Lex and Verum

The National Association of Workers' Compensation Judiciary

Number XXIX, January 2012

Thoughts from the NAWCJ President

By Hon. Ellen Lorenzen

My fellow judges and friends, welcome back to work. While I enjoy a holiday as much as the next person, I always find it a little hard to get geared up for a new year after two short work weeks. I am solving the problem this year by taking an immediate vacation so that I can travel to Fresno, CA for the birth of my second grandchild.

However, finding myself at the end of the old year with very little on my calendar (apparently lawyers in my area close up shop between Christmas and New Year's) and knowing that a new year was coming, bringing with it new things, including new office space and new mediators for my cases, I started thinking about change.

I have decided that I need to be more flexible and accommodating to changes. For example, in recognition of the paperless office, I no longer will be doing any paperwork. Instead I will have only "e-work" to do. I will no longer dial a phone number or ring somebody up. Instead I will "touch a tone." (I thought about "punch up" instead but I do not believe in the use of violence and, besides, I try not to damage state owned property.) I am not sure I will even make telephone calls. I may just "teletext" everyone. And I do not think I will use a telephone device at all. I will use "teletextcam." My teletextcam will lack a receiver or handset. I am only "hands free" and "wireless toothed."

A few years ago, Deputy Chief Judge Langham presented most of the workers' compensation judges in Florida pens engraved with the words, "for signing timely orders." I will preserve this pen as a treasured memento of days of yore but I will no longer sign orders with it or any such old fashioned device. Now I will affix my Adobe image. The bank wants an original document? Oh well, the best I can provide is a "verified duplicate." And I do not use the services of the mailman, mailperson, United States mail, or USPS anymore to send a hardcopy. It will be strictly "e-mail" with a "verified attachment." And anything involving a seal will require a visit to the zoo.

I thought about making a resolution (it being New Year's and all) to always use my new words but then I realized that a resolution might be an enforceable contract. I thought I should research that, so I read *Hernandez v. Board of County Commissioners of Hillsborough County*, 153 So. 790 (Fla 1934) to see what the ramifications of a resolution might be. In this case, the Board of County Commissioners (who was then and still is the governing body of the county in which I reside) passed a resolution which altered the district of local justices of the peace. Mr. Hernandez, one of the officers, was unhappy about the lessening of his sphere of influence and sought an injunction against the Board. However, before his case could be heard, the Board rescinded its resolution and the Florida Supreme Court refused to give Mr. Hernandez an opinion about the legality of the redistricting because it held there was no justiciable issue pending. I learned two things from that case: even if I make a resolution to be more flexible, I can break it without repercussion as long as I tell myself to forget about it first. And second, while the rest of the world changes, politics stays the same.

Have a happy and healthy New Year. As always, contact me at Ellen_Lorenzen@DOAH.state.fl.us.

Only 227 Days until NAWCJ Judiciary College 2012

See Page 4 for More Information

Workers' Compensation Research Institute Releases 12th Annual Michigan Benchmarks Study

The Workers' Compensation Research Institute (WCRI) released their CompScope Benchmarks for Michigan, 12th Edition in December 2011. The report summarizes the overall expense associated with workers' compensation claims, including indemnity and medical components, but also the expenses and costs associated with delivery of those benefits. Fifteen other states are included for comparison and context; these include California, Florida, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, North Carolina, Pennsylvania, Texas, Virginia, and Wisconsin.

The WCRI studied the growth of claims costs in these jurisdictions over a period 2004 to 2009. Texas and California had the lowest growth rate of "total costs per claim" during the period, each less than 15%. At higher end of the spectrum, Illinois and Wisconsin each experienced growth of 50% or greater. Michigan's growth rate was 31%, the fifth lowest among the studied states (the four lowest, in order, were Texas, California, Florida, and Maryland). WCRI noted that among the five lowest growth rates, three states (TX, CA, FL) had also experienced legislative reforms between 2004 and 2009. WCRI notes that Michigan's 31% was lower than the 39% median growth rate among the studied states, over the study period.

The report attributes significance to the Michigan indemnity benefit structure. The speed of return to work and the indemnity structure are credited with contributing to lower indemnity benefit payments, which WCRI's study concludes effected the moderate growth of claims costs in MI. However, the main cause of moderate claims cost growth according to WCRI was the constrained medical costs per claim over the period.

Medical costs per claim in Michigan were about thirty-two percent below the median of the sixteen states studied, about $9,600 compared to a median of just over $14,000. Michigan ranked the second lowest state in the study, with only Massachusetts demonstrating a lower medical cost per claim (considering those with more than seven days lost time) at approximately $8,000.00. Illinois had the highest medical cost per claim in the study, in excess of $18,000.00. WCRI concluded that Michigan's performance on medical costs were driven by "lower utilization of medical services and lower prices for some nonhospital services." The study notes that Michigan's fee schedule provides lower prices, and that both outpatient and inpatient costs were lower in MI.

The WCRI notes that Michigan's experience may have been influenced by the recession. The Michigan average weekly wages grew at the slowest rate of any of the study states during the period, only 3%; by comparison, Maryland's AWW contemporaneously grew by greater than 25%. They note that the Michigan unemployment rate has been significant since 2001. The report notes as an aside that claim costs grew more significantly in the latter portion of the study period (2008-2009), compared with 2005-2007). Possibly, as the recession extended, the effects became more pronounced. Potential "offsetting factors" to moderate growth from this effect include "increase in duration of temporary disability, more claims with settlements, and slowdown in wage growth."

Temporary disability can be measured in a multitude of methods. WCRI's selected method evaluated the volume of claims that experienced greater than seven days of lost time in their first six months. Between fiscal years 2008-09 and 2009-10, Michigan experienced a 6.7% increase in these claims, exceeded only by IA and MN among the studied states.

The report concedes that various state laws are significantly diverse. They note that only five states in the study have "wage loss" systems. These include MI, MA, VA, LA and PA. Among these "wage loss" states, indemnity costs per claim were the lowest in Michigan by significant percentages. The report cautions that "lump sum settlement payments" are included and reported as "indemnity benefits" in an effort to increase the consistency of WCRI analysis between various states, some of which allow settlement of future medical benefit entitlement and some of which do not allow such release. They note that even in jurisdictions in which future medical settlement is permissible, it is nonetheless "not common."

This comprehensive report is available from WCRI, http://www.wcrinet.org/.

Professionalism Considerations in Oral and Written Advocacy

By Hon. Charles Kahn

It's hard to know exactly where to start with most professionalism topics. We all know that professionalism contemplates civility, decency, and a genuine regard for others. About ten years ago, with this in mind, I searched the web using a search engine known as hotbot.com. I entered: professionalism, lawyers, legal. The search ran and in a few seconds returned 3 websites as matches. The second site was called "Australian Rules Football." Hopefully this was not an unintended metaphor on this topic.

