National Association of Workers' Compensation Judiciary

Lex and Verum

Number XIV, 1010

"What a difference a day (100 years) makes?"

Workers' Compensation 1911-2011

Time is inexorable, and "progress" is at least arguably so. In 2011, workers' compensation will celebrate its 100th birthday in this country. That revelation is news to many, as most of us labor on in systems that are not yet that old. Some of us will not be here to celebrate the 100th anniversary of the particular state system in which we labor daily. The Workers' Compensation Centennial Commission (WCCC)[1] is an independent group formed for the purpose of celebrating the first workers' compensation law in the United States, signed on May 3, 1911 and taking effect about four months after on Sept. 1, 1911 in Wisconsin. They are planning now so that this anniversary is duly acknowledged.

Workers' Compensation was clearly not invented in the United States. The birth of modern workers' compensation may have been in Prussia (Germany) in the 1870s and 1880s. Some credit Maryland with passage of the first U.S. workers' compensation law, in 1902.[2] Others credit New York with the first.[3] Others credit Wisconsin with passing the first "comprehensive"[4] workers' compensation law in the U.S in 1911. Gregory P. Guyton asserts that this Wisconsin law was among ten state laws passed in 1911, and that thirty-six states joined that group between 1911 and 1920. (Endnote 4). If this historical recitation is accurate, then many states will celebrate the centennial of their workers' compensation statutes in the next few years. He concludes that Mississippi was the last state to enact a workers' compensation law, in 1948.

In the last century, the world has changed dramatically in so many ways. Of these, arguably the technological changes have been the most momentous. Groundbreaking innovations like mimeograph copies, memory typewriters, and facsimile machines have come to the practice of law, and then faded to the background as they were replaced with the personal computer, photocopiers, and e-mail. Niels Bohr said that "technology has advanced more in the last thirty years than in the previous two thousand. The exponential increase in advancement will only continue." The volume of information available, and the efficiency of the advances in methodology for accessing and using that information are both advancing, and changing the world around us. The sheer volume of information on the internet, and the rate of data growth are staggering. It has been said that "if you tried to read every document on the web, then for each day's effort you would be a year further behind in your goal," although the source of that thought has not been identified, it illustrates the sheer volume at which documents and information are added to the web.

As we celebrate the origins of workers' compensation as a process or system, we pause to consider the impact of these changes in technology and information access upon this practice. We will struggle in coming months to describe some of the many ways that technology impacts the system generally, and more specifically the tasks associated with adjudicating the benefit disputes within the systems. On page 11 of this edition, we highlight an upcoming program of the ABA that will mark the Centennial of this often perplexing institution that is our livelihood and passion.

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[1] http://www.workerscomp100.org/index.html
[2] http://en.wikipedia.org/wiki/Workers'_compensation#cite_note-14
[3] http://eh.net/encyclopedia/article/fishback.workers.compensation
[4] http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1888620/

"History consists of a series of accumulated imaginative inventions."
Voltaire

"Second Fridays" 2011

November 12, 2010
The Latest on Spinal Surgeries: A Discussion on Procedures and Outcomes
Trang H. Nguyen, Ph.D.
Fellow of Occupational and Environmental Medicine
University of Cincinnati College of Medicine
Cincinnati, OH

Workers' Compensation, a Brief History

by Lloyd Harger, Florida Division of Workers' Compensation

Simply defined, workers' compensation recompenses, gives something to a worker, one who performs labor for another, for services rendered or for injuries. This simple definition is taken in part from Webster's Ninth New Collegiate Dictionary and in studying this subject closely, we find this definition extremely accurate. Workers' compensation is not "insurance", rather, it is social insurance, much the same as unemployment compensation and social security. It is however, the oldest form of social insurance.

Insurance, as defined, is coverage by contract whereby one party undertakes to indemnify or guarantee another against loss by a specified contingency or peril. The very word "Insurance" comes from the Latin word for "Security". The word "Policy" comes from the Italian language meaning "Promise." The first evidence of insurance appeared in China around 3000 BC when merchants would divide their cargo into several ships, protecting their investments and dividing any losses among themselves. This system was continued forward and in 1750 BC the Babylonians devised a system where the merchant would borrow money to finance his shipment of goods. He paid the lender an additional sum of money and in exchange for this additional sum, the lender agreed to cancel the loan should the shipment be lost or stolen. This system was recorded in the Code of Hammurabi around 1750 BC. The Romans are credited with developing life and health insurance through guilds or clubs around 600 AD.

Under the various workers' compensation systems, insurance is purchased or provided by employers through individual insurance companies, funds, or self insurance plans to provide the worker with the indemnity and medical benefits required by the laws or acts of the various states or provinces. The Jones Act, Harbor worker's, Longshoremen's Act, the Federal Workers' Compensation act, are all under governmental regulation and administration but the purpose of these laws are all the same, to compensate the injured worker for loss of wages and medical benefits. All are meant to be self-executing and are constantly changing, but they are still there, protecting not only the worker, but the employer as well and have been for many years.

Moving through history, very little is found regarding workers' compensation, although other forms of protection against the liability of one against another come to light and the term known as "insurance" becomes popular. Common law was the avenue for claims against another. Under liability, the "duty" and "breach of duty" of one to and against another was the rule to follow. It wasn't until the early 18th century that the "respondeat superior" doctrine under "Old English" law came into being. Under this doctrine, the master (employer) was held to be liable for damages to a third person caused by a servant's (employee) act or omission while the servant was acting within the course and scope of employment. Not many workers were protected under this doctrine unless they were injured by a fellow worker. Overall, it was still another step in the right direction.

The Modern Birth in Europe

Germany took the lead in the protection of injured workers in 1838 by passing legislation protecting railroad employees and passengers in the event of accidents. Further changes were made in 1854 when a law was passed requiring certain classes of employers to contribute to sickness funds and in 1876 a "Voluntary Insurance Act" was passed, which failed in actual operation. Bismarck introduced a Compulsory Plan in 1881, which was enacted in stages and finalized in 1884 and is the model for our present system.

"Workingmen's" Compensation bloomed in England in 1880 when the English Parliament passed the "Employer's Liability Act." Industrialization swept across Europe like a storm in the 1800's. In England, under English Common Law, the injured worker had only one recourse and that was to sue the employer. It was virtually the same system that existed in Germany who, for many years, had been closely allied with England in many business ventures.

Continued, Page 3

Interesting Articles on the NAWCJ website at http://www.nawcj.org/EdArtsandPubs_Articles.htm

A Brief History, Continued from Page 2.

