Lex and Verum

The National Association of Workers' Compensation Judiciary

Number VII, 0310

NAWCJ Judicial College Offers Unprecedented Opportunities

NAWCJ President John Lazzara has announced that the 2010 Judicial College will offer new ancillary programs in addition to the extensive seventeen hour Judicial continuing education curriculum.

Judicial College 2010 will include a hearing technology display. Attendees will have the opportunity to observe the results of various efforts to integrate technology into the hearing process. Included will be digital court recording tools, a demonstration of the use of video teleconference for trial, information on effective use of portable document formats (PDF) for compiling and sharing searchable records of proceedings, automated dictation software, and more. As Judges, as people, we struggle with the never ceasing impact of technology on our lives. Attendees this year will have the chance to observe and understand turning this technological innovation into better public service.

The Judicial College will also feature an inaugural multi-state comparative law program with Judges from Florida, Louisiana, Maryland, Mississippi, and Pennsylvania. These Judges bring to the table a wealth of experience and academic insight into similarities and differences in various state laws and processes.

Most states offer, or require, training for new civil and criminal judges, but rarely offer such opportunities for workers' compensation adjudicators. Most state workers' compensation agencies are too small to maintain effective programs, particularly when judicial turnover may be rare and sporadic. The NAWCJ is now offering a "New Judge Primer" ancillary program in conjunction with the Judicial College. This intensive, small-group program will provide insight from a Chief Judge, a Commission Chair, and senior Judges from around the country. Multiple state perspectives will be presented on the difficult transition from lawyer to adjudicator. This invaluable experience for new adjudicators will precede the main curriculum and bring invaluable perspective to Judges with 2 or less years of experience.

April 9, 2010 "Second Fridays Seminar"

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The Decline and Fall of the American Judicial Opinion: Back to the Future from the Roberts Court to Learned Hand

Jeffrey A. Van Detta*

Excerpted from 12 BARRY L. REV. 53 (2009)**

There are a variety of forces contributing to the decline and fall of the American judicial opinion. Some might lay this at the door of reactionary political ideology; others, at the feet of an aggressive foreign policy on the world stage; and still others, at the gates of an American judicial trend towards intentional isolation from the influence of legal developments in the courts and legal systems of other nations.

In addition to these forces, however, I think there is another. That force is epitomized by scenes such as the memorable one in December 2000 of CNN's Legal Reporter feverishly flipping back and forth through the Supreme Court's opinion in Bush v. Gore as it literally rolled off the press, desperately trying to get the gist of an opinion that was not written for the benefit of its audience of readers in mind.[3]

Indeed, as any law student can attest, it is often difficult to discern for whom appellate judges are writing their opinions and by what principles their writing is guided. Part of the difficulty may be the isolation and disconnection experienced by appellate judges from the people and from the trial courts where the people's causes are heard. It is potentially quite significant that in the present U.S. Supreme Court, not a single justice has had any judicial service as a trial judge. This is certainly a far cry from the days of Justices like John Marshall or Joseph Story, who spent much of each year acting as federal district court judges while riding throughout their respective Circuits.

The lack of trial-court service may well be a significant factor in the emergent decline and fall of the American judicial opinion. To help us understand how trial-court service may season the writing and thinking of Supreme Court justices, we will turn to the classic example of the experienced trial judge who became one of the nation's storied federal appellate judges: Learned Hand.

The subject of trial court experience and its effect on appellate opinion writing has been overlooked. Important questions about the role of trial court judges as opinion writers have not been explored, such as: What makes a judge a good trial court writer? Should this be measured by the writing of the appeals court judges who review them? Does it even matter if trial court judges write well?

These are important questions, especially with the growth of our state and federal trial court systems in the United States and Canada. Yet, they've not been directly posed, nor adequately answered, even by law professors who use judicial opinions daily as the grist for milling the laity into lawyers.

