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<https://www.dropbox.com/sh/wv67qn007hfy6kf/AAA6-seyrbOHxLn-cdGqc0Aa?dl=0>

PRESIDENT TOM DOMER'S MESSAGE - CHARGE TO THE TROOPS: TAKE 3

I am proud to be a workers' compensation lawyer. I am proud to represent injured workers. And I am prouder still to be President of the College. I have been a Fellow of the College since its inception. When notified, I thought "It's a nice honor. I can wear a tux, have a nice dinner in a faraway city, and maybe post something on the firm website." Since then I have learned the College has many other dimensions, based primarily on the College's unique composition: lawyers for workers and employers, judges, and academics. National advocacy groups already exist for injured workers, defense counsel, and workers' compensation judiciaries. Put very simply, the College exists to elevate the profession of workers' compensation, and to recognize those who have done so.

The College is healthy and growing. We just inducted 48 new Fellows. The College just completed presentation of the Second Annual National Symposium on workers' compensation issues in Nashville, primarily composed of speakers from the College. We continue our long-term sponsorship of Kids' Chance of America and heard from a very moving scholarship recipient. We are exploring contacts with the American College of Occupational and Environmental Medicine, and presenting a webinar educating occupational doctors on workers' compensation issues. This summer, Board members and I will participate in the WCI (Workers' Compensation Institute) National Conference. The College continues its Law Student Writing Contest, this year with a record number of participants.

Lastly, Fellows can look forward to a survey later this year to obtain your input on issues you think important as we move forward. Please contact any member of the Board regarding your interest in Board membership and/or committee service to the College.

*Tom Domer
Milwaukee, WI*

THE LATE HON. IRVIN STANDER, PENNSYLVANIA BAR ASSOCIATION CHAMPION, RECOGNIZED, AT CWCL NASHVILLE GALA, AS NATIONAL WORKERS' COMPENSATION "LEGEND" – Judge Dave Torrey, Pittsburgh, PA



The late Judge Irvin Stander of Philadelphia has been honored by the ABA-founded College of Workers' Compensation Lawyers as a national Workers' Compensation "Legend." Attorney Marcia Stander Freedman, the judge's niece, and a partner at the New Jersey firm Stahl & DeLaurentis, accepted the award at the CWCL Induction Dinner, Nashville, TN, March 3, 2018. (Ms. Freedman is an accomplished attorney and bar leader in her own right.) Notably, last year's Legend was Ms. Frances Perkins, the iconic, longtime Secretary of Labor to President Franklin D. Roosevelt and an expert on New York workers' compensation law.

Judge Stander began his career in the workers' compensation field in 1972, when he turned 65. He was to work in the referee job for over 20 years, finally retiring as Judge at age 86. Earlier, he was a lawyer with expertise in zoning, inheritance taxes, and land use. So dedicated to scholarship and excellence in the field was Judge Stander that our Section awards its top honor in his name: *The Irv Stander Award*, presented to the lawyer whose dedication to the administration of workers' compensation law, clients, professionalism, and regard for colleagues, is so extraordinary that it serves as an example to others. The Philadelphia Bar Association, meanwhile, each year presents the *Irvin Stander Memorial Prize* to a top-notch graduating law student.

Judge Stander, upon taking his job, immediately threw himself into scholarship of the law. In the 1970s, he was a Lecturer in Law at Temple University Law School, teaching a course on workers' compensation, and had a regular column in the *Pennsylvania Law Journal*. On two occasions, he collected his various columns and had them published in invaluable book-length anthologies. For many years, each week he would hand-write a summary of the new developments in the case law and mail them out to his fellow judges and others.

In 1989, Judge Stander attended, at the Hershey Hotel, a national workers' compensation "summit" convened by industry. After he attended the event, held on September 7-8, 1989, he penned a 5000-word memo to members of the community who had the good fortune to be on his mailing list. This memo is a time capsule, to take us back to the eve of the reforms that were soon to unfold in Pennsylvania and other states. It is notable that Judge Stander *handwrote* the entire memo.

At CLE events, Judge Stander would frequently lecture on the importance of submitting meticulous proposed findings. "Your proposed findings are your jury speech!" he would admonish. He ultimately published his advocacy on this point in the *Journal of the National Association of Administrative Law Judges*. Importantly, Judge Stander was an advocate for elevating the status of the workers' compensation referee. Stander welcomed, notably, the 1972 significant change in the law elevating the referee (later WCJ), to final fact-finder.

DEFINING MOMENTS

Chief Judge Kenneth Switzer, Nashville, TN

The following are remarks given by Judge Switzer as the Keynote speaker at the 2018 Induction Dinner.

Tonight is about defining moments. Each of us has these moments that may or may not define us. They do not always have to be triumphant moments. They can be moments of elevation, of insight, of pride, of connection. This keynote address is a defining moment for me.

Being asked to deliver the "keynote" address was a moment for me. My mind immediately turned to bands playing, confetti falling, balloons floating and raucous crowds chanting my name. I don't hear a band; I see no confetti or balloons. And you certainly do not look like a raucous crowd – although I do see a few Florida judges I have heard stories about.

So, I am plagued by this thought: Does anyone really listen, or worse yet, care? It is a similar position to a high school commencement speaker. No one is here to see me, much less remember my name and even less likely to recall what I said. You are mainly here to be honored by induction into this College of Workers' Compensation Lawyers based on your years of service to your communities in this specialized area of the law.

With an audience so full of distinguished persons with much greater knowledge, experience and exemplary careers than this speaker, the silent thoughts churning through your minds are likely, "Who is this guy, and what can he say to me that I have not already heard?" Or possibly, "How long will this take?"

Allow me to answer those questions. I probably cannot say to you anything you do not already know, and this will be over before you know it. So, patience please.

Judge David Torrey of Pennsylvania, who in my assessment is likely the most knowledgeable workers' compensation judge in America, is such a prolific writer that he is known as "the N.T. Wright of workers' compensation law." Anyway, Judge Torrey tells a marvelous story about how he became part of the workers' compensation fabric. It seems that, as an aspiring law student at Duquesne Law School in 1983, a classmate told him of an opening in a local law firm. The friend promised to recommend Judge Torrey. His friend leaned over to him and whispered these words of caution: "I must tell you, however, Dave, that all they do is workers' compensation."