Enter the Legal Profession

Barristers, solicitors and others with legal knowledge and training came forward in increasingly large numbers from 1850 forward and represented the injured workers on a contingency or percentage of what they could collect basis. Although the burden of proof was on the worker as well as other legal expenses, the courts became backlogged and the general public suffered from this unfair and inefficient system as crowded dockets and few judges delayed other civil actions. In the midst of this chaos and confusion, it was noticed that the worker was beginning to prevail in these actions and with the growing legal profession's assistance were tying up attaching machinery, buildings and property of the employers through liens and attachments

In 1897, England repealed the employer's liability act of 1880 and replaced it with a "workmen's" compensation act. Meanwhile, the storm that swept through Europe during this period of industrialization reached the shores of the United States fueled by the aftermath of the Civil War from 1861-1865.

Into the 20th Century

The northern states in this great conflict geared up for the war through the building of factories to produce various armaments with the iron and steel industries taking the lead. However, it was the garment industry in the New York/New Jersey area that brought attention to the plight of the injured worker. Previously making uniforms for the soldiers of the Union, this industry converted rapidly to the manufacturing of clothing for civilian wear after the war ended. These "sweatshops" paying very little yet demanding high production, became the target for the earliest litigation on behalf of injured workers who were usually paid nothing if they were injured on the job. Safety was nearly non-existent.

Through the 1880's to the turn of the century, the legal profession in the United States was also growing and the increase of lawsuits had the same effect on the judicial system in the United States that it had in England and Germany. First, the crowded dockets, second, few judges to handle the cases and third, and most important to the worker, judgements were rendered in favor of the worker at a steadily increasing rate. By 1908, the workers were winning in nearly 15% of all cases. The American concept of "workmen's" compensation was now based on that of Germany and England's philosophy, that industry is responsible for the costs of injuries inherent in industrial occupations.

The first "workmen's" compensation law passed in the United States was the Federal Employer's Liability act. Covering certain Federal Government employees engaged in hazardous occupational duties as well as employees of common carriers engaged in interstate and foreign commerce. It was adopted in 1908 at the urging of President Theodore Roosevelt. He pointed out to congress that "the burden of an accident fell upon the helpless man, his wife and children" and that this was "an outrage." So it was that the Federal Government took the lead in providing workers with protection in the event of on the job injuries in the United States.

Not Quite Ready

Prior to 1908, there was an attempt by several states to do something for at least some workers. These attempts were in the form of legislation of employer liability acts. These acts were based on the theory that the employee must bear his own economic loss from an industrial accident unless he could show that some other person was directly responsible, because of a negligent act or omission, for the occurrence of the accident. These acts brought some of the workers into the same arena of litigation as a common stranger and the employer's liability was limited to his own negligence or at most, for the liability of someone for whom he was directly responsible, under the doctrine of Respondeat Superior. Georgia passed their act in 1855 and by 1907, 26 states had passed employer liability acts.

None of these state acts embodied an actual compensation principle and most simply said, "prove it" and sue. In 1902 the state of Maryland came close, passing an act that provided for a cooperative accident insurance fund. Benefits were provided only for fatal accidents and the law was ruled unconstitutional 3 years later. In 1908, Massachusetts passed an act authorizing establishment of private plans for compensation upon the approval of the state board of conciliation and arbitration. This act faded into obscurity soon after passage. New York adopted a workmen's compensation act which was compulsory for certain hazardous jobs and optional for others.

One year later in 1911, the Court of Appeal of New York in the Ives v. South Buffalo Railway Company case ruled the act unconstitutional on the grounds of deprivation of property without due process of law. The state of New York had been a controversial stage for "workmen's" compensation since 1898, when the Social Reform Club of New York drafted a bill to take before the state legislature that proposed compensation for certain types of industrial accidents.

Continued, Page 5

In Keeping with our mission to facilitate and encourage education, collegiality and interaction for those who adjudicate workers' compensation disputes, the National Association of Workers' Compensation Judiciary is pleased to provide the following information on the next meeting of the Southern Association of Workers' Compensation Administrators (SAWCA). You can learn more about SAWCA by visiting their website, *www.sawca.com*

SAWCA

The Southern Association of Workers' Compensation Administrators

The Southern Association of Workers' Compensation Administrators, Inc. (SAWCA) is a cooperative effort of nineteen jurisdictions; seventeen states, the District of Colombia and the Virgin Islands. The States are: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia and West Virginia. SAWCA was formed in 1949 and incorporated in 1980. The Mission of SAWCA is to make available and present instruction by means of forums, lectures, meetings, and written material regarding the administration of workmen's laws and to provide an avenue by which those interested in workers' compensation may interact with one another to share information and address issues common to the jurisdictions that are members of the association.

2010 ACC Registration

The Southern Association of Workers' Compensation Administrators Invites You to Join Them for the 2010 All Committee Conference Beginning November 8, 2010 at

The Greenbrier

White Sulphur Springs, WV

Summary: Attendee Convention Registration - $350; Companion Registration - $100; For More Convention Information: Visit www.sawca.com / call Gary Davis - (859) 219-0194 / email at gary.davis@sawca.com; Hotel Accommodations: $199 / Call The Greenbrier at: 800-624-6070. Wish To Arrive Early or Stay Late...Take Advantage of the Exclusive SAWCA Rate of $125.00 . Enjoy Two Extra Nights At "America's Resort… The Greenbrier.

Monday, November 8
Ex. Com. Meeting 2pm -5pm
Ex. Com. Dinner 7pm -9pm

Tuesday, November 9
Opening General Session 9am -12pm
Committee Meetings: 2pm - 5pm
Claims Administration
Admin. & Procedures
President's Reception 6pm - 8pm

Wednesday, November 10
Committee Meetings: 9am -12pm
Self Insurance & Insurance
Management Information Systems
Convention Lunch Noon - 1:30 pm
Committee Meetings: 2pm -5pm
Adjudication
Medical Rehabilitation
Coffee, Cordials, Confections 8:30 - 10pm

Thursday November 11
General Session 9am -11am

A Brief History, Continued from Page 3.

Labor unions, strangely enough, were the main opposition mainly because they feared that state control of worker's benefits would reduce the popularity of unions as well as the worker's loyalty. It essentially never got off the drawing board. "Workmen's" Compensation was on the move; the Federal Government took the first solid step with the Federal Employer's Liability Act, now the states took their turn.

The Great Trade Off

The individual states moved a little slower and the year 1911 is most significant in the history of workers' compensation in America. Wisconsin was the first state to adopt a "workmen's" compensation law that was to remain under debate for many weeks. The employers lobbied the state legislature for what is now known as the "great trade-off." Through this legislation, the employer agreed to provide medical and indemnity (wage replacement) benefits and the injured employee agreed to give up his/her right to sue the employer. It was clear that the growing success of litigation was beginning to be felt by the business community. This same year, 1911, ten more states enacted "workmen's" compensation laws. Four more states adopted laws in 1912, and eight more passed laws in 1913. By 1948, all the states had at least some form of "workman's" compensation in effect including Alaska and Hawaii. Although they did not acquire statehood until 1959, they had taken the step to adopt legislation in 1915 when they were territories. Today, in addition to the 50 states, workers' compensation laws are in effect in the District of Columbia, Puerto Rico, Virgin Islands, the Navajo Nation, the Dominion of Canada, and 12 Canadian Provinces. Workers' compensation has become the exclusive remedy for the injured worker. It also protects employers from damage suits filed by the injured worker as well as provides employers with a basis for calculating production costs.