To be motivated to pose these questions requires an appreciation for the trial judge's task, and a particular sensibility toward the challenges facing trial judges, distinct from those borne by their appellate brethren. Trial judges face a difficult transition upon appointment. Usually drawn from the ranks of practicing litigators, newly appointed trial judges must learn to move from advocacy to decision, from marshalling and presenting evidence to fact-finding and synthesizing. At the same time, their trial court opinions must nevertheless persuade the reader that the evidence has been fairly evaluated, that the correct factual inferences have been drawn from the evidence, and that the law has been correctly applied to the factual inferences. In addition to the usual burdens of assuming a judgeship (such as new working environments, decreased compensation, cases arising in unfamiliar areas of the law. inherited case backlogs, and new administrative duties), trial judges face the daunting burden of writing judicial opinions, orders, and judgments - the written record by which their performance and legacy will be measured.

This burden facing new trial judges has been recognized and addressed by the Canadian Institute for the Administration of Justice (CIAJ). Over the July 4 holiday several years ago, I was privileged to be among the faculty invited by the CIAJ to teach at its annual Judgment Writing Seminar held at the Faculte du Droit, Universite de Montreal.[4] As I reviewed and commented on judgments written by the Justices in my section, it dawned on me that the typical emphasis of judicial writing seminars was misplaced here. That is because most judicial writing seminars hold up appellate opinions as the exemplars of "good judicial writing." Thus, most of the faculty of this conference taught from the *appellate* opinions of American judges such as Cardozo (*Palsgraf*)[5] and Jackson (*Monsette*)[6], Canadian judges such as Chief Justice Brian Dickson[7], and British judges such as Lord Denning.[8]

Continued, Page 3.

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Appellate opinions, however, serve very different functions from the functions served by the trial court judgment. Unlike the appellate opinion, the trial court judgment does not find the facts and evidence readily organized and the evidence logically sifted. The trial court opinion must create a coherent narrative from the raw source material - the evidence (witness testimony, depositions, exhibits, reports, demonstrative evidence) introduced at trial. The trial court is thus able to indulge less artistry (and sometimes license approaching manipulation[9]) in the order and emphasis of presentation than appellate courts enjoy. Accordingly, the way to teach effective writing to trial judges would appear to call for writing models other than appellate writing models.

If appellate writing models are not the route, then what should we use? Pondering this question in Montreal inspired me to consider the trial court opinions of one of America's most revered appellate writers: Second Circuit Court of Appeals Judge B. Learned Hand. Law students are quite familiar with many of Judge Hand's famous appellate decisions: The *T..J. Hooper*[10] and *United States v. Carroll Towing Co.*[11] in Torts, *James Baird Co. v. Gimbel Brothers* and *L. Albert & Son v. Armstrong Rubber Co.*[12] in Contracts, the *Alcoa* case in Antitrust[13], and *Huchinson v. Chase & Gilbert*[14] in Civil Procedure. In his study of the Second Circuit in Hand's era as appellate judge (1924-1961), Professor Schick observed how Hand had achieved a sparkling reputation as an *appeals* court judge.

But how does Hand stand up as a writer of trial court opinions? Is a great appellate writer also a great writer of findings of facts, conclusions of law, and judgments? By what standards would we judge Hand as a judicial writer, based on his legacy of published trial court opinions (which number over 1,000)? And would good trial-court writing skills produce better appellate opinions? Would giving more weight to trial-court experience in judicial selection processes improve the insight and quality of appellate opinions?

To solve the riddle of the decline and fall of the American judicial opinion, this article starts, not with an exegesis of the politics or opinions of the Roberts Court. Rather, this article seeks to go back to the future, by looking to Learned Hand's trial court writing and what it can teach us in order to evaluate the current state of American judicial writing. A critical component of this undertaking is the adoption of a methodology well-suited for the analytic task. Thus, this article undertakes to answer each of those questions, using the principles and techniques of superior legal writing developed by Armstrong and Terrell in their seminal work. THINKING LIKE A WRITER.[16]

Continued, Page 5.

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Meet Your Board

Dave Torrey, creator and author of the four-volume treatise *Pennsylvania Workers' Compensation: Law & Practice* (West 3rd ed. 2008), is a Workers' Compensation Judge for Allegheny County, Pennsylvania. He was appointed to his position during the Casey Administration. He is also a member of the Department of Labor & Industry WCJ Rules Committee.

Since 1996, Dave has also been an Adjunct Professor of Law at the University of Pittsburgh School of Law, and a preceptor in the school's Student Externship Program. He has published seven law review articles dealing with workers' compensation topics, and he lectures frequently on the subject.

