# Lex and Verum

## The National Association of Workers' Compensation Judiciary

Number IV, 1209


# NAWJC Board of Directors Grows!

National Association of Workers' Compensation Judiciary President John Lazzara recently announced that four Judges have been unanimously elected to join the NAWCJ Board of Directors. These additions enhance the vitality of the Association, and bring an even wider variety of backgrounds, experiences and perspectives to our efforts. The new Board members are:

Judge R. Karl Aumann. Judge Aumann is the Chairperson of the Maryland W/C Commission, the former Maryland Secretary of State, and is a leader of the Southern Association of Workers' Compensation Administrators (SAWCA).

Judge David Torrey. Judge Torrey is a Pennsylvania Workers' Compensation Judge, an Adjunct Professor of Law, University of Pittsburgh School of Law, and is a Fellow of the College of Workers' Compensation Lawyers.

Judge David Imahara. Judge Imahara is a Georgia State Board of Workers' Compensation Administrative Law Judge, and Director of the Alternative Dispute Resolution Division.

Judge Ellen Lorenzen. Judge Lorenzen is a Florida Judge of Compensation Claims, the Former-Co-Chair of the American Bar Association Employment & Labor Law Section, Workers' Compensation Committee, and is a Fellow of the College of Workers' Compensation Lawyers.

Judges Aumann, Torrey, Imahara, and Lorenzen join Judges Lazzara, Cohen, Hawkes, Langham and Wolf in leading your Association. The Association currently needs Judges willing to participate in various committee assignments. Interested Judges should contact President Lazzara.

Watch future issues of the Lex and Verum for full biographical features on our new Board members. See page three of this edition for Judge Cohen's biography.

## January "Second Fridays Seminar"

January 8, ~~2009~~ 2010

It is time to make that difficult annual adjustment, and begin remembering to write 2010 each time. The "Second Fridays Seminar" program will kick-off 2010 with a program on the involvements of Medicare in our state workers' compensation programs. Our presenter is Rafael Gonzalez, a leading expert in Medicare issues, and Medicare set-aside trusts. Make plans now to join us on January 8, 2010 at noon Eastern. This program is provided free of charge to NAWCJ members.

Join us January 8, 2010 for Second Fridays Seminars

# NAWCJ Judicial College 2010:

The curriculum for the 2010 NAWJC Judicial College is being organized now. Do you have suggestions for topics or specific speakers? Please send your suggestions by email to Judge Lazzara JJL@NAWCJ.org, and make plans to join us. The 2010 NAWCJ College will be presented in conjunction with the Florida Workers' Compensation Institute (www.fwciweb.org) at the Marriott World Center (www.marriottworldcenter.com) in Orlando on August 15 through 18, 2010.

# Evaluating Occupational Claims of Chemical-Induced Injury

By Raymond D. Harbison and James McCluskey

The first evaluation of workplace injuries was performed by Bernadino Ramazzini, an Italian physician. He proposed a rule in the 17th century for evaluating whether a workplace-induced illness could be the cause of a disease in an individual. He taught Italian physicians to ask about symptoms and observe signs but also to obtain details of an individual's occupation, because without this information, a correct determination of the cause of an illness could not be made. However, Ramazzini was not encumbered by government regulations, litigation, and workers' compensation controversies. Nor was he faced with evaluating thousands of chemicals as potential causes of a worker's illness.

The workplace and the work performed there have changed significantly over the course of the past several decades. No longer is workplace exposure confined to the "laborer" or to a factory; it now applies to workers such as health care personnel, statisticians, office workers, and employees in many other workplaces, which contain a diverse array of hundreds of chemicals that may be involved in workplace exposure. For this reason, although occupational diseases such as plumbism and asbestosis have readily apparent diagnostic features, considerable controversy arises over the myriad workplace complaints associated with potential workplace exposure to chemicals. These factors make determining the cause of a workplace injury difficult and contentious.

Modern assessment of occupationally induced disease is complicated by many biases of perception and by misinterpretation both of the information provided on Manufacturer's Safety Data Sheets and of regulatory standards and guidelines. Signs such as opacities on a chest radiograph are not in themselves specific for the determination of the cause of a disorder, and patient history alone cannot reveal the cause of the disease or ailment. Work history may provide information that relates to the patient's symptoms and signs, but exposure, dose, and biological plausibility must be verified to determine the cause of the ailment.

## THE PURPOSE OF REGULATION

The dilemma of the health and safety specialist today is the legal and ethical obligations to protect worker health and safety and the responsibility to accurately and reliably determine the cause of workplace injuries.

Many governmental regulations are intended to reduce risks to human life and health. Some regulations control chemical use in the workplace. Regulations directly affect not only the use of chemicals and allowable "risks" from exposure to chemicals, but also the perception of chemical risks. It is therefore important to clarify the risk assessment process and the proper context of risk regulations in the protection of worker health.

The purposes of regulation are risk management and risk reduction. Before government agencies can promulgate regulations to reduce and to manage risks, they must first identify and quantify the risks. Policies that manage chemical risk must have as their cornerstone an accurate assessment of the toxicity of the chemical to be regulated. Consideration of the toxicity of the chemical is the most important aspect of the regulatory process. The challenge is to determine what effects are toxic manifestations of the chemical, what are the health risks of these manifestations, and how such risks can be quantified and reduced. Regulation inevitably addresses the question, "How safe is 'safe'?"