The foregoing was reprinted with permission from the Florida Division of Workers' Compensation website, http://www.myfloridacfo.com/wc/*http://www.myfloridacfo.com/WC/history.html*

The College of Workers' Compensation Lawyers 2010 Writing Competition for Law Students

Submissions are now being accepted for the 2010 College of Workers' Compensation Lawyers Law Student Writing Competition.

The scope of permissible topics is broad, i.e., any aspect of workers' compensation law. Students are encouraged to present a public policy issue, a critique of a leading case or doctrine, or a comment on a statute or the need for a statutory modification.

All students currently enrolled in accredited law schools in the United States and all those recently graduated from them (graduation on or after May, 2009).

Prizes available as follows: First prize - $1,500.00, Second prize - $1,000.00, and Third prize - $500.00

The winner's article will also be considered for publication in the Workers' First Watch, The Workers' Injury Law and Advocacy Group (WILG) magazine, or in a future issue of an appropriate ABA committee newsletter or journal. The winner will also be invited (expenses paid) to the Annual College Induction Dinner to be honored during the program.

Articles must be original from the applicant, and limited to one entry. Articles must not presently be under consideration for any other publication or written as part of paid employment.

The due date is November 1, 2010. For more information, visit their website, http://www.collegeofworkerscompen sationlawyers.org/index.html

The Articles on Pages 10 and 11 are reprinted courtesy of WorkCompCentral.com. Their generosity with such reprints helps make this publication possible.

The NAWCJ acknowledges the Florida Workers Compensation Institute, the Florida Office of Judges of Compensation Claims, NAWCJ President John Lazzara, FWCI Chairs James McConnaughhay and Steven Rissman. Without them, there would be no NAWCJ.

Bullying from the Bench

By Steven Lubet*

Sitting in Galveston, Texas, federal district Judge Samuel B. Kent has little use for inept attorneys – and he often lets them know it in uniquely colorful terms. Thanks to the Internet, lawyers all over the country are now aware of Judge Kent's penchant for chastising incompetent counsel, since several of his unorthodox opinions have been widely circulated via email and various website postings. For those who have not been let in on the fun, here are some choice excerpts from Judge Kent's recent opinion in B*radshaw v. Unity Marine Corporation.*[1]

> Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact – complete with hats, handshakes and cryptic words – to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions. With Big Chief tablet readied, thick black pencil in hand, and a devil-may-care laugh in the face of death, life on the razor's edge sense of exhilaration, the Court begins.

After explaining why the defendant's brief was particularly bad, Judge Kent then turned his attention to the efforts of plaintiff's counsel.

> The Court commends Plaintiff for his vastly improved choice of crayon – Brick Red is much easier on the eyes than Goldenrod, and stands out much better amidst the mustard splotched about Plaintiffs briefing. But at the end of the day, even if you put a calico dress on it and call it Florence, a pig is still a pig.

Many lawyers reacted with guffaws, or at least amused chuckles, enjoying Judge Kent's caustic wit. For example, a colleague of mine suggested that we distribute the opinion to our students with a warning that "This is what can happen if you don't study hard in law school." I am told of judges who "got quite a hoot" from it, remarking "this judge is a riot" and "I only wish that I had written it."

Schadenfreude runs deep. It is easy to take guilty pleasure in the misfortune of others, especially when they appear to be as bumbling as the lawyers who drew Judge Kent's wrath. After all, they both apparently filed briefs that were devoid of meaningful authority, while failing to address the central issue before the court. We have all seen the havoc wreaked by poor lawyering, and it is tempting to snicker that the dummies deserved whatever they got.

Let's resist that urge, at least for the time being, while we think a bit about the use and misuse of judicial opinions. In that regard, Judge Kent's stylings turn out to be a symptom, or perhaps an exemplar, of a more general problem for both the judiciary and the legal profession.

Federal judges exercise enormous power over lawyers and their clients. Armed with life tenure and broad discretion, a judge can do great damage to an attorney's reputation and career, while the lawyer has almost no recourse. So when Judge Kent decided to torment the hapless counsel in the Bradshaw case – who are identified by name in the published opinion – he was taking aim at people who could not defend themselves. Under prevailing law, they cannot even get their case transferred to a new judge.[2] They just have to grin and bear it, in the hope that "His Honor" doesn't decide to go after them again.

In litigation, the judge is the maximum boss. Everyone else is a supplicant, compelled to engage in stylized demonstrations of obeisance. We stand when the judge enters and leaves the room. Our "pleadings" are "respectfully submitted." Before speaking, we make sure that it "pleases the court." We obey the judge's orders and we even say "thank you" for adverse rulings. These are the mandatory trappings of respect, but they do not ensure that a judge's actions will always be respectable.

By belittling the lawyers who appear before him, Judge Kent used his authority to humiliate people who – in the courtroom environment – are comparatively powerless. There is a name for that sort of behavior, and it isn't adjudication. It's bullying.

Continued, Page 7

Bullying, Continued from Page 6.

It smacks of nothing so much as the biggest boy on the playground picking on the smaller kids who are unable to fight back.[3] Even the "crayon" taunt reveals the judge's own schoolyard perspective, much more than it tells us anything about his unfortunate targets.

And this is no defense of the *Bradshaw* attorneys. I assume that their work was thoroughly dismal and that Judge Kent's legal judgments were unfailingly correct. But a federal judge has many decent, reasonable ways of dealing with inadequate lawyers. He can chew them out in court, he can call them into chambers, he can require them to rewrite their briefs, he can sanction them under 28 U.S.C. § 1927. Any one of those steps could have been taken with a far greater remedial effect than can be achieved through public shaming. Elementary schools long ago abolished the dunce cap, recognizing that it was both cruel and counterproductive.

Publication of an opinion, however, is an extraordinary measure. As Professor David McGowan recently pointed out, there are very good reasons for courts to avoid the unnecessary proliferation of published opinions.[4] The Judicial Conference of the United States has endorsed a resolution on the limitation of publication, suggesting that it be restricted to "decisions of precedential import."[5] The Fifth Circuit rule, adopted January 1, 2001, notes that "the publication of opinions that merely decide particular cases on the basis of well settled principles of law imposes needless expense on the public and burdens on the legal profession."[6]

By any standard, Judge Kent's opinion in *Bradshaw* has scant precedential value. The actual issue in the case is a garden variety application of the *Erie* doctrine to a statute of limitations question, which the court answered in a single paragraph while remarking that it could be "readily ascertained."[7] Thus, the only possible purpose for publication was to add to the embarrassment of the attorneys. I have no quarrel with embarrassing lawyers when it is necessary to the outcome of a case – as obviously happens in Rule 11 decisions and in *Habeas Corpus* petitions based on inadequate representation, for example. But in *Bradshaw* the comments were entirely gratuitous, not even rising to the level of dicta.