In 2007, he was elected Fellow of the ABA-related College of Workers' Compensation Lawyers.

He is a member and past chair (1998-99) of the Pennsylvania Bar Association Workers' Compensation Law Section. He has written and edited the Section's bi-monthly, magazine-style, *Newsletter* since 1988. The newsletter includes an unabridged summary and critique of the latest court precedents, reports on developing legislation and trends, book reviews, and original articles and essays. In May, 2009, he published his 100th issue.

Dave is a 1982 graduate of West Virginia University, and received his law degree from Duquesne University School of Law, in Pittsburgh, in 1985. While at Duquesne, he was Editor-in-Chief of the *Law Review.*

Dave is a native of Alexandria, Virginia. He attended Ft. Hunt High School, and was a member of the school's award-winning symphonic band. He is a former member of the United States Army Band ("Pershing's Own"), based in Washington, D.C. (1976-1979); and also served in the 201st U.S. Field Artillery, West Virginia Army National Guard (1979-1982). Dave is also a middle-of-the pack distance runner. Since 1993 he has been a member of the Pittsburgh Frontrunners. He has written and edited the club's *Newsletter* since 1995.

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John T. Salatti has taught legal writing for twelve years. He was a Dean's Fellow in the Research, Writing, and Advocacy Program at Emory for four years. He also served on the *Emory Law Journal* for four years, two of them as an Associate Editor. From the *Journal*, he received the Red Pen Award for Excellence in Editing and the first Distinguished Service Award. In response to regular requests for his writing expertise, Mr. Salatti joined forces with Professor Terrell and formed LAWriters. In addition to his writing consulting, Mr. Salatti is a private practitioner, mediator, and mediator trainer. He is cited in this month's feature article.

Code of Judicial Conduct!

Judge Wolf has been a judge on the Florida First District Court of Appeal since 1990, serving as chief judge from July 2003 to June 2005. He has served on the Florida Judicial Qualifications Commission since 1999, has served on the civil procedures rules committee, local government law certification committee, and committee on rules of evidence of the Florida Bar. Judge Wolf is an adjunct professor in Florida constitutional law and local government at Florida State University Law School. Judge Wolf published an article entitled "Discipline in Florida: The Cost of Misconduct" in the spring 2006 issue of *Nova Law Review.*

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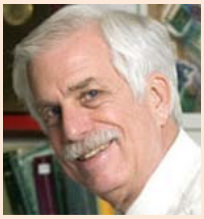

He Wrote the Evidence Book!

Florida State University Professor Charles Ehrhardt wrote Florida Evidence, the leading treatise on the topic, and Florida Trial Objections. He has been cited as an authority by appellate courts more than 500 times. He taught Torts, Evidence, Trial Practice and Trial Evidence Seminar. After serving 35 years as the Ladd Professor of Evidence, he earned emeritus status in 2007, but continues to teach. He has served as a commissioner to the National Conference of Commissioners on Uniform State Laws, as faculty of the National Judicial College and the Federal Judicial Center. He has been a visiting professor at University of Georgia and Wake Forest.

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- Advanced Medicare Implications

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In their seminal work, work, Professors Terrell and Armstrong draw a crucial analogy between legal thought and legal writing. Analogizing to the jurisprudential writings of Ronald Dworkin, Terrell and Armstrong note that just as legal principles are the overarching guides from which legal rules spring, so, too, are the "background principles" of effective legal writing that "establish the framework within which all [written] rules (and what we will call "techniques") apply." It is the ability of the principles of effective writing to "speak to fundamental purposes" that guides legal writers in "assess[ing] the relative importance of specific rules (and techniques), to choose among them when they conflict, and to draw them together toward the single and of clear, persuasive prose."[17]

What are the background principles that are the overarching guides? They are the product of applied cognitive psychology—how human beings receive and process information of various kinds in various settings. Terrell and Armstrong were among the first to apply lessons of cognitive psychology and theory to create a new perspective on an area of legal studies (i.e., writing). The use of cognitive psychology in illuminating topics in the law is spreading[18].