Indeed, all they do is workers' compensation? As Judge Mills of Florida is quoted as saying on your program:

Workers' compensation is a very important field of the law, if not the most important. It touches more lives than any other field of the law. It involves the payments of huge sums of money. The welfare of human beings, the success of business, and the pocketbooks of consumers are affected by it daily.

This law involves almost every worker in America. More money is spent in the area of workers' compensation law than any other area of the law.

And, in an amazing factoid: every state administers their own system.

Has this occurred to you, as it did to me while preparing for this event? This is one area where the pterodactyl of judicial interpretation known as the "Commerce Clause" has not swooped in with claws extended to preempt state authority. Each community has decided on its own what the reaches of their workers' compensation law will be for workers in that state.

What is incorrectly referred to as a "social experiment" started over 100 years ago. I know of no other experiment that has lasted so long. It has long outlived its experimental stage. It is an ever-changing reality. The wisdom of this diverse plan is that each state can learn from the others what works and what does not. Communication among the states, through organizations like the IAIABC, the NAWCJ and SAWCA, have led and will continue to lead to improvements in delivery of this vital program to the employees and employers of this country. I trust those of you in this room have the courage to continue defending this reality. But, I digress.

You see, to Judge Torrey, the friend's whisper was a moment that he remembers to this very day. We all have moments. Moments are historical in nature. As you sit here tonight, you probably do not realize you are sitting near some very historic moments or certainly moments that were important to people living through them.

Two blocks from here is the federal Courthouse – the Estes Kefauver Building – he ran for vice-president with Adlai Stevenson in 1956. In that building, Jimmy Hoffa was convicted of jury-tampering. In that building, the case of *Baker v. Carr* was tried. And, just across the street is the U.S. Customs House.

Rutherford B. Hayes came here in 1877 to lay its cornerstone, and that led to a moment in his life. When President Hayes came to Nashville, he brought his wife, Lucy, also known as "Lemonade Lucy" because of her opposition to alcohol. They stayed at the Maxwell House Hotel, which, like most hotels in the south at the time, had two entrances: one for the men and one for the ladies. This prevented women's sensibilities being insulted by men who might be smoking, drinking or possibly cursing in the public areas of the hotel. Even if a woman came with her husband, he escorted her to the ladies' entrance, checked her in, and then came back to escort his wife to their room. The main entrance to Maxwell House was on Fourth Avenue, known as "Cherry Street" at the time. The women's entrance was on Church Street.

Fourth Avenue was also the home of The Gentlemen's Quarters, three establishments: the Southern Turf, the Climax and the Utopia. They offered gambling in basement, drinking on the main floor and ladies of the evening on upper floors. This was the reason "real ladies" did not walk on Cherry Street.

While in Nashville, President Hayes was invited to the Southern Turf for a few beers and to shoot the breeze with some of the boys. Someone came to the Maxwell House Hotel to tell Lucy where her husband was. She stomped out the main entrance of the hotel, across Cherry Street, into the Southern Turf, up on the stage and began to sing temperance hymns. The President left with her.

Now consider Edward Ward Carmack. He was the editor of morning newspaper around the turn of the Twentieth Century and a state representative. He had an acquaintance, Duncan Cooper, who was an editor for the afternoon paper. The tenuous friendship they had was severed by differences of opinion on the issue of prohibition. Carmack was very much for prohibition; Cooper was very much opposed.

It did not take long for the debate to hit the newspapers. One afternoon, Duncan Cooper printed in the paper that E. W. Carmack was "the dumbest man in the state of Tennessee." Mr. Carmack was not happy, and even though Mr. Cooper threatened Mr. Carmack if he spoke of Mr. Cooper in the paper, the next day Mr. Carmack printed in the morning paper that Mr. Cooper was a jackass. Thus ended the tenuous friendship.

On November 9, 1908, Mr. Carmack left the Capitol building on a bright, sunny fall day to go to lunch. Unbeknownst to him, Mr. Cooper had been called by the governor, Malcolm Patterson, to meet him in his office at the Capitol. Mr. Cooper's son, Robin, escorted his father because he was rather elderly and because of the rancor between him and Mr. Carmack. Walking from Mr. Cooper's law office to the Capitol, they passed the construction of the Hermitage Hotel. The elder Mr. Cooper stopped to observe the construction as his son continued up Union Street.

There he ran into Mr. Carmack, and so, expecting trouble, he pulled out his gun. Mr. Carmack had been enjoying a chat with an acquaintance, a rather heavy-set woman, when he saw Robin Cooper and his gun. Mr. Carmack grabbed the lady and pulled her in front of him to use her as a shield, so that Robin would not shoot at him. Mr. Carmack then pulled out his own gun, leaned around the lady and began to shoot at Robin. Duncan Cooper heard the gunshots and began to hurry toward the sound. In the meantime, the poor lady, realizing she was caught in the middle of a gun battle, fainted at Mr. Carmack's feet. Still pointing his gun at Robin, Mr. Carmack tried desperately to get the lady up off the ground, but he could not budge her. Duncan Cooper arrived on the scene in time to see his son shot in the arm by Mr. Carmack and to see Robin shoot Mr. Carmack twice in the chest, killing him there on the street.

The Coopers were arrested, tried, convicted and sentenced to prison. Shortly afterward, they were pardoned by Governor Patterson. The story says that Governor Patterson signed the Coopers' pardon papers before the Coopers shot Mr. Carmack. It seems he was found in a most compromising situation unbecoming to a governor at the Gentlemen's Quarters when the Coopers blackmailed him into signing those papers.

Another moment for Tennessee was August 1920, when thirty-five states had ratified the Nineteenth Amendment, giving women the right to vote. All eyes were on Tennessee, the swing state. It was a hot, humid, miserable summer in Nashville. The Hermitage Hotel housed those on both sides of the issue. It was known as the "War of the Roses." If one supported the Nineteenth Amendment, a yellow rose was worn; if against, a red rose.

Josephine Pearson, a woman from McMinnville, Tennessee, came to town to campaign against the Amendment. She had several smokescreen arguments, such as: women know nothing about politics; women need to stay home and take care of their men and children; think of all the trees that will have to be cut down to make all that paper and all those pencils! States' rights was her true argument. She did not want a federal government strong enough to dictate to states. Josephine wore three red roses pinned to her dress every day.