Furthermore, there are severe costs when courts use published opinions for the purpose of humiliation, even when couched in humorous terms.[8] First, we ought to worry about the impact on the parties. *Bradshaw* is a Jones Act case, involving serious personal injuries to a seaman. Judge Kent's decision dismissed an important defendant from the case, causing a definite setback to the plaintiff. Imagine how the injured Mr. Bradshaw would feel upon reading this passage from the opinion:

> After this remarkably long walk on a short legal pier, having received no useful guidance whatever from either party, the Court has endeavored, primarily based upon its affection for both counsel, but also out of its own sense of morbid curiosity, to resolve what it perceived to be the legal issue presented. Despite the waste of perfectly good crayon seen in both parties' briefing (and the inexplicable odor of wet dog emanating from such) the Court believes it has satisfactorily resolved this matter. Defendant's Motion for summary Judgment is granted.[9]

Continued, Page 8

The NAWCJ "Second Fridays" Education Programs are Made Possible in Part by a Grant from the Florida Workers' Compensation Institute.

Thanks FWCI!

"The position of a Judge has been likened to that of an oyster anchored in one place, unable to take the initiative, unable to go out after things, restricted to working on and digesting that which the fortuitous eddies and currents of litigation may bring his way."

Louis D. Brandeis

"The idea of a fair trial has been the greatest contribution made to civilization by our Anglo-American polity."

Arthur L. Goodhart

"But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary."

Robert H. Jackson.

"The elaborate argument . . . does not need an elaborate answer."

Oliver Wendell Holmes

Bullying, Continued from Page 7.

Put aside the fact that Mr. Bradshaw was injured when climbing from a tugboat to the pier, which Judge Kent chose to use as part of a joke. Until seeing this excerpt, Mr. Bradshaw might once have believed that federal judges decided cases out of an obligation to justice, not out of affection for counsel, and certainly not out of morbid curiosity (another bad joke). He would surely be confused, or more likely appalled, by the court's trivializing reference to the odor of a wet dog. And remember, the plaintiff lost. Although you would not know it from reading the opinion, the case was about Mr. Bradshaw, not about the judge's relationship to the lawyers. Will Bradshaw be able to read Kent's opinion and feel that he received a fair hearing?

Then there is the problem of civility. Many observers, including a good number of federal judges, have bemoaned the decline of civility in the courts. Rambo lawyers, it is said, are too combative, too overbearing, too ready to substitute personal attacks for advocacy. But why should lawyers be polite when the court itself insults and demeans them? If the judge calls my adversary "blithering counsel," adding that his work is "asinine tripe,"[10] why should I treat him any differently? If the court engages in that sort of name-calling, why shouldn't I incorporate similar bombast into my own arguments and briefs? What hope is there for civility, when the judge himself coarsens the discourse?

By modeling intemperate behavior, Judge Kent merely invites more of the same from the lawyers in his court and beyond (given the Internet-driven notoriety of Kent opinions). As an old Yiddish saying puts it, a fish rots from the head.

We might also be concerned about the quality of justice being dispensed in Judge Kent's courtroom. As stated earlier, I have assumed thus far that all of Judge Kent's decisions have been legally correct. In fact, however, there are reasons to doubt his rulings. When the court becomes so contemptuous of lawyers, and so eager to insult them in public, we must wonder whether its judgments are truly free of bias. A judge who becomes so incensed just might possibly be inclined to take it out on the offending counsel (and by extension, on counsel's client).[11] Of course, there is no way to know for sure. Judges make thousands of discretionary decisions in the course of resolving motions or trying cases. Most of those decisions are not subject to review; many are not even recorded. Does the judge listen closely to the arguments of "blithering" lawyers? Will you get a fair hearing in your next case, if the judge said your last smelled like a wet dog? Is the judge open minded, or is he just playing gotcha? Judge Kent, no doubt, believes that he is scrupulously even handed, but we are entitled to question his level of self-awareness, given how little self-consciousness he has shown in several of his opinions.

Finally, we have to consider the morale of the lawyers. I don't mean we should worry about whether their feelings have been hurt. Lawyers are all grown-ups, and most of them are pretty well-paid. But we do have to worry about the vigor of the advocacy in Judge Kent's courtroom. Will lawyers pull their punches for fear of incurring Judge Kent's ire? In the *Labor Force* case, Judge Kent blistered a lawyer for seeking a change of venue, per 28 U.S.C. § 1406(a), rather than moving for transfer to a new division, per 28 U.S.C. § 1404(a).
Admittedly, the mistake was elementary, and counsel compounded it by bringing his motion under Rule 12(b)(3), but Judge Kent's reaction was. In addition to insulting the lawyer in scathing terms, the court determined that the attorney was "disqualified for cause from this action for submitting this asinine tripe."[12]

Imagine that you are a young (or not-so-young) lawyer with a case before Judge Kent. Now imagine that you want to advance a novel claim or make an innovative motion. You know that your chances are slim, but you believe that your position is supported by a "good faith argument for an extension, modification or reversal of existing law."[13] Judge Kent, however, has a reputation for seeing things in stark black and white. And when he thinks something is "asinine," well, the roof caves in.[14] How much would you be willing to risk in order to bring your inventive motion? Would you be willing to see yourself maligned in a published opinion? Vilified by name in Internet postings across the country? Removed from the case, with the consequent responsibility of explaining it to your client?

No matter what the merits of their positions, lawyers will obviously have to tread softly in Judge Kent's courtroom. In a system that is premised on zealous advocacy, that's just a shame.

Samuel B. Kent is not the only martinet on the federal bench, alas. But he has succeeded in becoming the best known by virtue of his intentionally outlandish, publicity-seeking opinions. One of the great strengths of our Constitutional system is that federal judges are appointed for life – a measure intended to assure the independence of the judiciary. Occasionally, however, a judge, for reasons of large ego or poor judgment, mistakes independence for license and becomes abusive. Unfortunately, there is no good response to that sort of misconduct, which often tends to get worse over time. Lawyers may talk behind the judge's back, but in the courtroom it pretty much has to be "Yes, Your Honor," and "Thank you, Your Honor," lest the client suffer.

Continued, Page 9

Bullying, Continued from Page 8.