> An older lawyer was accused of being uncaring and even vicious:
>
> "Some people say that I must be a horrible person, but that's not true. Why, I have the heart of a young boy -- I keep it in a jar right on my desk."

But lawyers are not alone in our frustration. My closest childhood friend is a family physician. Driving to school one day, he noticed that his 5 year old son had picked up his stethoscope and started to play. What a thrilling moment, he thought. The boy wants to follow in my footsteps! Then the child spoke into the instrument: "Welcome to McDonald's. May I take your order?

It's only fair that I let you in on some secrets of a judge. You need to listen carefully to what we judges say. Here's a little help with some translation:

1. “Counsel, could you address the jurisdiction issue first?” = “Please show me how I can unload this turkey on some other judge."
2. "This is a fairly obscure area of law." = "I have no clue what you're talking about."
3. "I'll be taking this matter under advisement." = "I'm going to work some poor law clerk like a galley slave to research everything there is to find about this, and then decide it by a coin flip."
4. “Although there is authority on both sides of the issue, the better-reasoned line of cases seems to say. . ." = "I disagree with the leading 42 cases on this point, but my clerk was able to find a 1946 South Dakota case that can be twisted into what I think the law ought to be."
5. “This case reminds me of an amusing story from when I was in private practice." = "I'm going to bore you to tears with an old joke from the early 1950's, and you're going to feign amusement because the fate of your case hangs in the balance."
6. The judge turns to you and says: “I haven't made up my mind one way or the other on this issue.” = “You're gonna lose big time.”

What is professionalism? We are not talking about the rules of The Florida Bar, sometimes called legal ethics. We all know that these rules set a bottom standard. Fall below this and the Bar can discipline you. Professionalism contemplates aspirational standards. The Bar's official website on professionalism tells us: "Lawyers can be dishonest, unprincipled, untrustworthy, unfair, and uncaring without breaking the legal ethics code." We all know the sad truth of this statement. Professionalism is behaving, in your life as a lawyer, with civility, integrity and competence. Rule number one is that if we are to cultivate a climate of civility we cannot tolerate the plea that we have all heard from small children: "He started it; she hit me first."

Continued, Page 5.

NAWCJ Judicial College 2012

August 19 through 22, 2012

Up to Twenty-one Hours of Judicial Education available for only $200.00!

Judiciary College 2012 is the product of extensive efforts of our Curriculum committee:

Hon. Stephen Farrow
Georgia State Board of Workers' Compensation

Hon. Sheral Kellar
Louisiana Workforce Commission

Hon. John J. Lazzara
Florida Office of Judges of Compensation Claims

Hon. Heather Leslie
D.C. Department of Employment Services

Hon. James Szablewicz
Virginia Workers' Compensation Commission

Save the Dates

August 19 through 22, 2012

Bring on the Roundtables!

Judiciary College 2012 will include roundtable discussions on:

- Appellate review of Comp Decisions
- Introduction to Social Media
- Effective Use of Judicial Technology

Professor Terrell RETURNS!

We are privileged to have Timothy P. Terrell, a former Fulbright Scholar, and Professor of Law at Emory University as a key speaker at the NAWCJ Judiciary College 2012. Professor Terrell presented at the inaugural College to rave reviews. He brings the topic of effective judicial writing and drafting to life! He will lecture on writing and editing effectively, with particular emphasis on the trial order. He is a dynamic speaker and dedicated scholar of the law. His works include "Rethinking Professionalism" and "When Duty Calls" both published in the Emory Law Journal (1992); Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing (Clark Boardman Company, 1992); "Transsovereignty: Separating Human Rights from Traditional Sovereignty and the Implications for the Ethics of International Law Practice," Fordham International Law Journal (1994); "A Tour of the Whine Country: The Challenge of Extending the Tenets of Lawyer Professionalism to Law Professors and Law Students," Washburn Law Journal (1994); "Ethics with an Attitude," Law and Contemporary Problems (1996); "Professionalism as Trust: The Unique Internal Legal Role of the Corporate General Counsel," Emory Law Journal (1997) and several articles on legal writing and editing for West Publishing Company's Perspective periodical.

More Information At:

www.NAWCJ.org

www.FWCIweb.org

Professionalism, from P.3

If you will suffer me a religious reference, beyond the Golden Rule, which is already required reading–an ancient sage known as Rabbi Hillel taught on the subject of civility in a seemingly vulgar society: "In a place where no one behaves like a human being, you must strive to be human." Although it is unlikely he was referring to some ancient bar association, who among us cannot identify at least a little with the vision of a place where no one behaves like a human being?

Now let's get to some specifics applicable to professional oral and written advocacy. First a "to do" list that really falls under the heading of common sense. These apply to the context of law practice, but are not limited to that context. If you violate these rules people will notice. (1) Always tell the truth; (2) play nice; (3) pay attention; (4) make sense; and (5) keep your promises. Under the heading "Always Tell the Truth," a couple of suggestions. First, be honest--to yourself, your clients, opposing counsel, and the court. This is probably the most important point of all. Second, avoid overstatement and exaggeration–these practices do not assist a court with determining what is important in the case.

Truthfulness is also important in client management. Controlling client expectations is not the easiest thing for a lawyer to do. The decision to proceed to trial or whether to take an appeal generally should involve thoughtful and thorough communication between attorney and client. There is an impression that some institutional clients, government agencies, large companies, insurance companies, simply tell counsel to proceed to trial or take the appeal. An attorney may not be asked in any meaningful way for input on the decision. That does not mean their professional responsibility has vanished or somehow been superseded by the client's executive order.

The lawyer's job is to determine whether a prospective point on appeal has reasonable merit. Before meeting with the client on an appellate matter, an attorney should have a tactical plan that includes honest appraisal of both the mechanics of the appellate process, and the reasonable chances of success. The attorney must, of course, explain to the client the time involved. Lawyers should avoid telling the client that “appeals take forever, that's just the way it is,” unless they are prepared to personally make a pledge to meet all deadlines without seeking extensions. Appellate courts are virtually current in processing cases, and can now usually assign a case to a panel as soon as the reply brief is filed or the time expires for filing a reply brief.

