Lex and Verum

The National Association of Workers' Compensation Judiciary

Number XXXVII, September 2012

President's Message

By Hon. Ellen Lorenzen, President, NAWCJ

I am back from our annual college and still have not caught my breath but I wanted to pass along a few comments. I particularly want to thank Judge Langham and his committee for putting together the programming and all our judges who cheerfully contributed their time and efforts by appearing on panels or by introducing speakers.

To those of you who were there: I hope you enjoyed yourselves as much as I did. I did not get a chance to meet all of you and I hope you will come back next year so we can talk. If you have not already filled out your evaluation form, I would appreciate it if you could or even just send along an e-mail with your likes/dislikes and high points/low points. One comment of my own: next year we will try our best to provide printed materials. We will also figure out how to let you know the IP address for obtaining the materials on line if you want to bring your I-Pad or notebook. I think we can send you a link ahead of time and you can download the materials to bring with you. If you think that would work, let me know.

To those of you who were not there: I am sorry you could not make it. You missed a lot of really good presentations. For instance, I learned how to rework the opening paragraph of my orders to make it clearer to my readers what the specific legal issues I addressed were, as well as my rulings. Currently I only provide my rulings and I do not think that is a sufficient road map to keep my readers from getting lost as they try to follow the twists and turns of my reasoning. If you are reading this paragraph in bewilderment, give some thought to coming next year.

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NAWCJ President Ellen Lorenzen and President-Elect David Torrey discussing the Judiciary College and the rebroadcast of Dr. McCluskey's presentation by Webex.

Florida Chief Financial Officer and Cabinet member Jeff Atwater opened the College and reminded attendees of their critical role in the workers' compensation systems across the country.

President's Message, from Page1.

Without a doubt my vote for the most entertaining presentation award goes to Susan Constantine. I will never watch an interview with a political candidate or a suspected criminal the same way again but I suspect it will take a lot of practicing what Ms. Constantine tried to teach me before I will rely on it in my courtroom. I certainly want to look into the research she mentioned relating to LIWC (Linguistic Inquiry and Word Count) to see if it might apply to analyzing written material in my quest for truth, or at least help me determine how convinced someone is that (s)he is writing the truth. Ms. Constantine's talk did make me consider whether I spend too much time taking notes and not enough time just observing the witnesses.

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Professor Timothy Terrel of Emory University lecturing on effective judicial writing at Judiciary College 2012

Team 6 from Florida Coastal School of Law in Jacksonville (left) posed with judges from the Florida First District Court (right) after winning the 2012 Moot Court Competition

Breaking News

Bankruptcy Court Ruled August 28, 2012,
In re: Prime Tanning, See Page 19

As usual, I enjoyed our lunch with our own judges and their multi-state presentation. Besides the substantive information presented, I was impressed by Judge Hopens' ability to communicate with each panelist and also members of the audience after gobbling down her lunch.

Enough about the immediate past; what about the future? In the coming months I will be filling you in on a research project that NAWCJ plans to undertake under the guidance of Judge David Torrey, who takes over as President in January 2013. He and I will be asking for input from each of you about the way things are done in the world of workers' compensation in your state and for possible contacts with judges in other states which are not currently represented by our membership. I promise you our questions will not impose a lot of work or require a lot of time from you. I know how busy you are in your professional and personal lives already.

I would also like you to start thinking about next year's Moot Court. This year was the first year that NAWCJ sponsored the Earle Zehmer Moot Court competition which has been taking place in conjunction with WCI 360's annual education seminary (the one with several thousand attendees that is going on down the hallway from our college) for 20 years or so. WCI 360 will pay all expenses for moot court attendees and we would love to have a law school from your state represented. As far as I know, this is the only moot court competition which presents a workers' compensation problem. If you know anyone from your local law schools who might be interested, start passing the names to me and I will have someone contact her/him. Lastly, we begin planning for next year's college soon. If you want to be involved in planning or being on a panel, let me know. And, if you would like to come but your agency cannot fund your attendance or can fund only a part of your attendance, NAWCJ has some scholarship funds available. Keep that in mind when we start talking about the 2013 program in January.

As always, contact me at
Ellen_Lorenzen@DOAH.state.fl.us

Twenty Opinion-Writing Myths

By: Judge Gerry Lebovits

ED. NOTE. The New York Court system s publishes a book on judicial writing, The following is an excerpt from the 2004 edition. This is a compendium providing an unbelievably detailed focus on legal writing. The table of contents alone is thirty-four pages. The original work is available here: http://ssrn.com/abstract=1406709

1. Only geeks with thick glasses can write good opinions. That is fine; literary style is not very important in opinion writing.

Reality: Judges must be good writers. As professional writers, judges should dedicate themselves to a lifelong study of writing. You cannot be a great lawyer, law clerk, or judge, whatever your other qualities, unless you write well. Here is the reverse: No shoddy lawyers, law clerks, or judges are good writers. As Fordham Law School's former dean, John Feerick, explained, "Without good legal writing, good lawyering is wasted, if not impossible." (John D. Feerick, *Writing Likea Lawyer,* 21 Fordham Urb LJ 381, 381 [1994].)

Legal educators agree on little. But they all agree that legal writing is the most important skill future lawyers and judges must acquire. *(See e.g.* American Bar Association, *Legal Education and Professional Development-An Educational Report of the Task Force* on *Law Schools and the Profession: Narrowing the Gap* 264 [1992] [MacCrate Reportj.) Legal ethicists have their debates. But they all agree that legal writing must be competent. *(See e.g.* Debra R. Cohen,
Competent Legal Writing - A Lawyer's Professional Responsibility, 67 U Cinn L Rev 491 [1999].) American opinion writing must be especially competent "because no judicial system in the common law world has featured the judicial opinion to the extent that the American system has." (William Domnarski, In the Opinion of the.Court xi [1996].)

The following goes in the "My Inferiority Complex is not as Good as Yours" Department. Those who assume that only geeks write well see writing as a series of complicated do's and don'ts. That is not surprising. There *are* many rules, although the most difficult ones are rules of usage, not rules of grammar. Anyone who can speak English, though, can write English. To compose effectively, you need not know every style rule, which can be learned one by one anyway. Nevertheless, the sooner you learn the rules, the better. As the Chinese proverb goes, "The best time to plant a tree is 10 years ago; the second best time is now."

Judges and law clerks know that they must periodically undergo continuing legal education to study substantive law and procedure. *(See* Robert A. Leflar, *The Quality ofJudges,* 35 Indiana LJ 289, 304 [1960] ["It is a rare judge who does not appreciate the need for further self-education, and strive for it constantly."].) All appellate judges and their law clerks know the value of studying writing in addition to substance and procedure. But some trial judges and their law clerks do not. Perhaps they do not know that resources are available to help them. Perhaps they believe that the magic of appointment elevated them above pedestrian activities like writing. Perhaps their egos are too large to acknowledge that their writing-that everyone's writing-can improve. Perhaps they believe that they can get by on boilerplate, or oral opinions, or, in the case of judges, good law clerks. Perhaps they believe that they are too old to learn writing. Perhaps they believe that style is unimportant. Perhaps they suffered so greatly studying legal writing in law school that they do not care to repeat the experience.

You do not get experience until after you need it. But just as you can drive a car without knowing how an engine works, to write effectively you need not know the difference between syntax-the order of words in a sentence-and the parts of speech. With study, practice, an editor, and the right attitude, you can write as comfortably as you drive. Experienced motorists drive without thinking about every shift in gear. Experienced writers compose without thinking about every usage rule. To think constantly about gears is never to arrive at the destination, or never to be happy about the trip. To think constantly about usage is never to finish a document, or never to be happy about the product.

And literary style *is* important. If good opinion writing is critical to the good administration of justice, literary style is critical to good opinion writing:

> "Some judges argue that literary style has little or nothing to do with the quality of opinions, that style is 'dressing' merely, and that the functions of opinions are served by their substantive content.

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"*Writing Myths"* from Page 3.

> "Some judges argue that literary style has little or nothing to do with the quality of opinions, that style is 'dressing' merely, and that the functions of opinions are served by their substantive content. This simply does not make sense. For one thing, every judge has a writing style, whether he knows it or not. Whatever it is, it determines how effectively the substantive content of the opinion is conveyed." (Robert A. Leflar, *Some Observations Concerning Judicial Opinions,* 61 Colum L Rev 810,816 [1961].)