The current approach to regulating risk preserves many perception biases that arose in the 1970s and early 1980s. During this time, for example, the public was repeatedly alarmed by predictions that approximately 90% of human cancers could be caused by synthetic chemicals. We now know that most excess cancer is caused by cigarette smoking, diet, lifestyle, and factors other than industrial chemicals. But the fear remains despite the evidence. Furthermore, recent analyses of animal testing—the scientific studies on which those predictions were made—indicate that about 95% of the animal cancer bioassays are incorrect when extrapolated to humans.

That is, they are false-positive results. Recent discoveries and reevaluations show that animal testing has serious limitations when an attempt is made to apply these results to the human model. Despite its routine application, no accepted scientific basis exists for the assumption that results can be meaningfully extrapolated from test animals to humans (Office Science Technology Policy Guidelines, Guideline 8, p. 10376). Nevertheless, this procedure continues to be used to establish regulatory guidelines with the understanding that this is a conservative approach that is likely to provide extraordinary margins of safety. However, regulations protect; they do not predict.

*Continued, page 3*

Evaluating Occupational Claims, *Continued from page 2*

CONSERVATIVE RISK ASSESSMENT

The conservative nature of regulatory risk assessment serves the intended purpose of protecting public health. By maximizing perceived risks and forcing them to stay within those bounds considered to be "acceptably safe" or "virtually safe," the regulator prevents actual risks from becoming significant and ensures that workers are not subjected to unacceptable risks via chemical exposure. It is clear that the intention of these risk assessments is not to accurately portray the actual human risk. They clearly do not. One might ask whether risk assessments based on regulatory methodologies can ever be used to determine whether workplace chemical exposure has caused a worker to sustain an injury—that is, whether a health effect in one person actually was caused by chemical exposure. The answer is yes, but only as a means of ruling out the workplace exposure as the cause of the injury, not as a tool to establish causation.

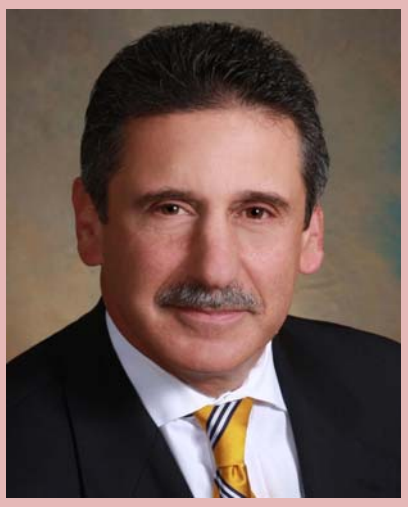
The strength of the regulatory process, for example, by which safety guidelines for carcinogens are established is its inherently conservative nature, which places an upper bound on the cancer risk. It is the consensus of the scientific and regulatory communities that in most instances, the actual risk of cancer posed by certain chemical exposures are not known and may, in fact, be zero. This regulatory goal—to err well on the side of safety—can be used to reasonably exclude the chemical cause of an injury when the exposure is so low that estimated risks fall within regulatory guidelines for acceptably small risks.

It must be stressed that because of the conservative nature of the risk assessment process, the converse is not true. It cannot be concluded that an exposure exceeding some regulatory standard necessarily places an individual at an increased risk of developing an injury. Indeed, the regulator has not served the public if the regulatory level embodies so little a margin of safety that any excursion above this value actually places humans at a significant risk.

Regulatory risk assessments are suitable for three primary purposes. First, risk assessment allows regulators to set an upper bound on the potential risk posed by the chemical and thereby provide an adequate margin of safety in the absence of human data describing the human response at the exposure level of interest. Second, regulators may also use these estimates to rank the relative potencies of, or risks posed by, certain substances—for example, animal carcinogens—thereby assisting them in prioritizing chemicals for which regulatory controls should be developed (OTA, 1981). Third, because of their conservative nature, risk assessments are useful in dismissing workplace exposure as the cause of an injury in when the risk is low and alternative factors become the more likely cause of the disease or illness. In fact, when the risk is low, alternative factors do become a more likely cause of the disease or illness. When the risk is low, the only conclusion that can be reached with any reasonable degree of scientific or medical certainty is that the chemical exposure cannot be the likely cause of alleged adverse health effects.

*Continued, page 4*

# Meet Your Board:



A native of Orlando, Florida, Bob Cohen graduated from Brandeis University in 1979 with a B.A. degree in American Studies. He graduated in 1981 from the Florida State University College of Law, where he served on the *Law Review*. After more than 20 years in private practice, concentrating in administrative and civil law representing large companies, professional licensees and consumer associations, Bob was appointed by the Governor and Cabinet in October, 2003, as the Director and Chief Administrative Law Judge of the Florida Division of Administrative Hearings which includes under its umbrella, the Office of Judges of Compensation Claims. Bob currently serves as President of the National Association of Administrative Law Judiciary, a Board Member of the NAWCJ, on the Second Judicial Circuit Bench/Bar Committee, an alumni member of the William Stafford Inn of Court, a Board Member of the Legal Aid Foundation of the Tallahassee Bar Association, and has served as a consumer organization representative on the Federal Alliance for Safe Homes Steering Committee, The Residential Community Mitigation Program Advisory Committee, and the Department of Revenue Property Tax Administration Task Force. He is active in the community, having previously served as President of the Tallahassee Bar Association, the Legal Aid Foundation (twice), and numerous community organizations. He is also a past recipient of the Florida Bar's Pro Bono Service Award for the Second Judicial Circuit. Bob is a frequent speaker on topics related to administrative law at Bar events, regional and state organizations, and in the classroom. He is Board Certified by the Florida Bar in State and Federal Government and Administrative Practice.