Moving on to the heading "Play Nice," courtesy plays an important role in professionalism. Be courteous and show respect for opposing counsel and the court. If opposing counsel has misstated something (in the record or in a case), inform the court of your view or understanding of the record, the facts, the law, the case holding, or whatever the "something" is--you may indicate that opposing counsel may have overlooked whatever it is, but do not accuse opposing counsel of lying. Do not--under any circumstances--engage in personal attacks on opposing counsel. Always shake opposing counsel's hand after the proceeding has concluded. Respect for the court or decision maker does not call on you to grovel. Repeated use of the phrase "This Honorable Court" in your brief will eventually lose any tinge of authenticity. You will choose for yourself how you address opposing counsel and the judge. If you were raised in Santa Rosa County, as I was, you will never have a dilemma. To any one older than me, it is "yes sir" or "yes ma'am.”

Paying attention is also critical. Know and meet your deadlines. Lawyers should focus on and listen to their clients when they are in the lawyer’s office and return their phone calls. Clients are people too, and they deserve the attorney’s respect. Listen to the court and do not interrupt the judge. Take care with pagers and cell phones. No matter what you think, people get uncomfortable having a conversation with you, if you are constantly being buzzed, beeped, rung or cute electronic tunes keep emerging from your purse. People will think that you have something more important to do. Again, this is a matter of common courtesy.

Continued, Page 6.

NAWCJ

National Association of Worker’s Compensation Judiciary

P.O. Box 200, Tallahassee, FL 32302; 850.425.8156 Fax 850.521-0222

Professionalism, from P.5

Attorneys should always strive to make sense. This is one we need to think about. Although it seems unlikely to some of us, most people are not lawyers. When you explain something (e.g., cause of action, course of action, court ruling) to clients, put it in terms that the client can understand. Many clients, even some sophisticated ones, such as public officials, will not ask you to explain; they will merely nod and glaze over. When the topic next comes up, they may sincerely wonder why you never brought it up before.

The attorney's interest, and that of her or his client demands that an attorney makes herself or himself understood in what they write. Something that can't be said too often–-if you have a license to practice law, that means you are the lawyer. Review motions and briefs before you file them with the court--or better still have another attorney in your office review them--to make sure your argument and analysis are clear. When you sign that document, it's yours.

Finally, lawyers must keep promises. If the attorney tells a client they will get back to her, then they must do it. Do not commit to something that you cannot do and do not make promises to clients or the court that you cannot keep.

Now that we have reviewed the basics, let's move on to "ADVANCED COMMON SENSE--What You Should Have Learned in Law School." Even when applying Advanced Common Sense, do not forget basic common sense. This portion of the discussion is divided into two sections: proceedings in the trial court and proceedings in the appellate court. Obviously, some points overlap. For instance, attorneys should always know and follow the applicable procedural rules.

Trial practice can get hectic and demanding. If opposing counsel needs to reschedule a deposition or hearing, an attorney should strive to allow it. You never know when you may need to do the same. Along those same lines, if you have a default judgment entered and opposing counsel calls you, on day 21, with a good reason for not responding, consider consenting to have the default judgment set aside without making the court hold a hearing. Of course, this is the type of decision that must be discussed with your client, but it is up to the lawyer to exercise independent professional judgment.

Disclose pertinent case law before the hearing so that opposing counsel has the opportunity to present a contrary argument--do not sandbag opposing counsel. Try not to present stacks of cases to the judge, where you have failed to include these cases in your memorandum. Along those same lines, be courteous and respectful to witnesses and opposing counsel during hearings and depositions.

Do not tell your witnesses what to say, no matter how tempting it may be to do so. Coaching witnesses is really the "heel wedge" of litigation. In golf you are required to play it as it lies. We have some specific exceptions, movable obstructions, ground under repair. In Anatomy of a Murder, the lawyer, Jimmy Stewart, is interviewing the accused, Ben Gazarra, in jail. The accused gives his account of what happened. He killed the victim, quite rationally, because the victim raped his wife, Lee Remick. The lawyer, having researched Michigan law carefully, listens, and then explains: "that is an interesting story, but you know, if you acted under the grip of an irresistible impulse the law would excuse what you did."

Continued, Page 7.

Your NAWCJ Board of Directors 2011

Hon. Ellen Lorenzen, President
Tampa, Florida
Florida Office of Judges of Compensation Claims

Hon. David Torrey, President Elect
Pittsburgh, Pennsylvania
Pennsylvania Department of Labor and Industry

Hon. Melodie Belcher, Secretary
Atlanta, Georgia
Georgia State Board of Workers' Compensation

Hon. Robert S. Cohen, Treasurer
Tallahassee, Florida
Florida Division of Administrative Hearings

Hon. John J. Lazzara, Past-President
Tallahassee, Florida
Florida Office of Judges of Compensation Claims

Hon. Michael Alvey
Owensboro, Kentucky
Kentucky Workers' Compensation Board

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

Hon Paul M. Hawkes
Tallahassee, Florida
Florida First District Court of Appeal

Hon. Jennifer Hopens
Austin, Texas
Texas Department of Insurance, Division of Workers' Compensation

Hon. David Imahara
Atlanta, Georgia
Georgia State Board of Workers' Compensation

Hon. David Langham
Pensacola, Florida
Florida Office of Judges of Compensation Claims

Professionalism, from P.6

The analogy to golf is pertinent because the witness or client interview is a lot like being out on the golf course, just you and the ball. How many of you who play golf have had a lie, that was playable, but just didn't allow you to advance the ball toward your objective, the hole? How do you handle the situation? Don't cheat on this.

After the judge rules, the argument is over. If you are asked to draft an order, only include the matters ruled on by the court. If you would like the order to be more expansive, you should bring the matter back before the court, with notice to your opponent.

If you appeal the trial court's decision, you again should know and follow the applicable rules. The only books kept at an arms' reach in my chambers are the Florida Statutes, the American Heritage Dictionary, and the West compilation of the Florida Rules of Court. It's wonderful to be a person who can commit the rules to memory, but if you are like me, you will feel better if you just consult the book.

The effective professional advocate at the appellate level will also be mindful of the perspective of the appellate court and the role of the appellate attorney. Appellate advocacy, or appellate-type advocacy, is the essence of lawyering. It's the part of practicing law that provides a link to all the historical richness of our profession.

When an attorney tries a jury case, and to some extent, a bench case or administrative case, the attorney is like a carpenter building the third story of a building. Ideally, the attorney should get the jury to focus on the beauty and brilliance of that third story. If successful, the jury may not notice that the foundation and the first two stories are built of gossamer and toothpicks. At the appellate court, the attorney can still be a carpenter. Now, however, the attorney/carpenter must build the foundation. The appellate court will not get to the magnificent third floor if it cannot stand on the foundation. The brief functions as the staircase to get the court to the core of the argument. The appellate court needs the staircase. Making sense is critical here.