State representatives' minds were hard to change, and neither side seemed to be gaining ground. Josephine gave great public speeches warning of the demise of the family if women were given the right to vote. Others gave great oratories for the other side. It was decided to convene the legislature and take a straw vote to test the waters. The count was split right in half. Lobbyists were working overtime to sway votes. Josephine attached herself to a young man named Harry Burn, a young representative from East Tennessee. She hounded him so desperately that Harry agreed to vote against the Amendment. That was all Josephine needed. The day

came for the official vote. There was a party atmosphere in Nashville. Josephine was feeling great because she had Harry Burn in her back pocket.

Unbeknownst to Josephine, Harry had received a letter from his mother concerning the issue. Mrs. Burn was a widowed landowner who leased out part of her land to men in the area to work. Because she was a landowner, she had to pay taxes. Because she was a woman, she could not vote concerning tax rates. Because the men she leased the land to did not own it, they did not have to pay taxes. But because they were men, they could vote concerning tax rates. There is no question why Mrs. Burn hoped the Nineteenth Amendment would pass. She told her son to “strike a chord for womankind and vote for the Amendment,” which is exactly what he did.

Josephine was stunned when the vote passed, and when they went through rollcall and she learned that Harry had cast a vote for the Amendment instead of against, the story says she began to chase him through the Capitol building, frightening him so badly that he climbed out of an upper floor window, and he hung there until the fire department rescued him.

And about two blocks from the Capitol, at a lunchroom counter in a restaurant, another moment took place. The time was 1960: February 13. Lunch counters in downtown Nashville were clearly marked “Whites only.”

A group of students from Fisk University, led by a young John Lewis, dressed as if on the way to church and well-manneredly walked into the restaurant and took a seat at the counter.

Now, this was not a spur-of-the-moment thing. It was planned. The students had worked for weeks studying the principles of non-violent protest. They had rehearsed at Fisk University with other students, who had cursed them, mocked them, assaulted them and spit on them. They were ready to respond nonviolently to these taunts. At first, onlookers were astonished. A waitress reportedly was so shocked she dropped all the dishes she was carrying. They did not get served. But they came back. And on the third week of the sit-in, they were harassed and assaulted. And they were arrested, not their assaulters. They were convicted of loitering and fined \$50 or spend thirty days in jail. They chose the thirty days.

In April, a prominent black lawyer’s office and home were fire-bombed. He and his wife were not injured. Later that month, 4,000 people marched down Jefferson Street to the Courthouse and met Ben West, the mayor of Nashville, and asked him whether he “believed it wrong to discriminate on a the basis of race.” He said yes. Then they asked, “Should the lunch counters be desegregated?” He agreed that they should. And a couple of weeks later, they were, without any violence.

And that was another defining moment in Nashville’s history.

You have defining moments. Do you notice them? Do you see them as they happen, or as you look back? Well, tonight is your moment. How will you respond? I mean, “All you do is workers’ comp.”

Our courts are the great levelers. In our courts, all men are created equal. I am no idealist to believe firmly in the integrity of our courts and our jury system. That is no ideal to me; that is a living, working reality.

SPOTLIGHT ON A FELLOW



**Kip Kubin
Martin|Pringle
Overland Park, KS**

Do you represent injured workers, employer/insurers, or are you exclusively a Judge or Mediator?

My practice has always been primarily representing employers and insurers. As some of you may know, I changed firms at the beginning of the year and now am with the Martin Pringle Law Firm and work out of their Overland Park, Kansas office. Since Martin Pringle offers a broad spectrum of legal services to business clients, my practice was a natural fit with them.

How long have you been working representing the same segment of the workers' compensation industry?

I have been practicing primarily in the area of workers compensation for over 30 years. My other area of emphasis is Native American law, and I have handled several issues before the Bureau of Indian Affairs and the National Indian Gaming Commission. As a

Have you worked in any different segment of the workers' compensation industry in the past and, if so, which one?

No.

Are you in private practice? If so, how many lawyers are with your firm?

I have always been a lawyer in a private practice, my current firm has approximately 50 lawyers over three offices in two states.

Are you in-house counsel for an employer or insurer?

Most of my clients are self-insured, but I also do some work for insurers.

What is your case load like?

I consider my case load somewhat unique. I practice in a border City, so approximately half of my practice is in the jurisdiction of Kansas and the other half in the jurisdiction of Missouri. I basically cover from the Colorado Border on the west to the Illinois Border on the east for my client. I spend a lot of time in the car.

For practicing attorneys, on average, how many cases do you try in a year?

I probably try as many, if not more, than the average practitioner in my area. I estimate I try between 15 to 20 cases a year to a final award. I start trying more than that, but many get resolved during the trial process.

Did you choose the practice of workers' compensation law or did it choose you? Please explain.

Workers' compensation chose me as a practice area, more than me selecting it. Early in my career, as an associate for a large defense firm, I spent most of my time working on product liability claims and environmental cases. I had just completed a two-year stint working on an environmental case (USA v. Conservation Chemical Company). Soon after that assignment ended, I got to my office one morning only to find a stack of 30 workers' compensation files on my desk and a copy of the Kansas Workers' Compensation Handbook. I knew nothing

about the area of law. My work in this area of the law started because my office was located next to the senior partner who headed up the workers' compensation practice for the firm. What I soon learned is that workers' compensation was a great opportunity to develop a client base and I have been practicing in the area ever since.

When were you admitted to the College of Workers' Compensation Lawyers?

I was admitted into the College in 2009 at New Orleans, LA.

What is the best thing about being a Fellow in the College of Workers' Compensation Lawyers?

The best thing about the College is the people you meet. I have met some of the most driven, smart and dedicated lawyers during my years of involvement with the college. I can honestly say I always learn something at the annual meetings. The second-best thing about the college is that you have a forum to discuss the "bigger" issues of workers compensation.

Are you active in the legal community? If so, how?

As I get older, my involvement in the bar is declining. However, I have been active in the local bar, serving as Johnson County Bar President, active in the State bar, serving 8 years on the Board of Governors for the Kansas Bar Association. In regard to the workers' compensation bar, I served a decade on the Kansas Workers' Compensation Advisory Board and have been on the State Seminar planning committee for the Kansas Department of Labor for the last 10 years.

Are you active in your general community? If so, how?