Terrell and Armstrong have distilled effective legal writing into four principles that apply at the level of the entire document (nor its macro-organization). First, the context principle: readers absorb information best if they understand its significance as soon as they receive it. Second, the congruence principle: the organization of the information should match the logic of the analysis. Third, the segmentation principle: readers absorb information best if it is presented to them in relatively short pieces that do not exhaust the reader's span of attention. Fourth, the evidence principle: an effective writer not only applies these principles, but does so with an informed perspective from having determined the identities, knowledge bases, and needs of each audience of the document. The content and consequences of each of these principles is explained in the subsections that follow.

A. The Context Principle

Cardinal among the sins committed by legal writers is the tendency “[w]hen it comes time to communicate the information,” they “dump [it] on the page as quickly as they can.”[19] That sin creates fundamental dissonance between reader and writer. “Because they have not yet been given the container that allows them to hold the information intellectually, [readers] end up drenched rather than enlightened.”[20] Thus, according to Terrell and Armstrong, a writer's first task is to construct a container. The container is the reader’s “understanding of “the information’s significance—“its point, its importance, the logic that makes all its pieces cohere.” In this way, the container permits the reader to fit information "together with other pieces of information to form a coherent pattern" as the reader "approach[es] new information by trying to fit it into a pattern."[21] This container enhances the reader's comprehension by providing "more explicit - and clearer - information about the structure of the writer's information or analysis. Terrell and Armstrong emphasize that “readers absorb information best if they understand its significance as soon as they see it.”[22] Thus, they advise, the writer must “give them a context or framework that helps” readers to “grasp the details’ relevance and importance”—*before* “inundating them with details.”[23] In addition, the context or framework containing the information should assist the reader in grasping “the organization that binds” the details together.[24] In a word, the key to Terrell and Armstrong’s cognitive (or reader-centric) approach to professional writing is “meta-information” – information about the information that is to be communicated through a writing. The rationale of meta-information is straightforward: “for your reader to appreciate your substantive information, you must also provide . . . information that prepares your reader’s mind to absorb your substance.”[25] When the reader is given meta-information, s/he “has been made ‘smart’”:

> Once we understand how the details matter, we are far more likely to focus on the important ones and remember them. We also realize what we can afford to forget . . . .[26]

As applied "to every level of a document,"[27] the context principle is implemented by techniques such as "giv[ing] intellectual shape in advance to a new block of information" and "linking new information to previous information."[28] More specifically, Terrell and Armstrong proffer three “techniques” to realize this principle. First, the writer should provide a focus for any discussion—at the level of the entire document, the level of each section, and at the paragraph level. As Terrell and Armstrong observe, this focus—the context—is the glue that binds an otherwise unruly gaggle of thoughts and facts together.

B. The Congruence Principle

The second of the background principles discerned by Terrell and Armstrong is founded on the essential congruence that must exist between the organization of a legal document's logic, on the one hand, and the organization of the presentation by which that logic is explained to the writer's audience.[45] Although this principle may seem self-evident - indeed, inevitable - a dissonance between the logic of analysis and the logic of presentation often inheres in much of what is written by lawyers, judges, and - yes - sometimes even law professors.[46] How does this happen to highly trained

Continued, Page 6.

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John Salatti, LAWriters

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Show judges how to be compelling communicators for all their audiences. We create this advantage by demonstrating how all readers-judges and lawyers-approach any document, and how a writer can use that attitude constructively. By applying LAWriters' methods, judges will deliver opinions that present their arguments persuasively and efficiently.

Decline and Fall, from page 5.

professionals whose thinking and writing should be their stock-in-trade? Terrell and Armstrong see the difficulty in the temptation afforded by the default organizations that arise in the legal reasoning process itself:

The failure does not usually happen when the new material is a mess, because then the writer has no choice but to think about its organization. The problems arise when the material already has a plausible organization, one that creates a superficial impression of coherence. In these situations, even good writers may fail to realize that [the] existing organization does not match the logical structure of their analysis.[47]