The attorney builds the staircase using several tools. The brief is perhaps the most important. It is the opportunity to instruct the court. Be persuasive. Instruction, education, is the key to persuasion. The attorney should strive to "make the light come on." Jury-style advocacy is not effective appellate advocacy. The attorney should not expect the appellate court to take a leap of faith--it will rarely happen. The attorney should examine the construction of the argument, not only for persuasiveness, but for completeness.

Follow the rules. Some lawyers look at a brief as an impediment rather than a means to a good result. Some lawyers see the rules as nit-picking and meaningless, the procedures as formalistic, and the appellate process as a dehumanizing event. They may be right, but that point of view does not lend itself to effective appellate advocacy. The effective appellate advocate relishes the opportunity to be a wordsmith with the brief, and to hold the other side to the same exacting standards she demands of herself.

The record is key. The appellate lawyer should consult with the trial lawyer. The trial lawyer may have a different view of the case than what is reflected by the record. Counsel must use (and cite to) the record. Notice I am not saying be entrapped by the record--use it. Of course you are bound by the record, but you can be a more creative advocate if you view the record as a friend rather than a foe. The record is what happened in the trial court, not what the trial lawyer wishes, and honestly believes, happened. The appellate lawyer must make the decision about how to craft an appellate argument, and even whether to make an argument in the first place.

The first issue to deal with in preparing a brief is jurisdiction; the second is the applicable standard of review. The District Courts of Appeal are very conscious of jurisdiction and standard of review. Ensure that the order rendered is appealable. In those limited cases where review is by appeal of a non-final order or by extraordinary writ, note the procedures for invoking the court's jurisdiction. The appellate rules are actually quite explicit. The attorney, not the attorney's secretary or paralegal, is responsible for knowing the rules. Counsel must know the standard of review in order to prepare the statement of facts in the brief. The law requires that a statement of facts be cast in light of the applicable standard of review. If the standard of review is abuse of discretion, as it generally is on evidentiary issues, and procedural rulings during trial, counsel’s approach will be different than if the standard is de novo, as it is for pure issues of law. Most factual determinations of a trial judge or an administrative law judge are subject to the test of competent substantial evidence (CSE). In such a case, the statement of the facts must recognize this. It is unprofessional for the appellant in a CSE case to portray the facts in a light most favorable to their view of the evidence. In an appeal from an order granting summary judgment or a motion to dismiss, however, the appellant is entitled to all favorable inferences from the facts. The appellee in these cases cannot rely on disputed facts, even if their affidavits are better that the other side's.

The statement of facts is generally the first thing appellate judges read. As an appellant, the attorney's goal should be for the other side to read this statement, not like it, and come to a professional judgment that there is nothing he can do about it.

Continued, Page 8.

Professionalism, from P.7

Such a statement cannot be written by merely going from witness to witness and summarizing testimony. A more effective statement is topical, it has definite subjects, and it leads logically from beginning to end, so at the end the reader anticipates the legal argument. The argument must be implicit in the statement of facts. How to do it? Work at it just like you would any other task. Accept the challenge. Be prepared to start over and rewrite as many time as it takes.

The argument section is for legal argument, not to disparage the other side, or even worse, the lower tribunal. If the case is controlled by precedent, the attorney should state that clearly. If another case controls by inescapable logic, rather than because it is on all fours, the attorney should state that clearly. Distinguish similar, unfavorable cases. If you object to extension of a similar case to your facts, tell the court why an unjust or illogical outcome will follow extension of the precedent to your facts. Counsel must take the case law as they find it, but they are entitled to criticize published opinions or to point out why a particular opinion is incomplete or cannot be read as black letter law without specific reference to its facts. Reading advance sheets or the Florida Law Weekly illustrates that there are few truly black letter law cases. A corollary of the tremendous volume of appeals is that virtually every case has some distinguishing facts. It is the job of the appellate advocate to find those facts. If the case is against counsel's position, explain why it cannot logically control; if it supports counsel's position, they must explain why the factual difference doesn't matter to the legal analysis.

This reminds me of something that happened in our court. An attorney called one of our judges and asked the judge's opinion about a certain statute or line of case law. The judge discussed the matter generally with the attorney. A few weeks later, as the judge was preparing for oral argument, the judge realized that the case on which he was working involved the very point the attorney had discussed with him previously, and that attorney wrote the brief. I have had the uncomfortable experience on several occasions to have a lawyer, with whom I thought I was engaged in a friendly conversation, suddenly say: "I've got this case, it probably won't come before you, and here's what happened..." Don't do this.

Do think about what you are asking the court to do in a given case. When you make an argument, don't ignore the potential effect on other cases. If you are the appellant, you should not select a default position that, if adopted by the court, would have un-defendable results in other fact patterns. Another of the intangibles of professional appellate advocacy is the ability to give the court a way to decide your case.

Most judges prefer judicious use of appendices. Provide the court with the order on review. Give us the jury selection if you have a peremptory challenge issue. A reference in argument to a readily available appendix is better than mere reference to the record. I have a small desk. Give the court what it needs to see things your way, and package it to fit on my desk.

Preparation is the hallmark of professional advocacy. In both trial and appellate courts, be prepared for hearings and oral arguments. Know the facts of your case. Oral argument is the ultimate challenge. Be ready to answer specific questions about the record. Be prepared to confront the weakest link in your argument. Equity will not overcome a fatal flaw of logic. We should all try not to say, "Sorry your honor, I didn't try the case, so I wouldn't know that." Be tactful. Do not interrupt the judge. Even if you think you know what the judge is asking, let the judge finish the question before you answer.

Continued, Page 9.

Workers' Comp Resources

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

Florida Workers' Compensation Institute
www.fwciweb.org

John Gelman's Blog
http://workers-compensation.blogspot.com/

Judge Tom Leonard's Blog
http://judgetom.blogspot.com/

Lynch Ryan
http://www.workerscompinsider.com/

Justia Law Search
http://blawgsearch.justia.com/blogs/categories/workers-compensation

On December 19, 2011, Jon Gelman listed his top ten blog posts for 2011. Topics include the Japanese nuclear disaster, Newt Gingrich on Comp, cell phone injury concerns, OSHA concerns with distracted driving, and pharmaceuticals prescribed for workers' compensation patients.

http://workers-compensation.blogspot.com/2011/12/top-10-workers-compensation-blog-posts.html

The Lex and Verum is published monthly by the National Association of Workers' Compensation Judiciary, P.O. Box 200 Tallahassee, FL 32302

"Second Fridays" Continues, Free Educational Programs from the NAWCJ

January 13, 2012 (12:00 p.m. Eastern)
Dr. Ray Harbison
Evidence Based Science for Causation Analysis

February 10, 2012 (12:00 p.m. Eastern)
Rafael Gonzalez
The Center for Medicare Set-aside
Medicare set-aside update

March 9, 2012 (12:00 p.m. Eastern)
Dr. Steve Boyd
Effective public speaking

April 13, 2012 (12:00 p.m. Eastern)
David Dreszer, Esq.
Cultural Diversity

Make plans today to tune-in

Dial 888.808.6959
Conference Code 889675

Some Thoughts:

"An education isn't how much you have committed to memory, or even how much you know. It's being able to differentiate between what you know and what you don't."

