



Lex and Verum

Number X, 0610

NAWCJ Membership Grows!



The response to our efforts has been heartwarming. Our membership continues to grow in volume and diversity. Your membership supports the NAWCJ mission: to provide educational opportunities exclusively for the workers' compensation judiciary at the trial or appellate level. The Association has focused on providing educational forums concerning issues that are unique to this system of justice. Emphasis is placed on providing an educational source and national forum that will enhance the ability of workers' compensation judges on a national scale to deal with a commonality of issues, regardless of the substantive laws of the different states.

Registration is open for the 2010 Judiciary College, and early registrations are significantly increased this year. We anticipate a great turnout and a great program. In the Fall, we will resume our "Second Fridays" webinars on a variety of legal, medical and procedural topics. The Lex and Verum will likewise continue to provide periodic updates on our progress and programming, and interesting articles on topics that challenge us all.

We will have a general membership business meeting in conjunction with the Judiciary College in August. There will be a transition to new leadership for the organization. My reflections on these two years as NAWCJ President will appear in a future Lex. For now, I note that we have much to be proud but a great deal of work remains before us.

If you have not joined, I encourage you to complete and submit an application today. Your support of this effort means success. If you are not planning to come to Orlando for the Judiciary College, I encourage you to reconsider. This will be an exceptional opportunity. I hope to hear from you, and to see you in Orlando.

"Second Fridays Seminars" 2011

"Second Fridays" has concluded for 2010. This year the Florida Office of Judges of Compensation Claims (OJCC) sponsored nine programs on the "Second Friday" of each month. Topics included a primer on MRSA, Developing Leadership Skills, Dealing with Medicare Set-Asides, Challenges of Discovery in the Electronic Age, Nanotechnology, Exposure Claims, and Objective Medical Evidence. These included the helpful, the curious, the scientific and the perplexing. The OJCC is proud to have presented these programs in conjunction with the NAWCJ. In 2011 (around here, July 1 is "New Years"), the NAWCJ will continue to offer these programs. If there are topics or challenges that you would like to hear more about, now is the time to let us know your ideas as we move through the curriculum process. If you would like to assist with the planning, contact us. Email President Lazzara at JLL@NAWCJ.org.

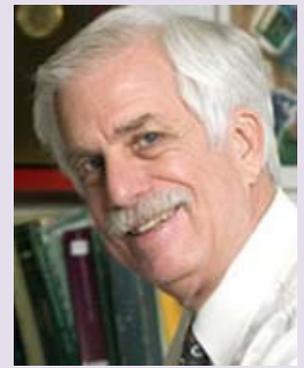
NAWCJ Judicial College 2010:

The curriculum for the 2010 NAWCJ Judicial College is being organized now. Do you have suggestions for topics or specific speakers? Please send your suggestions by email to Judge Lazzara JLL@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.

Impeachment with Evidence of Prior Criminal Conviction

Charles W. Ehrhardt*

Florida State University Law Review, 10:235



Under Section 90.610(1) convictions for crimes involving dishonesty or false statement are admissible to attack the credibility of a witness, regardless of the punishment imposed. This prior criminal activity is relevant to impeachment because it involves the truthful character of the person, which is the issue it is offered to prove.

The Code, as originally proposed by the drafters and promulgated by the legislature, provided that only convictions for crimes involving dishonesty or false statement be permitted to impeach.¹⁵ It was the drafters' intent that the provision be broadly construed so that it included not only crimes such as perjury and embezzlement, but also included crimes such as larceny, robbery and burglary. In the 1978 amendment adding a second type of conviction which could be used to impeach, i.e., convictions of crimes involving possible punishment of more than one year imprisonment, the legislature substantially conformed the Code to the Federal Rules with regard to the type of crimes that can be used to impeach. In amending Section 90.610, it is probable that the legislature intended to adopt an interpretation of those crimes involving dishonesty or false statement that is similar to the interpretation of the Federal Rule. Thus, the intent of the drafters to broadly construe those crimes involving dishonesty or false statement was probably negated by the 1978 amendment.¹⁶

Judicial interpretation of Federal Rule 609 reflects disagreement as to what crimes involve dishonesty or false statement. The view of a majority of courts,¹⁷ apparently including the old Fifth Circuit,¹⁸ is that if some false or fraudulent scienter is inherent in the crime, the crime involves dishonesty or false statement. In other words, crimes involving fraud, perjury, or false statement would qualify,¹⁹ but a conviction for burglary or larceny may not.²⁰ The latter involve stealth rather than false statement. Similarly crimes of force or violence would be excluded.²¹ Another view is that if the facts and circumstances surrounding a conviction, which is not on its face a crime involving dishonesty or false statement, establish that the crime did in fact involve dishonesty or false statement, the conviction could be used to impeach.²² For example in *United States v. Hayes*,²³ the court said that a conviction for importing cocaine did not on its face involve dishonesty or false statement; it involved nothing more than stealth. However, the court indicated that if "the importation involved false written or oral statements . . . on customs forms"²⁴ it would involve dishonesty or false statement. The burden is upon the party wishing to use the conviction to demonstrate to the court that the necessary facts were present.²⁵ The difficulty with this view is that before a witness can be asked about many convictions, there must be a trial within the trial to determine whether the prior facts show dishonesty. The third, and minority view, is that the term "dishonesty" is broad enough to include such crimes as petit larceny (shoplifting) and burglary, but not public intoxication.²⁶

Recently the First District Court of Appeal apparently adopted the middle view, permitting the offering party to demonstrate that the facts and circumstances surrounding the prior crime demonstrate that dishonesty or false statement was involved. In *Hall v. Oakley*,²⁷ the court held that a conviction for petit larceny could not be used to impeach as a crime involving dishonesty or false statement "unless the prosecution has demonstrated that such crime involves some element of deceit, untruthfulness or falsification bearing upon the defendant's capacity to testify truthfully."²⁸ Because of the uncertainty of whether a particular conviction involves dishonesty or false statement, one recent decision suggested that prior to the use of this type of impeachment, a trial court could inform the witness of the types of crimes which involve dishonesty or false statement. The witness thus could avoid either opening the door to the jury learning of the nature of specific crimes because of his failure to acknowledge such convictions or creating the impression of a pattern of criminal conduct by acknowledging more convictions than he is required to under the Code.²⁹

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IV. A "Conviction" for Purpose of Section 90.610

Only evidence of criminal convictions is admissible under Section 90.610;³⁰ a witness may not be interrogated as to former arrests or other accusations of crimes.³¹ The fact of conviction makes the evidence admissible. It is immaterial whether the witness pleads not guilty, guilty or nolo contendere.³²

The fact that the conviction is being appealed at the time of the trial during which it is offered for impeachment purposes does not bar admission of the conviction.³³ Similarly, the fact that the conviction has been the subject of a pardon does not render evidence of the conviction inadmissible.³⁴ However, both the pendency of the appeal and the pardon are admissible on redirect to rehabilitate the witness and mitigate the effect of the evidence.³⁵ Although there is no case or statutory law on point, it would seem that if a person's civil rights have been restored pursuant to Section 940.05, such restoration would be treated as a pardon for the purposes of Section 90.610.

If a person pleads guilty or is found guilty by a jury but the sentencing judge withholds an adjudication of guilt, there has been no conviction and the person's credibility cannot be impeached with it.³⁶ Sometimes convictions and other records relating to a person's criminal history are ordered expunged. Section 943.058(6) Florida Statutes (1981) provides that when criminal history records have been expunged or sealed, the person is restored to the status that she had before the criminal proceedings. The person's status before charges were brought was that she had not been convicted of the crime in question and therefore the expunged conviction would not be admissible. The statutory provision makes a specific exception for a person who is a defendant in a criminal proceeding. Thus, a conviction which had been expunged or sealed could be used to impeach a criminal defendant who testifies as a witness, but could not be used to impeach a witness in a civil case or any witness in a criminal case other than the defendant.³⁷

If the prior offense occurred while the person was a juvenile and it was handled as a juvenile matter, evidence of the juvenile adjudication is inadmissible.³⁸ Section 90.610(1)(b) is consistent with other statutory provisions in which the adjudication of a juvenile is not treated as a criminal conviction.³⁹

If the conviction was obtained in violation of the witness' sixth amendment right to counsel, it is not a valid conviction and may not be used to impeach.⁴⁰ However, unless the objection is timely raised, the matter will be treated as being waived.⁴¹ Although it is unclear, apparently convictions which might be invalid because of subsequent appellate rulings holding that evidence was obtained in violation of other constitutional rights may be used as convictions under Section 90.610.⁴²

V. Grounds to Exclude Convictions Offered for Impeachment

A. Probative Value versus Prejudice

When the witness who testifies is the criminal defendant, the jury is likely to consider convictions admitted to impeach as evidence the defendant is a "bad" person and use the evidence for that purpose, especially when there are a number of prior convictions.⁴³ Section 90.610 does not specifically allow the trial judge any flexibility in admitting convictions to impeach; it simply provides that counsel may offer certain convictions if he chooses to do so.

Federal Rule 609 contains a provision not found in Section 90.610. It provides that a felony conviction may be used to impeach only when the court determines that the probative value of admitting the conviction outweighs its prejudicial effect to a criminal defendant. There is no similar provision in the Federal Rules regarding crimes involving dishonesty and false statement. Rule 609 has generally been interpreted by the federal courts to require the trial judge to conduct a balancing test to determine the admissibility of felony convictions and to make an explicit, on-the-record finding that the probative value of admitting the conviction outweighs its prejudicial effect.⁴⁴ However convictions for crimes involving dishonesty and false statement are automatically admissible without a federal court employing a balancing test.⁴⁵ Since the Rule 609 balancing test is limited to prejudice against a criminal defendant, felony convictions can be used to impeach a witness in a civil case or a prosecution witness in a criminal case without the balancing test being applied.⁴⁶

Section 90.610(1) of the Evidence Code uses the same language in defining the types of convictions that are admissible to impeach except that the Florida Legislature omitted any requirement that the court conduct a balancing test before permitting the convictions to be used. Thus, it can be argued that the omission was intentional and a trial judge cannot exercise his discretion in excluding convictions of a felony or crime involving dishonesty or false statement. Section 90.610(1), in omitting any mention of a balancing test, was modeled after *Federal Rule of Evidence 609* as it was submitted by the Supreme Court to the Congress before Congressional amendment. According to the Advisory Committee to the Federal Rules,⁴⁷ the proposed rule was intended to admit the convictions without any weighing or balancing of the competing interests by the Court. Thus it can be argued that if a conviction is of a type enumerated in Section 90.610, it is admissible and it is improper for the trial judge to exercise any discretion in determining its admissibility.

