I've been thinking a lot about THAT too).

Communication takes a lot of effort. There are language differences, culture differences, family differences, education differences and many, many more complicating factors that make managing expectations a lot of work. But that's why we're in this industry - it is our job to educate, communicate and above all manage the expectations of those who we service, be they employer, worker, administrator, judge - whomever. There's an old saying to which I have no attribution but it is relevant nevertheless: Don't be disappointed with the results you didn't get by the work you didn't do. Next time you're frustrated with a claim, think about how well you have managed the expectations of the person causing you grief - likely not very well. By the time the frustration arises however, it's a bit too late to manage the expectation, and all you're left with is attempting to manage the outcome, which is decidedly even more difficult.

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The foregoing was originally published in the October 22, 2013 DePaolo's Work Comp World blog and is reprinted here with permission, see http://daviddepaolo.blogspot.com/2013/10/its-all-about-expectations.html

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## For More Information:


**THE COLLEGE OF WORKERS' COMPENSATION LAWYERS**
**ATTN: SUSAN WAN**
**1997 ANNAPOLIS EXCHANGE PARKWAY, SUITE 300**
**ANNAPOLIS, MD 21401**
**EMAIL: SUSAN.WAN@CWCLAWYERS.ORG**

http://www.cwclawyers.org/index.html.

# IAIABC/NAWCJ Webinar

***November 20, 2013***

The IAIABC is excited to partner with the National Association of Workers' Compensation Judiciary to host a webinar on the use of videoteleconference technology for conducting trials. The program will discuss the benefits of this technology, costs, challenges, and perspectives.

- Florida Judges David Langham and Stephen Rosen will discuss and demonstrate the equipment, explain the integration of the system into the Florida Office of Judges of Compensation Claims, and answer questions.

*Please contact Heather Lore, IAIABC Manager of Membership and Marketing, at hlore@iaiabc.org with any questions.*


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