An opinion that "presents a sound statement of the law will hold its own regardless of its literary style. But, the fact that substance comes before style does not warrant the conclusion that literary style is not important." (American Bar Association, Section on Judicial Administration, Committee Report, *Internal Operating Procedures of Appellate Courts* 31 [1961].) Although literary style is important, a satisfactory "objective is not a literary gem but a useful precedent, and the opinion should be *constructed* with good words, not plastered with them." (Bernard E. Witkin, Manual on Appellate Court Opinions § 103, at 204-205 [1977] [emphasis in the original].)

2. Legal writing is subjective. Opinion writers see so much bad writing that they have little incentive to improve their own writing.

Reality: Objective standards determine whether legal writing is good. People disagree only about the less important aspects of legal writing. And precisely because so much legal writing is poor, opinion writers should strive to write well. Poor writing goes unread or is misunderstood. Good writing is appreciated. Great writing is rewarded lavishly. As Professor Fuller said:

> "The great judges of the past are not celebrated because they displayed in their judicial 'votes' dispositions congenial to later generations. Rather their fame rests on their ability to devise apt, just, and understandable rules of law; they are held up as models because they were able to bring to clear expression thoughts that in lesser minds would have remained too vague and confused to serve as adequate guideposts for human conduct." (Lon L. Fuller, *An Afterward: Science and theJudicial Process,* 79 Harv L Rev 1604, 1619 [1966].)

Continued, Page 6.

Did you know?

The National Association of Workers' Compensation Judiciary has undertaken a study of procedural distinctions among the various jurisdictions. Under the leadership of President-Elect David Torrey of Pennsylvania's Department of Labor and Industry, a survey has been prepared and published. This will be the initial step in gathering comparative data regarding the processes in the various jurisdictions. It is hoped that the results from this survey will provide a foundation from which the NAWCJ can build and publish a database comparing various jurisdictions. The survey was provided to attendees at the 2012 Judiciary College in Orlando, and is reprinted on pages 19-22 of this edition. Please take a few moments to complete the survey and then send it to us by email, facsimile or mail. The NAWCJ thanks you for your support and participation.

NAWCJ Judicial College 2012!

THANKS!

The Judiciary College 2012 has concluded. We are proud to thank our phenomenal speakers!

Professor Timothy Terrel
Atlanta, GA
Emory University

Honorable Jennifer Hopens
Austin, TX
Texas Department of Insurance, Division of Worker's Compensation

Honorable Michael Alvey
Frankfort, KY
Kentucky Workers' Compensation Commission

Honorable Melba Dixon
Jackson, MS
Mississippi Workers' Compensation Commission

Honorable *Sylvia Medina Shore*
Miami, Florida
Florida Office of Judges of Compensation Claims

Honorable James Szablewicz
Richmond, Virginia
Virginia Workers' Compensation Commission

James McCluskey, M.D., MPH, PhD.
University of South Florida
Tampa, FL

Professor Charles Ehrhardt
Florida State University
Tallahassee, FL

Steven E. Weber, D.O.
From Orlando Orthopaedic Center, Orlando, FL

Susan Constantine – As seen on CNN, MSNBC, ACB, CBS, and HLN.
Orlando, FL

Honorable Steven Rosen
St. Petersburg, FL

Honorable Melissa Jones
Washington, D.C.
District of Columbia Department of Employment Services

Elizabeth Rissman
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William Wieland, Esq.
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Honorable Nikki Clark
Tallahassee, FL

Honorable Warren Massey,
Atlanta, GA

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"*Writing Myths"* from Page 4.

Perfection in writing is impossible. But perfection should be the goal, so long as perfection does not interfere with a deadline. Poor opinion writing signals mediocrity or worse, and that is unhealthy for the administration of justice: "A judge need not be vicious, corrupt, or witless to be a menace in office. Mediocrity can be in the long run as bad a pollutant as venality, for it dampens opposition and is more likely to be tolerated." (Maurice Rosenberg, *The Qualities of Justice - Are They Strainable?*, 44 Tex L Rev 1064,1066 [1966].)

3. Write in a comfortable setting. Then finish a section before taking a break.

Reality: These are matters of personal preference. But most people find writing difficult. The work will be finished faster and more concisely if the writer writes in an uncomfortable setting. Moreover, many writers who take a break between sections become complacent. They find it hard to resume quickly. A writer who takes a break in the middle of a sentence has an unenjoyable break but returns to work quickly. However you do write, though, write at a time and place with few distractions.

4. Reread your opinion soon after you submit it.

Reality: The time to edit your writing is before you submit your final product. Rereading what you have written months after you have written it is helpful to measure progress. But rereading something too quickly after you submit it leads to frustration. Most writers' egos are still wrapped up in their writing, and nothing can be improved after it is submitted.

5. Creativity is the essence of good opinion writing.

Reality: Except in hard cases, the law does not reward creativity. It rewards logic and experience. As Justice Holmes observed, "The law is not the place for the artist or poet. The law is the caning of thinkers." (Oliver Wendell Holmes, quoted in Case & Comment 16 [Mar./Apr. 1979].) A good argument weighs little if, before you consider it, no one, not even a secondary authority, raised it, suggested it, or at least laid the foundation for it, regardless how logical and wise it seems. That is the system of precedent, well explained by New York's Chief Judge John T. Loughran in *Some Reflections* on *the Role of Judicial Precedent,* 22 Fordham L Rev 1 (1953). Thus is it said that "a page of history is worth a volume of logic." *(New York Trust Co. v. Eisner,* 256 US 345,349 [1921, Holmes, J.].) Legal writers gain nothing "reinventing the wheel. And trial judges may not disregard binding appellate precedent. The most they can do is urge a change in the law that only legal authority itself can justify.

6. Good opinion writers write for themselves.

Reality: Good opinion writers write for their readers. Unfortunately, "[t]oo often ... judges write as if only the writer counted. Too often they write as if to themselves and as if their only purpose were to provide a documentary history of having made a judgment. Instead, they must realize that the purpose of an opinion is to make a judgment credible to a diverse audience of readers." (Dwight W. Stevenson, *Writing Effective Opinions,* 59 Judicature 134, 134 [1975].)

An honest, effective judicial opinion for a varied audience must be simple. The goal is to write an opinion "that will contribute to clear understanding of court opinions by laymen and the public in general; perhaps by lawyers, too." (Boyd F. Carroll, *The Problems of a Legal Reporter: Views* on *Simplifying Appellate Opinions*, 35 ABAJ 280, 281 [Apr. 1949].)

7. Organizing increases the workload. It is just one more thing to do.

Reality: Organizing by outlining is a great timesaver if the case is complicated. Those who hate to outline should adopt a flexible approach, but outline they should. Not outlining often means spending more time overall. If you outline you will have a vision before you start, you will know what goes where, and you will not forget or repeat things.

8. Writing a lengthy opinion is harder and takes more time than writing a brief one.

Reality: Writing something short, concise, and to the point is harder than writing something lengthy or rambling. Pascal noted this phenomenon in the seventeenth century: "I have made this letter longer than usual because I lack the time to make it shorter." (Blaise Pascal, Provential Letters xvi, quoted in *Hayes v. Solomon,* 597 F2d 958,986 n 22 [5th Cir 1979, Hill, J.]' *cert denied* 444 US 1078 [1980].)

9. If you have little to say about something, even something important, do not use much space writing it.

Reality: If you have nothing to say, or nothing good to say, do not say it. The same applies to writing. Consider James

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"Writing Myths" from P.6

Russell Lowell's comment about the loquacious: "In general those who have nothing to say Contrive to spend the longest time in doing it." But something that must be communicated will get lost if little space is devoted to it. Expand your important point to give it the stress it deserves.

10. Real opinion writers never compose on word processors. They write longhand.

Reality: The best writers under 40 are computer literate. They make their final edits on a hard copy but compose on the screen. They rarely write in longhand. They never dictate anything longer than a page or two, for "[d]ictating an opinion invites amendment and re-writing to shorten and strengthen its structure." (James D. Hopkins, *Notes* on *Style in Judicial Opinions, 8* Trial Judges J 49 [1969], reprinted in Robert A. Leflar, *Quality in Judicial Opinions*, 3 Pace L Rev 579,585 [1983].) Beware, though: Word processing lets writers write more than readers care to read. Judge Matthew J. Jason explained the problem:

> "[I]n recent years we have witnessed great technological advances in the methods of reproduction of the written word. Too often this process is merely viewed as a license to substitute volume for logic in an apparent attempt to overwhelm the courts, as though quantity, and not quality, was the virtue to be extolled." *(Slater v. Gallman,* 38 NY2d 1,5 [1975].)