Thus the congruence principle counsels that a legal writer "should break free from any organization that does not arise directly from the actual logic of [the] analysis."[48] Otherwise, the writer "will be asking [his or her] readers to retrace the path of [his or her] thinking - or of someone else's thinking - rather than offering them a coherent discussion of [the] results of the writer's thinking.[49] Terrell and Armstrong articulate a number of techniques that articulate the congruence principle in writing. Addressing the main point of the analysis explicitly and initially gives the writer an opportunity to link the point to a "road map" summarizing the organization of the analysis.[50] The writer can then use the road map to further clarify the congruence of logic and exposition in two ways. First, explaining how the supporting points of the analysis relate to the main point establishes vertical coherence. Vertical coherence reflects the author's reasoning both from the "'top down"' and from the "'bottom up"' - i.e., the main point implicates each of the subpoints, and each subpoint speaks directly to the main point, not to another subpoint.[51] Second, horizontal coherence results from the relationship among the subpoints themselves and is established through a combination of the logical relationship among the questions, propositions, or conclusions that underlie the analysis and the analytic procedure by which the writer approaches an issue.[52] In the realm of the analytic procedure, Terrell and Armstrong note the importance of imposing clarity and the divisive and sequence of the subpoints, especially by consciously choosing the most effective organizing patterns to present them, making the pattern explicit, and using only one pattern at a time.[53]

C. The Segmentation Principle

The segmentation principle is based on a fundamental observation from cognitive psychology. That observation is that "[r]eaders absorb information best if they can absorb it in pieces."[54] The genesis of the segmentation principle, however, should not be misunderstood as a patronizing view of modern readers' abilities, nor on a

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Decline and Fall, from page 6.

defeatist attitude toward the products of our current system of education. As Terrell and Armstrong observe,

> [p]roperly applied, this principle is more than a sop to your readers' impatience. It should walk hand in hand with an earlier principle: Make the structure explicit. If you break your prose into chunks, the divisions should help to make the document's structure visible. And, if you set out to make the structure explicit, a step that requires you to make it clear to yourself, you will find it much easier to "chunk" the writing.[55]

In practice, this principle applies throughout a document. First, on a macro-organizational level, large blocks of undifferentiated text are quite daunting to readers and generally operate as a metaphorical "keep out sign" – or, on a more sophisticated level, the writer's equivalent of the greeting to Hell imagined by Dante: "All Ye Who Enter Here Abandon Hope!"[56] Instead of this effect, however, the writer can take the reader by the hand – as Virgil took Dante – and use segmenting (i.e., "chunking") of blocks of information to make them mentally digestible. This is accomplished by breaking up larger blocks of text using subheadings, shorter paragraphs, and "white space" on the page.[57]

Within the mid-level (or "intermediate") structure of a document, even shortened paragraphs can be made more comprehensible to readers by employing segmenting devices such as numerical lists or bullet point presentations.[58] At the micro-level, segmenting requires crafting sentences either to be shorter, or to be broken into mentally digestible segments, separated by effective use of punctuation.[59]

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* Jeffrey A. Van Detta is Professor of Law, John Marshall Law School-Atlanta, Georgia. During 1987-1988, he was privileged to serve as law clerk to Judge Roger S. Miner, U.S. Second Circuit Court of Appeals, and spent many hours in the same halls of Foley Square U.S. Courthouse as had Judge Hand and his own law clerks.

**This excerpt is printed by the *Lex and Verum* with permission of the author and the Barry University Law Review, see, Professor Jeffrey A. Van Detta, The Decline and Fall of the American Judicial Opinion, Part I: Back to the Future from the Roberts Court to Learned Hand -- Context and Congruence, 12 BARRY L. REV. 53 (2009).

Editor's Note: A co-author of THINKING LIKE A WRITER, Timothy P. Terrell, was the Judicial Writing instructor at the NAWCJ Judicial College 2009. Professor Terrell's partner in LAWriters, John Salatti, is the Judicial Writing instructor at NAWCJ Judicial College 2010. Mr. Salatti's contributions to effective legal writing are also cited in this article, see footnotes 25 and 41. *Continued, Page 8.*

Your NAWCJ Board of Directors

From the Trenches

"Experts are people who know a great deal about very little and who go along learning more and more about less and less until they know practically everything about nothing.

Lawyers, on the other hand, are people who know very little about many things and keep learning less and less about more and more until they know practically nothing about everything.

Judges are people who start out knowing everything about everything but end up knowing nothing about anything because of their constant association with experts and lawyers."

Author unknown.

Decline and Fall, from page 7.