Anatole France

"There is no medicine like hope, no incentive so great, and no tonic so powerful as expectation of something better tomorrow"

Orison Swett Marden

Professionalism, from P.8

Be an advocate. Attorneys should understand the difference between advocacy and contention. Mastering this distinction can be a big problem for new lawyers, and for some experienced lawyers. You want to forcefully pose a position rather that lashing out at your opponent or the court. Judges ask questions sometimes that make unwarranted assumptions. Effective advocates are prepared to explain why certain assumptions are unwarranted or even wrong. Do not let the court bully you. Some judges seek concessions during hearings or oral argument. An attorney should anticipate this. Be prepared to concede what you can without falling on your sword. If you concede the case away, you will lose.

The current professionalism wave and its attendant committees, commissions, studies, retreats, and whatever else the Bar and the Supreme Court are doing with your money, have focused on what most of us call manners and civility. My thoughts about the topic of professionalism have led me toward a feeling that really, there is but a thin line between professionalism and competence. Consider the synonyms for the word "professional" as an adjective: accomplished, adept, competent, consummate, expert, master, practiced, proficient, skillful. Nowhere on the list will you find: deceitful, devious, two-faced, guileful, evasive or scheming. True mastery of technical lawyering contemplates also mastery of professionalism. On the other hand I see little correlation between financial success and professionalism. Our most difficult struggle comes where the prospect of compensation is tied to professional decision-making. This is the challenge of our profession. Each attorney must meet the challenge. The end result is bound to involve some degree of frustration, but it will also, hopefully, involve an even greater degree of professional success and personal satisfaction.

_____

The Honorable Charles Kahn is a United States Magistrate in the Northern District of Florida. He was a judge of the Florida First District Court of Appeal in Tallahassee from 1991 through 2010. He earned a B.A. from Vanderbilt University in 1973, cum laude, and his J.D. from the University of Florida in 1977, with Honors. Prior to taking the bench, he was in private practice in Pensacola, Florida, served as a Litigation Attorney, Florida Department of Transportation, served as an Assistant Public Defender, and Assistant State Attorney. Judge Kahn served on the Florida Supreme Court Committee on Standard Jury Instructions (Civil); The Florida Bar Judicial Administration Selection and Tenure Committee (Chair 2004-2005); Florida Supreme Court Judicial Ethics Advisory Committee (Chair 1998-99 & 2000-01); Florida Supreme Court Public Records Workgroup (Chair 2000-01); Florida Bar Rules of Judicial Administration Committee (Chair 1999-2000); Master, Tallahassee American Inns of Court (President 2005-2006); Admitted to practice before United States Supreme Court, United States 5th, 6th, and 11th Circuits, United States District Court, Northern District of Florida; United States Army Court of Military Review. Chair, District Court of Appeal Budget Commission. Judge Kahn has been an Adjunct Professor, Florida State University College of Law; Florida College of Advanced Judicial Studies; Florida Conference of Circuit Judges; Florida Conference of County Judges; American Judicature Society College of Judicial Conduct Organizations. His published articles include "Judicial Elections: Canon 7, Politics, and Free Speech", The Florida Bar Journal , Vol. LXXII, No. 7 July/August 1998; "No-Fault Insurance" Chapter in Florida Automobile Insurance Law (1991, 1995, 1998); "'But I'm A Friend of the Court' and Other Predicaments: What Every Lawyer Should Know About the Florida Code of Judicial Conduct," The Florida Bar Journal, March 2002.

CMS Announces New *Self-Calculated Final Conditional Payment Amount* Option for Certain Liability Claims

By: Mark Popolizio, Esquire

The Centers for Medicare and Medicaid Services (CMS) will implement a new ***Self-Calculated Final Conditional Payment Amount*** option beginning in February 2012 through which Medicare's "final" conditional payment amount may be obtained *prior* to certain liability settlements, judgments, awards, or other payments. This option will be limited to liability cases involving physical trauma injuries where treatment has been completed and which otherwise meet CMS' qualifying criteria as listed below.

Based on the limited information released thus far, the parameters and requirements of CMS' ***Self-Calculated Final Conditional Payment Amount*** option can be outlined as follows:

Which Cases Will Qualify?

As referenced, this new option will only apply to certain liability cases. In order to qualify for this option, CMS states that **ALL** of the following criteria must be met:

1. The liability insurance (including self-insurance) settlement will be for a physical trauma based injury (the settlement does not relate to ingestion, exposure, or medical implant);
2. The total liability settlement, judgment, award, or other payment will be $25,000 or less;
3. The date of incident occurred at least **six months** before the beneficiary or his representative submits his proposed conditional payment amount to Medicare; and
4. The beneficiary demonstrates that treatment has been completed and no further treatment is expected either through a written physician attestation or by certifying in writing that no medical treatment related to the case has occurred for at least **90 days** prior to submitting the proposed conditional payment amount to Medicare.

How Will it Work?

The beneficiary or his/her representative "*will calculate the amount of Medicare's conditional payment amount using information received from the Medicare Secondary Payer Recovery Contractor (MSPRC), the MyMedicare website, or other claims information available to the beneficiary.*"

Thereafter, the MSPRC will review the submitted amount. If the MSPRC determines that the submitted amount is accurate, it will then respond by providing Medicare's "final" conditional payment amount within 60 days. In order to "secure" the final conditional payment amount, the beneficiary must settle his/her case within 60 days after the date of Medicare's response.

CMS' Next Steps & Related Information

CMS is expected to post detailed instructions on how to use this new process on the MSPRC website (www.msprc.info) by January 15, 2012. CMS further indicates that it *"will leverage existing processes to the greatest extent possible."* However, the agency did not provide any further information on this point.

As for other matters, it is interesting to note that CMS describes this new process as *"an initial step to provide beneficiaries and their representatives with Medicare's conditional payment amount prior to settlement."* CMS also states that it plans on expanding this option in the future *"as it gains experience with this process."* Crowe Paradis Services Corporation will continue to monitor developments in this area and will update the claims industry accordingly as additional information is obtained.