11. Know everything about your topic before you begin to write.

Reality: Some argue that "[a]n effective brief is fully thought through before a word is set to paper." (Judith S. Kaye, Callaghan's Appellate Advocacy Manual [John W. Cooley, ed], quoted in Albert M. Rosenblatt, *Brief Writing and Oral Argument in Appellate Practice,* 24 Trial Lawyers Q 22, 22 [1994].) On the other hand, you will never start to write, or you will start to write only the night before your opinion is due, if you insist on knowing everything before you begin. The key is to know everything by the time you finish. You can always change focus in midstream, especially if you compose on a computer. Outlining in advance and constant editing will control your writing.

12. Do not start to write an opinion until inspiration hits you.

Reality: Reflection and deliberation assure fair and accurate decisions. But your opinion will be late if you wait until inspiration strikes. Waiting to become inspired will turn you into a procrastinator, if you ever get around to procrastinating. Waiting for sudden bursts of insight or energy is an excuse to delay writing. These excuses are symptoms of writer's block-which, because the law rewards logic over creativity, except in hard cases-should not afflict the opinion writer. *(See* Stewart G. Pollock, *The Art of Judging*, 71 NYU L Rev 591, 593 [1996] ["To deny the similarities between artistic and judicial endeavors, however, would ignore the reality that judging, particularly in hard cases, is unavoidably creative."].) Legal writing requires more sweat than inspiration. Writers often begin sentences not knowing how they will end. Inspiration comes as you write and edit.

Continued, Page 9.

"Second Fridays," Free Educational Programs from the NAWCJ

September 7, 2012

Mark Popolizio, Esq., will present "Medicare Compliance" an overview of the challenges posed by requirements to take Medicare's Interests into account when settling a workers' compensation case. Mark is an expert in MSA and compliance.

October 12, 2012

Sanford Silverman, M.D. is a pain management physician. He will present perspectives on pain management with focus on the challenges of the growing evidence regarding opiod medications.

November 9, 2012

Alex Cuello, Esq. will present his perspective on guardianships and the challenges to workers' compensation professionals when working with injured workers who are unable to attend to their own best interest.

Make plans today to tune-in

All Second Fridays presentations are free. To join at 12:00 Eastern time, email judgelangham@yahoo.com for details.

Announcing the College of Workers' Compensation Lawyers 2012 Annual Writing Contest for Law Students.

The Lex and Verum has been privileged to publish some exceptional essays by law students this year. The College of Workers' Compensation Lawyers conducts an annual essay contest.

The 2011 First Place essay, *Workers' Rights: Should Undocumented Mean Uncompensated*, was written by Amanda Jaret. Ms. Jaret was a third year law student at St. John's University School of Law when she produced this excellent article. It was republished in the July 2012 Lex and Verum. This article asserts that undocumented workers have been "massively exploited" by employers. Ms. Jaret addresses "one of the most challenging questions in worker's compensation, whether and to what extent undocumented workers may receive workers' compensation benefits."

Ms. Shelby Skeabeck authored *Cue The Lights: A Call to The Supreme Court And Congress to Shed Light on the Confusing Law in the DBA/Longshore Act Circuit Split. Ms. Skeabeck* was a third year law student at the Earle Mack School of Law at Drexel University in Philadelphia, Pennsylvania, when she produced this work. Ms. Skeabeck identifies conflict between the Defense Base Act and the Longshore Act. She argues that the Supreme Court should accept jurisdiction and rectify the conflict. She notes, however, that Congress and the Court are unresponsive to this conflict. This was republished in the June 2012 Lex and Verum.

Mr. Ian Hayes authored The Intoxication Defense and Addiction, placing third in the 2011 contest. It was republished in the May 2012 Lex and Verum. Mr. Hayes argues that "states should reconfigure the intoxication defense to give consideration to the unique role that addiction plays in some workers' lives." His review of the various standards adopted in the United States is informative and his arguments persuasive.

The College of Workers' Compensation Lawyers inducted its first class in March 2007.

> The College of Workers' Compensation Lawyers has been established to honor those attorneys who have distinguished themselves in their practice in the field of workers' compensation. Members have been nominated for the outstanding traits they have developed in their practice of twenty years, or longer, representing plaintiffs, defendants, serving as judges, or acting for the benefit of all in education, overseeing agencies and developing legislation. These individuals have convinced their peers, the bar, bench and public that they possess the highest professional qualifications and ethical standards, character, integrity, professional expertise and leadership. They have a commitment to fostering and furthering the objectives of the College and have shown significant evidence of scholarship, teaching, lecturing, and/or distinguished published writings on Workers' Compensation or related fields of law. In addition to these characteristics, a Fellow is expected to display the following traits in their day to day practice of workers' compensation and related fields:
>
> - A Fellow stands out to newer attorneys as a model of professionalism in deportment and advocacy;
> - A Fellow has earned the respect of the bench, opposing counsel and the community;
> - A Fellow displays civility in an adversarial relationship;
> - A Fellow avoids allowing ideological differences to affect civility in negotiations, litigation and other aspects of law practice;
> - A Fellow demonstrates an active interest in resolving issues;
> - A Fellow is a student of the law;
> - A Fellow has a thirst for knowledge in all areas of the law that affects their representation of their clients in Workers' Compensation or their duties in adjudicating cases brought before them;
> - A Fellow actively participates in the state, local and/or National Bar.

The College is now accepting submissions for the 2012 writing contest. Details are on the College website, http://www.cwclawyers.org/html/writing_contest.html, and on pages 24-25 of this edition.

Your 2012 NAWCJ Board of Directors

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"*Writing Myths" from P.7*

It is hard to write judicial opinions. Together with emotional strain and the requirements of research and technical accuracy, "as a writer, a]n appellate] judge is under a pressure to produce and publish more severe than that felt by any college professor or journalist." (Johnson, *What Do Law Clerks Do*?, 22 Tex BJ 229, 230 [1959].) If your strength ebbs, you, the trial or appellate opinion writer, are an important public servant who "does not have the luxury of setting aside the case and coming back to it in a month because you have writer's block; you wade through to the end, no matter how paralyzed your pen." (Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings,* 62 U Chi L Rev 1371, 1385 [1995].)

All cases must be decided, even when the equities appear balanced and law and fact seem unclear. After all, "[a]ppellate judges, indeed all judges, have one overriding responsibility: to decide cases." (Eugene A. Wright, *Observations of an Appellate Judge: Use of Law Clerks, 26* Vand L Rev 1179, 1179 [1973] .) Do not worry if you cannot decide a case immediately. A few days' thought and study will resolve doubts, lead to an epiphany, and allow the opinion-writing process to begin. Judge Cardozo beautifully described an experience through which every opinion writer lives from time to time:

> "I have gone through periods of uncertainty so great, that I have sometimes said to myself, 'I shall never be able to vote in this case one way or the other.' Then, suddenly, the fog has lifted. I have reached a stage of mental peace .. . , [T]he judgment reached with so much pain has become the only possible conviction, the antecedent doubts merged, and finally extinguished, in the calmness of conviction." (Benjamin N. Cardozo, *The Paradoxes of Legal Science* in Selected Writings of Benjamin Nathan Cardozo: The Choice of Tycho Brahe 80-81 [Margaret E. Hall ed 1947] .)

13. Finish your opinion early.

Reality: Start early, as soon as reason overcomes emotion and you have the feeling of decision, who should win and, roughly, why. Your labor will be more efficient if you start to draft before the case gets cold in your mind. Starting early lets you start over after a false start and still submit your opinion on time. False starts happen from time to time: "A judge .. . often discovers that his tentative views will not jell in the writing." (Roger J. Traynor, *Some Open Questions* on *the Work of State Appellate Judges,* 24 U Chi L Rev 211,218 [1957] .) But take the time and make the effort to edit until the project is due. You will have fewer regrets afterward. If you write in haste you will repent in court. As Chief Justice Marshall wrote, "The past cannot be recalled by the most absolute power." *(Fletcher v. Peck,* 10 US [6 Cranch] 87, 135 [1810].)