Thus, an exposure that exceeds a regulatory guideline is not likely to cause an adverse effect, even if the exceedance is within the margin of safety. Regulations are thus protective because of the safety factors incorporated into them.

## RISK ASSESSMENT AND KNOWLEDGE OF CHEMICAL MECHANISMS

Knowledge of the mechanism by which a chemical produces an effect in animals is essential for attempting to extrapolate the animal testing results to humans. Again, for regulatory purposes, a knowledge of the mechanism of toxicity is not required, but to determine the cause of a human illness, it is necessary to extrapolate animal testing data to determine human illness. In any situation involving workplace exposure to a toxic substance, where the alleged exposure is followed by an allegedly observable physiological change or deficit, the ultimate problem confronting the health and safety specialist attempting to attribute a chemical cause to a workplace injury lies in determining whether there is a basis for concluding that the observed effect would not have occurred in the absence of the chemical exposure. Various people have attempted to devise a methodology sufficient for linking disease processes occurring in a specific individual after specific chemical exposures. Although there is no general agreement as to the types of information required before such a relationship can be demonstrated, in all cases, there is general agreement that in the absence of certain information, no valid conclusion regarding cause and effect can be drawn in a specific individual's case. The following minimal steps are generally required by the scientific community before any reasonable medical or scientific probability can be expressed relating a chemical exposure and an observed effect in a specific individual.

1. Exposure to a putative agent must be documented.
2. The exposure must occur in such a fashion that the chemical is temporally eligible to be the cause of the observed effect.
3. The exposure level must be documented at a level capable of inducing a known toxic effect.
4. The observed toxic effect, whether acting directly on the target organ or indirectly through alteration of body chemistry or function, must be satisfactorily linked to the observed effect in the target organ. The observed effect must be biologically plausible and known to be caused by the agent.
5. A toxic effect suspected of being responsible, either directly or indirectly, for injury to a specific organ must have been replicated in a general population upon identical exposure.
6. Confounding variables, such as drug-induced intrinsic factors or effects caused by infectious diseases, must be eliminated as potential causal or contributing factors.
7. If the latency period (the time between exposure and alleged effect) is extended, some plausible explanation for delay of onset of the disease process must be present, either through data from similarly exposed populations or other sources.
8. The specific effect from the putative agent must be demonstrated as occurring in the specific individual involved. In cases when no effect can be demonstrated other than injury to a target organ, no conclusion can be drawn unless specific cytotoxicity affecting the target organ can be demonstrated.
9. A consistent pattern of identical effects under controlled circumstances must be demonstrated (i.e., literature precedence).
10. A consistent morphologic pattern under controlled circumstances (or a pathognomonic effect) must be demonstrated and existence of the specific morphologic pattern confirmed in the individual case under consideration.
11. Epidemiologic and bioassay tests must be supportive.

There must be formal evidence that a worker was exposed to a harmful level of chemical before a causal relationship can be attributed in a specific individual. Further, there may be an observed toxic effect capable of leading to the injury, and blood and tissue analyses may confirm an effect caused by the chemical exposure. Specific chemical-induced cytotoxicity may also be used to confirm the target organ injury.

## ASSESSING CAUSAL FACTORS OF CHEMICAL EXPOSURE

Empirical data must be available to indicate that the chemical exposure is capable of causing the observed or alleged injury. That is, the effect must be an effect known to be caused by this chemical. If no direct or indirect data are available indicating that the chemical exposure is capable of causing the injury, then this would be the first time in the history of medicine anyone has claimed such a chemical-induced injury. If this is the case, whoever is making such a claim has an obligation to describe the methodology used to arrive at this conclusion.

The latency period between the chemical exposure and the manifestation of the injury or effect must be plausible. There must be a reasonable explanation for a delay in onset or a continuation of the effect or injury. There must be evidence in the literature of such a latency period having been established by means of epidemiological data.

*Continued, page 5*

A consistent pattern of similar effects under controlled circumstances must have been reported in the scientific literature. A consistent morphologic pattern (evidence of pathological changes in tissue) under controlled circumstances must have been reported in the scientific literature from similar chemical exposures. Specific physiological changes must be demonstrated and these physiological changes must be linked to the alleged injury.

There must be epidemiological data linking the chemical exposure with disease or injury, or a record of such data being linked to the alleged injury or disease. Bioassay tests may indicate that this chemical exposure is capable of causing the injury or effect or contributing to physiological changes leading to the injury or disease.

The sole evidence of exposure cannot be based on the recollections of the worker. No reasonable scientist would conclude that sufficient evidence exists for linking an alleged chemical exposure and a workplace injury using those facts alone. Even under the most minimal standards, the evidence is totally absent to draw a conclusion that workplace exposure resulted is an injury relying on the history of the worker.