Mark Popolizio, Esquire is Section 111 Senior Legal Counsel for Crowe Paradis Services Corporation. Mark is a nationally recognized leader in MSP compliance. He has authored numerous articles on MSP issues including MMSEA Section 111 reporting, MSAs and conditional payments. Mark is a regularly featured presenter at national seminars and other industry events. Mark is based out of Miami, Florida and can be reached at mpopolizio@cpscmsa.com or (786) 459-9117.

10th Anniversary 1999-2009
workcompcentral®
Improving Workers' Compensation Through News and Education

Report Card Grades States on Patient Outcomes

By Greg Jones, Western Bureau Chief

A ranking of state workers' compensation systems based on injured workers' outcomes shows that while there isn't always a direct correlation between costs and care, states that have better outcomes for injured workers also tend to have lower premiums.

The Work Loss Data Institute's 2012 State Report Cards for Workers' Comp, published on Dec. 21, is intended to show insurers, state agencies and employers which states are doing well in treating workers and getting them back to work.

The report cards compare states in areas such as incidence rates, cases missing work, median disability duration and delayed recovery rate. The report cards also compare how different states do with the key condition of low back strain. The report cards grade states from "A+" down to "F," based on 2009 data from the U.S. Occupational Safety and Health Administration. States that received an "A" include Alabama, Arkansas, Georgia, Minnesota, Missouri and Utah.

New York received an "F" for the 10th straight year, according to a statement from the Work Loss Data Institute. Other states given an "F" include Kentucky, West Virginia and Wyoming. California and Illinois received "Ds," while Florida and Texas received "Bs."

The report cards look at whether injured workers get better and go back to work, and while it doesn't track actual medical costs, it should help identify medical cost trends, the institute said. In addition to letter grades, Work Loss Data Institute uses the data is has been collecting since 2000 to place states into Tiers, which gives an indication of which direction the states are heading, according to Phil Denniston, president of the Work Loss Data Institute.

States are placed in tiers from I to VI based on trends that have developed over the past 10 years. Tiers I, III, and V are for states that are holding steady or improving and correspond to average grades of "B+" or better, between "B" and "D," and "D-" or worse. Tiers II, IV and VI are for states that are trending downward.

"Now that we have 10 years of this stuff, we're looking at trends," Denniston said. "We're seeing the fact that Texas used to be one of the worst and now is in the middle and moving in the right direction, and others are starting to get a little worse than before." Florida is an example of a state that is heading in the wrong direction, Denniston said. The state was given a "B," but it is also in Tier IV."

A component of Senate Bill 899, reform legislation passed in California in 2004, mandated the use of evidence-based medicine. Denniston said that has resulted in better care and improved return-to-work times. "Based on the data we have, which is heavily based on return-to-work, return-to-work has improved in California," he said. "Since the reforms, outcomes are better for injured workers in California."

Denniston said different methods to study system performance, such as the Oregon Department of Consumer and Business Service's biennial Premium Rate Ranking Summary, tend to be consistent in their findings. In addition to its "A," Utah is a Tier I state. Utah ranked No. 45 in the 2010 Oregon report with an average premium of $1.54 per $100 of payroll. New York ranked No. 13 in the 2010 report -- down from No. 19 in 2008 -- with an average premium of $2.38. "The different reports are similar in that they say states like New York are bad and states like Wisconsin or Utah or Minnesota are doing pretty well," Denniston said.

It's not surprising, he says, because good medical care leads to lower rates of disability, faster return-to-work times and reduced system costs. There are other factors, such as frictional costs that are independent of medical care, but patient outcomes drive system costs, Denniston said.

There are some complaints with the methodology underlying the ranking, with detractors saying that OSHA statistics under-count the number of work injuries that are occurring. "Companies have an incentive not to report things they're supposed to to OSHA," Denniston said. "That might be happening, but if it is, it is consistent across all states."

Continued, Page 12.

Report Card, from P.11

Another problem with the OSHA data is that it doesn't include states that do not participate in the federal government's Survey of Occupational Injuries and Illnesses. Those states include Colorado, Idaho, Ohio, Pennsylvania, Maine, Mississippi, New Hampshire, North Dakota, Rhode Island and South Dakota.

Still, Denniston said using the federal data is preferable for the comparisons because different states have different coding systems and reporting requirements. "OSHA (data) is not perfect, but it's based on federal requirements that every state has, so it's consistent," he said.

25 Players Sue NFL in Federal Court for Concussions

Twenty-five former football players sued the National Football League last week, in the latest of a wave of lawsuits against the league for allegedly failing to protect them from brain injuries. Former players filed two lawsuits against the NFL in Georgia and Florida federal courts. Among the plaintiffs are former Baltimore Ravens running back Jamal Lewis and St. Louis Rams offensive lineman Kyle Turley.

Lewis and three other players filed the first suit in the U.S. District Court for the Northern District of Georgia last Wednesday, in a case titled Lewis v. NFL. A group of 21 other players filed the second suit in the U.S. District Court for the Southern District of Florida on Thursday.

The two suits are the latest addition to a collection of four other concussion-related suits filed by players since last July. All of the actions allege that the league breached a duty to protect players from concussions that led to disabling brain injuries, such as chronic traumatic encephalopathy (CTE).

One suit that was filed in early December specifically alleged that the league allowed and encouraged the use of Toradol, a pain-masking nonsteroidal anti-inflammatory drug (NSAID) that increases bloodflow, and therefore increases the severity of concussions.

Turley, Patrick Surtain, Lamar Thomas, and Oronde Gadsden were among the 21 players who filed the suit in Florida federal court. That suit seeks to hold the NFL liable for negligent undertaking, fraudulent concealment, fraudulent misrepresentation and negligent misrepresentation. Turley's suit is premised upon the allegation that the NFL knew about the dangers of repeated concussions for almost a century, yet it actively deceived them into believing that the concussions did not present “serious, life-altering risks.”

The Florida complaint also mentions the NFL's creation of the Mild Traumatic Brain Injury Committee (MTBI Committee) in 1994, which was created to research and resolve the impact of concussions in 1994. When the committee identified medical evidence suggesting that repeated concussions could result in tragic brain injuries, the NFL concealed it, the players' complaint contends.

“The NFL's active and purposeful concealment and misrepresentation of the severe neurological risks of multiple concussions exposed players to dangers they could have avoided had the league provided them with accurate information,” the players' attorney wrote in the Florida suit. “Many of these players, since retired, have suffered severe and permanent brain damage as a result of the NFL's acts and/or omissions. In fact, the MTBI Committee's concealment and misrepresentation of relevant medical evidence over the years has caused an increased risk of life-threatening injury to players who were being kept in the dark.”