Citations:

[3] See, Stuart Taylor, "The Supreme Court—And Others—Flub The Challenge," in The Atlantic Online, Dec. 20, 2000.
[4]CANADIAN JUDICIAL COUNCIL, 2001-2002 ANNUAL REPORT at 7, available at http://dsppsd.pwgsc.gc.ca/Collection/JU10-2002E.pdf
[5] Palsgraf v. Long Island R.R., 248 N.Y. 339 (1928).
[6] Morissette v. United States, 342 U.S. 246 (1952).
[7] Edward Berry, Writing Reasons: A Handbook For Judges 75-84 (1998).
[8] Louise Mailhot And James D. Carnwath , supra note __, at 105-106.
[9]See, e.g., Richard A. Posner Cardozo: A Study In Judicial Reputation _ (1992).
[10] 60 F.2d 737 (2d Cir. 1932).
[11] 159 F.2d 169 (2d Cir. 1947).
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[13] __ F.2d ___ (2d Cir. 1945).
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[16] Stephen V. Armstrong And Timothy P. Terrell, Thinking Like A Writer: A Lawyer's Guide To Effective Writing And Editing (1992); Stephen V. Armstrong And Timothy P. Terrell, Thinking Like A Writer: A Lawyer's Guide To Effective Writing And Editing (2d ed. Practising Law Institute 2003).
[17] id.
[18] Raffaele Caterina, *Comparative Law And The Cognitive Revolution*, 78 Tul. L. Rev. 1501 (2004).
[19] Armstrong & Terrell 2d at 16.
[20] Id.
[21] Armstrong & Terrell 1st at ___; see Armstrong & Terrell 2d at 14, 16-18.
[22] Armstrong & Terrell 2d at 14.
[23] Id. at 14.
[24] Id.
[25] Jeffrey A. Van Detta & John L. Salatti, Judicial Opinion Writing: Beyond Logic To Coherence And Strength: A Presentation To The State Of Louisiana Division Of Administrative Law 8 (2001).
[26] Armstrong & Terrell 1st at 3-4.
[27] Armstrong & Terrell 1st at 3-5.
[28] Armstrong & Terrell 1st at ___.
[45] Armstrong & Terrell 1st at 3-7 – 3 -8; Armstrong & Terrell 2d at 16, 28, 79-85.
[46] Armstrong & Terrell 1st at 3-7; Armstrong & Terrell 2d at 28.
[47] Armstrong & Terrell 1st at 3-8.
[48] Armstrong & Terrell 1st at 3-8.
[49] Armstrong & Terrell 1st at 3-8 Armstrong & Terrell 2d at 97.
[50] Armstrong & Terrell 1st at 3-17 – 3-21; Armstrong & Terrell 2d at 62-63.
[51] Armstrong & Terrell 1st at 3-18; 3-20.
[52] Id.
[53] Armstrong & Terrell 1st at 3-22; 3-28; Armstrong & Terrell 2d at 16.
[54] Armstrong & Terrell 2d at 16, 133; see Armstrong & Terrell 1st at 5-21 -5-23.
[55] Armstrong & Terrell 2d at 16, 133; see Armstrong & Terrell 1st at 5-21 -5-23.
[56] Dante Allegheri, The Divine Comedy: Inferno (Robert Pinsky translator 19__).
[57] Armstrong & Terrell 2d at 16, 33-34, 114.
[58] Armstrong & Terrell 2d at 114, 118-121 (emphasis supplied).
[59] Armstrong & Terrell 2d at 16, 33-34, 114.

NAWCJ College 2009!

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Technology Corner

Rutgers Researchers Show New Security Threat Against 'Smart Phone' Users

February 22, 2010

NEW BRUNSWICK, N.J. – Computer scientists at Rutgers University have shown how a familiar type of personal computer security threat can now attack new generations of smart mobile phones, with the potential to cause more serious consequences.

The researchers, who are presenting their findings at a mobile computing workshop this week in Maryland, demonstrated how such a software attack could cause a smart phone to eavesdrop on a meeting, track its owner's travels, or rapidly drain its battery to render the phone useless. These actions could happen without the owner being aware of what happened or what caused them.

"Smart phones are essentially becoming regular computers," said Vinod Ganapathy, assistant professor of computer science in Rutgers' School of Arts and Sciences. "They run the same class of operating systems as desktop and laptop computers, so they are just as vulnerable to attack by malicious software, or 'malware.'"