14. Obsessive-compulsives and the omniscient make great opinion writers.

Reality: I wish I had written this 16 times by now: Do not obsess over what you write. Never sweat the small stuff. It will paralyze you. Become obsessive, if at all, only at the very end, during your final edit, when attention to detail is important. Then submit your work and be done with it. Opinions are like children. At some point you must let them go and hope for the best.

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"*Writing Myths" from P.9*

Doing your best and trying your hardest also means not worrying about being reversed. Obsessing over the possibility of reversal might lead to a timid opinion or indecision. The most experienced and learned trial judges sometimes suffer reversal. Just as appellate judges must be open to the possibility of error below, so must trial judges be grateful for appellate review if they make mistakes, or even if others see things differently. The potential for appellate correction should relieve anxiety, not create it.

The omniscient are even worse opinion writers than the obsessed. According to Ninth Circuit Judge Merrill, the omniscient do not recognize an occupational hazard of judging:

> "There is both prospective and retrospective danger to the judge who demands of himself nothing less than omniscience. In the first place he will find it difficult ever to let loose of an opinion, feeling that further study may expose some lurking error in his reasoning. He simply will not get his work out. In the second place, having reached a decision, he may have rendered himself immune to all further enlightenment on the subject." (Charles M. Merrill, *Some Reflections* on *the Business of Judging,* 40 J State B Cal 811,812 [1965].)

15. Good opinion writers rarely need time to edit between drafts. And good opinion writers do not need editors.
Reality: Put your project aside, however briefly, a few times while you write and edit. You will catch mistakes you did not see earlier and make improvements you might not have thought of earlier. Self-editing requires objectivity. You cannot be objective if you do not distance yourself from your work. Thus, start early, but edit late. If you have an editor, take advantage. Welcome suggestions gratefully, and think about them, even if you ultimately reject them. Editors, unlike writers, always consider the only one who counts: the reader.

16. No one cares how you cite, so long as your citations can be found.
Reality: Just as a few dents greatly diminish the value of a fine car, so does improper citation mar legal writing . Just as a gourmet can tell whether the main course in a restaurant will be good by how good the bread is, so can legal readers tell from the quality of the citation format whether the writing and analysis will be good. If the writer is sloppy about citations, the writer might be sloppy about other, more important things. Readers know that writers who care about citations care even more about getting the law right.

Some judges and law clerks insist that they care not at all how lawyers cite, so long as lawyers give the correct volume and section numbers so that citations can be found. Judges and law clerks who insist that they could not care less about lawyers' citing do so for one or more false reasons: as code to suggest that they are so fair and smart that they can see through the chaff to let only the merits affect their decision making; because they themselves do not do not know the difference between good citing and bad; or to communicate their low expectations of the lawyers who appear before them. Judge and law clerks should tolerate lawyers' imperfect citations but must cite proficiently.

17. Only perfectionists care about occasional typographical errors.
Reality: What applies to imperfect citation format applies even more to typographical errors. Spell-check every time you exit your file. Proofread carefully on a hard copy. Proofreading reflects pride of authorship. Arkansas Supreme Court Justice and later NYU Law Professor Leflar explained why pride of authorship is important: "An opinion in which the author takes no pride is not likely to be much good." (Robert A. Leflar, *Some Observations Concerning Judicial Opinions,* 61 Colum L Rev 810,813 [1961].)

Readers find proofreading mistakes easily, more easily than writers can. These are the same readers who pay little attention to what you write until you make a mistake. Proofreading mistakes adversely affect the opinion to a degree vastly out of proportion to their significance.

If your final drafts regularly drop words and contain typographical, citation, formatting, and quotation errors, you might be learning disabled (LD) to one degree or another and in one form or another. In the United States, "15% of the population is affected to varying degrees" by dyslexia. (Unmesh Kehr, "Medicine-Deconstructing Dyslexia: Blame it on the Written Word," *Time Magazine,* Mar. 26, 2001, at 56,56.) It is not a matter of intelligence. Dyslexics have difficulty breaking down the written word, especially the notoriously variable and complex written English word. English has 1120 ways to spell its 40 phonemes, sounds needed to pronounce words. Italian, by contrast, needs only 33 letter combinations to spell its 25 phonemes. (Id.) Those who speak Italian are as dyslexic as those who speak English, but dyslexia affects readers and writers of English, not readers and writers of Italian.

A learning disability is a gift. The learning disabled have talents the differently-abled will never know. Some of the best writers have been learning disabled.

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Think of Albert Einstein, whose penetrating writing proves that he was not merely a physicist. Think of Sir Winston S. Churchill, whose History of the English Speaking People won him the 1953 Nobel Prize for Literature and proved that he was not merely a politician with a gift for gab. LD writers must compensate by proofreading with special care and a second set of eyes. With that extra care, LD writers can often be better writers than non-LD) writers.

For an inspirational, autobiographical piece about an LD opinion writer, see Jeffrey Gallet, *The Judge Who Could Not Tell His Right from His Left and Other Tales of Learning Disabilities, 37* Buff L Rev 739,740 (1989)("I am a kind of talking frog-a learning disabled judge."). The late Judge Gallet, then a Family Court judge for the State of New York in the City of New York and later a U.S. Bankruptcy judge for the Southern District of New York, discovered at 34 that he was dyslexic (reading), dysgraphic ('riting), and dyscalculiac ('rithmetic). Yet he wrote more articles, books, and opinions than many people have read.

18. Prose in opinion writing is best directed to the highest common denominator.

Reality: Legal writing is best directed to smart high-school students. If they understand, you, so will a more educated readership. Keep your words, sentence structure, paragraphs and organization simple. Complex prose is weak prose. The erudite explain difficult concepts in easy-to-read language. From Harvard Law Professor Warren: "[T] he deepest learning is the learning that conceals learning." (Edward H. Warren, Spartan Education 31 [1942].)

19. Legal writing has little to do with reading nonlegal subjects. It is enough to read judicial opinions to learn good legal writing.

Reality: Writing has everything to do with reading, from finding good models, to assessing the merits of a written argument, to learning to think clearly. The goal is to read widely and critically.

Reading cases is not the best way to learn opinion writing. Frankly, some judges write poorly. *(See e.g.* Steven Stark, *Why Judges Have Nothing to Tell Lawyers About Writing,* 1 Scribes J. Legal Writing 25 [1990].) Some law-school teachers select cases to make their students feel inadequate: "Not many readers can defend the prose of judicial opinions selected for case books, a style students instinctively assume is 'the way law looks.'" (Terri LeClerq, Guide to Legal Writing Style xvi [2d ed 2000].)

Opinion writing sets the standard by which many lawyers write. If imitation is thought to flatter, it is not flattering that writing gurus like Temple Law Professor Lindsey consider opinion writing a poor legal-writing model: "Unfortunately, court opinions influence the writing styles of students, lawyers, judges and even law professors. That [is] a distressing, or at least sobering, thought for all of us. If you are what you eat, you write what you read. Garbage in, garbage out." (John M. Lindsey, *Some Thoughts about Legal Writing,* NYLJ, Oct. 27, 1992, at 2, col 2.)

Professor Lindsey overstated his case. Lawyers' and judges' writings have different functions. *(See* William Domnarski, *The Opinion as Essay, the Judge as Essayist: Some Observations* on *Legal Writing,* 10 J Legal Profess 139 [1985] [arguing that judges' and lawyers' writings cannot be analyzed together]; Judith S. Kaye, *One Judge's View of Academic* Law *Review Writing,* 39 J Legal Educ 313, 320 [1989] [arguing that law professors "are writing for each other"].) But many, including many opinion writers, share Professor Lindsey's opinion about opinion writing.

If reading opinions will not teach you how to write a good opinion, how can you learn good opinion writing? Not on a wing and a prayer. It is not enough to recognize good writing when you see it. *(Cf. Jacobellis v. Ohio,* 378 US 184, 197 [1964, Stewart, J., concurring] ["I know [obscenity] when I see it ...."].) Nor is it enough to choose one grammatical construct over another just because the chosen option looks good.

Professor Lindgren suggests returning to school, but" [i]f school is not the answer for most of us, what is? A few people may learn to write from their supervisors on the job, but most will have to learn the same way I am trying to, by reading style books." Games Lindgren, *Style Matters:* A *Review Essay* on *Legal Writing,* 92 Yale LJ 161, 168-169 [1982] [book review].)