The suit includes a jury request, and seeks unspecified damages for bodily injury, pain and suffering, disability, medical expenses, earnings loss, and loss of potential employment. Like its Florida counterpart, Jamal Lewis' suit in a Georgia federal district court seeks to hold the NFL liable for negligence, fraud, fraudulent concealment, and negligent misrepresentation. Former Green Bay Packers running back Dorsey Levens is also a co-plaintiff in the suit.

Lewis' and Levens' complaint also mentioned the MTBI committee's alleged failures to protect players from repeated concussions and CTE. Both suits refer to “punch drunk syndrome,” which dates back to a 1928 study and has historically been used to describe boxers' behavior after experiencing repeated concussions. Lewis' suit also seeks a jury trial and unspecified damages.

The Foregoing was reprinted with the permission of WorkCompCentral.com. The NAWCJ thanks WorkCompCentral for their support of this newsletter and the ideal of promoting professionalism and collegiality among the nation’s workers’ compensation adjudicators.

Breaking Down CMS' New Section 111 TPOC Reporting Extensions & QSF Reporting Exception

By: Mark Popolizio, Esquire

The Centers for Medicare and Medicaid Services (CMS) has released two new "Alerts" as part of its continuing implementation of Section 111 of the Medicare, Medicaid & SCHIP Extension Act.[1] These Alerts relate to a Responsible Reporting Entity's (RRE) obligation to report claims involving Medicare beneficiaries under CMS' Section 111 reporting trigger known as "TPOC" - Total Payment Obligation to the Claimant.[2]

Through an Alert dated September 30, 2011 *(September 30-Alert)*, CMS announced TPOC reporting *extensions* for certain liability cases. In a second Alert, CMS established a limited TPOC reporting *exception* for settlements involving a Qualified Settlement Fund (QSF).[3] As occurred previously, these changes were released on the eve of when liability TPOC reporting was set to commence.

With liability TPOC reporting officially scheduled to go "live" in January 2012, this article outlines CMS' new policy changes as they relate to TPOC reporting as follows:

CMS' Liability TPOC Reporting Extensions

By way of brief background, the TPOC reporting trigger is comprised of several different components. A complete examination of each of these components is beyond the scope of this article. However, in general, TPOC can be described as a one time or lump sum payment related to a claim resolution (or partial resolution) through a settlement, judgment, award, or other payment in cases where medicals were claimed and/or where the settlement, judgment, award, or other payment releases medicals, or has the effect of releasing medicals.[4] If the claimant is (or was) a Medicare beneficiary on the applicable TPOC date and the TPOC amount exceeds CMS' interim monetary reporting thresholds, then TPOC reporting is required.[5]

Prior to CMS' *September 30-Alert*, liability TPOCs on or after October 1, 2011 exceeding CMS' interim monetary threshold amounts were to be reported, with RREs required to submit their initial TPOC reports in the first quarter of 2012.[6] By way of example, under CMS' prior reporting schedule, liability TPOCs on or after October 1, 2011, through the end of 2012, greater than $5,000, were to be reported. Thereafter, reporting is required in accordance with applicable reporting thresholds for 2013 and 2014. CMS' new Alert modifies certain aspects of this schedule as it pertains to initial liability TPOC reporting as outlined and discussed in the following paragraphs.

Through CMS' *September 30 Alert*, liability TPOC reporting is now required in accordance with the following implementation schedule:

- TPOC date on or after October 1, 2011 and TPOC amount > $100k = reportable. (RRE reports in the first quarter of 2012).
- TPOC date on or after April 1, 2012 and TPOC amount > $50k = reportable. (RRE reports in the quarter beginning July 1, 2012).
- TPOC date on after July 1, 2012 and TPOC amount > $25k = reportable. (RRE reports in the quarter beginning October 1, 2012)
- All TPOCs with TPOC dates on or after October 1, 2012 which are over the minimum threshold amount are reportable. (RRE reports in the first quarter of 2013).

In comparing CMS' new reporting criteria with its prior schedule, it is noted that CMS basically *retained* October 1, 2011 as the reporting start date, but temporarily *increased* the initial monetary threshold amount for reporting. CMS then pushed back into 2012 additional reporting start dates which are based on corresponding reductions in the reportable monetary threshold amounts. These modifications, when measured against CMS' prior reporting schedule, will have the effect of reducing the number of claims that RREs will initially need to report, effectively providing RREs with a temporary reporting extension for certain liability cases.

Continued, Page 14.

CMS, from P.13

As reflected in the revised schedule, the reporting extension basically winds down by the fall of 2012. Specifically, starting in October 2012 RREs will be required to report liability TPOCs where the TPOC date is on or after October 1, 2012 and the TPOC amount is "over the minimum threshold amount." CMS' *September 30 Alert* does not contain any further information regarding the referenced "minimum threshold amount."

However, per CMS' current interim monetary reporting thresholds, reporting would be required for claims where the TPOC date is on or after October 1, 2012 (and through December 31, 2012) and the TPOC amount is greater than $5,000. Thereafter, the reporting thresholds indicate that reporting is required for claims where the TPOC date is January 1, 2013 through December 31, 2013 and the TPOC amount is greater than $2,000; and for cases where the TPOC date is January 1, 2014 through December 31, 2014 and the TPOC amount is greater than $600. In 2015, all TPOCs regardless of amount become reportable.[7]

It should be noted that CMS' new reporting extensions are optional, and RREs may still report liability TPOCs if they desire even if the TPOC does not technically meet the specific reporting schedule outlined above. Over the past year, some RREs have already started reporting their liability TPOCs notwithstanding CMS' official implementation schedule and criteria.

Importantly, as should be discerned from the above discussion, CMS' *September 30-Alert* did <u>not</u> make any changes to CMS' implementation dates or other directives governing TPOC reporting for workers' compensation or no-fault cases.[8]

CMS' TPOC-QSF Reporting Exception

As noted, through a separate Alert, CMS announced a limited TPOC reporting *exception* for certain settlements, judgments, awards, or other payments which include a Qualified Settlement Fund (QSF). Under the TPOC-QSF reporting exception, reporting under Section 111 is not required if <u>*all*</u> of the following criteria are met:

- The settlement, judgment, award or other payment is a liability insurance (including self-insurance) TPOC amount; where there is no Ongoing Responsibility for Medicals (ORM) involved; and
- The settlement, judgment, award or other payment will be issued by a QSF under Section 468B of the IRC, in connection with a State or Federal bankruptcy proceeding; *and*,
- The funds at issue were paid into the trust prior to October 1, 2011.