Smart phones are cellular telephones that also offer Internet accessibility, texting and e-mail capabilities and a variety of programs commonly called "apps," or applications.

Ganapathy and computer science professor Liviu Iftode worked with three students to study a nefarious type of malware known as "rootkits." Unlike viruses, rootkits attack the heart of a computer's software – its operating system. They can only be detected from outside a corrupted operating system with a specialized tool known as a virtual machine monitor, which can examine every system operation and data structure.

Virtual machine monitors exist for desktop computers, but in current form, they demand more processing resources and energy than a portable phone can currently support.

Rootkit attacks on smart phones or upcoming tablet computers could be more devastating because smart phone owners tend to carry their phones with them all the time. This creates opportunities for potential attackers to eavesdrop, extract personal information from phone directories, or just pinpoint a user's whereabouts by querying the phone's Global Positioning System (GPS) receiver. Smart phones also have new ways for malware to enter the system, such as through a Bluetooth radio channel or via text message.

"What we're doing today is raising a warning flag," Iftode said. "We're showing that people with general computer proficiency can create rootkit malware for smart phones. The next step is to work on defenses."

In one test, the researchers showed how a rootkit could turn on a phone's microphone without the owner knowing it happened. In such a case, an attacker would send an invisible text message to the infected phone telling it to place a call and turn on the microphone, such as when the phone's owner is in a meeting and the attacker wants to eavesdrop.

In another test, they demonstrated a rootkit that responds to a text query for the phone's location as furnished by its GPS receiver. This would enable an attacker to track the owner's whereabouts. Finally, they showed a rootkit turning on power-hungry capabilities, such as the Bluetooth radio and GPS receiver to quickly drain the battery. An owner expecting remaining battery life would instead find the phone dead.

The researchers are careful to note that they did not assess how vulnerable specific types of smart phones are. They did their work on a phone used primarily by software developers versus commercial phone users. Working within a legitimate software development environment, they deliberately inserted rootkit malware into the phone to study its potential effects. They did not find a vulnerability that a real malware attacker would have to exploit.

The research team is presenting its findings at the International Workshop on Mobile Computing Systems and Applications (HotMobile 2010). Working with Ganapathy and Iftode were Jeffrey Bickford and Ryan O'Hare, who worked on the project as undergraduates, and Arati Baliga, who worked on it as a postdoctoral researcher. The research was supported by the National Science Foundation and the U.S. Army.

Electronic Lump-Sum Settlements Meeting Set for March 26: *CENTRAL* [2010-03-05]

The Nebraska Workers' Compensation Court will hold a meeting March 26 on its electronic lump-sum settlement (E-LSS) project.

The meeting is set for 9 a.m. to 10 a.m. in the court's fourth floor conference room at the TierOne Center at 1221 N St. in Lincoln. The deadline for registration is March 19.

At the meeting, the court will demonstrate the Medicare, Medicaid, medical expenses and child support tabs for the program. At previous meetings, the court has demonstrated the log-in, naming the document, return to work, injury date look-up, docket look-up and settlement payment tabs.

Skydiver Sentenced for Comp Fraud: EAST [02/12/10]

A Hudson Falls, N.Y., skydiver and mountain climber whose activities made national television last year avoided a prison sentence on Thursday but was ordered to pay at least $54,000 in restitution, the Glens Falls Post-Star reported.

Jacob Bancroft, 29, was featured in a national television report on insurance fraud along with a video of him skydiving while receiving workers' compensation benefits for a back injury he sustained at Irving Tissue mill in Fort Edward, N.Y.

Investigators alleged Bancroft also worked a construction job, went mountain hiking and served as a volunteer firefighter while receiving benefits.

The newspaper said he was placed on probation and will have to repay the amount he received in benefits over the next four years to stay out of jail.

He was accused of receiving $83,000 in salary and medical payments to which he was not entitled. The Post-Star said a video on the MySpace social networking website also showed him hiking while wearing a backpack.

Bancroft was charged with grand larceny, insurance fraud and falsifying business records. He pleaded guilty in December to a felony charge of falsifying business records and could have been sentenced to five years in jail.

The newspaper said Bancroft collected the benefits through First Cardinal. The insurer may pursue a civil complaint against Bancroft to collect the approximately $30,000 in medical benefits it paid on the claim, prosecutors told the newspaper.