But silence in the face of invective only encourages more of the same. And laughter at the ill fate of others – even when they are bunglers – just enables further victimization. Judge Kent, and others like him, need to know that ridicule isn't funny. It's just mean. It isn't judging, it's just showing off. I agree that slipshod lawyering can be a problem. But in the end, an incompetent lawyer is far less dangerous than a judicial bully.

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Ed. Notes: (1) Quotes from Judge Kent's decision in *Bradshaw* were included in the September 2010 *Lex and Verum*. (2) Judge Samuel Kent plead guilty to one count of obstruction of justice in February 2009, avoiding a potentially humiliating trial on that charge and five others accusing him of abusing two employees. The U.S. House impeached Judge Kent in June 2009. Before the U.S. Senate could proceed with hearing the trial on the impeachment, Judge Kent submitted his resignation, from prison, effective on June 30, 2009.

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* Steven Lubet is the Williams Memorial Professor of Law at Northwestern University. His newest book is *Fugitive Justice: Runaways, Rescuers, and Slavery on Trial*. This article was originally published in The Green Bag, Autumn 2001.

[1] 147 F. Supp. 2d 668 (S.D. Tex. 2001). The full text of the opinion, including the names of the lawyers, was also published in the *Legal Times* with the following introduction: "Though the opinion starts in a conventional enough manner, don't be fooled. For anyone thinking that pretrial motions, summary judgments, or even professional responsibility issues need be boring, read on! For the record, we have it on good word that, despite Judge Kent's claims to the contrary, the attorneys did not use crayons to draw up their briefs." Legal Times, August 20, 2001, page 43.

[2].A judge's expression of dissatisfaction with counsel is not a basis for mandatory recusal under 28 U.S.C. § 455, especially when there is no extrajudicial source for the court's displeasure. See generally, Shaman, Lubet & Alfini, Judicial Conduct and Ethics 3d, pp. 102-104 (explaining "extrajudicial source" rule as it applies to judge's bias or prejudice against counsel). Moreover, it would be hard to argue that Judge Kent's opinion raises a reasonable question as to his impartiality, per 28 U.S.C. § 455 (a), since he was equally nasty to both sides.

[3] Or perhaps the more apt analogy is to the gunslinger who uses his six-shooter to make a tenderfoot "dance," for the entertainment of everyone in the saloon.

[4] David McGowan, "Judicial Writing and the Ethics of the Judicial Office," 14 Geo. J. Legal Ethics 509, 568, 574 (2001). As Professor McGown explains, "The choice to make a public example of private conduct must be made with care." Id at 568.

[5] Judicial Conference of the United States, Long Range Plan for the Federal Courts 69 (1995), cited in McGowan, supra at 575. The recommendation referred to appellate opinions, but the same logic certainly applies to trial court opinions.

[6] Rule 47.5, Rules and Internal Operating Procedures of the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit rule goes on to specify six situations in which opinions should be published, none of which appear remotely applicable to Bradshaw. See also McGowan, supra at 575 note 322 (detailing the publication rules in other circuits).

[7] Bradshaw, supra at 671. This too was occasion for a barb from the bench: "Take heed and be suitably awed, oh boys and girls – the court was able to state the issue and its resolution in one paragraph … despite dozens of pages of gibberish from the parties to the contrary!" Id at note 3.

[8] Upon rereading, the Bradshaw opinion isn't really that funny, as it is mostly just a series of cheap shots. The crayon metaphor fights with the pig-in-a-dress, and we are left to wonder why either one would cause a "devil- may- care laugh i n the face of death, life on the razor's edge sense of exhilaration." On the other hand, readers will probably enjoy Judge Kent's opinions in Republic of Bolivia v. Philip Morris Companies, Inc., 39 F. Supp. 2d 1008 (S.D. Tex. 1999) and Smith v. Colonial Penn Ins. Co., 943 F. Supp. 782 (S.D. Tex 1996). Both opinions are considerably funnier than Bradshaw and, not coincidentally, they both refrain from ad hominem invective.

[9] Bradshaw, supra at 672.

[10] Labor Force, Inc. v. Jacintoport Corporation and James McPherson, 144 F. Supp. 2d 740 (S.D. Texas 2001). Judge Kent took the extraordinarily unusual step of publishing his order denying a change of venue in this matter, in which he named the erring lawyer while referring to his motion as "patently insipid" and "obnoxiously ancient." Judge Kent later withdrew the opinion from publication (perhaps having thought better of it), but not before it was spread about the country on the Internet. 144 F. Supp. 2d 740. Withdrawn for N.R.S. bound volume, 2001 wl 640675 (S.D. Tex.).

[11] See, e.g., United States v. Microsoft Corporation, 253 F.3d 34, 113 (D.C. Cir. 2001)(reversing in part because trial judge's intemperate characterizations of one party violated Canon 2a of the Code of Judicial Conduct, which requires federal judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary").

[12] Labor Force (see pdf of original opinion at www.greenbag.org).

[13] Rule 3.1, American Bar Association Model Rules of Professional Conduct.

[14] This appears to happen with abnormal frequency. A quick lexis search located 13 opinions in which Judge Kent referred to something as asinine (often "asinine on its face"), and many others in which he used equally pejorative adjectives, including ludicrous (23 times), ridiculous (15 times), absurd (19 times), preposterous (13 times), and idiotic (19 times). And see Massey v. State Farm Lloyds Ins. Inc., 993 F. Supp. 568, 569 (S.D. Tex. 1998)(denying plaintiffs' motion for remand to state court because it was "frighteningly disingenuous, and frankly, moronic").
In contrast, a search for all of the United States Courts of Appeals (combined) found only 16 uses of asinine since 1944; a similar search of all United States District Courts (combined) located only 38 such cases. Searches conducted August 16-17, 2001.

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Judge Dismisses Cassens RICO Case, Parties Watch Sister Case

By John P. Kamin, Legal Editor

A federal judge dismissed a high-profile racketeering suit against Cassens Transport Co. on Monday, but the dismissal did not surprise the parties, who have already been looking to the 6th Circuit Court of Appeals' review of a similar case.

The U.S. District Court for the Eastern District of Michigan granted summary judgment to the defendants in Brown v. Cassens Transport Co. after concluding that the exclusive remedy of the Michigan workers' compensation system barred the plaintiffs' racketeering suit.

The plaintiffs are six injured workers who alleged that an employer, an administrator, and a physician all conspired to deny benefits to injured workers, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO). The plaintiffs' attorney, Marshall Lasser, has filed several similar suits in the same district. In the decision, Judge Paul Borman also determined that the plaintiffs lacked standing to bring the suit under RICO, because the law requires business to show an "injury to their business or property."

"Regardless of how plaintiffs characterize the wrong, their medical expenses, workers' compensation benefits, medical mileage and attorneys fees are damages which are indisputably wholly derivative of their personal injuries and as such are not injuries to 'business or property' under RICO," the judge wrote. In a third portion of the opinion, Borman noted that the plaintiffs' damages were too speculative to give them standing to bring a RICO suit.