Outside of the practice, my wife and I are active in our church, whether that means we are reconstructing houses in Western Kansas after tornados or working around the Kansas City area in their Christmas in July program.

Tell us what activities you enjoy outside of work.

As far as hobbies go, I have a few. I trap shoot in a weekly league and my wife and I have ballroom dancing once a week. We also try to go to yoga once a week. On the weekends we like to travel and try out new restaurants.

Please share some words of wisdom with our readers.

I discovered early on that the only security you have as a lawyer is having a book of business. I don't think many lawyers realize that the practice of law is a relationship business. As such, I find I am not a very good millennial. I much prefer to talk to someone as opposed to text or email. I am reminded by a United Airlines commercial from the 1980's. In that commercial, the CEO of a company is trying to explain to his staff that a client of theirs for the last 25 years just fired them. He laments that now, instead of going to see their clients, they transact business with a fax or a letter (which certainly dates the commercial—but I continue). He proceeds to hand them airplane tickets and they are assigned to go and see clients. At the end of the commercial, one of the staff asks him where he is going, and he indicates he is going to see an old friend (who had just fired them). This commercial reminds me that my clients are not cells in a spreadsheet, but are individuals or businesses which have much invested in us as lawyers. I think we are better served if we have a similar investment in them as clients.

**Listen to Fellow Alan Pierce's latest podcast:
*Workers' Compensation for Performing Artists***

<http://www.cwclawyers.org/html/podcasts.html>

2018 LAW STUDENT WRITING COMPETITION - AND THE WINNER IS.....

Congratulations to Taylor O'Toole who submitted the winning paper in this year's CWCL competition, entitled *An Ongoing Debate: Whether Student-Athletes Should Be Considered Employees Entitled To Workers Compensation*. A graduate of the University of North Carolina at Chapel Hill in 2016, Taylor is now a second-year law student at The Pennsylvania State University School of Law. In her time thus far at Penn State Law, Taylor has earned CALI awards in three classes – Applied Legal Analysis and Writing, Legal Research, and Copyrights. Taylor also works as a Research Assistant for Professor Geoffrey Scott, helping him to write an intellectual property textbook, and assisting him in teaching an introductory intellectual property course for undergraduate students. Taylor is also a part of the Arts, Sports & Entertainment Law Clinic where she and her classmates assist clients with a variety of issues ranging from employment to intellectual property to contracts. Additionally, Taylor serves as the President of the Sports and Entertainment Law Society, as well as the Treasurer of Phi Alpha Delta Law Fraternity. As a proud Tar Heel and Nittany Lion, Taylor aspires to one-day work in the sports industry as general counsel for a professional sports team.

You can read Taylor's article by clicking here - http://www.cwclawyers.org/html/past_articles.html.

Writing Competition Winner Taylor O'Toole's Thoughts on Participating in the College's Law Student Writing Contest



The last couple of months have shown me that everything happens for a reason. Even the most arbitrary of decisions can have a great and lasting impact on your life.

In March of 2017, I just happened to select a workers' compensation course for my schedule for the Fall of 2017 because it fit in my schedule, and I knew the professor. At the outset of the semester, my professor, Mr. Jeffrey Erickson, told us that in lieu of a typical final exam, we were going to have to write a thirty-page paper. Many of my classmates groaned at the idea, but I was excited about the prospect of getting to research and write about whatever workers' compensation topic that I wanted. On that first day of class, Professor Erickson provided us with the flyer for the College of Workers' Compensation's Law Student Writing Competition and encouraged us all to enter our papers. In December of 2017, I submitted my final paper and largely forgot about it as I enjoyed my holiday break.

Fast forward to January where I had put out of my head everything to do with the previous semester in order to start fresh in 2018. That was until I just happened to come across the flyer that Professor Erickson had given to my classmates and I on the first day of our workers' compensation course. At that point, I realized that the due date was less than a week away, so I had to really get moving if I was going to submit my paper. I had a lot to do that week, as it was my first week back at school for the semester, and almost decided that I wasn't going to have enough time to dedicate to making the necessary edits. Thankfully, I made the time.

For this competition, I wrote about an industry that I am extremely passionate about: sports. While as a 2L I do not know exactly what area of law I would like to practice just yet, I do know that I would love to practice in the sports industry. As a proud Tar Heel and Nittany Lion, I hope to one-day make a career out of the passion

that has grown in me in every soccer game I have played, and every basketball and football game I have attended. In Nashville, I heard displays of that dedication and passion for workers' compensation law in each of the speeches and brief meetings with you all.

I feel very lucky that I "just happened" to make all of these decisions, as it led me to this outstanding organization. I am honored to have received this award, and to have been invited to Nashville for the Twelfth Annual Induction Dinner. I am also extremely grateful for the monetary award, which will be used to help fund my bar prep classes.

Again, thank you all for your time, hospitality, and generosity, and I hope that you all continue to administer this writing competition, as it is a great opportunity for future attorneys to express themselves and be recognized for their hard work. The recognition and support that I have received from so many esteemed attorneys and judges has instilled in me greater a sense of purpose and has solidified the fact that I have chosen the right profession. I would most definitely recommend this competition to any law student that I meet. This has truly been an unforgettable experience, and I thank you all for that.

Kids' Chance Strives to Provide More Money to More Kids – And They Need Your Help



What happens when a child loses a parent to a work-related fatality? How do families cope with a dramatic decrease in income because Mom or Dad cannot return to work due to an injury? In many cases, the goal of higher education seems unattainable. No student should be denied the opportunity to pursue an education due to lack of finances.

That's where you come in. At Kids' Chance of America, we believe that by investing in our children's future through scholarships, we can provide them with the tools to be successful in the workplace so that they can make a difference in their own lives as well as the lives of others. Kids' Chance of America is committed to identifying eligible scholarship applicants across the country. We would like to invite you to take part in the [Planning for the Future Initiative](#), to help us find future students in need!

What is the Planning for the Future Initiative and How Can I Help?

Previously known as the Planning for College Initiative, the newly redesigned Planning for the Future Initiative is an all-inclusive program designed to reach potential scholarship applicants. We understand that attending college isn't the only educational future students could choose, and we want to make our scholarships available to students that have a range of educational pursuits.