The rigorous scientific methodology must be utilized to differentiate between alleged diseases and ailments, which would occur naturally or by chance, from those that may be caused as a result of workplace chemical exposure. If the scientific methodology is not followed, arbitrary, anecdotal, and incorrect associations may be made because of individual bias, confounders, and failure to use a precise and objective comparison. The scientific method is generally accepted as the minimum requirement for determining the chemical cause of a human ailment or disease.

## CONCLUSION

The refinement of this objective methodology for establishing a cause-and effect relationships is a continuing process, with the first effort to formalize this process occurring more than a century ago when the Henle-Koch postulates were developed for establishing the causes of bacterial disease.[1] Heubner expanded the Henle-Koch postulates by adding the need for epidemiological data in establishing causation in viral diseases.1 In 1964, the U.S. Surgeon General concluded that cigarette smoking was a cause of lung cancer on the basis of an evaluation of epidemiological studies using the criteria of the following: the consistency of the association; the strength of the association; the specificity of the association; the temporal relationship of the association; and the coherence of the association.[2] In 1965, Sir Bradford Hill further advanced this scientific method by formulating nine criteria for evaluating epidemiological data used to determine chemical-induced injuries.[3] Adding to this methodology are the additional epidemiological considerations that identify important disease risk factors such as diet, smoking, alcohol, illicit drug use and abuse, and infectious agents. In addition, several publications describe the basis of the scientific method for establishing cause-and-effect relationships.[1—10]

There is a significant difference between the use of toxicity data, Manufacturer's Safety Data Sheets, hazardous materials data basis, product safety information, and scientific and medical literature for the protection of worker health and safety and trying to determine the cause of a workers claimed injury or illness. Remember, regulations protect; they do not predict!

**References**


1. Evans, A. S. Causation and disease: The Henle-Koch postulates revisited. *Yale J. Biol. Med.*, **1976**, *49*, 175.
2. *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service*. U.S. Department of Health, Education, and Welfare: Washington, DC, 1964.
3. Hill, A. B. The environment and disease. Association or causation? *Proc.R. Soc. Med.*, **1965**, *58*, 295.
4. Doll, R. Occupational cancer: Problems in interpreting human evidence. *Ann. Occup. Hyg.*, **1984**, *28*, 291.
5. Guidotti, T. L.; Goldsmith, D. F. Occupational cancer. *Am. Fam. Physician*, **1986**, *34*, 146.
6. Hackney, J. D.; Linn, W. S. Koch's postulates updated: A potentially useful application to laboratory research and policy analysis in environmental toxicology. *Am. Rev. Resp. Dis.*, **1979**, *119*, 849.
7. Harbison, R. D. *Hamilton and Hardy's Industrial Toxicology*. C. V. Mosby, 1998.
8. Susser, M. Judgment and causal inferences: Criteria in epidemiologic studies. *Am. J. Epidemiol.*, **1977**, *105*, 1.
9. Susser, M. Rules of inference in epidemiology. *Reg. Toxicol. Pharmacol.*, **1986**, *6*, 116.
10. Susser, M. What is a cause and how do we know one? A grammar for pragmatic epidemiology. *Am. J. Epidemiol.*, **1991**, *133*, 635.


This article was originally published in the Journal of Chemical Health and Safety, August 2001. It is reprinted with permission.

Dr. Harbison is a Professor at the University of South Florida College of Medicine. He is also a Research Professor at the Center for Environmental Diagnostics and Bioremediation at the University of West Florida. He holds degrees in pharmacology and toxicology. He is a member of the State of Florida Environmental Public Health Tracking Committee and an Associate Member of the H. Lee Moffitt Cancer Center and Research Institute, and a former Training Director of the National Institute of Occupational Safety and Health. Dr. Harbison presented a ***"Second Fridays Seminars"*** program to the NAWCJ in December 2009.

# Making the Paperless Office Work

By RICK JEFFRIES, Esq.

Every morning, I walk into my office to find nothing on my desk. An empty outbox, a paperweight with nothing under it. A beautiful expanse of empty space. Nothing to do? Hardly. With the help of good technology, excellent support team members, and a tiny bit of discipline, I enjoy a paperless practice. You're probably wondering how that is possible, with the number of documents a busy lawyer receives. What I describe below is the product of years of adapting, learning, and making mistakes. I've found that the right combination of hardware, software, and human process keeps the work flowing and the office neat.

Great, you're thinking. Another article by a ludicrously organized, type A, neat-freak lawyer, looking to make everybody do it his way. Worse, he's probably some sort of greenie, tree-hugging) antipaper extremist.

I am none of those things. More accurately, I am a mental case. Neither self-sufficient nor inflexible, I am actually quite disorganized. I have an attention span just long enough not to be a medical issue, and particularly when doing the less glamorous work of litigation, I can be distracted very easily. One of the reasons I have gone paperless is to keep my office a sanctuary - where the files and documents I'm not working on at the moment are not encroaching on my space and my attention. Clients find my office a serene place where they can discuss their matters calmly, and neither their confidential information nor anybody else's is left out in stacks and piles for other visitors to see.