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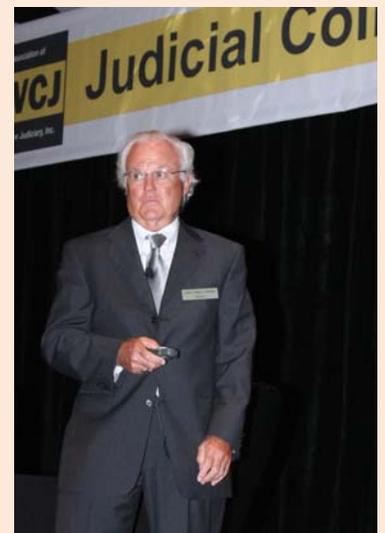
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A counter-argument can be made that under the Evidence Code the trial judge should exercise some discretion in admitting convictions to impeach. Section 90.403 provides that relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. Section 90.610 convictions are relevant to the issue of the witness' credibility. Therefore, it is argued that Section 403 would be applicable to Section 610.⁴⁸

If Section 403 is applicable to Section 610 convictions, there are two factors that will make the convictions more freely admissible in Florida than they are under the Federal counterpart. First, under the Federal Rules, cross-examining counsel can go into the nature of the crimes, the courts and the date of the offenses, even if the witness answers truthfully.⁴⁹ However, in Florida use of the convictions is much more limited. Counsel can only ask how many times the witness has been convicted and not go into the details of the convictions.⁵⁰ Two of the criteria the federal courts have focused upon in determining whether the convictions should be admitted under their balancing test are 1) the nature of the prior crime and 2) the similarity of the prior crime to the one charged.⁵¹ Since in the federal court the jury will almost always be apprised of the nature of the prior crime, there frequently is a danger the jury will convict a defendant who testifies because it believes he is a bad man who commits crimes of that sort. However, in Florida this danger is greatly decreased since Florida does not permit the nature of the prior offenses to come before the jury, unless the witness answers untruthfully.⁵²

Furthermore, the test to be applied by the court under Federal Rule 609, whether "the probative value of admitting this evidence outweighs its prejudicial effect," is different from the test to be applied under Section 90.403, whether the probative value "is substantially outweighed by the danger of unfair prejudice."⁵³ Any time a criminal defendant testifies and is impeached with a prior conviction he will be prejudiced in the eyes of the jury. Otherwise the prosecution would not offer the evidence. Section 90.403 excludes the evidence only when the court determines the prejudice is "unfair" and it "substantially" outweighs the probative value. A greater showing must be made under Section 90.403 to exclude the evidence then would be necessary under Federal Rule 609.⁵⁴

If Section 90.403 is applicable to convictions used for impeachment, the objecting party will have the burden of demonstrating to the court that the evidence should be excluded.⁵⁵ However, under Federal Rule 609 the prosecution has the burden of showing the court why the evidence should be admitted.⁵⁶

Therefore, if convictions meet the criteria of Section 90.610 they may be automatically admissible. If the court determines that Section 90.403 applies, nonetheless it would seem to be an unusual case in which the court would find the convictions to be inadmissible. It is unlikely a defendant would make the necessary showing to require exclusion. However, Section 90.403 would provide judges flexibility in cases where the possibility of prejudice is extremely great.

Some courts have indicated that the determination of whether a prior conviction is admissible to impeach is an appropriate matter for pre-trial determination by use of a motion in limine.⁵⁷ A pre-trial ruling obviously is helpful to counsel in planning the presentation of his case, e.g., whether the defendant will take the witness stand. A ruling prior to the witness being asked the questions about his prior convictions also aids the witness in not being confused in his answers.⁵⁸ However, the federal courts have found that there is no duty on the part of the trial judge to make such a ruling and that it is proper for the court to withhold any determination of admissibility until the defendant takes the stand.⁵⁹

When a pre-trial order permitting the use of a prior conviction to impeach is entered, a defendant may elect not to take the stand during the trial and attempt to preserve the court's ruling for appeal. The federal courts permit the defendant to raise the alleged error even though he was not impeached during the trial.⁶⁰

The argument that the defendant must take the stand and be impeached to preserve the point is based on the rationale that to hold otherwise would invite defense counsel to obtain a ruling prior to trial, never intending to call the defendant as a witness. Defense counsel would have obtained a "free ride" if the court was in error: "On appeal, the defendant should be expected to claim that he was kept off the stand by the court's adverse ruling, and that had he testified, he would have convinced the jury of his innocence or at least created a reasonable doubt as to his guilt."⁶¹

In *Hall v. Oakley*,⁶² the only Florida decision on point, the court held that a defendant did not have to testify to preserve the issue because the court felt that requiring the defendant to testify would improperly condition the testimony upon the acceptance of the court's evidentiary ruling.

B. Remoteness

Section 90.610(1)(a) provides that a conviction is inadmissible in a civil case to impeach when "it is so remote in time as to have no bearing on the present character of the witness." Thus, the trial judge must exercise her discretion to determine whether the conviction has sufficient probative value to be admitted.

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The provision does not include an arbitrary time limitation beyond which the evidence will not be admitted.⁶³ In determining remoteness the trial judge will have to undertake the same balancing process generally discussed above.⁶⁴ It is the one provision in Section 90.610 specifically directing the court to exercise its discretion.

The remoteness doctrine of section 90.610(1)(a) is limited to civil cases; the section does not refer to the remoteness in criminal cases. In the legislative process prior to the adoption of the Evidence Code, a committee of the Legislature amended Section 90.610(1)(a) to delete its applicability to criminal cases as was recommended by the drafters.⁶⁵ Thus, the issue arises as to whether a conviction in a criminal case can be excluded because of remoteness. Obviously, it can be argued that the face of the statute itself discloses an intent to limit the doctrine of remoteness to civil cases and not to apply it in criminal cases. There are two arguments available to apply remoteness in criminal cases. First, because remote convictions were excluded in criminal cases in Florida prior to the adoption of the Evidence Code⁶⁶ and because Section 90.102 provides that the Evidence Code "shall replace and supersede existing statutory or common law in conflict with its provisions," the existing common law applying remoteness to criminal cases still governs since Section 90.610 is not in specific conflict with it. Second, if Section 90.403 applies to convictions offered under Section 90.610, the court would exclude a remote conviction because it lacked probative value and there was a danger of unfair prejudice.

Thus, although it appears from the face of Section 90.610 that remote convictions are excluded only in civil cases, a more desirable approach would be to apply the doctrine to convictions in criminal cases on one of the two grounds expressed above.

Whenever a court rules that a conviction is admissible to impeach, counsel can rehabilitate the witness on redirect examination by having the witness testify that the conviction occurred a number of years ago.⁶⁷

VI. Procedures in Using Convictions

Although Section 90.610 only indicates which convictions are admissible to impeach and does not address the procedure that should be followed in examining a witness about prior convictions during the trial, Florida appellate decisions have established a method for using the convictions. Questions regarding past convictions should not be asked unless counsel has knowledge of a conviction and a certified copy of the judgment of conviction in his possession.⁶⁸ After a witness testifies on direct examination, she may be asked during cross-examination:

Q. "Have you ever been convicted of a felony?"

A. "Yes."

Q. "How many times?"

A. "Twice."

Q. "Have you ever been convicted of a crime involving dishonesty or false statement?"

A. "No."

If the witness answers the questions correctly, the questioning must cease; counsel can not go further and specify the nature of the crime of which the witness was convicted or the sentence that was imposed. However, if the witness answers a question incorrectly, counsel may impeach her testimony and prove that she has in fact been convicted of certain crimes by introducing a certified copy of the judgment of conviction for each crime.⁶⁹ Counsel may not attempt to prove the prior convictions with a "rap sheet."⁷⁰ Any remarks or questions concerning the details of the crime are inadmissible.⁷¹

VIII. Conclusion

Because of the likelihood that unfair prejudice will result when a conviction is improperly used to attack credibility, both the Florida and federal courts have required adherence to fairly precise guidelines when this impeachment technique is utilized. If counsel uses a conviction in an impermissible manner, the error that results is probably reversible. The most significant issue that has not been addressed by the Florida appellate courts involves whether, and when, the trial court should exercise its discretion in determining whether a particular conviction may not be used to impeach. As this and other unanswered issues are addressed, the Florida courts should remember that not only is it fair to use convictions to impeach a witness but that it is essential that the parties receive a fair trial.

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15. *Fla. Stat. § 90.610 (1977)*.
16. See *Hall v. Oakley*, 409 So. 2d at 97 (court discusses legislative intent to change meaning of code provision).
17. See, e.g., *United States v. Fearwell*, 595 F.2d 771, 775-77 (D.C. Cir. 1978).
18. See *Howard v. Gonzales*, 658 F.2d 352, 359 (5th Cir. 1981) (theft); *United States v. Walker*, 613 F.2d 1349, 1354 (5th Cir. 1980) (misdemeanor prostitution conviction inadmissible); *United States v. Ashley*, 569 F.2d 975, 978-79 (5th Cir. 1978), cert. denied, 439 U.S. 853 (1978) (shoplifting conviction inadmissible).
19. See *United States v. Williams*, 642 F.2d 136, 140 (5th Cir. Unit B 1981) (bribery); *United States v. De La Torre*, 639 F.2d 245, 249 (5th Cir. Unit A 1981) (perjury).
20. *United States v. Seamster*, 568 F.2d 188, 190-91 (10th Cir. 1978).
21. See *United States v. Harvey*, 588 F.2d 1201, 1203 (8th Cir. 1978).
22. See *United States v. Barnes*, 622 F.2d at 110; *United States v. Cathey*, 591 F.2d 268, 276, n.16 (5th Cir. 1979).
23. 553 F.2d 824 (2d Cir.), cert. denied, 434 U.S. 867 (1977).
24. 553 F.2d at 827-28.
25. Id. M. Graham, Handbook on Federal Evidence 485 (1981).
26. See *State v. Melendrez*, 572 P.2d 1267, 1269 (N.M. Ct. App. 1977); *Hall v. Oakley*, 409 So. 2d at 97 (Thompson, J. dissenting).
27. 409 So. 2d 93.
28. Id. at 97.
29. *Cummings v. State*, 7 Fla. L.W. 838 (Fla. 4th Dist. Ct. App., Apr. 14, 1982).
30. A military court-martial conviction may be admissible to impeach. See Annot. 7 A.L.R. 4th 468 (1981). But see *Braswell v. State*, 306 So. 2d 609, 613 (Fla. 1st Dist. Ct. App. 1975), cert. denied, 328 So. 2d 845 (1976) (summary court-marital after World War II not admissible); *United States v. Cathey*, 591 F.2d at 273 (issue not decided). A conviction in a foreign country will be admissible unless it is shown by the objecting party that the trial or proceeding giving rise to the conviction lacked procedural protections so as to render it unfair. See *United States v. Manafzadeh*, 592 F.2d 81, 90 (2d Cir. 1979); *United States v. Wilson*, 556 F.2d 1177, 1178 (4th Cir.) cert. denied, 434 U.S. 986 (1977). See generally, Comment, The Collateral Use of Foreign Convictions in American Criminal Trials, 47 U. Chi. L. Rev. 82 (1979). The findings of a municipal administrative board were found not to be a "conviction" in *United States v. Werbrouck*, 589 F.2d 273, 277 (7th Cir. 1978), cert. denied, 440 U.S. 962 (1979).
31. See *Fulton v. State*, 335 So. 2d at 284; *Harmon v. State*, 394 So. 2d 121, 125-26 (Fla. 1st Dist. Ct. App. 1980); *Dennis v. State*, 214 So. 2d 661, 662 (Fla. 3d Dist. Ct. App. 1968).
32. *United States v. Williams*, 642 F.2d at 138-39. Cf. *Chesebrough v. State*, 255 So. 2d 675, 676-77 (Fla. 1971), ("[A] defendant who is sentenced . . . [upon a plea of nolo contendere] is convicted of the offense charged."). Cert. denied, 406 U.S. 975, 976 (1972).
33. *Fla. Stat. § 90.610(2) (1981)*. The Fifth Circuit, in a habeas corpus review of a Florida trial, ruled a conviction inadmissible to impeach when the pending appeal is on the ground of a violation of the sixth amendment right to counsel. *Spiegel v. Sandstrom*, 637 F.2d 405, 407 (5th Cir. Unit B 1981). See generally, infra notes 39-41 and accompanying text.
34. *Fla. Stat. § 90.610(2) (1981)*.
35. *McArthur v. Cook*, 99 So. 2d 565. *Fla. Stat. § 90.610(2) (1981)* specifically provides for the admissibility of evidence that an appeal is pending.
36. See *Barber v. State*, 413 So. 2d 482 (Fla. 2d Dist. Ct. App. 1982); *United States v. Georgalis*, 631 F.2d 1199, 1203 n.3 (5th Cir. Unit B 1980); *United States v. Klein*, 560 F.2d 1236 (5th Cir. 1977), cert. denied, 434 U.S. 1073 (1978).
37. *Fla. Stat. § 943.058(6)(b)(2) (1981)*.
38. *Fla. Stat. § 90.610(1)(b) (1981)*. See *Dunlap v. State*, 404 So. 2d 853, 854-55 (Fla. 2d Dist. Ct. App. 1981); *Crespo v. State*, 344 So. 2d 598, 599 (Fla. 3d Dist. Ct. App. 1977). See *United States v. Ashley*, 569 F.2d 975, 978 (5th Cir.), reh'g denied, 573 F.2d 85, cert. denied, 439 U.S. 853 (1978); *Jackson v. State*, 336 So. 2d 633, 635 (Fla. 4th Dist. Ct. App. 1976); *Davis v. Alaska*, 415 U.S. 308, 319 (1974).
39. *Fla. Stat. §§ 39.10(4), 39.12(6) (1981)*.
40. See *Loper v. Beto*, 405 U.S. 473, 483 (1972); *Griffin v. Blackburn*, 594 F.2d 1044, 1046 (5th Cir. 1979).
41. See *United States v. Murray*, 492 F.2d 178, 196 (9th Cir. 1973), cert. denied sub nom. *Roberts v. United States*, 419 U.S. 854 (1974).
42. See *United States v. Penta*, 475 F.2d 92 (1st Cir.), cert. denied, 414 U.S. 870 (1973); J. Weinstein & M. Berger, 3 Weinstein's Evidence § 609[11] (1981).