We are looking to provide industry professionals, specifically those who spend time in regular communication with seriously and fatally injured workers and families, with a simple tool to identify children in need. We collect and maintain contact information for these scholarship applicants so that we may reach out to them when the time comes to start considering life after high school.

Throughout the country, Fellows in the College of Workers' Compensation Lawyers help the Kids' Chance organizations in their respective states to fulfill the mission of getting more money for more children of injured

workers. Although there are too many to name them all, Kids' Chance appreciates the work of each of you including **John Geaney** of New Jersey, **Jane Stone** of Texas, **Fred Greenbaum** of Missouri, **Terry Coriden** and **Sally Volland** of Indiana, **Jim McConaughay** of Florida, **LuAnn Haley** and **Bob Wisniewski** of Arizona, **Frank McCay**, **Joe Leman**, **Greg Presmanes** and **Ann Bishop** of Georgia, and hosts of others from every state. The College of Workers' Compensation Lawyers makes the lives of thousands of children better by helping spread the word about Kids' Chance and by helping raise funds so that no child will be refused a scholarship due to lack of resources.

As one of our scholarship recipients shared, "Receiving the Kids' Chance scholarship has made a world of difference to me. I am able to attend the local community college as a full-time student. If I did not receive the financial assistance from Kids' Chance, I would have probably second guessed whether I could pursue a college degree."

Collectively, Kids' Chance organizations across the country have already awarded over 6,000 scholarships, and with your assistance we can continue to grow that number. You can help us by sharing this program with your colleagues who also come in contact with injured workers or their families, especially those that have children who could be eligible for a scholarship now or in the future. [Planning for the Future materials can be found on our website](#), or to request Planning for the Future Cards, please contact our office at admin@kidschance.org.

ARTICLES OF INTEREST

Sweeping New Academic Article Is a Minor Treatise on the Workers' Compensation Program, Its Controversies – and its Retractions

By Judge David B. Torrey, Pittsburgh, PA, CWCL Secretary

Emily A. Spieler, (Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017, 69 RUTGERS UNIVERSITY LAW REVIEW 891 (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3079871.

Professor **Emily Spieler**, a renowned expert on workers' compensation law and insurance, has authored a sweeping new article addressing the program in which she highlights its controversies, and explains – and assails – the retractions of the last few decades. For the workers' compensation lawyer new to the field, Spieler's article is a crash-course relative to the history, purposes, and controversies, past and present, which have surrounded our practice. For the old hand, meanwhile, the author's insights, whether one agrees with them or not, will awaken myriad new reflections on our chosen specialty.

The new article has its genesis in a September 2016 Rutgers Law School seminar on the purported fraying of the system, and Spieler's comprehensive analysis is surely the most enriching of the papers that grew out of that meeting.

Spierer commences her article by explaining the basis of the "Grand Bargain," the now familiar term that she features in her title. Of course, most readers of this periodical will know that the phrase defines the trade-off made a century ago – workers gave up the right to sue their employers in tort for their injuries, but in exchange received the benefit of no-fault insurance benefits. Employers, meanwhile, gave up their right to raise defenses to liability, but won immunity from negligence suits. Even as the author explains the genesis of the system, she reveals an amusing irony: the phrase is of recent invention, first found, in the literature of the field, only in 2000. Theretofore, the arrangement was typically referred to as the "great compromise." Spieler thus extinguishes any romantic idea that our predecessors entertained this quaint, Edwardian-period sounding

phrase as they first applied the laws. “Grand Bargain,” linguistically, stands somewhere between lowbrow contrivance and petty fraud.

The author, in any event, thereafter describes the relative stagnation of the program over the succeeding decades and the responsive 1972 National Commission. That taskforce, authorized as part of the OSHA law, set forth recommendations that worked to modernize laws, increasing coverages of the program and the adequacy of wage-loss and medical benefits. Spieler then moves on to the contemporary period, 1990-2017, which she terms “reversing course.” Here, in a major section of her article, Spieler marches the reader through sixteen bullet-pointed aspects of retraction (which she says “is just a partial list”), ranging from some states’ abolition of the Rule of Liberal Construction, and the associated premise that the program constitutes remedial legislation; to restrictions on the duration of disability benefits, even to the severely impaired. Among the other bullets, the author correctly includes the increasing popularity (via deregulation), of compromise lump sum settlements as a method of closing claim files. This phenomenon, notably, has unfolded here in Pennsylvania, where one can encounter a worker, with an accepted claim, proposing to lump sum his case just weeks after surgery.

Complaints about this regressive tendency are well-known and have been the subject of several commentaries. Spieler’s treatment of the process, however, is enriched by her ensuing discussion of the external forces that play upon the system. These she categorizes as (1) changes in work; (2) changes in safety; (3) changes in work regulation; (4) changes in the social safety net; (5) changes in health care insurance, delivery, and technology; and (6) changes in political equilibrium. For example, she discusses how coverage of workers has declined because of the “fissuring” of the workplace, with more enterprises seeking to use independent contractors in place of traditional employees; and the wholly new phenomenon of the gig economy, whose entrepreneurs follow a similar approach. She also identifies the weakened organized labor movement as a factor that has allowed the pendulum to swing so dramatically away from workers and in favor of business.

Spieler then shifts her focus to describing the system as she perceives it in the present day. A special point within this discussion is the enduring problem with the system not comprehensively covering the workforce because of the many statutory exclusions that have for so long been a feature of compensation acts. She also identifies the phenomenon of the “failure to file claims in the first place” – that is, by those workers who are covered. Spieler argues, as have others in both our field, and similarly in tort, that many victims of workplace injury and disease never assert claims.

To this writer, the most intriguing aspect of the article is Spieler’s conceptual analysis of the “competing narratives” that surround our field. As we analyze the challenges that exist with regard to the system, she posits, how do we properly understand the program in the present day? Is workers’ compensation a remedial social insurance program, as originally conceived; or merely a no-fault liability system imposed as a substitute for tort? On the other hand, is workers’ compensation simply a disability management system?

This writer has certainly perceived the tension. For example, the default resolution of claims, even those not subject to dispute, via lump sum compromise, I find troubling, but if the program is, or has devolved to, primarily a litigation system, then such settlements reflect a natural resolution of claims. Likewise, this writer found the Oklahoma opt-out scheme to be abhorrent, but if workers’ compensation has devolved to mere disability management, then super-empowering employer control over the medical aspects of claims (and coextensive truncating of worker due process) follows logically.