**My Hardware**

Obviously, staying paperless requires some technology, but it does not have to be bleeding-edge stuff. Here are the tools I use daily to keep my practice paper-free:

- Laptop: I have a Dell Latitude 0820. Other than having a wide-aspect screen, it is not, with all respect to my Information Services Department, a particularly remarkable laptop. It isn't very light, it isn't exceptionally fast. It is a solid, business-grade laptop with solid, business-grade specifications.
- Second monitor: I connect a second monitor to my laptop. It is the most valuable peripheral device in my paperless environment. The monitor I use is capable of rotating 90 degrees and showing an entire page at once in portrait format. Most laptops are capable of supporting a second display. The extra display space allows me to read on one screen and write on another, rather than constantly switching between windows.
- Port replicator: My screen, phone, and other peripherals are all connected to a port replicator or dock. With the click of a button, I can untether my laptop and go mobile without disconnecting and reconnecting all the wires.
- Smart phone: My contacts, calendar, and inbox travel with me in a smart phone. I currently use an iPhone. I also have had positive experience with Windows Mobile devices.
- Scanning network copier: Part of keeping paper out of my office is transforming paper into data. All mail, faxes, and other incoming paper of any substance are immediately scanned in and either e-mailed to me or profiled on our document system.

**Critical Software**

Keeping data organized and accessible requires powerful, flexible software. In addition to e-mail and word processing applications (we use Microsoft Office, including Word, as well as Corel WordPerfect), I have found two programs essential to my paperless practice:

- Adobe Acrobat 9 Pro: Chances are you're familiar with the free Adobe Reader, the most popular way to read documents in Portable Document Format (.pdf). I use the non-free Adobe Acrobat 9 Pro, which allows annotation, editing, and powerful organizing of documents and files, including .pdfs, which is how most documents reach me.
- Microsoft OneNote 2007: OneNote is the single most important, life-changing software application I have ever used.

OneNote ships with some versions of the Microsoft Office Suite or is available at retail for $99. Microsoft also makes a free 60-day trial of OneNote available for download from the Internet. You may find the download at http://office.microsofr.com/en-us/onenote/default.aspx.

I use OneNote to capture everything: notes from meetings, research from the Internet, audio, photo, graphs, everything. It is a very simple but extraordinarily powerful tool.

*Continued, Page 7.*

# WHO WRITES THESE PLEADINGS?

Occasionally, an extreme example comes along that brings focus to a broader, if ill-defined issue. Every Judge has rendered a decision that contained a typographical error, and admittedly we may not be the best writers. Recognizing that everyone admittedly has strengths and weaknesses, however, we are repeatedly disappointed in the quality of pleadings filed by attorneys. There was a time when telling a pro-se claimant that their pleadings "looked like they were prepared by an attorney" was the ultimate compliment. Recently, however, the quality of attorney pleadings is often disappointing, with misspelled words and other grammatical errors that would be easily identified with a cursory spell-check. Such pleadings illustrate a lack of pride, laziness, and are simply unprofessional. The illusion that such lackluster practice was "a workers' compensation problem" was recently shattered with the publication of a Federal Court order in Nault v. The Evangelical Lutheran Good Samaritan Foundation d\b\a Good Samaritan Society- Daytona, in the Middle District of Florida, Orlando Division, case number 6:09-cv-1229-0rl-31-GJK. Judge Gregory Presnell entered a September 2, 2009 Order to Show Cause. In his response, Plaintiff's counsel explained "it appears that undersigned counsel did not properly review the complaint before it was filed and served." The response overall was perceived by Judge Presnell as "otherwise being riddled with unprofessional grammatical and typographical errors that nearly render the entire Motion incomprehensible." Judge Presnell illustrated his perceptions (frustrations) by correcting the pleading and attaching it to his order. This extreme example may perhaps serve as a reminder of the value of careful drafting, proof-reading, and staff supervision. The full Motion and Response is available at "Above the Law" at the web address below (you may have to copy the link and paste it into a browser). Judge Presnell ordered counsel to re-read the court rules and to hand deliver a copy of the order and corrected Motion/Response to his client.

More at:
http://abovethelaw.com/2009/09/21/Nault%20v%20Evangelical%20Lutheran%20Full.pdf

The clipping from Above the Law that led to this column was spotted and forwarded by the Honorable Ellen Lorenzen, of the Florida Office of Judges of Compensation Claims, Tampa, Florida. If you see something worth sharing, send your suggestion to President John J. Lazzara, - *jjl@nawcj.org*.

*Making the Paperless Office Work, continued from page 6.*

Why not just use a favorite word processor for note taking, you ask? OneNote uses a notebook as the principal metaphor for its user interface. If you keep stuff in three-ring binders to stay organized, you'll love One-Note immediately. Rather than open to a blank page, as Word or WordPerfect would do, OneNote opens to your notebooks, each of them organized to your preferences, with section tabs and pages within those sections. Even better, all your notes and data are instantly available; no need to search for the right file or use an Open command. OneNote is my trial notebook, my mediation briefcase, and my oral argument binder.

OneNote has no Save button. Everything you type (or if you use a tablet-style PC, write) or capture is immediately saved. If you're connected to a network, your notes are continuously backed up to a drive share,

Finally, OneNote has intuitive and simple text entry and editing features. As with a notebook, you can write anywhere on the page just by clicking, but you can drag things together and take them apart, reorganize by dragging text around, create diagrams, charts, and numbered lists, just by typing in a way you would find natural. If I type "1. Apples" and press Enter, OneNote understands I am making a list and starts the next line with "2." If I type "Fruit <tab> Quantity <enter>," OneNote understands I am making a table and immediately draws the lines, expanding the table as long as I want to keep entering data.