AG Sues Contractor For Cheating on Comp Premiums: WEST [2010-03-04]

California Attorney General Edmund G. Brown Jr. has filed a lawsuit against a Northern California construction company for allegedly misclassifying employees as independent contractors to reduce its workers' compensation insurance premiums, and for violating prevailing wage laws.

Country Builders Inc. of Livermore has won several public works contracts that required it to pay the prevailing wage. Some of the company's projects include University Village student housing at University of California at Berkeley, Jubilee Senior Housing in Berkeley, and the Seven Directions Apartments in Oakland.

"Country Builders cheated its workers out of wages and falsified payroll records," Brown said in a press release. "This is an outrageous case about a company that took public money and then cooked its books to shortchange the state's workers' compensation fund."

Investigators estimate that in 2007 and 2008, Country Builders was able to save approximately $1 million in wages by failing to pay workers the prevailing wage and the pay rate set forth in the collective bargaining agreement. And the company intentionally misclassified lower-wage workers as higher-wage workers to its insurance carrier, the State Compensation Insurance Fund, and underpaid its premiums to SCIF by at least $136,000.

Brown's office filed the civil lawsuit in Alameda Superior Court this week alleging violations of labor laws and citing unfair business practices. The lawsuit seeks a permanent injunction against the company, restitution for the workers and the State Compensation Insurance Fund, and civil penalties.

Vice, Virtue and "The Merchant of Venice"

by MICHAEL P. MASLANKA, Esq.

Excerpted from the original article published in Texas Lawyer, January 18, 2010 vol. 25 • No. 42

William Shakespeare's play "The Merchant of Venice." Here are some highlights: Antonio is a wealthy Venetian merchant. His dear friend, Bassanio, reluctantly seeks a loan from Shylock so he can enter a lottery and marry Portia. The loan comes due and can't be repaid. Antonio, once wealthy, is now poor (over-leveraged in the shipping business). Shylock demands his pound, and a trial is convened by the Duke of Venice. Portia disguises herself as a male judge, pulls strings and gets appointed to preside.

The trial scenes are riveting. Readers see the narrative cascading to a climax — Shakespeare at his cinematic best. Shylock demands payment, while Bassanio pleads with the disguised Portia to bend the law: "Wrest once the law to your authority/To do a great right, do a little wrong/and curb this cruel devil of his will." But Portia says, "It must not be . . . 'twill be recorded as a precedent/and many an error, by the same example/will rush into the state: it cannot be." Portia refuses Bassanio's plea to use her power and void the contract. Yet she repeatedly asks Shylock to accept a settlement offer of three times the value of the debt. Shylock says no, arguing that a deal is a deal.

Portia ominously says, "For, as thou urgest justice, be assured/Thou shalt have justice, more than thou desirest." She rules that the contract calls for flesh, not blood, and if Shylock spills a "jot" of blood, he will have violated Venetian law and therefore will be executed. Shylock agrees to forfeit his monies to spare his life.

Yes, there is vice, but there also is virtue. Despite her vested interest, Portia refuses to debase the law. Before she finally brings the hammer down on Shylock, she gives him an opportunity to change his mind.

All good lessons. But the most important is this: We are just not because we must be, but because it is in our nature to be so. "The quality of mercy is not strained/it droppeth as the gentle rain from heaven/upon the place beneath . . . though justice be thy plea, consider this/that in the course of justice, none of us should see salvation/we do pray for mercy/and that same prayer doth teach us all to render/the deeds of mercy. . . ."

What comes around goes around.

Humorous Quotes

Certified Court Reporter for the State of Missouri overheard:

"Q: How did you hurt your back?"

"A: This guy threw this 500 lb. dead cow at me when I wasn't ready and it landed on my head."

Brand new attorney and a judge with a sense of humor:

Attorney: Objection, Judge! He is beating a dead horse!
Judge: Is that your legal objection?
Attorney: Yes, Judge
Judge: I don't see that as a legal objection.
Attorney: It is listed somewhere between, "Objection, that's confusing" and "Objection, it is just not right to ask that question."
Judge: Well, then in that case, I'll sustain it, but next time you might want to just say, "Objection, asked and answered."

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

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THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY
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