Only reading broadly and critically will lead a writer to study the vocabulary and rules of writing. Most great legal writers stress that reading nonlegal subjects is a prerequisite to good lawyering. This was Justice Frankfurter's advice to a 12-year-old boy who wanted to prepare for a career in the law:

> "My dear Paul:
> No one can be a truly competent lawyer unless he is a cultivated man. If I were you, I would forget about any technical preparation for the law. The best way to prepare for the law is to come to the study of law as a well-read person. Thus alone can one

Continued, Page 12.

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acquire the capacity to use the English language on paper and in speech and with the habits of clear thinking which only a truly liberal education can bring ....

With good wishes,
Sincerely yours,
Felix Frankfurter"

(Felix Frankfurter, *Advice to a Young Man Interested into Going into Law,* in The Law as Literature 725 [Ephraim London ed 1960].)

20. Law clerks should trust their judges when they are told, "Just give me a draft."
Reality: Many new attorneys believe that a supervisory attorney's most common fib is to instruct the new attorney to submit "only a draft." The problem here is communication, not dishonest supervisors. A seasoned attorney's draft is a less-seasoned attorney's final product. A less-seasoned attorney's draft provides little help to a seasoned attorney, and especially a judge, who might have forgotten that it takes years to write well. The solution: New attorneys should hand in their best work even when told to submit only a draft.

_____

Gerry Lebovits holds advanced law degrees (M.C.I. and LL.M.) and serves as an adjunct professor (teaching "Drafting Judicial Opinions" and other courses) at New York Law School. A Housing Court Judge in New York City, he was principal court attorney in the New York State Court system for almost 16 years. He has published on a broad range of legal subjects and authors a column on legal writing for the New York State Bar Journal. For a number of years, he has conducted judicial training seminars on opinion writing under the auspices of the New York State Office of Court Administration, Jude Lebovits' Handbook, now in its seventh edition was developed for those seminars and has been distributed widely to the New York bench.

Judge Lebovits' Perspective on his work:

"I would be honored if this work in progress helps law clerks and their judges render justice. I would be content if it makes them think about writing."

Gerry Lebovits
GLebovits@aol.com
November 2004

NAWCJ Judiciary College 2013

With the 2012 Judiciary College behind us, we are refocusing our efforts. We will be evaluating the program in coming weeks as we begin the process of planning for next year. Mark your calendars now for these future Judiciary College dates.

Judiciary College 2013 * August 18-21, 2013

Judiciary College 2014 * August 17-20, 2014

Judiciary College 2015 * August 23-26, 2015

Judiciary College 2015 * August 21-24, 2016

If you have suggestions for topics generally or specific speakers, please contact judgelangham@yahoo.com

2012 All Committee Conference

The Big Easy

November 12-16, 2012

Where else but New Orleans? Where else by the Hotel Monteleon? The All Committee Conference promises to be a memorable experience for all. The subject matter and the venue both hold great promise.

Hotel Monteleone first opened in 1886 and still retains its old-world sophistication. Located on Royal Street, rooms offer views of the French Quarter and are appointed with modern amenities and antique-style furnishings.

The 2012 All Committee Conference (ACC) theme is *Real Issues – Real Answers.* Attendees at the Regulator Roundtable in Orlando will recall that Federal decisions and policy are a hot topic for workers' compensation today. According to SAWCA Executive Director Gary Davis, the 2012 ACC "goal is to deal with the topics focusing on the real problems" states are having with "MSA's and Bankruptcies."

The MSA topic will be covered by a "who is who" panel including

Moderator
- Karl Aumann (Commissioner, Maryland)

Panelists
- Doug Holmes (UWC)
- Kari Lou Frank (PennStuart)
- Ben Pugh (Carr Allison)

The bankruptcy panel will further discuss the Prime Tanning bankruptcy and all that it entails for workers' compensation generally and self-insurance specifically. Following up on the excellent summary delivered by Paul Sighinolfi (Maine) at the August Regulator Roundtable, this roudtable will further illuminate the interesting arguments being made by creditors. It is probable that the bankruptcy court in Prime Tanning will have ruled by the ACC, and this will be an excellent opportunity to discuss the outcome with peers.

Laissez Les Bon Temps Roulez ("Let the Good Times Roll") this November in the Big Easy with SAWCA. More details available on the website, http://sawca.com/default.htm

SAWCA Mission

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.

California Ethics Committee Finds 8 Cases of Judicial Misconduct

The California Workers' Compensation Ethics Committee found eight cases of judicial misconduct after reviewing 38 complaints against workers' compensation judges in 2011.

In one case, a defense attorney complained that a judge had pre-decided a Labor Code Section 132(a) discrimination case because the judge on three occasions said if the defendant did not settle, the applicant would prevail. The defendant did not settle and the judge issued an order finding in favor of the applicant. Another complaint filed by a defense attorney said a judge presiding over a lien trial said he was retiring at the end of the month and did not care what the parties did because the case was no longer his problem. The attorneys left, but soon realized they needed another ruling on the case. When they later appeared before the same judge, the defense attorney said she needed time to review the documents and prepare for trial. The judge said the amount of time the attorney needs to review files is dependent upon her skills as an attorney. The attorney started crying, at which point the judge said, "I don't think you girls are capable of trying any case."

A complaint filed by an applicants' attorney said after requesting a judge sign an order with respect to his lien claim, the judge approached him "with an intimidating face expression" and grabbed documents from him. The attorney said he was "offended, intimidated and frightened."

In another case the committee identified as judicial misconduct, a judge told an applicants' attorney that he should consider retiring.

Other complaints alleged that a judge spent 30 minutes talking to a friend while attorneys were waiting to proceed with a case and that a judge who offered to help two attorneys working on a pre-trial conference settlement began discussing the merits of the case and disclosed how he would rule.

The committee's 2011 annual report does not identify the judges in any of the complaints. The report also does not describe disciplinary actions, saying only that it "recommended further action" and that "the administrative director has taken appropriate corrective action."

The committee received 41 new complaints in 2011, including three that were received after the committee's final meeting of the year.

The majority of complaints came from injured workers and their attorneys. Employees who were not represented filed 20 complaints, injured workers who were represented by attorneys filed five complaints and applicant attorneys filed six complaints.

Defense attorneys filed five complaints, attorneys representing lien claimants filed three complaints and hearing representatives filed two complaints.

The articles on pages 13 and 14 are republished from Workcompcentral.com with the permission of the publisher. NAWCJ acknowledges and thanks WorkCompCentral for their support of this newsletter and the ideal of promoting professionalism and collegiality among the nation's workers' compensation adjudicators.

Lobbyists Attempting to Drum Up SMART Act Support during Break

By John P. Kamin, WorkCompCentral Correspondent

Lobbyists for employers are making a strong push to win more Congressional support for legislation that would change the way the Centers for Medicare and Medicaid Services governs reimbursements and set-asides, Medicare set-aside experts told attendees of a Florida workers' compensation conference. Congressional passage of the "Strengthening Medicare and Repaying Taxpayers (SMART) Act" would send a message to the Centers for Medicare and Medicaid Services (CMS) about how it collects reimbursements for conditional payments, Roy Franco told attendees of the Workers' Compensation Institute's 67th Annual Educational Conference in Orlando, Fla. Franco is a principal partner at Franco Signor, LLC. "If we pass a law, then we send a message to Medicare that they have gone too far," he said. "If we can tell them that they have gone too far, then we as a group, have the juice and the energy to change something in Congress, which by the way, is very hard to do we will make an impact. We are very close."

Franco explained that the SMART Act, which is comprised of H.R. 1063 and S.B. 1718, currently has 132 co-sponsors in the U.S. House of Representatives and 19 co-sponsors in the U.S. Senate. As Congress currently takes its annual late-summer recess, groups such as the Risk Insurance Management Society (RIMS) and the National Association of Medicare Supplement Advisors (NAMSA) are contacting Congressional home offices in an attempt to drum up more support for the bills, he said.

The SMART Act would impose a number of important reforms, Franco said. For example, the legislation would adjust the current "$1,000 per-day-per-claim" fine for failure to report bills for which CMS should be reimbursed. "The SMART Act is going to adjust that penalty and fine if a primary plan acts under good faith in submitting that information," Franco said. He noted that under the SMART Act, payers could also have a clear statutory right to appeal a CMS demand that would be similar to a Medicare beneficiary's right of appeal.