Conclusion

It is important that RREs duly note CMS' new Alerts in relation to their Section 111 compliance programs. The policy changes set forth in these Alerts should be carefully analyzed to determine their potential applicability with respect to Section 111 reporting obligations. As part of this process, it is important to remember that even if Section 111 reporting is not required, other Medicare compliance issues, such as conditional payment reimbursement and Medicare set-asides, still need to be considered and, if applicable, addressed as these are separate and independent compliance obligations with their own requirements and directives under the Medicare Secondary Payer Statute.

---

[1] Section 111 of the MMSEA is codified at 42 U.S.C. 1395y(b)(7) and (8). Subsection (7) pertains to group health plans (GHP), while subsection (8) sets forth the reporting obligations related to non-group health plans (NGHP). CMS' Alerts as discussed herein relate exclusively to NGHP reporting obligations under Section 111.

[2] Under Section 111, the party obligated to report is referred to as the "Responsible Reporting Entity (RRE)." RRE determination is fact and situational specific. Under CMS' directives, there are a number of potential entities that could be RREs for Section 111 purposes. While a detailed discussion of CMS' RRE directives is beyond the scope this article, in general RREs typically include, but are not limited to, carriers and self-insureds. It is important to note that claimants and their lawyers are <u>not</u> RREs under the Section 111 reporting law. *See*, CMS' *NGHP User Guide* (December 16, 2011, Version 3.3), Chapter 7 and any subsequent "*Alerts"* that the agency has released.

It should also be noted that in addition to TPOC, CMS has established a reporting trigger referred to as ORM – Ongoing Responsibility for Medicals. CMS' new Alerts do not pertain to ORM reporting and, as such, review of this separate reporting trigger is not addressed in this article.

[3] This Alert is undated. However, it was released at, or around, the same time as the *September 30-Alert*.

[4] *See*, CMS' *NGHP User Guide* (December 16, 2011, Version 3.2*)*, p. 9, 48, 72 and 108.

[5] In the NGHP User Guide, CMS defines the TPOC "date" as follows:

> Date payment obligation was established. This is the date the obligation was signed if there is a written agreement unless court approval is required. If court approval is required it is the later of the date the obligation is signed or the date of court approval. If there is no written agreement it is the date the payment (first payment if there will be multiple payments) is issued. CMS' *NGHP User Guide* (December 16, 2011, Version 3.3*)*, p. 9 and 191.

Continued, Page 14.

CMS, from P.14

The TPOC "amount" is defined as follows:

> Dollar amount of the total payment obligation to the claimant. If there is a structured settlement, the amount is the total payout amount. If a settlement provides for the purchase of an annuity, it is the total payout from the annuity. For annuities, base the total amount upon the time period used in calculating the purchase price of the annuity or the minimum payout amount (if there is a minimum payout amount), whichever calculation results in the larger amount. *Id*. at 192-193.

[6] Under CMS' TPOC interim monetary reporting thresholds, Section 111 reporting is ***not*** required in the following situations: Where the TPOC date is prior to January 1, 2013 and the TPOC amount is $0-$5,000; where the TPOC date is January 1, 2013 through December 31, 2013 and the TPOC amount is $0-$2,000; and where the TPOC date is January 1, 2014 through December 31, 2014 and the TPOC amount is $0-$600. There are no threshold exemption amounts starting in 2015. In relation to these thresholds, CMS defines the TPOC "date" as the "the last (most recent)" TPOC date. This may be relevant in situations where there are multiple TPOCs. *See*, CMS' *NGHP User Guide* (December 16, 2011, Version 3.3*)*, p. 69. It should be noted that CMS' *September 30-Alert* modifies this schedule in certain aspects for liability TPOC reporting as more fully addressed above.

[7] CMS' *NGHP User Guide* (December 16, 2011, Version 3.3*)*, p. 69.

[8] For workers' compensation cases, TPOC reporting is required for TPOCs occurring on or after October 1, 2010 which exceed CMS' interim monetary reporting thresholds as outlined in endnote 6 above. For no-fault cases,

---

Mark Popolizio, Esquire is Section 111 Senior Legal Counsel for Crowe Paradis Services Corporation. Mark is a nationally recognized leader in MSP compliance. He has authored numerous articles on MSP issues including MMSEA Section 111, MSAs and conditional payments. Mark is a regularly featured presenter at national seminars and other industry events. Prior to dedicating his practice to MSP compliance in 2006, Mark practiced workers' compensation and liability insurance defense for ten years representing carriers, employers, third party administrators and self insureds. Mark is based out of Miami, Florida and can be reached at mpopolizio@cpscmsa.com or (786) 459-9117.

Some Thoughts

"Expecting the world to treat you fairly because you are a good person is a little like expecting a bull not to attack you because you are a vegetarian"

Dennis Wholey

"The administration of justice is the firmest pillar of government"

George Washington

"Law is not justice and a trial is not a scientific inquiry into truth. A trial is the resolution of a dispute."

Edison Haines

"If we do not maintain Justice, Justice will not maintain us."

Francis Bacon

"A good and faithful judge ever prefers the honorable to the expedient."

Horace

Drug Testing as a Precedent to Receiving Workers' Compensation?

Some in Tennessee predict that the legislature will consider legislation in 2012 that will require workers' compensation recipients to undergo drug testing. This effort follows enactment of a Florida statute in 2011 requiring drug testing for welfare recipients, a process that was previously unsuccessfully attempted in Michigan, and which is currently under Constitutional challenge in Federal court.

Critics in Tennessee advocate against drug testing, fundamentally because of the costs associated with it, and the probable legal challenges to such a mandate.

It is difficult to draw definitive conclusions as to the success of the Florida experience to date, less than one year into welfare recipient testing. Both advocates and detractors in Florida currently claim that the data thus far supports their individual respective positions regarding the law. This is a topic that may receive additional debate, and if so press, in coming months.

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.

NAME: _____ **DATE:** ____/____/____

Firm or Business: _____

PROFESSIONAL ADDRESS: _____

_____

PROFESSIONAL E-MAIL: _____

ALTERNATE E-MAIL: _____

PROFESSIONAL TELEPHONE: _____Fax:_____

HOW DID YOU LEARN ABOUT NAWCJ? _____

Mail your application and check to:

Kathy Shelton
P.O. Box 200
Tallahassee, FL 32302
850.425.8156
Email: kathy@fwciweb.org

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY

There are opportunities for sponsorship of the 2012 NAWCJ Judicial College August 19 through 22, 2012, in Orlando, Florida. If you are interested in sponsoring any of the following:

WELCOME LUNCHEON PRIME SPONSOR

JUDICIAL RECEPTION PRIME SPONSOR

JUDICIAL ATTENDANCE SCHOLARSHIP

Please Contact

Kathy Shelton
P.O. Box 200
Tallahassee, FL 32302
850.425.8156
Email: kathy@fwciweb.org