My own perception is that workers’ compensation is all three of these items which Spieler so insightfully identifies, but that balance must exist if a program is to be fair and operate successfully. On the issue of narrative, meanwhile, it is notable that some commentators, addressing (presumably) all elements of the community, now refer to workers’ compensation as “the industry.” That usage, as opposed to the traditional

neutral terms like the “program,” or “the system,” has expanded recently. An industry exists, and robustly so, but default use of the term is reductionism and is, in any event, an unsatisfactory way to refer to our sector of legal practice.

Spieler, after a hundred pages of critique, concludes her article by fulfilling her promise of reassessing the “Grand Bargain.” She suggests that the system works adequately when addressing obvious accidents and injuries, but that traditional exclusions and contemporary retractions have made the system unsatisfactory. Like many academics, she flirts with the idea that fairness and adequacy of compensation for injuries can be achieved by restoring tort liability, but her dalliance with that unlikely-to-be-enacted proposition is set aside in favor of enumerated propositions for progressive change. Among these recommendations are a unified healthcare payment system; return to the National Commission principle of benefit adequacy; increased attention to safety; the ability of workers to bring negligence suits against employers when the compensation act allows no recovery for occupational disease; strengthening of antiretaliation laws; expansion of covered workers; and “national standards that set a floor and eliminate the desperate state-to-state competition that results in a race to the bottom.”

Coming in at 123 pages, with over 600 footnotes, Professor Spieler has shared with us a *tour de force* critical review of the system and its challenges. Indeed, this writer does not perceive that any significant issue has been left unaddressed. She is an adamant, though nonpolemical, opponent of the “reversal of course” that marks our field’s modern-day environment. *(Re)assessing the Grand Bargain*, her great accomplishment, constitutes a brief against retraction and for reform. Though Spieler does not always acknowledge opposing views – for example, she does not adequately address the legitimate employer anxiety about worker moral hazard, which so pervades virtually every discussion of the system – her account of workers’ compensation is educational, enlightening, and humane.

**Baddies, Bullies, Buddies and Billers: A Perspective on
Litigation Personalities**
By Fellow **Robert Wisniewski, Phoenix, AZ**



While litigating Arizona workers’ compensation cases for over 41 years from both defense and claimant’s perspectives, I have distilled certain litigation personalities worthy of categorization and commentary. You may recognize your defense attorney and even an injured workers’ attorney as well. My categories are not in any ranking, such as bad to worse or visa-versa. You can make these value judgments.

A lawyer may occupy one predominant personality category but can shift to others depending on a variety of things such as his perception of his client’s wishes, the insurance claims representative’s personality, the attorney’s personality, the particular nuances of the case, including adverse claimant/adverse claimant’s counsel’s personalities and peculiarities. Personalities can also be combined.

Baddies

This litigation personality style does not believe that any worker, any injury or any condition is worthy of workers’ compensation benefits. Despite the legislative grant of workers’ compensation benefits, the Baddie does not believe, for example, that any worker should have a compensable claim, much less a loss of earning capacity award. The Baddie sees the system as a giveaway program encouraging injured workers not to work. The Baddie says “I can’t believe that event caused any injury;” or “we are paying people not to work”,

discounting the fact of the injury, the worker's lack of transferrable job skills or a poor labor market. The Baddie may be influenced by the adjuster/insured who shares his same world view. The Baddie sees all workers' compensation Judges as compliant, co-conspirators facilitating such unworthy and possibly fraudulent claims. Baddies are inherently paranoid, uncompromising, and often short in temper and stature. Baddies need therapy, medication, and a spanking.

There Are Baddies in the Injured Workers' World

The injured workers' Attorney Baddie and his client see the whole system as stacked against them. They believe the client is entitled to unlimited benefits. The injured worker Baddie thinks the "keys to the pharmacy" is his divine right. The injured worker Baddie believes that despite a catastrophic injury, and a miraculous recovery, he still should be entitled to buckets of benefits. It is not a good day when a defense Baddie Attorney and an injured worker's Attorney Baddie meet up.

Bullies

Bullies are Baddies with a mean streak. While a Baddie may "sincerely" question the workers' compensation system, a Bully uses the system to work out personal inadequacies. Bully Attorneys may also be fueled by insureds/adjusters and undeserving injured workers' opposing counsel. Everything is a battle. Any compromise is viewed as defeat, both professionally and personally. The defense Bully sees the injured worker through the opposite of rose-colored glasses – his glasses are dark. The defense Bully fights everything, everyone, every time. The defense Bully may even dislike his own insurance company client, except for the fact that his client provides the opportunity to conduct litigation and bill. The defense Bully never recognizes that his litigation style is counter-productive. When he loses, it is the doctor's fault, the Judge's fault, the system's fault -- the great giveaway program at the workers' compensation court – but not his own personality and counter-productive, overly aggressive litigation style.

The injured worker's Bully attorney is identical -- nothing is compromised. A score sheet – win or lose. The best way to handle a Bully of either ilk is the schoolyard maxim – face him down, be reasonable and litigate to his detriment. Judges do not like Bullies. Occasionally, a lawyer will "play" the Bully, taunting him until he explodes, demonstrating the grave difference between a reasonable, professional and aggressive representation in a case. All sides and the Judge appreciate a reasonable approach. Recall in workers' compensation, a scorched earth policy works only one time. In the small workers' compensation community the word about the Bully gets around quickly.

The injured worker's Bully attorney fights everything by the filing of a multitude of petitions, bad faith claims, and unfair claims processing petitions. They eschew a telephone call to the claims representative to work out differences. They want vindication, litigation and their day in court. The injured worker's Bully attorney often chooses a litigation lawyer who thinks like him -- everyone is out to punish and deprive benefits. So, war continues without compromise. Two Bullies/two Baddies, a Bully and a Baddie in litigation is a poor combination and not a happy place. Woe to the Judge, lots of hearings, battles, discovery, delays -- everything fought out and expensive resources. By the way, Bullies and Baddies love litigation -- it allows them to bill!