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43. See supra note 5 and accompanying text.
44. *United States v. Preston*, 608 F.2d 626, 639 (5th Cir. 1979), cert. denied, 446 U.S. 940 (1980); *United States v. Mahone*, 537 F.2d 922, 928-29 (7th Cir.), cert. denied 429 U.S. 1025 (1976).
45. See, e.g., *United States v. Toney*, 615 F.2d 277, 279-80 (5th Cir.), reh'g denied, 622 F.2d 1043, cert. denied, 101 S. Ct. 403 (1980); *United States v. Dorsey*, 591 F.2d 922, 934 (D.C. Cir. 1979).
46. J. Weinstein & M. Berger, 3 Weinstein's Evidence § 609[04]-[05] (1981).
47. 56 F.R.D. 183, 270 (1972). Federal Rules of Evidence for United States Courts and Magistrates, Advisory Comm. Notes 25 (1975); see *United States v. Toney*, 615 F.2d at 280. Since section 90.610 is a specific provision dealing with a distinct rule of evidence, the argument is that 403 has no application.
48. *United States v. Toney*, 615 F.2d at 283-84 (Tuttle, J. dissenting).
49. See *United States v. Wolf*, 561 F.2d 1376, 1381 (10th Cir. 1977) (court noted that it ordinarily is improper to permit cross-examination into other details of the crime); *Tucker v. United States*, 409 F.2d 1291, 1294 n.1 (5th Cir. 1969).
50. See, e.g., *McArthur v. Cook*, 99 So. 2d at 567; *Cummings v. State*, 7 Fla. L.W. 838 (Fla. 4th Dist. Ct. App., Apr. 14, 1982). See infra notes 64-65 and accompanying text.
51. See D. Louisell & C. Mueller, Federal Evidence § 316 (1979); M. Graham, Handbook of Federal Evidence 471-72 (1981) (listing eight additional factors courts may also consider).
52. See infra notes 64-69.
53. Fla. Stat. § 90.403.
54. For a discussion of the differences in these standards see Judge Tuttle's dissent in *United States v. Toney*, 615 F.2d at 283-84.
55. See C. McCormick, Evidence § 43 (Cleary ed. 1972) (1978 Supp.).
56. See *United States v. Hendershot*, 614 F.2d 648, 652 (9th Cir. 1980); *United States v. Hayes*, 553 F.2d 824, 828 (2d Cir.), cert. denied, 434 U.S. 867 (1977).
57. See, e.g., *United States v. Oakes*, 565 F.2d 170, 173 (1st Cir. 1977)
58. In *Cummings v. State*, 7 Fla. L.W. 838, it was suggested that upon motion the court instruct the witness as to what crimes involve dishonesty.
59. *United States v. Johnston*, 543 F.2d 55, 59 (8th Cir. 1976).
60. See, e.g., *United States v. Toney*, 615 F.2d at 279. In *United States v. Cook*, 608 F.2d 1175, 1186 (9th Cir. 1979), cert. denied, 444 U.S. 1034 (1980).
61. *United States v. Toney*, 615 F.2d at 281 (Tjoflat, J. concurring). This concurring opinion contains a strong argument for this view. See *Crespo v. State*, 379 So. 2d 191 (Fla. 4th Dist. Ct. App. 1980), cert. denied, 388 So. 2d 1111 (Fla. 1981); *Swan v. Florida Farm Bureau Ins. Co.*, 404 So. 2d 802, 803 (Fla. 5th Dist. Ct. App. 1981).
62. 409 So. 2d 93, 95.
63. Federal Rule 609(b) provides that if ten years have elapsed from the date of conviction or release from confinement, whichever is later, the conviction may not be used unless the court determines, in the interests of justice, that the probative value of the conviction substantially outweighs its prejudicial effect.
64. See *Ward v. State*, 343 So. 2d 77 (Fla. 2d Dist. Ct. App. 1977).
65. Florida Legislature, House Judiciary Committee, Subcommittee on Court Systems & Miscellaneous, meeting tape [believed by archives to be], May 15, 1975: Florida State Archives, Series 19, Box 210T; Florida Legislature, House Judiciary Committee, meeting tape, May 20, 1975: Florida State Archives, Series 19, Box 210T.
66. See *Braswell v. State*, 306 So. 2d 609, 613 (Fla. 1st Dist. Ct. App. 1975).
67. See *McArthur v. Cook*, 99 So. 2d at 567.
68. See *Cummings v. State*, 7 Fla. L.W. 838.
69. See id. (interpreting Section 90.610); *Fulton v. State*, 335 So. 2d at 384; *McArthur v. Cook*, 99 So. 2d at 567; *Sneed v. State*, 397 So. 2d 931, 933 (Fla. 5th Dist. Ct. App. 1981).
70. See *Goodman v. State*, 336 So. 2d 1264, 1267 (Fla. 4th Dist. Ct. App. 1976); *Irvin v. State*, 324 So. 2d 684, 686, n.2 (Fla. 4th Dist. Ct. App. 1976).
71. See *Cummings v. State*, 7 Fla. L.W. 838; *Goodman v. State*, 336 So. 2d at 1266; *Hill v. Sadler*, 186 So. 2d 52, 54 (Fla. 2d Dist. Ct. App. 1966). Prior to the Evidence Code, the fact that a conviction was for perjury or false statement could be revealed to the jury. *Johnson v. State*, 361 So. 2d 767 (Fla. 3d Dist. Ct. App. 1978).

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

It's just not fair...

PRO SE DEFENDANT: Objection, Your Honor, that attorney spoke to her witness before trial!

JUDGE: What is your legal objection?

DEFENDANT: Cheating!

Editor's note: Chief Judge Poindexter will lecture for an hour on the challenges of pro-se litigants in your hearing room, Judiciary College 2010. See the brochure at the end of this issue!

What a smart attorney...

ATTORNEY: I see from your questionnaire that you have twins.

JUROR: Yes Sir, I do.

ATTORNEY: Tell me - are they the same age?

Basically, you are a pain...

JUDGE: Counsel, you have turned in your fee application but I don't understand what it means when you write, "\$1,500 multiplied by three."

COUNSEL: Judge, there is authority for the multiplication factor based on the difficulty of the case.

JUDGE: What was difficult about this case?

COUNSEL, Well, Judge, basically dealing with Your Honor is what was difficult about this case.

What is the College of Workers' Compensation Lawyers?

“ . . . established to honor those attorneys who have distinguished themselves in their practice in the field of workers' compensation.”

The Trial and Insurance Practice and Labor Law sections of the American Bar Association jointly established the College of Workers' Compensation Lawyers in 2006. The purposes of the organization include promoting professionalism in workers' compensation, providing significant workers' compensation educational opportunities, and recognizing exceptional workers' compensation professionals through membership.

The College has grown slowly since its establishment. Each Fellow may nominate one candidate each year, but despite this the organization has not doubled in size each year. The core values of the College guide membership nominations. Successful candidates have academic workers' compensation experience in significant writing or lecturing. The expectation is that Fellows will be actively engaged in the College's underlying purposes. Induction to the College is an honor, but the core purpose of the College is far from honorary. Fellows are inducted in the belief that they are professionals that can be expected to remain fully engaged in the process of promoting professionalism, producing a legitimate publication, and producing professionalism education opportunities. Fellowships are only offered to candidates whose professionalism is beyond question. More information about the organization is available at www.collegeofworkerscompensationlawyers.org

As a multitude of organizations continue to recognize the crucial nature of professionalism and attempt to shift the focus of their individual organizational professionalism efforts, the efforts of exceptional groups such as the College will be critical. Enhancing the understanding of professional practice and promoting professional behavior will benefit the practitioners, their clients and state's workers' compensation systems generally. The College should be encouraged, and its members congratulated on their efforts to raise the professionalism consciousness of workers' compensation.

Gerald Rosenthal Announces Florida's New Inductees into the National College of Workers' Compensation Lawyers

It is certainly of great prestige to be recognized by the peers of your specialization within your practicing state, but it is of the utmost esteem to gain national recognition. The College of Workers' Compensation Lawyers has been established to honor those attorneys who have risen to the top in the field of workers' compensation law throughout the country and have distinguished themselves as the best in their practice. The College encompasses claimant and defense attorneys from all states. In order to be inducted into the College of Workers' Compensation Lawyers, a Fellow must demonstrate scholarly pursuits, exemplary advocacy, and professionalism of the highest standards with the bench, opponents, clients and the community. Each Fellow inducted into the College has 20 or more years of experience practicing in the field of workers' compensation law. The purpose of creating the College is not only for Fellows to be recognized as prominent attorneys in their field, but more so the College has been established to become a resource for newer, less experienced attorneys to turn to for mentorship, guidance and advisement. Currently, the College is strategizing a method where the Fellows will serve as leaders to other attorneys in the community. For instance, in 2010 the College is hosting a writing competition for all law students in the United States. For more information regarding the College Of Workers' Compensation Lawyers, visit its website: <http://www.collegeofworkerscompensationlawyers.org/>.

Gerald Rosenthal pledged the oath as a proud Fellow of the College of Workers' Compensation Lawyers in 2008. He truly has been unflinching in his lifelong pledge and dedication to the College and the practice of workers' compensation law. Gerald Rosenthal, as founding partner, commemorates his seventy person law firm for entering its 25th year of aggressively fighting for the injured – no matter how catastrophic the injury or complex the litigation -- in workers' compensation claims. Rosenthal, Levy and Simon, P.A. is nationally renowned for its representation of workers with life-threatening illnesses and injuries. It is with high regard and admiration, Gerald Rosenthal proudly announces the induction of his colleagues, the most recent 2010 Fellows from the State of Florida into the College of Workers' Compensation Lawyers: Ramon Malca, Alfred L. Deutschman, Stephen L. Rosen, Richard A. Sicking, H. George Kagan, and Glen D. Wieland. It is also of significant mention that James N. McConnaughay and Steven A. Rissman are the 2010 Florida Inductees deferred to 2011 Fellowship.