"The phrase 'business or property' excludes damages for personal injuries and the pecuniary losses flowing therefrom and excludes damages which are speculative and based upon mere expectancy interests," Borman wrote. "The damages which plaintiffs claim to have suffered are both too intimately tied to their personal injury claims and too speculative to constitute 'injury to business or property' under RICO."

Borman's ruling was the latest chapter in the Cassens case, which had attracted national headlines after the 6th Circuit Court of Appeals ruled that the plaintiffs' allegations were sufficient enough to survive the defendants' first motions to dismiss. The U.S. Supreme Court refused to review that ruling. While Monday's decision is important to the parties involved, it did not surprise attorneys familiar with the case. Lasser, the plaintiffs' attorney, said the decision to dismiss is similar to a decision in an identical case, Jackson v. Sedgwick Claims Management Services.

"A similar case was dismissed by Judge Edmunds of the U.S. District Court, and it's now pending in front of the U.S. Court of Appeals for the 6th Circuit," he said. "In fact, Judge Borman just yesterday dismissed the Cassens case that Judge Edmunds used to dismiss the case in front of her, which was identical for all purposes . . ." Lasser confirmed that he plans to appeal the Cassens decision, but pointed out that the Jackson appeal will control the outcome in Cassens. Matthew Leitman, the attorney for a defendant employer (Coca Cola Enterprises) in the Jackson case, said that Borman's decision is helpful, even though a district court opinion cannot control how the 6th Circuit will treat the Jackson appeal. "As a purely technical matter, it is certainly not binding on the appellate court," he said. "But I think the fact that another federal judge thought like Judge Edmunds supports the conclusion that she got it right. I think it is certainly relevant, but it is not controlling, obviously." The Jackson case is currently still in the briefing phase. The court has given Lasser until early November to file a reply brief, which will allow him a chance to respond to amicus briefs filed by the American Insurance Association, the National Council of Self-Insurers and the U.S. Chamber of Commerce.

Leitman pointed out that the defendants have requested oral argument, and ultimately expects the 6th Circuit to rule on the Jackson appeal in about six to 10 months. Since WorkCompCentral last reported on the Jackson case in early September, the defendants have filed their appellee briefs. The briefs are supportive of Edmunds' decision to dismiss Jackson, and contend that plaintiff workers cannot use RICO to do an "end run" around Michigan's workers' compensation system.

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OSHA Prepares to Target 'Distracted Driving,' Especially Texting

National 09/22/10

The U.S. Departments of Labor and Transportation announced Tuesday they have formed a partnership to combat "distracted driving," with a special emphasis on sending text messages while behind the wheel. Secretary of Labor Hilda Solis, in announcing the initiative, said motor vehicle crashes are "a leading cause of worker fatalities."

"It is imperative that employers eliminate financial and other incentives that encourage workers to text while driving," Solis said. "It is well recognized that texting while driving dramatically increases the risk of a motor vehicle injury or fatality," she added.

An executive order signed last year by President Barack Obama prohibited federal employees from texting while driving and directed the Department of Transportation to look at the issue. The Occupational Safety and Health Administration is launching a multi-pronged initiative that includes an education campaign for employers, to be launched during "Drive Safely Work Week" in early October, calling on employers to prevent "occupationally related distracted driving," with a special focus on prohibiting texting while driving.

OSHA will post an open letter to employers on the agency's website during "Drive Safely Work Week." The website also will showcase model employer policies and encourage employer and labor associations to promote OSHA's message.

The campaign plans alliances with the National Safety Council and other key organizations as outreach to employers, especially small employers, aimed at combating distracted driving and prohibit texting while driving. Special emphasis will be put on reaching younger workers by coordinating with other Department of Labor agencies as well as through alliance partners and stakeholders. OSHA also will investigate and issue citations and fines where necessary to end the practice when it receives "a credible complaint that an employer requires texting while driving." David Michaels, assistant secretary of labor for OSHA, said the agency urges all employers to prohibit requiring or encouraging workers to text while driving.

How Did We Get Here, and Where Are We Going Next?

By David Langham

Technology is rapidly changing the world around us. Yesterday's marvels fade rapidly in the glow of today's new hardware, applications and processes. A great example is the facsimile machine, which facilitated faster transmission of documents among parties and with others. As astonishing as this revelation was, it was essentially a device that photographed a paper in one location, transmitted that photograph across a telephone line, and printed the photograph on a similar, limited function, dedicated machine in another location. As astonishing as this technology was, and as essential as the fax machine was to the "modern" office, we hardly noticed its ebbing, and were startled by the realization that it had become less than essential, and to a great extent redundant of email. This illustrates two maxims for us. First, we are likely to be continuously confronted with new technology, and second, those astonishing revelations and capabilities will repeatedly be eclipsed by even more astonishing capabilities.

Arthur C. Clarke was a great visionary, and Twentieth Century science fiction author. His portrayals of the future in such works as *2001, a Space Odyssey* (April, 1968)[1] were fantastic in their day and are therefore memorable. In 1951 he said "[i]f we have learned one thing from the history of invention and discovery, it is that, in the long run - and often in the short one - the most daring prophecies seem laughably conservative." With this as a cautionary note, and trying to remain conscious of the fact that our perceptions of the wonders of today's technology are likely to be embarrassingly belittled by the technology of tomorrow, I pause here to document some nonetheless amazing transitions in litigation in the first decade of the Twenty-First Century. In doing so, I recall IBM Chairman Thomas Watson's 1943 prophecy "I think there is a world market for maybe five computers;" Ken Olson's (President of Digital Equipment Corporation) 1977 prediction that "there is no reason for any individual to have a computer in their home," and other similar prognostications that have miserably, albeit humorously, failed the tests of time.[2]

Part of the force driving innovation is a combination of interrelated market forces. Hardware and software are changing constantly. An uncredited "anonymous" description from the internet, on how to distinguish between these: "those parts of the system that you can hit with a hammer are called hardware; those program instructions that you can only curse at are called software." Programmers are intent on providing innovation in their respective software(s). The fact is, the consumer has to have a reason to want the new word processor, or we would all still be using that copy of WordStar[3] we bought in 1978 and installed on our TRS-80 computers.[4] By making the "next" version more powerful, software producers drive our consumption.