The act would also eliminate the requirement to use a claimant's entire Social Security number. Instead, CMS would use the last four digits of each claimant's number. Because CMS already uses the last four digits in the drug database, this change would come at little cost to CMS, he said. Franco noted that the Congressional Budget Office evaluated the SMART Act and concluded that it would create no additional government spending. Furthermore, the SMART Act would allow parties to self-calculate what amounts are owed to CMS before agreeing to a settlement, he said. This will help parties avoid the problem of negotiating a settlement and reaching agreement on the amount of the set-aside, only to have a CMS demand more than the amount agreed to. "It is going to allow parties to self-calculate conditional payments up front, so they know what the amount of money owed is prior to settlement," Franco said. "You are going to watch us run through a few cases here, where the parties got absolutely confused, got to a settlement stage, and then agreed on the amount when the conditional payment was not known. Today, Medicare believes that they do not have to calculate the final demand until after settlement. That is absolutely crazy. No claim disposes of liens after a settlement occurs. You need to get an amount, and the SMART Act would create a self-calculated process."

Franco and co-panelist Mark Popolizio proceeded to summarize a number of cases where litigants in the underlying case had a legitimate disagreement about the conditional payment owed to CMS, including *Hadden v. U.S.* (U.S. 6th Circuit Court of Appeals, 2011), *Bradley v. Sebelius* (U.S. 11th Circuit Court of Appeals, 2010) and *Carty v. Clark* (U.S. District Court for the Eastern District of Pennsylvania, 2012). Popolizio is senior legal counsel for Crowe Paradis.

For example, the Carty case featured a claimant and a payer who wanted to settle, Popolizio explained. This was complicated by the fact that the parties did not know what CMS's final demand for payment would be, he said.

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"The first stipulation that the plaintiff (claimant) agreed to ? and you cannot always get plaintiffs to agree to this ? is that (the carrier) is going to hold the whole settlement money in trust pending your production of Medicare's final conditional payment lien done," Popolizio said. "They were successful in getting that done."

The claimant submitted the amount of conditional payments to the payer, but the payer thought the estimate was too low. Fearing that the claimant's estimate did not include hospital bills that CMS may be owed money for, the payer held the claimant's settlement money in trust until the parties could decide how much was owed to CMS.

"He did not want to release the money at all," Popolizio said. "The court ruled against the defendant (payer) on two grounds."

First, the U.S. District Court for the Eastern District of Pennsylvania refused to enforce the settlement's language hinging payment upon receipt of CMS's final demand letter, and ordered the payer to pay the claimant.

"Their second point was, yes, that we recognize the potential concern here that maybe some point in the future Medicare may come back (for payment) . . . but you cannot prospectively assert Medicare's rights," Popolizio said.

In other words, the payer could not assert Medicare's rights in an attempt to prospectively protect itself against a higher-than-anticipated CMS demand, which might never occur.

While keeping the push on Congress, set-aside experts are also keeping an eye on the courts. Franco and Popolizio pointed out that the U.S. Supreme Court is currently deciding whether to grant review to the Hadden case. In that case, the U.S. 6th Circuit Court of Appeals ruled that CMS had the right to recover $62,338 from a $120,000 settlement Vernon Hadden received after being struck by a utility truck in Western Kentucky in 2004.

Hadden contended that CMS is entitled to $8,200, because the payer who settled was only 10% liable in the case. (The primary tortfeasor responsible for the vast majority of the negligent behavior that caused the accident was never located.) The U.S. Supreme Court has scheduled a conference to review the case on Sept. 24. Franco said that it is possible for the court to decide to grant or deny review before that date, however.

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The Cost of Producing Electronic Documents in Civil Lawsuits

By Nicholas M. Pace and Laura Zakaras

Pretrial discovery procedures are designed to encourage an exchange of information that will help narrow the issues being litigated, eliminate surprise at trial, and achieve substantial justice. But, in recent years, some have claimed that the societal shift from paper documents to electronically stored information (ESI) has led to sharper increases in discovery costs than in the overall cost of litigation. A case-study gathered cost data for 57 large-volume e-discovery productions, including those in traditional lawsuits and regulatory investigations; collected information from extensive interviews with key legal personnel from the responding companies; and reviewed the legal and technical literature on e-discovery, with emphasis on the intersection of information-retrieval science and the law. Although the results cannot be generalized to all litigants or even large corporations in particular, the monograph provides a richly detailed account of the resources required by a diverse set of very large companies operating in different industries to comply with what they described as typical e-discovery requests.

Companies could lower the high cost of large-scale electronic discovery in lawsuits by using a computer application known as predictive coding to reduce the number of documents requiring human review, according to a new study from the RAND Corporation.

The study also calls for rule changes to address concerns about the scope and process of preserving information in anticipation of future litigation.

Pretrial discovery procedures are designed to help narrow the issues being litigated, eliminate surprise at trial and achieve substantial justice. But in recent years, claims have been made that the societal shift from paper documents to electronically stored information has led to sharp increases in discovery costs compared to the overall costs of litigation. Some claim that these escalating costs are preventing people from litigating legitimate disputes.

The study includes 57 case studies from eight large corporations, reviews the literature on electronic discovery, estimates the costs of complying with discovery requests and examines the challenges of preserving electronic information.

The authors also interviewed key legal personnel to find out how each company responded to new requests for e-discovery, the steps taken to comply with such requests, the nature and size of each company's information technology infrastructure, and its document retention, disaster-recovery and archiving practices.

The costs associated with e-discovery can be grouped into three main categories: collection (locating potential sources of information following a demand to produce electronic documents and data); processing (reducing the volume of collected electronic data and converting it to forms more suitable for review); and review (evaluating the information to identify relevant, responsive and nonprivileged documents). About 8 percent of the costs are incurred during the collection phase, 19 percent during the processing phase and 73 percent during the review phase.

"Typically, in the review process, you're talking about someone, usually an outside attorney, having to sift through documents to find the ones that are relevant and responsive to the case, and eliminating the ones that are privileged," said Pace, a senior social scientist at RAND, a nonprofit research organization. "If it's just a few boxes of documents, the costs of conducting such a review are likely to be modest. When the volume increases to tens of thousands, or even millions, of e-mails and other electronic documents, the labor costs associated with an eyes-on examination can be enormous."

While some litigants have tried to reduce costs by hiring lower-cost temporary attorneys or even English-speaking lawyers in countries such as India and the Philippines, significant reductions in future costs in this area are unlikely. In addition, techniques to group the documents in such a way as to make the review more efficient are unlikely to yield the dramatic savings necessary to address stakeholder concerns.

On the other hand, predictive coding—a type of computer-categorized review application that classifies documents according to how well they match the concepts and terms in sample documents—may provide substantial savings. Human reviewers are still necessary, but only to review a much smaller subset of documents. One study estimated that the number of hours attorneys spend reviewing materials could be cut by about 80 percent.

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None of the companies in the RAND study was using predictive coding for review purposes in the cases examined. Litigants' concerns about predictive coding may include whether the approach will be able to identify all potentially responsive documents, while avoiding any overproduction, and whether it will be able to identify privileged or confidential information.

The biggest obstacle, however, is the dearth of judicial guidance on the issue. There isn't a large body of judicial decisions squarely approving or disapproving of the use of predictive coding—and few law firms are going to want to become early adopters, Pace said.

Another challenge for companies is determining how much digital information should be preserved for the purposes of future litigation and how best to prevent inadvertent destruction or alteration of potentially discoverable data. None of the companies surveyed were able to calculate how much it costs to track and preserve data, although those practices contribute to the overall cost of litigation.

Some judicial decisions have addressed preservation scope and process, however, the decisions serve as precedent only in specific jurisdictions and are sometimes in conflict. As a result, attorneys reported they had no clear understanding of whether their decisions about what and how to preserve were legally defensible and not at risk for serious sanctions. Litigants reported they secured more information than actually necessary in order to minimize the chances that their decisions could be called into question later.

The study recommends that companies adopt computer categorization to reduce the costs of review in large-scale e-discovery efforts and improve tracking of production and preservation costs. Researchers also suggest policymakers and the courts should bring certainty to legal authority concerning preservation.

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Upcoming Conferences:

These programs are not sponsored or endorsed by the NAWCJ, but are noted here for information.