A Practitioners Perspective on the Demands of Complex Litigation

By: Gerald Rosenthal

At my firm, Rosenthal, Levy & Simon, P.A., we are involved in many types of complex litigation. The majority of these matters are worker's compensation cases which are assigned to our "catastrophic injury trial team" (CITT), which I oversee. The types of injuries include amputations, brain injuries, crush injuries, burns, electrocutions, closed head wounds, multiple fractures, heart and lung disease, Hepatitis C and other blood-borne pathogens and numerous types of chemical exposures. While I enjoy the challenges of complex litigation, it is only a portion of what we offer to the community. Anyone who has suffered an injury—whether on the job or through the negligence of others—will find the help they need at Rosenthal, Levy & Simon, P.A. following an accident. For more than thirty five years, this has been my calling.

Complex litigation claims are costly and come with material risk many firms are unwilling to undertake. For the greatest number of my cases, compensation is contingent upon success. You must have substantial resources to fund these matters, including the costs of legal experts, travel, and heavy litigation costs, as carriers routinely deny, delay and litigate these claims. In some matters, the burden required by statute is greater than that of a typical workers' compensation claim. Florida defines Occupational Disease as "only a disease for which there are epidemiological studies showing that exposure to the specific substance involved, at the levels to which the employee was exposed, may cause the precise disease sustained by the employee."

Therefore it is not just enough to have an expert give you a favorable opinion. Rather, the opinion must be based in part on epidemiological studies. In some cases, we are breaking new ground, as we did with Hepatitis C exposure in police, EMT's and police evidence handlers as illustrated in City of Delray Beach v. Sparks, 702 So.2d 492 (Fla. 1st DCA 1997). The amounts of medical information that must be mastered can be staggering. Add to this the great quantities of documentary evidence that must be organized, processed, and made accessible and you see the demands on both the attorney and support staff. It is vital to have legal and support staff who excel, not only on an intellectual and organizational level, but who are dedicated to the project. The demands on their personal lives can be daunting.

In Florida, there are time constraints that limit our ability to present the best possible case to the Judge of Compensation Claims. As a practitioner this can be onerous to accept. It is critical that your expert have the ability to review and consider all relevant testimony and documentary evidence prior to issuing an expert report and/or testifying at the trial level. The injured worker is at an extreme disadvantage without the appropriate time to request, receive and review the voluminous documentary evidence in a complex claim. The documentary evidence in connection with the medical records aid me in selecting the type of experts I will need. I will make the routine requests that I make in every workers' compensation claim handled by our office. Additionally depending on the type of complex claim we are handling, additional records are required in order to successfully prosecute the claim. For example, in a chemical exposure claim we require each employer provide us with the MSDS logs. Requests such as this take can take an employer additional time beyond the standard thirty days to provide our office. Moreover, we routinely are required to take numerous lay and employer witness depositions to support a claim. Frequently, these depositions lead us to request additional documentary evidence that we were unaware existed. This portion of the discovery process has to be completed prior to selecting and securing the required experts necessary to skillfully handle a complex claim. However, Florida Statute 440.25 outlines the procedure for Mediation and Hearings. This statute forces the parties to mediation within 130 days after the filing of a Petition for Benefits. The statute further requires to the injured workers detriment in a complex claim, that the Final Hearing shall be held within 210 days after receipt of the petition for benefits. In the majority of complex claims additional time is needed to complete discovery and fairly present our case. A Judge of Compensation Claims in Florida will frequently grant an initial

Continued, Page 11.

continuance as long as the request falls within the 210 day time frame. However, any continuance request taking you beyond the 210 day requirement outlined by the statute can become more difficult to secure and in some cases impossible without the assistance of the First District Court of Appeals.

Exposure cases involving multiple clients present special challenges. While each client is unique, all have common threads, including (in varying degrees): employer, carrier, venue, exposures/toxins, types of disability/disease, medical providers and expert witnesses. The approach we designed for large groups of “related” claimants who retain us begins by researching each case individually. Then from the larger group, a cross-section of cases is selected representing the range of venues, exposures, and resulting, disease, disability or death. A summary of these variables for the cross-section of clients is then sorted and presented in a document named the “damage matrix.” The damage matrix is vital to guide us—and later the defense counsel—through the process of reviewing the etiology and symptoms, eventually arriving at a valuation of the cases in an organized, systematic fashion. We can begin mediation on the much more accessible cross-section presented in our damage matrix. Once we reach an understanding, the matrix results can be extrapolated to the larger group.

Securing competent and knowledgeable experts from elite academic settings such as University of North Carolina , Harvard University and Duke University is costly but highly beneficial. Our experts have proven to be well-versed; they have immersed themselves in the project in order to gain total mastery; and they have exhibited a keen interest in the claimants. Their ongoing demand as legal experts has made them “quick studies,” They have quickly grasped the necessary legal concepts related to their presentations. We have utilized experts in the fields of Epidemiology, Industrial Medicine, Toxicology and Pulmonary Medicine. After the Claimant has been evaluated by each individual expert, we secure an expert physician to prepare a global report utilized in the claim compiled from the individual reports prepared by each specialist. The Global Report will give an inclusive impairment rating which is compiled by combining the impairments provided by each individual expert which aids us in formulating and evaluating the overall value of each individual claim.

We are conducting preliminary investigations for a project estimated at 4000 claimants working in as many as fifteen states. We anticipate selecting six states and 10% of the injured workers in those states as test cases. When we work in multiple states, consolidation of discovery becomes an important factor. The consolidation of jurisdictions into one venue for discovery purposes only reduces the expense for both the claimant and the defense. To avoid costly mistakes, it is imperative to develop expertise in multi state jurisdictions. One method we have used successfully is to retain local co-counsel.

Rosenthal, Levy & Simon, P.A. presently handles cases throughout the country, most heavily in Florida , North and South Carolina . We are proud that our efforts have already brought large numbers of worthy claimants much needed medical care and lost wages. The great beauty of a career in the field of worker’s compensation is to know that your successes bring not just money, but health, help and hope to the injured worker and his family. Some of the greatest moments in my career have been the private expressions of thanks from claimants and family members after my efforts led to life saving surgeries, including organ transplants—benefits that would not have been made available but for the efforts of our team.

Wage and Hour Suits Increase

Recession can lead to layoffs and layoffs to family financial crisis. According to studies, there have been significant recent increases in wage and hour lawsuits. A substantial portion of those suits focus on allegations regarding employee misclassification. Settlements of these suits have been tracked and reported. Marked increases in this type of litigation has been noted in California, Florida, Illinois, New Jersey, New York, Massachusetts, Minnesota, Pennsylvania, and Washington.

To learn more on this trend, visit:

<http://www.kiplinger.com/businessresource/forecast/archive/wage-and-hour-lawsuits-costing-employers-millions.html>

http://www.seyfarth.com/index.cfm/fuseaction/news_pub.news_pub_detail/object_id/d6c20e1b-9a47-4e72-a073-80b983585012/SeyfarthShawsSixthAnnualWorkplaceClassActionLitigationReportShowsUnabatedClimbInFinancialStakesInWorkplaceClassActionLitigation.cfm%22

Keeping Legal Minds Intact, Mitigating Compassion Fatigue Among Legal Professionals

By Linda Albert, LCSW, CSAC, State Bar WisLAP coordinator
Reprinted with permission from the State Bar of Wisconsin.



What is compassion fatigue?

There are several different terms often used to refer to the same phenomenon; to name a few: compassion fatigue, vicarious trauma, secondary traumatic stress, second hand shock, and secondary stress reaction. Compassion fatigue is defined as the cumulative physical, emotional, and psychological effects of being continually exposed to traumatic stories or events when working in a helping capacity. It has been studied extensively in social workers, nurses, doctors, and therapists who work with victims of trauma. Recently, researchers have begun to examine the impact on legal professionals including lawyers doing criminal law or family law and judges. Compassion fatigue involves a cluster of symptoms such as, but not limited to, sleep disturbance, anxiety, intrusive thoughts, a sense of futility or pessimism about people, lethargy, isolation, and irritability. The development of compassion fatigue involves neurophysiology and is best addressed from both the neurobiological and the social psychological research and perspectives.

Who is most at risk?

Levin et al (2003) found that attorneys and judges who work in the field of criminal or family law are at higher risk of developing compassion fatigue compared to those who work in other areas of the law. These legal professionals listen day after day to stories of human-induced violence. They read and reread detailed documentation of the traumatic material within cases. Attorneys are often times in long-term relationships with their clients, thereby witnessing the impact of the trauma on their client or their clients' victim. Particularly in domestic violence cases, they observe clients reentering into risky environments without regard for safety and, throughout their work with victims, offenders, and the system, they are expected to perform at the top of their game without being impacted by the traumatic material. After all, lawyers and judges are taught not to show weakness, to deny, defend, and deflect vulnerability, while staying emotionally detached at all times.

The reality is that attorneys and judges are human beings. Any person regardless of professional competence can develop compassion fatigue. The struggle for legal professionals is the assumption (both their own and that of others) that they will not be impacted by the work that they do. The reality can be quite different. Lawyers and judges when exposed to traumatic stories and events may have physiological reactions such as increased heart rate, breathing rate, and muscle tension. They can have emotional responses such as anger or fear. They may also experience changes in their assumptions about life, other people, and issues of safety. Often legal professionals will be unaware of these reactions or ignore or dismiss them as unimportant. These reactions are indicative of the physiological and psychological changes occurring within the mind and body due to the processes of empathy or identification, reactions of the autonomic nervous system, and patterns of thinking. If left unchecked and unattended to these reactions wear on the mind and the body resulting in the cluster of symptoms known as compassion fatigue. It is comparable to erosion, only it happens to a person, not the environment. The results can be varying degrees of impairment for the attorney or judge.

What places legal professionals at increased risk?

Levin found that compared to mental health providers and social service workers attorneys surveyed had "significantly higher levels of secondary traumatic stress and burnout." Researchers report that this is likely due to higher case loads, lack of supervision or support, and lack of education in regards to the impact of ongoing exposure to traumatic material and events. Osofsky et al (2008) also identified similar organizational and job issues that contribute to the development of compassion fatigue. Factors included high caseloads, minimal support from supervisors, lack of peer support, excessive paperwork, inadequate resources to meet demands, and limited job recognition.

Continued, Page 13

These researchers also reported the impact of compassion fatigue on the work environment, listing such issues as increased absenteeism, impaired judgment, low motivation, lower productivity, and high staff turnover.

These factors coupled with the culture of practicing law may discourage attorneys or judges from recognizing the signs of distress, disclosing if they are struggling, or preventing them from seeking assistance. In contrast, social service and mental health workers are educated about the potential impact of the work on their mental and physical health and are encouraged to talk about it and address how the work affects them in order to lessen the impact. This is often done in a safe, confidential, and supportive environment. Legal professionals and managers universally state they do not have this provision built in to their work environment, that they are bound by confidentiality, and would lack the resources, time, or energy to create this environment for themselves.