Buddies

A remaining litigation style is the Buddy. He wants to be perceived as a friend to all – a reasonable man to the Judge and opposing counsel. He may even joke with the injured worker, is friendly and realistically attempts to define the issues. The Buddy is kind, charming and respectful, knowledgeable and understanding. The Buddy tries compromising, or narrowing of the issues to avoid unnecessary litigation. The injured worker Buddy has the same perspective: move the case to a reasonable conclusion. The Buddies work out the differences, narrow the issues, seek reasonable middle ground, no unnecessary litigation, courteous to all (court

reporters, witnesses, judges, and all litigants). Buddies can morph into Billers (see below)-business model of nice guy but bills the insurance company until almost the end, then settles!

When you look at who is representing your interests, which litigation personality type would you like to see as the “face of your company” or the “face of your client”? Parties in litigation can occupy at times different faces and can shift personalities from time to time and from case to case and from company to company. Stand back and evaluate your defense counsel, just as the claimant should stand back and evaluate his own choice of counsel. Unfortunately, most claimants do not have that perspective – this one case is their only case. However, as insurance professional representatives, you have the opportunity to reflect and recognize which personality type is your chosen counsel and do you want that personality to be the “face of your company”. No one profits by incessant Baddie/Bully behavior except the financial pocketbook of those individuals, to the detriment of the insurance company and the entire workers’ compensation system.

Billers

There is another personality type – The Biller. The more fighting that goes on, the more painful the litigation, the more documents, telephone calls, or painting the opposing counsel as a “Baddy” to his own insurance client yields an increase in more billable hours and an expensive defense counsel’s bill.

At the beginning of every case, the adjuster should examine the issues/the case plan and costs. Not every case needs the same cookbook: interrogatories, deposition, the same Independent Medical Exams, the same routine. As an insurance professional, you should be able to look at the evidence and predict the outcome. As a claims professional you should be able to work with your lawyer, and the opposing counsel to resolve the claim. Don’t let litigation take on its own life. There’s nothing wrong with the claims representative calling the injured worker’s counsel (the injured worker’s counsel can’t ethically initiate that contact). Hold your own attorney accountable to see where the costs and expenses are going. Intervene, get cases managed and resolved. Initiate discussion of compromise. Don’t just turn the case over to defense counsel, never examining its progress.

I can’t tell you how many times I’ve sat back and watched defense counsel drive the bill up when I’m trying to get less than \$100 - \$200 of out-of-pocket expenses reimbursed to my client. I get letters and multiple phone calls from the defense counsel claiming that we never sent documentation; they didn’t understand the documents and didn’t get every piece of the documents. It’s not in my client’s best interest to provide only partial/incomplete data. So I do it again because I can’t talk directly to the insurance client. I can’t say: “Are you really going to spend X-plus in legal fees to pay \$300 of bills that you will ultimately have to pay?” Rare is the defense counsel who says “I don’t need the deposition, interrogatories or Independent Medical Exams. I’ve read the file, I know what the issues are; let’s see if we can resolve it, moving toward a common ground at this time.”

In most cases, there should be at least a deposition but I think interrogatories are unnecessary in a workers’ compensation case. Most workers’ compensation communities are small and everyone knows essentially where the case is going and what the issues are. Yet, a deposition is useful. A deposition is an opportunity for the injured worker to have his “day in court” and the defense counsel to meet with the opposing counsel, and both sides (after the deposition) mutually evaluate the strengths and weaknesses, report back to the insurance carrier/client and try to resolve the case rather than have the issues polarized. The issues can be narrowed and when narrowed, they can hopefully be resolved without additional litigation.

Conclusion

Every lawyer has his own perspective and his own litigation face, and may have to shift faces in the same case. The key is an understanding of each side’s respective position and attempt a resolution short of expensive litigation. In some cases, the only answer for both sides is litigation because they are so far apart in their evaluations. These cases are the minority.

Look at your injured workers' opponents. Look at your own defense counsel. Look at the opponent's counsel. What are the personalities? Bully? Baddie? Buddy? Biller? Combo? Some attorneys "talk" settlement but never get there. Why? Because they are more interested in exorcising their own personalities, billing the files and racking up fees to their financial gain. Most adjusters, when they turn the file over to defense counsel, think that is the end of it and they do not review the file again or engage in efforts to resolve the case. Do not lose control of your defense counsel any more than the injured worker's lawyer should lose control of his client.

The whole process should be a constructive relationship rather than an increase of billable time. I can tell you of so many types of cases that could have settled at a certain number, say, "x". During the course of litigation, we found out that the value of the case increased by "y". The defense counsel bill is somewhere between \$5,000 and \$15,000 – more than "x" and "y" combined or even doubled! Phone calls between the adjuster and injured worker's counsel early on in that case could have resolved the case, saving all a lot of time, heartache, and money resources.

When the injured worker believes that he is being unfairly treated by the insurance company, litigation is thus personalized; he's the only one being attacked this way. There are social factors in every case which inhibit resolution. Everyone has different expectations of benefits and expectations. The goal of the lawyers, on both sides, is to rationally define those expectations, clarify them, seek the common goal of resolution and move the case towards an intelligent resolution. Every case should not be a battle; carefully choose the mountain that you want to die on. The injured worker's counsel has nothing but time on his hands. If he has a reasonably intelligent and sympathetic client, it is a force multiplier before the Judge. With a Baddie or Bully against you, it's not going to bode well for a resolution in favor of the insurance company or for your side if you are the Bully/Baddie. Remember, the Judge handling the case is an individual and a human being. That individual is going to attempt to decide that case in the fairest, most reasonable resolution. It will make the situation more difficult for you, if the insurance client hires a Bully/Baddie/Biller. The poor result is fairly predictable. Evaluate your attorney's personalities!

Is It Time for a Model Workers' Compensation Act? by Fellow [Jim Anderson](#), Jackson, MS



A federal takeover of the state workers' compensation systems is not the choice solution to the current impetus for change, but change will come. A model act might avoid this, to everyone's benefit.

Although the election of 2017 might have slowed some of the impetus for change in workers' compensation on a national level, most workers' compensation professionals believe that the discussion will continue and will reach a new focus level as the political pendulum swings. Nearly everyone believes that an efficient workers' compensation system that provides realistic benefits without destroying the economic reality of affordability should be the goal, and most would also agree that a competent and efficient workers' compensation system is a significant component of economic reality.