The Kansas Department of Labor, 38th Annual Workers' Compensation Seminar, October 2-3, 2012 Overland Park Convention Center, $140.00.
https://www.dol.ks.gov/Files/PDF/RegistrationFlierAgenda.pdf

Maryland Workers' Compensation Educational Association, 2012 Conference, October 14-17, Ocean City, Maryland, $225.00.
https://mwcea.com/registration/registration.asp

10th Annual Wisconsin Workers' Compensation Forum, October 17-18, 2012, Country Springs Hotel, Pewaukee, Wisconsin, $99.00
http://www.wiwcforum.org/index.php

17th Annual North Carolina Workers' Compensation Educational Conference, October 10-12, Raleigh Convention Center, Raleigh, North Carolina, $275.00
http://www.ic.nc.gov/news.html

Ha Ha Ha Ha Ha

The Judge admonished the witness, "Do you understand that you have sworn to tell the truth?" "I do." "Do you understand what will happen if you are not truthful?" "Sure," said the witness. "My side will win."

The judge said to his dentist: "Pull my tooth, the whole tooth and nothing but the tooth."

Judge: Is there any reason you could not serve as a juror in this case? Juror: I don't want to be away from my job that long. Judge: Can't they do without you at work? Juror: Yes, but I don't want them to know it.

The Judge asked the defendant, "Mr. Jones, do you understand that you have sworn to tell the truth, the whole truth and nothing but the truth?" "I do." "Now what do you say to defend yourself?" "Your Honor, under those limitations… nothing."

Bankruptcy Court Rules in "Prime Tanning"

Workers' Compensation Administrators, Regulators and Judges have followed *In re: Irving Tanning Company, Prime Tanning Co., Inc., et. al.* for months. The case has come to be referred to in short-hand as "the Prime Tanning case." This bankruptcy case signaled implications for self-insurance across the country. At the Workers' Compensation Institute Educational Conference in Orlando last month, the Prime Tanning case was the subject of a lively discussion among regulators from 17 states in the Regulator Roundtable sponsored by the Southern Association of Workers' Compensation Administrators.

As background, most states allow businesses to "self-insure" their workers' compensation risks. That is, rather than purchasing a worker's compensation insurance policy to pay for injuries at their company, they instead agree to pay those benefits and costs themselves. Most states also require that businesses making this election provide collateral much in the same way a bank may require borrowers to provide collateral for a loan. In this way, the business can save expense by insuring their own losses, but with the collateral there to protect injured workers in the event that the business finds itself unable to pay those benefits for some reason.

Most states also have some entity in place to adjust and pay claims following the failure of insurance companies or self-insured (often some form of "guaranty" association). These guaranty associations may be the beneficiary of surety documents, letters of credit, or the receiver of assets pledged by self-insureds for the payment or workers' compensation benefits. These guarantee associations or funds are a safety net for injured workers, often funded in part by assessments on insurance companies or self-insured employers.

The business in the Prime companies instance is a conglomeration of principals and subsidiaries operating a business primarily in Maine and Missouri. For the sake of simplicity, these are referred to here as the "Prime companies," or the "debtors." The Prime companies self-insured their potential workers' compensation losses in both Maine and Missouri for various years in their history. When the Prime companies filed for Chapter 11 bankruptcy, the companies' sought to use the self-insurance collateral as they would any other asset of the Prime companies. Essentially, this would increase the volume of assets for distribution, or for use in the reorganization. This collateral reportedly included tangible assets, such as bonds, and contingent assets, such as letters of credit.

The Missouri Department of Labor, The Missouri Private Sector Individual Self-Insured Guaranty Corporation, the Main Superintendent of Insurance and the Maine Self-insurance Guaranty Association (the "objecting parties") objected to this use of the self-insured collateral, and therefore objected to the plan of reorganization under Chapter 11, Title 11, U.S.C.. Notably, the Maine workers' compensation laws allow for the possibility that an injury may not be reported to the state for a period of years in certain circumstances. This is critical from the standpoint of the injured workers, because it is difficult if not impossible to determine with certainty the population of open and potential workers' compensation claims that will require payment. Determining a fixed figure to be held in reserves for such open and potential claims is therefore impractical, and therefore determining how much of the collateral will not be used for workers' compensation claims and thus will be potentially available to the Prime Companies thereafter is likewise impractical.

Judge Louis H. Kornreich ruled on August 28, 2012. He noted that the Prime companies presented evidence that there would be "excess self-insurance funds" for distribution under the reorganization plan, after all workers' claims had been paid. He noted that the objecting parties had presented evidence that there would be no such surplus. Judge Kornreich concluded that this difference in the parties' respective positions was "legal rather than factual." He held that the legal question was essentially whether the Prime companies "had a property interest in the excess Self-Insurance Funds upon the commencement of the" bankruptcy. He concluded that if the Prime companies did, then they would prevail on this claim and the self-insured collateral would be included with the other assets of the Prime companies.

After rejecting the contention that these funds were significantly similar to funds such as a tax refund, Judge Kornreich concluded that the funds in question are governed by state law. He concluded that when the bankruptcy was commenced, the Prime companies had "nothing more than a chose in action to recover excess funds under state law. He concluded therefore that the reorganization plan confirmation was appropriately denied without prejudice on these grounds. A "further pretrial conference to be scheduled by the parties after 28 days from this order" will likely provide further illumination of the course that will be followed as this case proceeds.

2012 Comparative Analysis Survey

The National Association of Workers' Compensation Judiciary is undertaking this survey in an attempt to discern and assimilate some of the procedural distinctions between various workers' compensation jurisdictions. We appreciate you taking a few minutes to compete this survey. Please provide the completed form by email to Judge David Langham at david_langham@doah.state.fl.us or to Judge Ellen Lorenzen at Ellen_lorenzen@doah.state.fl.us.

I. Rules of Evidence

a. Does your jurisdiction require the use of an evidence code or standards to determine the admissibility of evidence and the rendering of decisions in disputed claims? YES/NO
b. Are your decisions bound (?) by Evidentiary written standards/rules? YES/NO
c. If yes, are those standards codified in your statute or code? YES/NO
d. If not codified , are those standards included in your procedural rules? YES/NO
e. Are they the same statutory evidence code used by your jurisdiction? Constitutional Courts (part of the judicial branch of state government)? YES/NO

II. Rules of Procedure

a. Do you have written procedural rules for workers' compensation proceedings? YES/NO
b. Are they the same procedural rules used by your jurisdiction's Constitutional Courts? YES/NO
c. If not, are they rules specifically promulgated for only Workers' Compensation Proceedings? YES/NO
d. If not, are they rules promulgated for all State Administrative Proceedings? YES/NO

III. Expert Medical Testimony

a. How often is expert medical testimony presented in workers' compensation proceedings in your jurisdiction:
   i. Live testimony? _____%
   ii. Telephonically? _____%
   iii. By deposition? _____%
   iv. By written reports or forms? _____%
b. Are medical records afforded any presumption of admissibility as evidence if they are from:
   i. Authorized doctors? YES/NO
   ii. Independent Medical Examiners (IME) doctors? YES/NO
   iii. Unauthorized treating physicians? YES/NO
c. Does your jurisdiction have a "judge –appointed" tie-breaking doctor process when the medical opinions of the physicians are in disagreement? YES/NO

IV. Other Expert Testimony

a. How often is other expert testimony (vocational or occupational) presented in your jurisdiction?
   i. Live? _____%
   ii. Telephonically? _____%
   iii. By deposition? _____%
   iv. By written report or form? _____%
b. Is testimony by non-medical experts common in your jurisdiction? YES/NO

Continued, Page 21.

Survey, from Page 20.

V. Ethics Codes

a. Do you have written code of ethics for workers' compensation adjudicators ? YES/NO
b. Do you have written code of ethics for workers' compensation commissioners? YES/NO/NA
c. Are they the same ethics codes used by your jurisdiction's Constitutional Courts? YES/NO
d. If not, are these codes specifically promulgated for only workers' compensation proceedings? YES/NO
e. If not, are they rules promulgated for all State Administrative Proceedings? YES/NO

VI. Appointment and Duration of Tenure (Board Commissioners)

a. To be a Commissioner in your jurisdiction,
   i. Are you elected? YES/NO/NA
   ii. Are you appointed? YES/NO/NA
      1. If so, by whom? _____.
   iii. What is the duration of appointment? _____ years.
   iv. Can you be removed "for cause" prior to the term expiring YES/NO/NA
   v. Is there a limit of how many terms you may serve YES/NO/NA
      1. If so, how many terms _____
   vi. Is there a maximum age for Commissioners? YES/NO/NA
      1. If so, what is the maximum age? _____.
   vii. (Optional) Salary Range per year: $ _____ to $ _____.