Those working as public defenders or prosecutors may identify with some of the above. For example, prosecutors or public defenders involved in a long, arduous trial are seldom afforded the time to replenish and restore themselves following the trial. Instead they are likely to go forward the next day into another formidable case without the ability to take pause and reflect on how the work is impacting them physically, emotionally, or mentally. One lawyer stated, "I am expected to operate like a machine, often getting notices to be at four places at the same time and go from trial to trial with no regard for what I can reasonably do or what the impact might be on myself as a professional or a person."

What can legal organizations do?

A review of the literature suggests that law organizations and entities first need to recognize and acknowledge that compassion fatigue exists and to identify how it impacts the legal professional and the organization. Prevention strategies include reducing caseloads due to the correlation between high caseloads and the prevalence of compassion fatigue and educating legal professionals about what compassion fatigue is and how a person may be impacted while working with traumatic stories and events. Supervisors and managers would be astute to address this issue, educate their legal staff, and encourage staff to debrief their high trauma cases on a regular basis in a supportive atmosphere. With the current culture of budget deficits, limited space and resources, and increasing caseloads it is imperative (albeit difficult) for public defenders, prosecutors, family law attorneys, and judicial entities to adopt a strategy of how to address and mitigate this phenomenon versus rationalize why they cannot.

What can legal professionals do?

Whether an attorney, judge, doctor, or a mental health professional the recommendations to mitigate or treat compassion fatigue are similar.

Awareness. It is important for legal professionals to understand what compassion fatigue is, and to regularly assess for it by using a survey, checklist, or other instrument.

Debriefing. Talking on a regular basis with another practitioner who understands and is supportive is helpful. This involves talking about the traumatic material, how one thinks and feels about it, acknowledging how one is personally affected by it, and putting a plan in place for balance.

Balance. The research on mitigating compassion fatigue emphasizes working on balance in all areas of one's life. Because of the physiological and psychological changes that occur, a holistic approach is best. Yes, this means establishing a healthy diet, sleep, and exercise program, which we all talk about but few of us actually attend to. Exercise and relaxation work can be beneficial in counteracting the impact on the autonomic nervous system. Working on healthy interpersonal relationships is also a good idea (even if we have been married or divorced a zillion years and live with small children, adolescents, or have aging parents giving us the excuse to say "balance is impossible"). Most of us give up on finding balance as work and personal life just keeps pouring it on, but the truth is there are probably steps we can take to simplify, to do less of, to ask for help, or just plain stop trying to be all things to all people, including our clients. Sound familiar? Start thinking about how you can work on balance versus why you cannot.

Be intentional. If your life is out of whack, you have compassion fatigue, depression, anxiety, substance abuse problems, or are just plain overwhelmed, put a plan in place for change. Work with your thoughts. Recognize and acknowledge

Continued, Page 14

the skills you possess that contribute to your success as an attorney or judge (motivated, perfectionist, achievement oriented, driven, fixer) and the environment in which you work that may contribute to an imbalance in your life. Seeking balance encompasses a change in lifestyle that requires hard work addressing thoughts, emotions, and behaviors. Intentionally seek assistance to help yourself implement change and redirect the thoughts that tell you, "I should be able to do this by myself." Your new mantra can become, "I don't have to do it all by myself."

The good news: WisLAP can be a resource specifically for you

If you want to consult with a mental health professional or work with a trained attorney or judge, consider calling the Wisconsin Lawyers Assistance Program (WisLAP). The program offers free in-house educational sessions or one-on-one consultation or assistance. WisLAP specializes in understanding and addressing the issues that face today's legal professionals.

WisLAP is a member service of the State Bar of Wisconsin. The program uses trained Wisconsin judges and attorneys who provide confidential assistance to judges, lawyers, law students, and their families. Each request for help is treated with the same confidentiality as the lawyer-client relationship. WisLAP is exempt from reporting professional misconduct to the Office of Lawyer Regulation or to the Judicial Commission. WisLAP does not ask callers to disclose their identity and does not keep case records. The program is designed to help members build on their strengths and provide support through the enhancement of physical, mental, and emotional health. Confidential support is available 24/7 by calling 800-543-2625. Or contact Linda Albert, WisLAP coordinator, directly at 800-444-9404, ext. 6172, or email lalbert@wisbar.org.

*Linda Albert, a licensed clinical social worker and a certified alcohol and drug counselor, is the State Bar's WisLAP coordinator. She received her Master's Degree from UW-Madison in Social Work. She has professional assessment/treatment/referral competencies in the areas of addictions, eating disorders, depression, anxiety, trauma, and illness impacted by stress. Albert has worked over the past 25 years as an administrator, consultant, trainer, and psychotherapist in a variety of settings including providing services to impaired professionals.

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Want to read more?

Give 'til it hurts': Legal professionals worn down by 'compassion fatigue,' April 15, 2009

<http://www.wisbar.org/AM/Template.cfm?Section=InsideTrack&Template=/CustomSource/InsideTrack/contentDisplay.cfm&ContentID=83437>

Lester, *Understanding lawyer compassion fatigue in Wisconsin: Public defenders participate in study*, March 17, 2010

Bad Appeal Renders Attorneys Liable for Fees, 1st DCA Rules: *EAST* [05/18/10]

Two Florida claimants' attorneys who decided to appeal an order that was not appealable caused the 1st District Court of Appeal to assess attorneys' fees against them. In *Maradriaga v. 7-Eleven and Kemper Group*, No. 1D09-6394, 5/14/10.

Karla Maradriaga, a claimant who had worked for 7-Eleven, filed a workers' compensation claim. Her attorneys -- Albert Marroquin and Richard Zaldivar -- filed a motion to approve a purported settlement agreement, which the judge of compensation claims denied. The judge administratively reopened the case and instructed the parties to attend a "duly-noticed final hearing" on the matter.

Maradriaga's attorneys appealed the decision to the 1st District Court of Appeal. The appellate court dismissed the appeal because the judge of compensation claims' (JCC) order was not a final order. The appellate court also sent Zaldivar and Marroquin a "show cause order," seeking an explanation for why the attorneys and Maradriaga should not be liable for attorney fees under section 57.105(1)(b) of the Florida Statutes. "In their response to the show cause order issued on March 10, appellant's attorneys simply expanded on the previously stated reason as to why the JCC's order should be viewed as final, and advised they relied on a per curiam affirmance, without opinion, in conducting their analysis," the appeals court wrote. "A per curiam affirmance, without opinion, has no precedential value."

The appellate judges noted that the attorneys failed to offer a good reason to avoid the imposition of attorneys fees, and that these same attorneys have also appealed "a clearly unappealable order" in the past. The appellate court opted to impose the fees, and noted that Maradriaga is also liable for a portion of the fees.

Because of this, the court noted that the judge of compensation claims should consider offering Maradriaga a chance to obtain new counsel.



Wage and Hour Database Allows Tracking Enforcement Actions: *NATIONAL* [04/23/10]

The U.S. Department of Labor's Wage and Hour Division has created an online database that allows the public to search for enforcement actions against employers. The division reported the project is "a work in progress" and said "new features, functionality, and search criteria will be added over time."

The Enforcement Database includes records from the department's Employee Benefits Security Administration (EBSA), Occupational Safety and Health Administration (OSHA), Office of Federal Contract Compliance Programs (OFCCP), Mine Safety and Health Administration (MSHA), and Wage and Hour Division (WHD).

The division said the site is intended to make enforcement data collected by the agencies accessible and searchable by the public, using common search criteria. The division also has asked for comments on what features users would like to see included. The site includes descriptions of the various agencies and their duties. In the case of the Wage and Hour Division, the database includes all completed compliance actions since fiscal year 2009.

The results show whether any violations were found and the back wage amount, the number of employees due back wages, and the fines assessed. The data is updated quarterly. Users can search the database by agency, state, ZIP code, North American Industry Classification System (NAICS) code, and Standard Industrial Classification (SIC) code.

What's a Menisc and Why Would You ectomy One?

Medial meniscus

The medial meniscus is a fibrocartilage (a mixture of white fibrous tissue and cartilaginous tissue) semicircular band that spans the knee joint medially, located between the medial condyle (one of the two projections on the lower extremity of femur) of the femur (thighbone) and the medial condyle of the tibia (the inner and usually larger of the two bones of the lower limb between the knee and ankle). It is also referred to as the internal semilunar fibrocartilage. It is a common site of injury, especially if the knee is twisted.

Structure

The meniscus attaches to the tibia via meniscotibial (coronary ligaments). Its anterior (situated toward the front) end, thin and pointed, is attached to the anterior intercondyloid fossa of the tibia, in front of the anterior cruciate ligament; Its posterior (toward the back) end is fixed to the posterior intercondyloid fossa of the tibia, between the attachments of the lateral meniscus and the posterior cruciate ligament. It is fused with the tibial collateral ligament which makes it far less mobile than the lateral meniscus. The points of attachment are relatively widely separated and, because the meniscus is wider posteriorly than anteriorly, the anterior crus is considerably thinner than the posterior crus. The greatest displacement of the meniscus is caused by external rotation, while internal rotation relaxes it. During rotational movements of the tibia (with the knee flexed 90 degrees), the medial meniscus remains relatively fixed while the lateral part of the lateral meniscus is displaced across the tibial condyle below.

Function

The medial meniscus separates the tibia and femur and serves as a shock absorber, to decrease the contact area between the bones, reducing the peak contact force experienced. It also reduces friction between the two bones to allow smooth movement in the knee, distributes load during movement, and increases stability.

Injury

Acute injury to the medial meniscus fairly often accompanies an injury to the ACL (anterior cruciate ligament) or MCL (medial collateral ligament). A person occasionally injures the medial meniscus without harming the ligaments. Healing of the medial meniscus is generally slow. Damage to the outer 1/3 of the meniscus will often fully heal, but the inner 2/3 of the medial meniscus has a limited blood supply and thus limited healing ability. Large tears to the meniscus may require surgical repair or removal. If the meniscus has to be removed (meniscectomy) because of injury (either because it cannot heal or because the damage is too severe), the patient has an increased risk of developing osteoarthritis in the knee later in life. More chronic injury occurs with osteoarthritis, made worse by obesity and high-impact activity. The medial meniscus and the medial compartment are more commonly affected than the lateral compartment.

http://en.wikipedia.org/wiki/Medial_meniscus, republished here by license <http://creativecommons.org/licenses/by-sa/3.0/>



Want to see a Meniscectomy Live?

At the 2010 NAWCJ Judiciary College, Dr. Bryan L. Reuss, a board certified orthopaedic surgeon who specializes in Sports Medicine and has extensive experience in shoulder and knee surgery, will perform an arthroscopic meniscus surgery. Meniscus surgery is the more readily term for what has been referred to as a Meniscectomy. Dr. Reuss has treated many athletes both in the professional and amateur arena, such as NFL, UFL, PGA, collegiate and high school. While Dr. Reuss performs the surgery, Dr. Eric Bonenberger will narrate for the audience. Dr. Reuss and Dr. Bonenberger practice with the Orlando Orthopaedic Center in Orlando, FL. This is a "must see."

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY

APPLICATION FOR MEMBERSHIP

THE NAWCJ MEMBERSHIP YEAR IS A FOR 12 MONTHS FROM YOUR APPLICATION MONTH. MEMBERSHIP DUES ARE \$75 PER YEAR.
Contributions, gifts, or dues to the NAWCJ are not deductible as charitable contributions for federal income tax purposes.