However, those innovations require space, both in terms of storing the program and in terms of the processor capability to run all of those features. As we succumb to the allure of ever more powerful and integrated software, we tax the capabilities of our hardware. The cycle thus draws the hardware producers to design and build ever faster and more powerful machines to utilize that ever more powerful software. Intel co-founder Gordon Moore hypothesized in 1965 that the volume of transistors practical on an integrated circuit would double every two years ("Moore's law"). He has been astoundingly prescient, but perhaps too conservative, in this prediction. Thus, computer hardware capability becomes exponentially more powerful in very short cycles. This promise of greater capacity only encourages the software engineers to use, or exploit, that promised horsepower, further expand and integrate, and entice our consumption of the "next greatest thing."[5]

Document creation, revision and processing underwent fundamental evolution in the Twentieth Century as manual typewriters gave way to electric, then memory, then word processors, and then to computers. The requisite human skills and occupations similarly evolved from the "typing pool" to the paraprofessional. Document creation and storage leapt forward exponentially. Despite those evolutions, or revolutions, in document creation, each resulted in creation of a paper document that was used, delivered, and stored in that same paper form. Certainly, the facsimile machine brought greater speed, convenience, and lower cost to this process. However, in the end the user possessed and used a paper document.

Near the end of the Twentieth Century, electronic mail burst upon our consciousness and we realized the quintessential dream of transmitting bad jokes instantly to vast audiences of unwitting and often unwary friends, acquaintances, and total strangers. We must concede that we all initially perceived these jokes as the highest and best use of email. We evolved slowly to using email to transmit documents, and as the world settled into acceptance of a uniform document format (portable document format or "PDF"),[6] transmission of documents through this medium increased.

Continued, Page 13

Where are We Going Next," from page 12.

This transition represented an advantage over the facsimile transmission because it could accomplish document delivery without creation of a paper-copy on either the originating or the receiving end. Yet for all its advantages and benefits, this methodology retained burdens with document storage, organization, and accessibility.

From this rudimentary start, court systems began developing web-based platforms for effectuating the delivery and, simultaneously, solving these other issues. Slowly, agonizingly at times, electronic filing ("e-filing") was born.[7] With an internet-based platform, programming was deployed which allowed certain people the access to transmit a PDF document directly into the tribunal's electronic document management system, or database. Accessibility controls were incorporated so that litigants could submit pleadings and supportive documents into the "court file" directly, where they would be useable by tribunal personnel and the adjudicator (in most cases simultaneously). Other accessibility controls allow the public to access and view documents when appropriate, but not to submit documents as the litigants may. The result is efficiency made possible because the paradigm has shifted from paper to the PDF image format. These e-filing systems represent a unified and integrated solution to document transmission, sharing, and maintenance. That transition is comparable in magnitude to the shift in document creation effected by the personal computer over the manual typewriter.

The Florida Judges of Compensation Claims electronic filing program[8] began in November 2005 with two (2) documents filed electronically. Through the first year in testing, the monthly volume grew to one hundred eighty-two in November 2006. In the fall of 2010, the monthly volume is well in excess of thirty-five thousand documents. Over one million documents have now (as of September 3, 2010) been electronically filed with the OJCC. The program has resulted in cost savings for attorneys and for the state. Total savings to date are estimated at over $1.8 million.

The Florida First District Court of Appeal deployed their electronic filing more recently, in October 2009. The Court has just issued an administrative order making use of their e-filing program, called "e-DCA,"[9] mandatory for represented litigants effective October 1, 2010. They estimate that e-DCA affects an end-user (attorney) savings of approximately $750.00 per appeal. In the space of one short year, the Court registered 2,400 "users," build a database of over 230,000 documents and 3.9 million pages, and eliminated postage expenses related to the monthly distribution of about 7,500 "case mails" (documents or notices served by electronic mail). Having witnessed the lifespan of various technologies, I am reluctant to say with conviction that e-filing is the future.[10] However, clearly e-filing is the today of litigation and docket management, and what tomorrow may bring simply boggles the mind.

Historically, adjudication systems relied upon manual or mechanical methods for recording the proceedings before them.[11] Court reporters were the norm in many instances, with stenographic records produced for every proceeding. In other instances, mechanical tape recorders replaced or supplemented stenography. In either instance, translations of the spoken word into written English were human-intensive processes. The success of i-tunes and Napster, et. al. resulted from the music industry's earlier migration to digital recording (lased onto compact discs, or "CDs" initially and sold in stores.[12] Software developers soon marketed software for creating digital recordings with personal computers, and before long programs were specifically designed and marketed for recording tribunal/court proceedings.

The software and hardware investment that facilitates transition to this methodology is not insignificant. However, multiple advantages and long term cost savings justify the initial expense. Digital recordings are more stable than tape recordings, and those recordings can be "backed-up" in the same manner as any computer file. Recordings of proceedings are easily stored and do not require physical space as do tapes. Hearing recordings can be easily copied, as to a laptop for reference in the order preparation or as to another Judge's computer for reference in a future proceeding. These recordings can be inexpensively and quickly provided to a transcriber over the internet in the event that a written transcript is required, eliminating associated postage expense and risks of lost or misdirected/delivered tapes. Thus, the transition to this product (digital recording) facilitates cost-saving process changes.

The natural consequence of e-filed PDF pleadings and trial exhibits, combined with the digital recording method, is an electronic "record of proceedings." When appellate review is sought, the digital recording(s) and PDF trial exhibits are inexpensively and quickly transmitted to a transcriptionist, recordings are typed, converted to PDF, and the result combined with trial exhibit PDF images as the digital appellate record. With cooperation of the reviewing court or board, the resulting digital record can be transmitted to them over the internet for review. In any case, it can be transmitted in this manner to litigants and/or counsel as well. Storage expense for both the trial and appellate tribunals are minimized, and transmittal costs of postage, paper, and duplication are eliminated entirely. The cost savings are phenomenal. More impressive still, however, this digital record can be searched by "key word" in order to locate specific facts or argument within the record.

Continued, Page 14

Where are We Going Next," from page 13.

As microprocessor capacity increased, as "Moore's law" predicted, the development of the internet also fueled change. That is most apparent in our daily lives in the ways we access information on our computers and communicate with each other, such as the e-filing discussion above. For an illustration of the current result of recent hardware innovations, a "portable computer" in 1982 weighed 100 times more, cost ten times as much, and was 100 times slower than the i-phone.[13] There has been a similar acceleration of the technology that connects computers, which is also notable. The United Nations' "cyberschoolbus"[14] documents that radio took 38 years to reach 50 million users, and television required 13 years, but the internet accomplished that mark in 4 years. The expansion of internet content and capability has in turn driven rapid expansion of the infrastructure that connects us each to the internet, and thus each other.