VII. Appointment and Duration of Tenure (Judges)

a. To be a Judge in your jurisdiction,
   i. Are you elected? YES/NO
   ii. Are you appointed? YES/NO
      1. If so, by whom? _____.
   iii. What is the duration of appointment? _____ years.
   iv. Can you be removed "for cause" prior to the term expiring? YES/NO
   v. Is there a limit of how many terms you may serve YES/NO
      1. If so, how many terms _____ .
      2. If not, do you have to apply for reappointment? YES/NO
   vi. Is there a maximum age for Judges? YES/NO
      1. If so, what is the maximum age? _____.
   vii. (Optional) Salary Range per year: $ _____ to $ _____.

VIII. Exclusivity (Judges)

a. Do workers' compensation adjudicators in your jurisdiction also hear other kinds of cases?
   i. Civil cases? YES/NO
   ii. Other Administrative Law cases? YES/NO
   iii. Others? _____.
b. Are attorney's fees payable to worker's attorneys subject to approval by an adjudicator or commission? YES/NO

Continued, Page 22.

Survey, from Page 21.

IX. Evaluation of Commissioners

a. Are Commissioners in your jurisdiction regularly evaluated? YES/NO
   i. By a state official? YES/NO
   ii. By a commission or panel? YES/NO
   iii. In some other way (please specify)? YES/NO

   _____.

b. Are there specific qualification or performance standards against which they are measured? YES/NO
   i. Are these statutory? YES/NO
   ii. Are these in rules? YES/NO
c. How often does evaluation occur? _____ .
d. Is evaluation only in conjunction with a reappointment process YES/NO

X. Evaluation of Judges

a. Are Judges in your jurisdiction regularly evaluated? YES/NO
   i. By a state official? YES/NO
   ii. By a commission or panel? YES/NO
   iii. In some other way (please specify)? YES/NO
b. Are there specific qualification or performance standards against which they are measured? YES/NO
   i. Are these statutory? YES/NO
   ii. Are these in rules? YES/NO
c. How often does evaluation occur? _____ .
d. Is evaluation only in conjunction with a reappointment process? YES/NO

XI. Compromise Settlements Procedures

a. Can an injured workers completely settle their entitlement to workers' compensation benefits in your jurisdiction? YES/NO
b. If yes, does settlement require judicial approval? YES/NO
c. If yes, does settlement require commissioner's approval? YES/NO
d. Is there any distinction made for approval between represented and unrepresented workers? YES/NO.
e. Do attorneys' fees payable or deducted out of settlement proceeds require approval? YES/NO
f. Do reimbursable costs deducted out of settlements proceeds require approval? YES/NO

XII. Fact Finding Power

a. Are adjudicators in your jurisdiction the ultimate finder of fact? YES/NO
   i. If not, who is? _____

XIII. Appellate Review Process

a. Do adjudicators in your jurisdiction author or draft:
   i. Proposed orders? YES/NO
   ii. Final orders? YES/NO
b. Are workers' compensation decisions in your jurisdiction reviewed by or appealed to:
   i. Commission or Review Board? YES/NO
   ii. Constitutional Court? YES/NO
   iii. How many potential levels of review are there? _____ .

Continued, Page 23.

Survey, from Page 22.

XIV. Appellate Review Standards

a. Are workers' compensation decision/orders in your jurisdictions that are reviewed or appealed subject to:

i. Appellate deference *(decisions are affirmed if supported by competent substantial evidence)*? YES/NO

ii. De novo review? YES/NO

iii. Abuse of Discretion standard? YES/NO

Name *(optional)*: _____

Jurisdiction: _____

Phone (*optional)*: _____

E-mail *(optional:* _____

Comments/Suggestions: _____

_____

_____

_____

_____

_____

_____

THE COLLEGE OF WORKERS' COMPENSATION LAWYERS

Law Student Writing Competition

Submissions are now being accepted for the 2012 College of Workers' Compensation Lawyers Law Student Writing Competition.

TOPIC: 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.

ELIGIBILITY: All students currently enrolled in accredited law schools in the United States and all those recently graduated from them (graduation on or after May of 2012).

PRIZES:

First prize - $1,500, plus $1000 to winner's law school scholarship fund
Second prize - $1,000.00
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, and the ABA Tort and Insurance Practice Section Law Journal. The winner will also be invited (expenses paid) to the Annual College Induction Dinner to be honored during the program.

Note to Law School Deans/Professors (extra incentive to distribute flyer/encourage entries): An additional $1,000 to the winning student's law school scholarship fund.

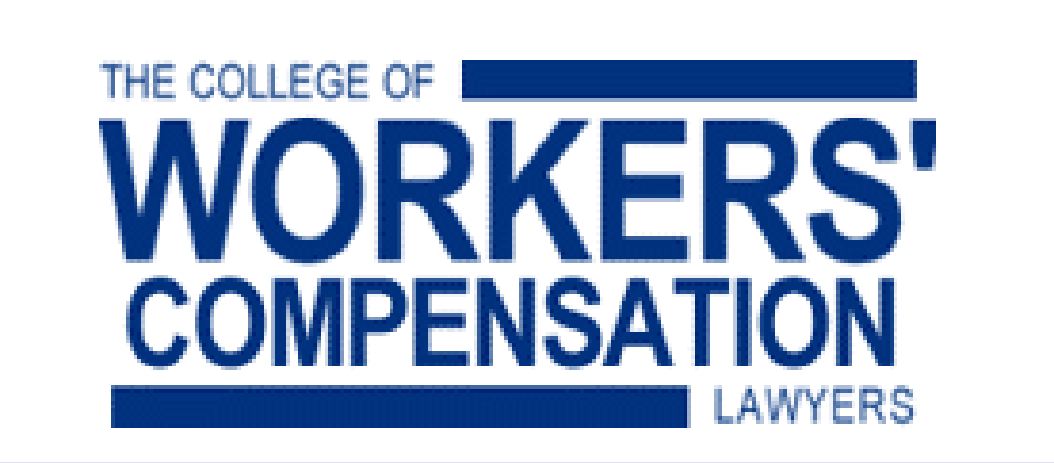
Continued, Page 25.

The College of Workers' Compensation Lawyers 2012 Law Student Writing Competition Rules

1. 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.
2. All articles are to be submitted in the following format:
   - Submitted by email (no author name in body of article, only in cover letter) to susan.wan@cwclawyers.org (Please reference "Writing Competition" in the subject line).
   - All articles are to be submitted by Jan. 15, 2013;
   - Double-spaced, on 8 ~ inch by 11 inch-paper, 1 inch margins;
   - Entries should be between 10 and 20 pages in length (including bottom of page footnotes);
   - Citations are to conform to "A Uniform System of Citation" (The Bluebook).
3. If published by the College, the articles become the property of the College. No submitted article may be published elsewhere until after announcement of the winners of the competition. Announcement of the winners will be made at least 30 days in advance of the Annual College Induction Dinner, Spring 2013.
4. Include a cover letter with your entry stating your name, mailing address and phone number (both school and permanent), name of school and year of graduation.
5. Applicant must be currently enrolled in an accredited law school or submit entry within 60 days of graduation.

Judging

The evaluation standards will be organization, quality of research, depth, originality of analysis, clarity of style and readability. The College reserves the right not to award and/or to reject any or all submissions.



THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY
APPLICATION FOR JUDICIAL MEMBERSHIP

THE NAWCJ MEMBERSHIP YEAR IS A FOR 12 MONTHS FROM YOUR APPLICATION MONTH. MEMBERSHIP DUES ARE $75 PER YEAR OR $195 FOR 3 YEARS. IF 5 OR MORE APPLICANTS FROM THE SAME ORGANIZATION, AGENCY OR TRIBUNAL JOIN AT THE SAME TIME, ANNUAL DUES ARE REDUCED TO $60 PER YEAR PER APPLICANT.

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

OFFICIAL TITLE: _____

Organization: _____

PROFESSIONAL ADDRESS: _____

_____

PROFESSIONAL E-MAIL: _____

ALTERNATE E-MAIL: _____

PROFESSIONAL TELEPHONE: _____Fax:_____

YEAR FIRST APPOINTED OR ELECTED? _____

CURRENT TERM EXPIRES: _____

HOW DID YOU LEARN ABOUT NAWCJ? _____

_____

DESCRIPTION OF JOB DUTIES / QUALIFICATIONS FOR MEMBERSHIP:

_____

_____

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

_____

_____

_____

Mail your application and check to:

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