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PROFESSIONAL TELEPHONE: _____ Fax: _____

YEAR FIRST APPOINTED OR ELECTED? _____

CURRENT TERM EXPIRES: _____

HOW DID YOU LEARN ABOUT NAWCJ? _____

DESCRIPTION OF JOB DUTIES / QUALIFICATIONS FOR MEMBERSHIP:

IN WHAT WAY WOULD YOU BE MOST INTERESTED IN SERVING THE NAWCJ:

Mail your application and check to: Hon. John J. Lazzara, NAWCJ President
P.O. Box 200,
Tallahassee, FL 32302-0200
850.488.2110 850.922.3661 (Fax)
Email: jjl@nawcj.org

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY

APPLICATION FOR ASSOCIATE MEMBERSHIP

THE NAWCJ ASSOCIATE MEMBERSHIP YEAR IS A FOR 12 MONTHS FROM YOUR APPLICATION MONTH. ASSOCIATE MEMBERSHIP DUES ARE \$250 PER YEAR. Contributions, gifts, or dues to the NAWCJ are not deductible as charitable contributions for federal income tax purposes.

NAME: _____ DATE: ____/____/____

Firm or Business: _____

PROFESSIONAL ADDRESS: _____

PROFESSIONAL E-MAIL: _____

ALTERNATE E-MAIL: _____

PROFESSIONAL TELEPHONE: _____ Fax: _____

HOW DID YOU LEARN ABOUT NAWCJ? _____

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Tallahassee, FL 32302-0200
850.488.2110 850.922.3661 (Fax)
Email: jil@nawcj.org

Warren Buffet said “price is what you pay, value is what you get.” Do not confuse the two. The NAWCJ College 2010 is an exceptional program and an exceptional value. This program delivers diverse national experts in the field at a fraction of the cost of most national programs.

Our 2010 program is presented three sections. Section one is the “New Judges” program. This is intended to ease the transition to public service for new adjudicators. The adjudicatory role presents new challenges to most; the role of adjudicator is far different from advocacy. Likewise, the transition from private employment to government service is challenging in itself. The “New Judge” program is a unique opportunity for adjudicators with less than two years of service to work in a close interpersonal environment with exceptional judges from throughout the country. This program begins Monday morning and concludes in time for the keynote speech of the Workers’ Compensation Institute by quarterback Dan Marino at 11:00 a.m.

The second section begins with Mr. Marino’s speech to the Institute, followed by a transition into the “judges only” program, starting with an informal luncheon and comparative law discussion, followed by an exceptional evidence seminar by Professor Charles Ehrhardt, and capped off with the Code of Judicial Conduct and Judge James Wolf. Every attendee will end this day with valuable “take away” perspectives from extraordinary speakers. The second section continues on Tuesday morning with an all-day program including two live surgeries, Deputy Chief Judge Poindexter will provide tips and guidance on working with pro-se litigants, Dr. Melhorn will address the use of impairment guides as only one of their authors could, Mr. Salatti will provide intensive insight into effective order writing, and there will be a live oral argument before the First District Court of Appeal. The second section will conclude Tuesday evening with a reception for all attendees, NAWCJ members, and associate members.

The final section on Wednesday provides three distinct and intense opportunities. Attendees may choose the multi-state program with specific state breakouts, or the Medicare set-aside program, or the Advanced Mediation Techniques program. Each provides advice and insight from leading experts in these fields.

Don’t let the price fool you. This program delivers unprecedented value. We look forward to meeting you there.

NAWCJ Judicial College 2010

Section One New Judges Program

Monday, August 16, 2010

8:30 – 11:00 **NAWCJ NEW JUDGE PROGRAM**

8:30 – 8:45 PM **WELCOME AND ANNOUNCEMENTS**

Honorable John J. Lazzara
Tallahassee, Florida
Florida Office of Judges of Compensation Claims

8:45 - 9:15 **ADVOCATE TO ADJUDICATOR**

Honorable R. Karl Aumann
Baltimore, Maryland
Maryland Workers' Compensation Commission

9:15 - 9:45 **JUDICIAL INDEPENDENCE AND RELATING TO THE BAR**

Honorable David Torrey
Pittsburg, Pennsylvania
Pennsylvania Department of Labor and Industry

9:45 - 10:15 **THE MOTION FOR RECUSAL, CONFLICT DISCLOSURE AND THE CODE**

Honorable Ellen Lorenzen
Tampa, Florida
Florida Office of Judges of Compensation Claims

10:15 - 10:45 **TRANSITION TO THE BUREAUCRACY OF STATE GOVERNMENT**

Honorable David Imahara
Atlanta, Georgia
Georgia State Board of Workers' Compensation

10:45 - 11:00 **BREAK AND TRANSITION TO DAN MARINO SPEECH**



The Florida Workers' Compensation Institute (FWCI) also has a morning program. NAWCJ College attendees are welcome to attend these.

9:00 – 11:00 **WORKERS' COMPENSATION CONFERENCE WELCOMING SPEECHES**

9:15 - 9:40 AM **SCHOLARSHIP AND AWARD PRESENTATIONS**

9:40 – 10:00 AM **ALEX SINK, FLORIDA CFO**

11:00 – 12:00 AM **GUEST SPEAKER, DAN MARINO**

11:00 - 5:00 PM **EXHIBIT HALL OPEN**



NAWCJ Judicial College 2010

Section Two Main Program, Day One (Monday)

Monday, August 16, 2010

**11:30 – 1:20 PM NAWCJ WELCOME LUNCH AND
MULTI-JURISDICTION COMPARATIVE LAW PANEL**

Honorable R. Karl Aumann
Baltimore, Maryland
Maryland Workers' Compensation Commission

Honorable John J. Lazzara
Tallahassee, Florida
Florida Office of Judges of Compensation Claims

Honorable Linda A. Thompson
Jackson, Mississippi
Mississippi Workers' Compensation Commission

Honorable Gwendolyn Thompson
Covington, Louisiana
Louisiana Workforce Commission

Honorable David Torrey
Pittsburg, Pennsylvania
Pennsylvania Department of Labor and Industry

1:20 - 1:30 PM BREAK

1:30 - 3:30 PM EVIDENCE IN WORKERS' COMPENSATION

Charles W. Ehrhardt, Emeritus Professor
Florida State University College of Law



The trials and tribulations of evidence, or the tribulations of trial evidence; states differ in their workers' compensation evidentiary standards, rules, and approaches. Professor Ehrhardt will bring the subject to the table with wit and wisdom for dealing with difficult objections to hearsay, authentication, relevance and prejudice.

3:30 - 3:40 PM BREAK

3:40 - 4:30 PM CODE OF JUDICIAL CONDUCT

Hon. James R. Wolf, Tallahassee, Florida
Florida First District Court of Appeal

Whether your state applies the Code of Judicial Conduct to you or not, these are great standards to live by on the bench. Judge Wolf brings experience, insight, and clarity to the canons that define appropriate judicial behavior. The Independence of the Judiciary is dependent upon the faith that litigants, counsel, and the public have in the impartiality and fairness of the process. That perception is in turn dependent upon each or our actions every day, and learning to apply the canons to shape the perceptions of your behavior on and off the bench is a great benefit to any Judge.

4:30 - 4:45 PM BREAK

4:45 - 5:15 PM NAWCJ ANNUAL BUSINESS MEETING AND ELECTIONS.

7:00 - 11:00 PM RECEPTION AND ENTERTAINMENT

NAWCJ Judicial College 2010

Section Two Main Program, Day Two (Tuesday)

Tuesday August 17, 2010

8:45 - 9:45 AM

LIVE SURGERY

Two Live Surgeries: Carpal Tunnel Release And Arthroscopic Meniscus

Moderator and Speaker:

Eric G. Bonenberger, MD
Orlando Orthopaedic Center

Surgeries Performed by:

Carpal Tunnel Release:
Lawrence S. Halperin, MD
Orlando Orthopaedic Center

Arthroscopic Meniscus:

Bryan L. Reuss, MD
Orlando Orthopaedic Center



Wait until you see what we have in store for you this year!!! This just keeps getting better. Watch and learn as two of the most renowned orthopaedic surgeons in Central Florida perform LIVE two of the most common surgeries in workers' compensation claims today. Dr. Lawrence S. Halperin, a board certified orthopaedic surgeon with over 20 years of experience in hand/upper extremity surgery will perform a carpal tunnel release. Dr. Halperin currently sits on the Board of Directors for the American Academy of Orthopaedic Surgery and Florida Orthopaedic Society. Dr. Bryan L. Reuss, a board certified orthopaedic surgeon who specializes in Sports Medicine and has extensive experience in shoulder and knee surgery will perform an arthroscopic meniscus surgery. Dr. Reuss has treated many athletes both in the professional and amateur arena, such as NFL, UFL, PGA, collegiate and high school. Although this presentation takes place as part of the Adjusters' Breakout, everyone is invited to attend.

9:45 - 10:00 PM BREAK AND TRANSITION

10:00 – 10:50 AM THE STRENGTHS AND WEAKNESSES OF IMPAIRMENT GUIDES

J. Mark Melhorn, M.D.

Wichita, Kansas
Orthopedic Surgeon, Hand Center

Dr. Melhorn is a nationally recognized expert in medicine and more specifically the causation of injury and return to work dilemmas. A hand surgeon by training and practice, he has edited two books for the American Medical Association: *A Physician's Guide to Return to Work* and *The Guides to the Evaluation of Disease and Injury Causation*. Dr. Melhorn has participated significantly in the editing of the American Medical Association Guides to Impairment that are employed by many states in their workers' compensation statutes and codes. Dr. Melhorn will provide insight on the purpose of such guides, their effectiveness as tools, and the academic debate surrounding the medico-legal decisions that are rendered each day using them.

10:50 - 11:00 AM BREAK

Continued, next page

NAWCJ Judicial College 2010

Section Two

Main Program, Day Two (Tuesday) Continued

11:00 -11:50 AM EFFECTIVELY WORKING WITH PRO SE LITIGANTS

Mark D. Poindexter, Deputy Chief Judge
Washington, D.C.
Office of Administrative Hearings

Does it seem like some cases take more of your time, staff time, and resources than others? This program will define some of the difficulties presented by the pro se litigant in workers' compensation. Deputy Chief Judge Poindexter, a national speaker on the subject, will provide insight into the conflict between effective litigation by pro-se litigants and the impartiality of the Judge.

11:50 -1:00 PM FLORIDA BAR WORKERS' COMPENSATION SECTION JUDICIAL LUNCHEON

1:00 - 2:00 PM ORAL ARGUMENT

Panel:

Honorable Paul M. Hawkes, Chief Judge
First District Court of Appeal
Tallahassee, FL

Honorable Charles Kahn
First District Court of Appeal
Tallahassee, FL

Honorable Joseph Lewis
First District Court of Appeal
Tallahassee, FL

Jon S. Wheeler, Clerk
First District Court of Appeal
Tallahassee, FL

Stephen M. Nevels, Marshal
First District Court of Appeal
Tallahassee, FL

Two actual cases will be argued live before a panel of Judges of the Florida First District Court of Appeal. The decision of the Court will be posted on the Court's website several weeks after the oral arguments take place. Although this presentation is part of Breakout for Adjusters, everyone is invited to attend

2:00 – 2:15 PM BREAK AND TRANSITION

2:15 – 5:00 PM EFFECTIVE LEGAL WRITING FOR JUDGES

John T. Salatti, Esq.
Washington, D.C.
LA Writers

Many have been credited with the quote "dying is easy, comedy is hard." In the same vein, perhaps adjudicating is easy, writing is hard, and editing is harder still. Judges struggle, sometimes unwittingly, with classic writing conflicts; who is our audience?, how much background is enough or too much? Mr. Salatti will apply years of writing and lecture skill to guide us through a step-by-step process for editing our orders, after which he and the group can discuss how better forethought *preceding* the original drafting may reduce editing time. This program will help us produce clear, concise, and effective rulings of value for the litigants before us, any reviewing courts or agencies, and the broader marketplace we serve.