There is a vast and obvious spectrum of geographic diversity in this country. Some state workers' compensation adjudication programs are able to service customers from single, centralized, location. In some instances this means that litigants travel to the adjudicators, while in others it means adjudicators must travel the circuit to the litigants. Either option, or permutation of some combination, represents significant financial expense and time costs. There have been attempts at video telephones; some doubtlessly inspired by the 1968 *2001 a Space Odyssey* depiction. Some courts have attempted to integrate some form of teleconference into their adjudication responsibilities, with varying historical success. Across the country, courts are now relying upon video appearance for certain responsibilities, such as criminal defendant first appearances, although in many instances this is through an internal "closed circuit" system rather than the internet.[15]

As we have all demanded ever faster internet access in response to ever larger volumes of internet information, entertainment and shopping opportunities, the connectivity infrastructure has developed from telephone lines to fiber optic, with ever increasing capacity. A result of this expansion has been a decreased "unit cost" for "bandwidth" or stated otherwise lower tolls for each additional lane of the information superhighway. This rendered interconnected video teleconference facilities, dependent upon such internet-based connectivity, a reality. As that reality was adopted and adapted by consumers, the cost of that technology has begun to decrease.

As noted in the Journal of Gender, Race and Justice, March 2006 (The Expansion of Video Conferencing Technology . . ..),[16] video conferencing is gaining acceptance for adjudicatory proceedings. In the Florida effort, it has been demonstrated to be cost-effective. Florida has interconnected its 17 Judges of Compensation Claims offices with video teleconferencing capabilities. The benefits are obvious. In the event of judicial disqualification, recusal or incapacity, a substitute judge can be called upon to step in from hundreds of miles distant to hear the case with little advance notice. The technology has evolved to permit relatively easy and quick manipulation of the remote camera by the judge with minimal instruction or practice. Coupled with judicial access to the e-filed pleadings and evidentiary exhibits, the remote video teleconference trial is a reality and also practical.

Notably, the astonishing transitions described here, e-filing, digital recordings of proceedings, and video teleconference became commercially available and widely consumer accessible only in the last ten years. Each marks a quantum-leap forward for the litigation process in terms of efficiencies and function. The success of each is intertwined with the commercial availability and success of the others. Each is a marvel, but the combined effect of the three is frankly inspiring.

A popular general criticism of various technologies has been that they are "a solution in search of a problem." The origin of this quote is unclear, and it has been referenced in criticisms of such advances as the laser and the iPad. The cautionary value of this quote, regardless of origin, is pertinent in many contexts as technology evolves. While we must not expend too much energy resisting technology for "resistance's sake," we must also be wary of adopting technology for "technology's sake." The corollary of this, simply put, is we must accept and welcome technology that furthers our underlying goal, but not be taken in by technology that beckons us, interests us, but does not improve or facilitate our adjudicatory role. As we struggle with the changes that technology ***will*** bring to adjudication process, we should strive to remember Elbert Hubbard's[17] caution "one machine can do the work of fifty ordinary men. No machine can do the work of one extraordinary man." As such, we must remember that we are extraordinary people chosen to deliver a worthy service to our states.

However, we must also accept that technology will inevitably change the adjudication process, as it will change most aspects of our lives. As Steward Brand puts it, "once a new technology rolls over you, if you're not part of the steamroller, you're part of the road." As adjudicators we must avoid being rolled over. As we move inexorably into

Continued, Page 15

Where are We Going Next," from page 14.

the future, we will confront technology and change. Putt's Law posits that "[t]echnology is dominated by two types of people: those who understand what they do not manage, and those who manage what they do not understand." As judges, we will invariably fall into the second category. We will not be programmers, or creators, of these new technologies. As such, we can hope at best to grasp, appreciate, and use these technologies which we frankly will not understand beyond rudiments. We must manage these technologies nonetheless, just as we are forced into the role of personnel manager periodically also. Thus as "extraordinary" women and men, it is each of us that must assure the presence and role of the adjudicator, despite the technological advances that may affect the process, the litigants, and the other participants in our proceedings. While we adjudicate the dispute, we must manage the docket, the participants, our staff and the technology that will facilitate our endeavor.

1968, USA, New American Library (ISBN 0-453-00269-2), June 1968.

[2] Similarly, Popular Mechanics in 1949 pronounced "computers in the future may have only 1,000 vacuum tubes and perhaps only weigh 1 1/2 tons.

[3] WordStar was a simple word processing program owned by MicroPro. The program was designed for CP/M, and later adapted to operate in the "disc operating system" or "DOS" environment designed by Microsoft. The initial iterations of "Windows" operated as a interface perceived by users, but in a DOS environment.

[4] The TRS 80 was marketed by Radio Shack. First released in 1977, it sold for $599.95 and ran on a proprietary operating system. Programs were loaded from cassette tapes. For an excellent timeline of hardware development from 1970 through 1993, see, http://oldcomputers.net/trs80i.html.

[5] For an excellent overview of the developed and developing science of quantum mechanics and the technological applications, see, *Physics of the Impossible*, Michio Kaku, First Ancho Books, 2009.

[6] Started as a tool to allow sharing documents internally at Adobe corporation, the concept was made public in 1991. See, http://www.prepressure.com/pdf/basics/history.

[7] An interesting overview of electronic court filing is available at http://www.google.com/search?q=history+of+electronic+court+filing+systems&hl=en&rls=com.microsoft:en-us:IE-SearchBox&rlz=1I7GZAZ_en&tbs=tl:1&tbo=u&ei=8cGtTMGzHMGBlAfczoz7AQ&sa=X&oi=timeline_result&ct=title&resnum=11&ved=0CDwQ5wIwCg

[8] http://www.fljcc.org/ejcc/

[9] www.1dca.org.

[10] In the 1997 film Men in Black, a primary character cautions "A person is smart. People are dumb, panicky dangerous animals and you know it. Fifteen hundred years ago everybody knew the Earth was the center of the universe. Five hundred years ago, everybody knew the Earth was flat, and fifteen minutes ago, you knew that humans were alone on this planet. Imagine what you'll know tomorrow." In considering the monumental blunders of Thomas Watson, Ken Olsen, and Popular Mechanics noted herein, I am content to admit I have no idea what I will ***know*** tomorrow.

[11] See a history at http://www.courtreportersmuseum.info/history.htm

[12] The recording medium changed to digital, with a manual delivery system initially, the disc. The transition to internet distribution was a process innovation, rather than a product innovation.

[13] According to Michael Milken, a financier and innovator famous for his fall from grace in the 1980s, "the iPod has 7,500 times the storage of IBM's largest computer in 1976. The new IBM (IBM) chip has 2 trillion calculations per second. In 1974, it cost $100 million to sequence a gene. Today, it cost $3, and by 2013, it will be 3 cents."

[14] www.un.org/cyberschoolbus

[15] See, http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/crmrev11&div=25&id=&page=

[16] http://www.accessmylibrary.com/article-1G1-147065772/expansion-video-conferencing-technology.html

[17] Hubbard was an American writer, lecturer and philosopher. He has been called "the most creative force in the evolution of American business in the end of the 19th century."

[18] Stewart Brand is an American author and lecturer.

[19] *Putt's Law and the Successful Technocrat*, Archibald Putt, 1981.

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