Data are useless if they can't be put to work, and OneNote permits me to export brief outlines to Word documents, notes to PowerPoint presentations, a few paragraphs of composed and reorganized text into e-mails, and so on. You can also print directly from OneNote, but unless it's my grocery list, I generally don't. Paperless, remember?

I am not a spokesman for OneNote, and I am as ambivalent about Microsoft as the next guy. But download OneNote's free trial and see what you think. It has changed profoundly the way I practice law.

**The Process of Going Paperless**

With hardware and applications in place, paperless-ness still needs a human element. I find a few simple daily actions are necessary to keep a paperless practice paperless. Here are some of the principles and processes I use.

The central principle of my paperless existence is "Don't take it, don't make it." Don't create paper or accept it from others. It's that simple.

Let's start with "don't take it." I ask colleagues not to bring paper to my office with which they don't plan on leaving. I don't let paper that matters into my office. Paper that matters is anything that would cause difficulty if 1 lost it. Usually this means "the original" or "the firm's only copy." Preprocessing incoming paper is critical.

Usually, I spend five minutes with my assistant and the morning mail. I try to decide at that point what each item will need, and decide to do one of the Four Ds:

Defer. These items need additional resources to complete, such as incoming discovery requests. I have my assistant scan them, calendar deadlines, draft a template for the responses, and link the document to me by e-mail. I then send an e-mail to the client with the answer template document with a request for a telephone call or a meeting.
*Continued, Page 7*

*Making the Paperless Office Work, continued from page 7*

Delegate. I delegate items that require assistance from a colleague. For example, we get a complaint and must file an answer. My assistant will follow the same process: scan the document, create a template answer, and send me the link. I then e-mail an associate with the answer skeleton and a request for action. The associate completes the draft and sends an e-mail to the client with a request for his or her review. I make revisions to the answer and communicate with the client as necessary.

Do. Some things can be done on the spot: RSVP to a seminar or luncheon, for example. If an item presents a task that can be completed in two minutes or less, I'll do it. But this is a vastly overused and dangerous category.

Discard. I discard documents of no lasting value to my practice. This is a tricky category but one I find I have consistently underused. Bar journals I'll never read, flyers to continuing legal education events I'll never attend, postcards for books I'll never read, all the detritus of having a mailing address goes right in the trash. Everything I keep has power over me. Everything I throw out has none.

Now let's consider "Don't make it." I don't make paper. My office contains no handwritten notes, scraps, no yellow pads, no Post-its, no memos to colleagues, no faxes. My assistant is responsible for the live originals. My default printer is a virtual printer (that IS, all my documents "print" to PDF by default). I try not to send a letter or a fax when an e-mail will do just as well. If my colleagues or clients want to print out what I send them, that's their choice. I don't make it for them.

**Banishing the Four Ps**

I have found that scraps of paper and handwritten notes were the foundation of my messy office. It was one thing to use a vendor to scan boxes of client documents or handle my mail by PDF. But the yellow pads, stickies, scribbles on envelopes-lost, orphaned data that I'd eventually lose or throw out from frustration remained. I had to banish from my office - once and for all - the Four Ps: pencils, pens, pads, and Post-its.

When I say "banish," I mean physically remove these items from my space. Without a pen, I use OneNote to capture a phone message. I can still throw it out, but I can also add the cell phone number my client left to Contacts with ease. Without a legal pad, I am forced to keep my "to do" list on OneNote, where I can delete, add, reprioritize, and reorganize with complete ease. I had to physically break the habit of writing with pens and pencils. My notes became searchable and organized. A friend and former colleague of mine keeps a OneNote page called "Stickies," where she keeps all of those important but uncategorized notes.

The stickies are no longer all over my phone and Computer; dog-eared legal pads no longer clutter my desk. Breaking the scrap habit, banishing the Four Ps, was critical to my paperless success.

**What About the Paper File?**

Obviously there are a few documents-though fewer than you think-whose status as an original is important, and my assistant keeps them aside in a discrete and secure location. Everything else gets placed in undifferentiated files, by client and matter, in chronological order after they are scanned and saved to our continuously backed-up document system. The real “file"-the place I look when I want to know something-lives on our servers. I'm not sure why I even keep the paper, except that some clients might find instant shredding of their documents, no matter how well preserved electronically, to be disturbing. But I haven't referred to a physical file in months, and I don't intend to start.

My assistant has displayed no interest in making pleadings books and correspondence cards. The drudgery of filing is replaced with the profiling and saving of a few documents a day.

**Refuting Objections to the Paperless lifestyle**

I have heard a host of objections to the idea of a paperless office, but I don't give them much credence. Here are the most common examples:

- "I can't read documents on the screen!" In my experience, that is wrong 97 percent of the time. My rotated second monitor allows me to read a page of text, larger than it would appear on paper, with my head up, my neck and back straight. I find reading from a bright monitor much more comfortable than looking down at paper. Three percent of the time, I like to read a draft on paper to get a fresh look. I don't print anything before the "bond paper" stage, the final draft. I either sign it or make my final revisions as markups-and in either case the paper leaves my office.
- "What if a colleague wants to review the file?" So what? What they really want is to get caught up on key pleadings, documents, and correspondence. These can be easily printed from the documents system, if absolutely necessary. Keeping everything in electronic format relieves me of the fear of loss, damage, and confusion. Everything is stored, backed up, and in order.
- "What about the big box of documents we just got from the client?" So what? Up to a boxful, we can handle scanning these documents on our office equipment. If I get more than a boxful, I use a vendor to scan the documents and make them searchable with optical character recognition (OCR) technology. OCR documents scan so they are searchable.