5:00 – 5:15 PM BREAK AND TRANSITION

5:15 - 6:15 PM NAWCJ RECEPTION

Invited Guests, NAWCJ Members and NAWCJ Associate Members

NAWCJ Judicial College 2010

Section Three

Breakout Programs, Day Three (Wednesday)

Wednesday Breakout Option One:

**8:45 - 4:00 PM BREAKOUT ON ADVANCED MEDIATION TECHNIQUES FOR MEDIATORS,
ATTORNEYS AND ADJUSTERS**

(PRE-REGISTRATION IS REQUIRED. REFER TO REGISTRATION FORM ON PAGE)

This will be an exceptional opportunity for continuing education from masters in their fields, including Circuit Civil and Family mediators, lawyers, and mental health counselors. This one-day Continuing Mediation Education program will be presented in 1.5 credit-hour sessions. Every attendee will be able to attend five of the eight courses offered during the day, including all of the ethics, domestic violence, and cultural diversity required credits. In addition, claims personnel will continue to develop skills in the process of mediating issues.

8:45 - 10:00 AM SESSION ONE, SELECT FROM THE FOLLOWING:

20 COMMANDMENTS TO WHAT TO DO AND WHAT NOT TO DO

Richard Wack, Attorney and Circuit Civil Mediator
Winter Park, FL

This entertaining perspective is brought to you from Richard's experiences over 35 plus years of practicing law and mediating cases throughout Florida. There is very little out there that he has not run across at least once. Some tips may be reminders, but some will be new tools that you can file away to use in your daily mediation practice. This breakout is "general" credit. Recommended for: All mediators and claims personnel.

PROFESSIONALISM AND THE CHALLENGES OF OUR DIGITAL AGE

Carl Zahner, Attorney and Director Florida Bar Center for Professionalism
Tallahassee, FL

Carl is a long time champion of professional practice and ethical interaction. This program will provide insight concerning the intrusions of the digital age into litigation, through Facebook, Twitter, and beyond. Carl will focus on the threats posed ethically and professionally and equip you to deal with lawyers and parties that rely on evidence or inference from these sources. He will also address restrictions on mediator marketing. This breakout is "ethics" credit. Recommended for: All mediators.

DEALING WITH THE INTIMIDATION, VIOLENCE AND THEIR CONSEQUENCES

Tania R. Schmidt-Alpers, Attorney and Circuit Civil and Family Mediator
St. Augustine, FL

Tania is a divorce attorney and mediator with extensive multi-state legal experience. This program will focus on the ways domestic violence interferes with lives and with resolution of disputes, both within family law cases and more generally. She will direct you to hints and signs of such activity, as well as, counsel you on when and how you confront the subject in the course of working towards resolution and conclusion. This breakout is "domestic violence" credit. Recommended for: All mediators and claims personnel.

NAWCJ Judicial College 2010

Section Three

Breakout Programs, Day Three (Wednesday)

11:30 – 1:00 PM GENERAL SESSION AND LUNCH (PROVIDED FOR PRE-REGISTERED ATTENDEES OF MEDIATION BREAKOUT (DESSERT IN EXHIBIT HALL))

THE USE OF HUMOR IN MEDIATION – IT’S SERIOUS BUSINESS

Ross W. Stoddard, III, Attorney –Mediator
Irving, TX

Is laughter really the best medicine? Every experienced mediator has encountered spots during mediations where the use of humor has either worked very well – or NOT. Ross will enlighten us on some of the nuances of the use of humor during mediation, and offer some tips and suggestions of how -- and when -- to use it. This one-hour “general” credit program is presented by one of the founding directors of the Association of Attorney-Mediators and one of the most in-demand speakers in the country on the topic of mediation.

1:15 – 2:30 PM SESSION THREE, SELECT FROM THE FOLLOWING:

BREAKING IMPASSE AND THE MARTIAL ARTS: ADVANCING AS A KICK #\$\$% MEDIATOR

John W. Salmons, Attorney and Circuit Civil, Family and Federal Mediator
Ft. Lauderdale, FL

This highly interactive session trains mediators in conflict resolution from the perspective of an experienced mediator and martial artist. Learn how to defend yourself from declaring the dreaded “impasse.” John is a Shodan in the Cuong Nhu Oriental Martial Arts Association and Past President of the Florida Academy of Professional Mediators. This session is “general” credit. Recommended for: All mediators.

MEDIATOR ETHICS REGARDING THE CASTAWAYS: HUMAN INTERACTIONS, THEIR PERILS, AND MEDIATION

Michael Orfinger, Attorney and Circuit Civil Mediator
Daytona Beach, FL

Sit right back and you’ll hear a tale, a tale of a fateful trip. Imagine the conflicts among seven stranded castaways on a deserted isle for an extended time. Michael brings a wealth of experience and insight to the ethical considerations of human interaction, person to person and in groups. This amusing approach to examining human interaction dynamics will give you tools to manage those interactions through the mediation process. This breakout is “ethics” credit.

WHAT DO I DO WHEN?

Ross W. Stoddard, III, Attorney-Mediator (civil & probate)
Irving (Las Colinas), TX

Mediators often experience ethical dilemmas and difficult situations during mediations, putting them between the proverbial “rock and a hard place.” This highly interactive session will cover some of the challenging issues which confront mediators during mediations – from the beginning of the day to the final caucus. The objective is to provide each participant with some useful and usable tips which will be available to them in their next mediations. This session is one-hour of ethics credit and one-half hour of general credit.

NAWCJ Judicial College 2010

Section Three

Breakout Programs, Day Three (Wednesday)

DOMESTIC VIOLENCE AWARENESS FOR MEDIATORS

Haley Cutler, *Manager of Professional and Community Education,
Women In Distress of Broward County, Inc., Ft. Lauderdale, Florida*

The presence or history of domestic violence may compromise the integrity of the mediation process. This workshop will build the capacity of mediators to understand the dynamics of domestic violence, recognize the indicators that a party may be experiencing domestic violence and understand the appropriate interventions. Additionally, mediators will leave this training with tools for domestic violence screenings, safety planning and referrals for use when appropriate. Recommended for: All mediators.

2:45 – 4:00 PM SESSION FOUR, SELECT FROM THE FOLLOWING:

BREAKING IMPASSE AND THE MARTIAL ARTS: ADVANCING AS A KICK #&% MEDIATOR

John W. Salmons, Attorney and Circuit Civil, Family and Federal Mediator, Ft. Lauderdale, FL
Repeat of 9:00 a.m. program, see above.

MEDIATOR ETHICS REGARDING THE CASTAWAYS: HUMAN INTERACTIONS, THEIR PERILS, AND MEDIATION

Michael Orfinger, Attorney and Circuit Civil Mediator, Daytona Beach, FL

WHAT DO I DO WHEN

Ross W. Stoddard, III, Attorney-Mediator (civil & probate), Irving (Las Colinas), TX

WHAT DO I DO WHEN

Ross W. Stoddard, III, Attorney-Mediator (civil & probate), Irving (Las Colinas), TX



NAWCJ Judicial College 2010

Section Three

Breakout Programs, Day Three (Wednesday)

Wednesday Breakout Option Two:

9:00 - 3:00 PM MEDICARE BREAKOUT, THE BOLD NEW WORLD OF TAKING MEDICARE'S INTERESTS INTO ACCOUNT

With millions of baby boomers about to become retirees, an unstable economy and 10% unemployment, continued higher costs for medical services, an unknown and untested federal legislation, and studies indicating Medicare is projected to be insolvent by 2019, the federal government has turned to the Medicare Secondary Payer Act to force litigants to take Medicare's interests into account when monetary funds are being provided to the injured party to cover past and future medical expenses associated with the claimed accident and resulting injuries. This breakout will explore when and how litigants must take Medicare's interests into account, including in-depth panel discussions on mandatory insurer reporting, Medicare conditional payments, and Medicare set asides. The breakout will also explore Medicaid related issues, including resolution of Medicaid liens and the creation and administration of special needs trusts.

Program Moderator:

Rafael Gonzalez

*CEO of the Center for Lien Resolution and the Center for Medicare Set Aside Administration
Clearwater, FL*

9:00 – 9:10 AM INTRODUCTIONS

Rafael Gonzalez

*CEO of the Center for Lien Resolution and the Center for Medicare Set Aside Administration
Clearwater, FL*

Michael Wescott

*NAMSAP President
Maitland, FL*

9:10 – 10:05 AM TAKING MEDICARE'S INTERESTS INTO CONSIDERATION: MANDATORY INSURER REPORTING

Panel:

John Williams, President and CEO

*Gould & Lamb
Bradenton, FL*

Mark Popolizio, Attorney

*Vice-President, NuQuest
Longwood, FL*

Todd Belisle

*Vice-President, The Center for MSA Administration, LLC
Clearwater, FL*



This panel will present a comprehensive overview of the current and projected mandatory insurer reporting landscape as set out by Section 111 of the Medicare/Medicaid SCHIP Extension Act of 2007. The panel will discuss the contextual background of the Act, which entities are required to report to the government, what information is necessary for reporting, the penalties for incomplete submissions or non-compliance, as well as the effects of such reporting on the litigants and their case.

10:05 – 10:20 AM BREAK

NAWCJ Judicial College 2010

Section Three

Breakout Programs, Day Three (Wednesday), Continued

Wednesday Breakout Option Two:

10:20 – 11:10 AM **TAKING MEDICARE'S INTERESTS INTO CONSIDERATION: MEDICARE CONDITIONAL PAYMENTS**

Panel:

Roy A. Franco, Attorney
Corporate Director, Risk Management Services, Safeway, Inc.
Pleasanton, CA

Rochelle Lefler, Attorney
Corporate Counsel, PMSI
Tampa, FL

Floyd Faglie, Attorney
The Law Office of John Staunton, PA
Clearwater, FL

Panel members will go through a comprehensive overview of Medicare conditional payment subrogation rights. Within this context, the panel will review the governing articles of the Medicare Secondary Payer Act concerning payment subrogation, the conditional payment process and payback timeline, entity responsibility, and the applicable waiver and appeals process.

11:10 – 12:00 PM **TAKING MEDICARE'S INTERESTS INTO ACCOUNT: MSA ALLOCATIONS, APPROVALS, AND ADMINISTRATION**

Panel:

Angela Wolfe, RN, Attorney
Med-Fi
Bradenton, FL

Jacqueline Green Griffin, Attorney
Eraclides, Johns, Hall, Gelman & Goodman, LLP
Jacksonville, FL

Danny Alvarez, Attorney
The Center for MSA Administration, LLC
Clearwater, FL



The panel will analyze Medicare Set Aside (MSA) allocations, the MSA approval process, and MSA professional administration. Within this context, the panel will discuss the Medicare Secondary Payer Act and the various CMS Memoranda. Problems arise in cases because after the MSA is submitted to CMS, CMS rejects those numbers and substitutes its own numbers. What do you do now? Our panel of experts will guide you through this maze. Lastly, the panel will address the benefits and drawbacks of private and professional administration and what they mean to the Medicare beneficiary, the employer/carrier, and even the attorneys representing the parties.