When dealing with the lives and well-being of the workforce and their families, as well as the significant financial effect that bad decisions have on the financial integrity of the workers' compensation community at large, it is easy to see how important workers' compensation is to our society as a whole. The concept is well illustrated in this quote:

Workers' compensation is a very important field of the law, if not the most important. It touches more lives than any other field of the law. It involves the

payments of huge sums of money. The welfare of human beings, the success of business, and the pocketbooks of consumers are affected daily by it.

Singletary v. Mangham Construction, 418 So.2d 1138, 1140 (Fla. Dist. Ct. App. 1982).

Click here to read the entire article: <http://acblaw.com/wp-content/uploads/2017/12/12.2017-JMA-For-The-Defense.pdf>

Ethical Negotiations: How Far is Too Far?

By Fellow **Greg Presmanes**, Atlanta, GA and **Phillip C. Kuck**

52 Tort Trial & Insurance Practice Law Journal, p. 903 et seq. (Spring/Summer 2017)



“Negotiation, we may say, ought strictly to be viewed simply as a means to an end; it is the road the parties must travel to arrive at their goal of mutually satisfactory settlement. But like other means, negotiation is easily converted into an end in itself; it readily becomes a game played for its own sake and a game played with so little reserve by those taken up with it that they will sacrifice their own ultimate interests in order to win it.”¹

From the first step into law school and beyond, lawyers are taught to be zealous advocates for their clients, unwavering, and willing to do whatever it takes to win. Indeed, the preamble to the Model Rules of Professional Conduct explicitly states that “[a]s advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”² This desire to win extends to lawyers’ behavior during negotiations. The preamble to the Model Rules further states, “[a]s negotiator, a lawyer seeks

a result advantageous to the client but consistent with requirements of honest dealings with others.”³ Whether attorneys employ truthful or deceptive negotiation tactics, however, largely depends on the individual.⁴

Click here to read the entire article:

https://www.americanbar.org/content/dam/aba/events/labor_law/2017/03/work/papers/gregory_paper.authcheckdam.pdf

¹ Lon L. Fuller, *Anatomy of the Law* 128 (1968).

² MODEL RULES OF PROF’L CONDUCT, Preamble [2]; Notably, comment 1 to Model Rule 1.3 which used to reference to a lawyer’s duty to act “with zeal in advocacy upon the client’s behalf” was deleted because zealous advocacy is often invoked as an excuse for unprofessional behavior.

³ MODEL RULES OF PROF’L CONDUCT, Preamble [2].

⁴ Andrea Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 Harv. Neg. L. Rev. 143, 185-189 (2002) (two types of negotiation styles: problem solving and adversarial).

Interview With Fellow **Terry Delehanty**, Longtime Chief Legal Officer and General Counsel of the National Council on Compensation Insurance (NCCI) – *Interviewed by Jon Evans*

Terry Delehanty is the longest serving General Counsel in the history of NCCI. He joined the company in 1990 and quickly ascended to the leadership role in 1998 where he was General Counsel until leaving in 2015. During his tenure he worked with three administrations and spearheaded every major initiative including the transformation of NCCI to a holding company, successfully negotiating the medical data call and recovering millions from fraud cases as well as managing a multitude of antitrust and other complex litigation. In addition, there were many other projects to address from the effort to go for-profit, ISO merger and ultimate resolution of IDR as an emerging competitor of the organization. He has been recognized for his achievements and leadership over the years. At the same time, Mr. Delehanty served on the boards of numerous charitable organizations throughout the community and nationally. He is now available for presentations, consultations and is looking forward to getting back into the game. He can be reached by email at tddelehantylaw@gmail.com.

Click here to read the entire interview - <http://mailchi.mp/e84ff7096fec/vuefpx8oxo-475805>

Honors and Accolades

- Fellow **Michael Alvey** (KY) was reappointed in January of 2018 as Chairman of the Kentucky Workers' Compensation Board.
- Fellow **Ann Bishop** (GA) received the 2017 Distinguished Service Award from the Workers' Compensation Section of the State Bar of Georgia and the 2018 Justice Benham Award for Community Service from the Chief Justice's Commission on Professionalism. She also has been elected to serve as Chair of the Mercer Law School Board of Visitors and serves on the Board of CWCL.
- Fellow **Tom Holder** (GA) is President Elect of WILG and will serve as President beginning in October 2018-October 2019.
- Fellow **David W. Langham** (FL), Deputy Chief Judge of Compensation Claims, was presented the 2017 Magna Comp Laude Award at the 6th Annual Comp Laude Awards and Gala in San Diego, California on October 31, 2017.
- Fellow **Wesley Marshall** (VA), Chairman of the Virginia Workers' Compensation Commission, was presented the 2017 Frances Perkins Award by the International Association of Industrial Accident Boards and Commissions (IAIABC) for his contributions as a leader and innovator in improving technology for the Virginia Workers' Compensation Commission. In addition, Chairman Marshall was reappointed as Chairman of the Commission for a six-year term in January of 2018.
- Fellow and Chairman **Frank McKay** (GA) has been elected to serve as President of the Southern Association of Workers' Compensation Administrators (SAWCA).
- Fellow **Marci Rosenberg** (GA) currently serves as President of the Georgia Workers' Compensation Claimants' Lawyers (WCCL) and is the first female to be elected to serve in that position.
- Fellow **Gerald A. Rosenthal** (FL) has endowed a new chair at the University of Florida Levin College of Law, from which he graduated in 1973. The Gerald A. Rosenthal Chair in Labor & Employment Law is designed to recruit a nationally-recognized expert in the field.
- Fellow **Robert Swisher** (KY) was appointed as Commissioner of Kentucky's Department of Workers' Claims in January 2018.

- Fellow **Bob Wisniewski** (AZ) received the Professional Hockey Players' Association Workers' Compensation Panel Member of the Year Award at their annual meeting in Niagara Falls, Canada.

Fellows are encouraged to submit articles for publication in future CWCL newsletters. Please contact any committee member with questions, or to forward your article:
[Ann Bishop](#), [LuAnn Haley](#) or [David Torrey](#)

Additionally, if you are an author of a blog regarding workers' compensation issues, please send the editors the website of your blog. We would like to include a list of all blogs written by CWCL Fellows in our next edition of the CWCL Newsletter.

CWCL LOGO

Fellows are encouraged to include the College logo on their website. Please contact [Susan Wan](#) for a downloadable file or download the logo.