*Continued, Page 9*

*Making the Paperless Office Work, continued from page 8*

The cost savings to the client are substantial (particularly when spared attorney or paralegal time looking for documents) and the client is impressed by our instant mastery of the information.

**How's My Paperless life?**

I am no longer dependent on a physical file. No matter how much data I need to carry around, my briefcase always weighs the same. Adobe Acrobat and OneNote have OCR and search capability. I never have to dig for documents-I can search them instead. My office is an inviting workplace always ready to meet clients or colleagues. Clients are impressed by how quickly and easily we can learn, organize, and inform them about their documents.

I hasten to add that I am not perfect; I am the weak link in my paperless processes. Where do I fail? I have a physical inbox. But it's very small, and I process it to done and empty it if it gets full. I sometimes get boxes of stuff and procrastinate about getting them scanned in. I chicken out on my system and let things accumulate. Sometimes, I let myself get lazy when it's "just one thing." I may leave it until the end of the day, but then I process it. Even when I fail, however, it is usually just a matter of deciding which of the Four Ds applies to the paper I have allowed into my clean zone, and getting the process started again.

**Be Paperless Your Own Way**

If the idea of a paperless practice appeals to you, it is probably easier than you think to implement. Hardware and software are important, but experience teaches me that the human process - daily discipline - is essential to keeping the office paperless. The human process is also the most susceptible to errors and crashes. What I've outlined here are just some rules, and they have adapted to new technology as it becomes available. You should feel free to modify the rules to fit your practice.

We've reached the technological limit of paper, but we're only beginning to learn what office technology can do. I have found that keeping my office paperless offers great rewards of efficiency, credibility, and organization, in exchange for modest investments of money and time.

Rick Jeffries is a partner in the Omaha, Nebraska, office of Cline, Williams, Wright, Johnson & Oldfather, LLP. His trial practice focuses on complex commercial matters, with particular emphasis on insurance and reinsurance, securities litigation and FINRA arbitrations, real estate disputes, trademark, intellectual property, and technology low. He can be reached at rickjeffries@clinewiffiams.com. This article is adapted from one he previously published in the May 2008 issue of The Nebraska Lawyer. Reprinted with permission.



This article was submitted as a suggestion for reprinting by the Honorable Kathy Sturgis, of the Florida Office of Judges of Compensation Claims, Ft. Myers, Florida. If you have a suggestion for reprinting of an article, send your suggestion to President John J. Lazzara, - *jjl@nawcj.org*

## Your NAWCJ Board of Directors



## Workers' Compensation Resources

National Association of Workers' Compensation Judiciary
www.NAWJC.org

Work Comp Central
www.workcompcentral.com

Workers' Compensation Service Center
www.workerscompensation.com

Thanks to our NAWCJ 2010 Judicial College Curriculum Committee:

Hon. Jennifer Hopens, Texas
Hon. David Imahara, Georgia
Hon. Ellen Lorenzen, Florida
Hon. Donna Remsnyder, Florida
Steven Rissman, Esq., Florida
Hon. David Torrey, Pennsylvania

## Points of Interest

The Journal of Bone and Joint Surgery has posted online an article on "What's New in Adult Reconstructive Knee Surgery."

http://www.ejbjs.org/cgi/content/full/91/12/3008.

The Center for Disease Control continues to see MRSA as a growing concern.

http://www.cdc.gov/eid/content/15/12/1925_cme_activity.htm.

## Coming in January

Social Networking Site Evidence
Medicare Set Asides
Medicine, Disability, & Liability

## WE NEED *YOU*, YOUR *WRITINGS*, YOUR *IDEAS*

Do you write about topics that would be of interest to our members? Have you entered a decision in which Judges around the country would be interested? The NAWCJ communicates monthly with more than 400 workers' compensation adjudicators and appellate review officials across the country. If you have ideas for articles or would like to submit a case note or article, contact Hon. John Lazzara at JJL@NAWCJ.org

# U.S. Supreme Court Denies Review of Cassens Decision

The U.S. Supreme Court on Monday denied review of Cassens Transport v. Brown et al., effectively upholding a lower court decision that injured workers can pursue racketeering lawsuits against employers and claims administrators that deny their claims.

Paul Brown and five other injured workers allege that Illinois trucking company Cassens colluded with its third-party administrator, Crawford & Co., and Dr. Saul Margules to fraudulently deny them workers' compensation benefits. A U.S. District Court dismissed the complaint, but the 6th U.S. Circuit Court of Appeals held that the claimants had sufficiently alleged that Cassens had engaged in a pattern of activity prohibited by the Racketeer Influenced and Corrupt Organizations Act (RICO) and that their injuries were caused by the alleged fraud.

The Michigan Self-Insurers Association, the American Trucking Association, the National Council of Self-Insurers and The Voice of the Defense Bar had filed petitions to submit amicus briefs, urging the high court to reverse the 6th Circuit's decision.