12:00 – 1:00 PM **LUNCH (ON YOUR OWN)**

NAWCJ Judicial College 2010

Section Three

Breakout Programs, Day Three (Wednesday), Continued

Wednesday Breakout Option Two, Continued:

1:00 – 2:00 PM PROTECTING SUPPLEMENTAL SECURITY INCOME AND MEDICAID ELIGIBILITY: SPECIAL NEEDS TRUSTS

Panel:

Jana McConnaughay, Attorney
Waldoch & McConnaughay, PA
Tallahassee, FL

John Staunton, Attorney
The Law Office of John Staunton, PA
Clearwater, FL

Leo Govoni,
The Center for Special Needs Trust Administration, Inc.
Clearwater, FL

Supplemental Security Income (SSI) is a cash assistance program administered by the Social Security Administration, providing financial assistance to needy, aged, blind, or disabled individuals. Medicaid is the federally funded, but state run program, designed to provide medical benefits to needy, aged, blind, or disabled low income people. The panel will provide personal injury and workers' compensation professionals with basic information about both programs. The panel will also provide those in attendance with key information that will assist the parties in resolving claims in which such benefits are at stake, while maintaining eligibility for SSI and Medicaid.

2:00 – 2:15 PM BREAK

2:15 – 3:00 PM THE UNKNOWN FRONTIER OF MEDICARE SET ASIDES: MSAs AND LIABILITY CLAIMS

Moderator:

Michael Wescott
NAMSAP President
Maitland, FL

Panel:

Tom Basserman
CMS San Francisco Regional Office
San Francisco, CA

Sally Stalcup
CMS Dallas Regional Office
Dallas, TX



Since 2001, CMS memos have made it very clear that in workers' compensation cases, an approved MSA will satisfy the parties' burden to take Medicare's interest into consideration when settling future entitlement to medical care as a result of the claimed accident. However, without any such CMS memos on liability/personal injury cases, the litigants in liability matters have been left to decide for themselves what the thresholds are for liability MSAs, whether MSAs are at all necessary in such matters, and if so, whether they need to be approved by CMS. This panel, made up of CMS regional office managers, will venture into the unknown frontier of MSAs and liability claims.

NAWCJ Judicial College 2010

Section Three

Breakout Programs, Day Three (Wednesday), Continued

Wednesday Breakout Option Three:

8:45 - 3:00 PM BREAKOUT ON MULTI-STATE WORKERS' COMPENSATION LAWS

Program Moderator:

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

We are bigger and better this year with new jurisdictions participating. In addition to the Southeastern states of Alabama, Georgia, North Carolina, Mississippi, South Carolina and Tennessee, the state of Texas, a first time member of the Breakout in 2009, is back by popular demand. Furthermore, we are pleased to welcome Louisiana to our group in 2010. Legal experts from this broad spectrum of states will assist claims' handlers and employer management teams in the recognition of important jurisdictional trends, case law, cost saving techniques, and litigation strategies as a means to reduce workers' compensation exposure. Ours is an exceedingly unique format that is not to be missed. At the conclusion of the afternoon general session, the 2010 Multi-State Book of Workers' Compensation Laws will be provided to all break-out attendees. The book includes the workers' compensation statutes from each of the eight (8) participating states.

8:45 - 9:35 AM OPENING GENERAL SESSION: LEGAL TRENDS AND ISSUES FOR 2010

State Regulators:

Andrea Pope Roche (invited)
Chairperson, South Carolina Workers' Compensation Commission

Teresa Bullington (invited)
Director of Specialists, Tennessee Department of Labor

Liles Williams (invited)
Chairman, Mississippi Workers' Compensation Commission

Honorable Pamela Thorpe Young
Chair, North Carolina Industrial Commission

Honorable David Imahara
Administrative Law Judge, Georgia State Board of Workers' Compensation

Honorable Rick Thompson
Chairman, Georgia State Board of Workers' Compensation

Honorable Robert Lang
Deputy Commissioner for Hearings, Texas Department of Insurance, Division of Workers' Compensation

Honorable Sheral Kellar
Chief Judge, Louisiana Office of Workers' Compensation



9:35 - 9:45 AM BREAK

NAWCJ Judicial College 2010

Section Three

Breakout Programs, Day Three (Wednesday), Continued

Wednesday Breakout Option Three, Continued:

9:45 - 11:30 AM INDIVIDUAL STATE OVERVIEWS WITH Q&A

(Move into individual breakout rooms)

Alabama – Grand Ballroom 1
Georgia – Grand Ballroom 2
South Carolina – Grand Ballroom 3
Tennessee – Grand Ballroom 4
Mississippi – Grand Ballroom 5
North Carolina – Grand Ballroom 6
Texas – Boston (Hall of Cities)

11:30 - 12:30 PM LUNCH (PROVIDED FOR ATTENDEES BY MULTI-STATE COMMITTEE)

12:30 - 2:20 PM REPEAT OF INDIVIDUAL STATE OVERVIEWS WITH Q&A (CONCURRENT SESSION)

12:30 - 2:20 PM So You Think You Have It Bad? Comparing And Contrasting How Differently The Same Legal Issues Are Handled By Multiple Jurisdictions

Panel Discussion to include attorneys from the participating states.

2:20 - 2:30 PM BREAK

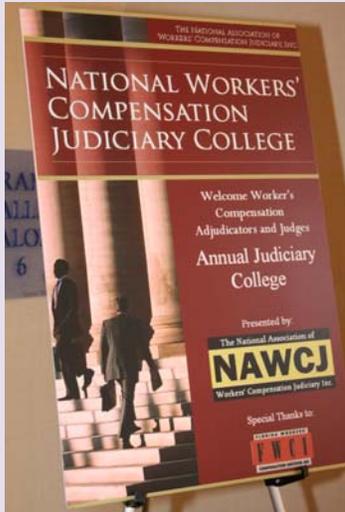
2:30 - 3:00 PM CLOSING GENERAL SESSION: CONCLUDING REMARKS AND SUGGESTIONS FROM THE REGULATORS/DOOR PRIZES/RELEASE OF 2010 MULTI-STATE STATUTE BOOK



NAWCJ Judicial College 2010

Section Three

Breakout Programs, Day Three (Wednesday), Continued



What they said about NAWCJ College 2009:

“Fabulous concept and program. Very useful information and wonderful to meet with judges from other states.”

“Overall, the seminar was extremely worthwhile. The hard work of everyone involved is greatly appreciated.”

“Very dynamic and compelling presentation.”

“Top-notch writing instructors like this year are always welcome.”

Last year's attendees requested:

“How to best deal with pro se claimants”

“a Multi-state discussion”

“Evidence”

“More judicial writing”

The 2010 Curriculum above delivers all this and much, much more!

NAWCJ College 2010 Registration Form

Name _____ First Name for Badge _____

Agency Name (as you wish it to appear on name badge) _____ Title _____

Business Mailing Address _____

City _____ State _____ ZIP _____

Telephone Number _____ Fax Number _____ Email Address _____

Continuing Legal Education License Number State/Association _____

Hotel Accommodations:

For your convenience a block of sleeping rooms has been reserved at the Orlando World Center Marriott for this event. Please complete the following information and a reservation will be processed for you. The sleeping room rate is \$164. Cut-off July 30, 2010.

Number of Rooms _____ Smoking Non-smoking Arrival Date 08/_____/2010 Departure Date 08/_____/2010

Check here if you have special needs that require attention.

College Registration Fee:

NAWCJ Members:

\$200.00 if paid on or before July 31, 2010

\$225.00 if paid on or after August 1, 2010

Non-Members

\$240.00 if paid on or before July 31, 2010

\$265.00 if paid on or after August 1, 2010

Method of Payment: Check Mastercard VISA American Express Discover

Credit Card Account Number _____ Expiration Date _____ CVV _____ Signature _____

Make Checks Payable To: The National Association of Workers' Compensation Judiciary, Inc.

FEIN # 26-4598530

Online Registration Is Available on June 15, 2010 At www.nawcj.org.

Registration: To register, mail the completed registration form, along with credit card information (VISA/MC/AmX/Discover) or a check made payable to: The National Association of Workers' Compensation Judiciary, Inc., P.O. Box 200, Tallahassee, Florida 32302-0200; fax form to (850)521-0222; or register online at www.nawcj.org. Registration for the Judiciary College will include conference handout materials, access to the exhibit area, Monday night reception, and participation in the Annual Workers' Compensation Educational Conference. Onsite Registration is \$225.00 for NAWCJ members, or \$265.00 for non-members. For more information, contact the National Association of Workers' Compensation Judiciary at (850) 425-8156 or 425-8155.

YOU MUST BE AN ADJUDICATOR OR ADJUDICATION ADMINISTRATOR TO ATTEND.

Contributions, gifts, or dues to the NAWCJ are not deductible as charitable contributions for federal income tax purposes.

To Attend the Mediation Program, You Must Complete this Form, and only this Registration Form. Attendance at the entire FWCI program is included in your Mediation Program Registration.

If You have Already Registered for the NAWCJ Program, You Must Still Complete and Return this Form so We can Reserve Enough Lunch.

Name _____ First Name for Badge _____

Business Mailing Address _____

City _____ State _____ ZIP _____

Telephone Number _____ Fax Number _____ Email Address _____

Check here if you have already registered and this is only submitted so that you will be counted for lunch on Wednesday _____

Hotel Accommodations:

For your convenience a block of sleeping rooms has been reserved at the Orlando World Center Marriott for this event. Please complete the following information and a reservation will be processed for you. The sleeping room rate is \$163. Cut-off August 1, 2010.

Number of Rooms _____ Smoking Non-smoking Arrival Date 08/_____/2010

Departure Date 08/_____/2010

Check here if you have special needs that require attention.

Registration Fee: \$225.00

Method of Payment: Check Mastercard VISA American Express Discover

Credit Card Account Number _____ Expiration Date _____ CVV _____ Signature _____

Make Checks Payable To: Florida Workers' Compensation Institute; FEIN # 26-4598530

Online Registration Is Available on May 15, 2009 at www.fwciweb.org (Click on "conference").

Registration: To register, mail the completed registration form, along with credit card information (VISA/MC/ AmX/Discover) or a check made payable to: Florida Workers' Compensation Institute, P.O. Box 200, Tallahassee, Florida 32302-0200; fax form to (850)521-0222; or register online at www.fwciweb.org. Registration for the Mediation Program will include conference handout materials, access to the exhibit area, Monday night reception, and participation in all educational opportunities of the Annual Workers' Compensation Educational Conference. For more information, contact the Florida Workers' Compensation Institute at (850) 425-8156 or 425-8155.

NAWCJ College 2010 Scholarship Application

Name _____

Agency Name _____

Title _____

Business Mailing Address _____

City _____

State _____

ZIP _____

Telephone Number _____

Fax Number _____

Email Address _____

Required Information:

I certify that I have contacted the agency for which I work and have accurately reflected the funding available below.

| | Source | Amount Provided |
|----------------|--------|-----------------|
| Tuition | _____ | \$ _____ |
| Lodging | _____ | \$ _____ |
| Meals.Per Diem | _____ | \$ _____ |
| Travel | _____ | \$ _____ |

I am requesting financial assistance from the NAWCJ for the following:

| | | |
|---------|-------|----------|
| Tuition | _____ | \$ _____ |
| Lodging | _____ | \$ _____ |
| Other | _____ | \$ _____ |

I have received financial assistance from the NAWCJ in the past for the following programs:

Program _____ Date _____

Program _____ Date _____

Judge's Signature _____

Date _____

Mail your application to:

Hon. John J. Lazzara, NAWCJ President
P.O. Box 200,
Tallahassee, FL 32302-0200
850.488.2110 850.922.3661 (Fax)
Email: jjl@nawcj.org