Cassens was self-insured for workers' compensation claims. The company argued that it was nevertheless protected by the federal McCarran-Ferguson Act, which precludes the application of federal laws, such as the RICO Act, that would impair state workers' compensation laws that were enacted for the purposes of regulating the insurance business.

In an amicus curiae brief, the Michigan Chamber of Commerce argued that the 6th Circuit's decision in the Cassens case would have a "staggering" impact on the self-insurance industry.

"State workers' compensation programs are precisely the type of state insurance program Congress sought to shield from burdensome federal intrusion," the Michigan Chamber's brief states. "But by permitting disappointed workers' compensation claimants to re-litigate the handling (including the claims handling) of their workers' compensation claims in civil RICO actions in federal court, the decision below subverts the core purpose underlying workers' compensation laws and opens a potential floodgate of federal lawsuits, including class actions, against amici's members whenever a state workers' compensation agency denies a claim."

On the other side, the public-interest advocacy group Public Citizen filed a brief arguing that self-insurance is not the business of insurance as contemplated in the McCarran-Ferguson Act, and even if it were, allowing RICO actions would not impede the application of any state workers' compensation law.

The Supreme Court's docket for the Cassens case is here: http://origin.www.supremecourtus.gov/docket/08-1375.htm

This article originally appeared on Workcompcentral.com on December 8, 2009. It is reprinted here with permission.


An update article on Workcompcentral on December 16, 2009 reported that Plaintiff will seek certification of a class action in Cassens.

Membership in the National Association of Workers' Compensation Judiciary is open to any person whose responsibility is the adjudication of workers' compensation claims. Throughout the nation, there are a variety of titles that are used to describe us, "Judge," "Commissioner," "Deputy Commissioner," "Referee," and "Hearing Officer" are a few. The NAWJC also has Associate Membership for those interested in supporting the education of workers' compensation adjudicators. The NAWJC is thankful to the concerned professionals that have contributed their time and resources to support our efforts. We recognize them here.

James Anderson
Anderson Crawley & Burke, PLLC
Ridgeland, MS

Regan Ankney
McAngus, Goudelock & Courie, LLC
Charleston, SC

Robert Barrett
Rissman, Barrett, Hurt, Donahue & McLain, P.A.
Orlando, FL

Douglas Bennett
Swift, Currie, McGhee & Hiers, LLP
Atlanta, GA

Sharkey Burke, Jr.
Anderson Crawley & Burke, PLLC
Ridgeland, MS

Thomas Cassidy, Jr.
Leitner, Williams, Dooley & Napolitan, PLLC
Memphis, TN

Tim Conner
Leitner, Williams, Dooley & Napolitan, PLLC
Memphis, TN

R. Stephen Coonrod
McConnaughhay, Duffy, Coonrod, Pope &Weaver, P.A.
Tallahassee, FL

Mark Davis
McAngus, Goudelock & Courie, LLC
Charleston, SC

Thomas Dement, II
Leitner, Williams, Dooley & Napolitan, PLLC
Memphis, TN

Robert Donahue
Rissman, Barrett, Hurt, Donahue & Mclain, P.A.
Fort Pierce, FL

Terry Germany
Anderson Crawley & Burke, PLLC
Ridgeland, MS

J. Russell Goudelock
McAngus, Goudelock & Courie, LLC
Charleston, SC

Laurence Leavy
Laurence Leavy & Associates
Davie, FL

Hugh McAngus
McAngus, Goudelock & Courie, LLC
Charleston, SC

James McConnaughhay
McConnaughhay, Duffy, Coonrod, Pope & Weaver, P.A.
Tallahassee, FL

John McLain, III
Rissman, Barrett, Hurt, Donahue & McLain, P.A.
Orlando, FL

David McLaurin
Anderson Crawley & Burke, PLLC
Ridgeland, MS

David Noblit
Leitner, Williams, Dooley & Napolitan, PLLC.
Chattanooga, TN

R. Briggs Peery
Swift, Currie, McGhee & Hiers, LLP
Atlanta, GA

Steven Rissman
Rissman, Barret, Hurt, Donahue & McLain, P.A.
Orlando, FL

Michael Ryder
Swift, Currie, McGhee & Hiers, LLP
Atlanta, GA

E. Louis Stern
McConnaughhay, Duffy, Coonrod, Pope & Weaver, P.A.
Sarasota, FL

Richard Waits
Swift, Currie, McGhee & Hiers, LLP
Atlanta, GA

Patrick Weaver
McConnaughhay, Duffy, Coonrod, Pope & Weaver, Pa
Panama City FL

## *UPCOMING "Second Fridays Seminars"* – Join us.

The Florida OJCC and NAWJC will co-sponsor lunch and learn seminars from 12:00 to 1:00 Eastern on the second Friday of upcoming months. Upcoming "*Second Fridays*" Lunch and Learn Opportunities for NAWJC Members:

January 8, 2010 Rafael Gonzalez, "Living with Medicare Set-Aside Requirements and Settling Cases."

February 12, 2010 Jerry Fogel, "Medicine, Disability, & Liability."

These programs are offered ***free of charge*** to NAWCJ members. For more information, email Judge Lazzara JJL@NAWCJ.org