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Larry Csonka Will Present the 2011 FWCI Keynote

Even from the beginning it seemed destined that football would become Larry Csonka's life. Born on December 25, 1946 in Stow, Ohio a husky 9 pound 13 ounce Christmas gift to his parents and a future generation of football fans. By age 16, he already stood 6'3" and weighed 237 pounds.



In 1968, Csonka was the Miami Dolphins' first round draft pick. Csonka and power running became synonymous in the NFL. He charged so tenaciously through defenses that his name became a household word and his nickname, Zonk, became a new American verb. From 1971-1973, he led the Dolphins to three Super Bowl appearances, earning All-Pro and Pro Bowl honors along the way. He and halfback Jim Kiick were affectionately known as "Butch Cassidy and the Sundance Kid," and were mainstays in the Dolphins' perfect 17-0-0 season in 1972. Csonka earned the MVP award of the Dolphins' Super Bowl VIII victory over the Minnesota Vikings by rushing 33 times for 145 yards and two touchdowns. In 1973, he was voted Super Athlete of the Year by the Professional Football Writers Association. His long-standing career rushing record for the Dolphins of 6,737 yards stood until 2010. Csonka's importance to the game of football was exemplified when he was elected to the Professional Football Hall of Fame in 1987. His inclusion in that prestigious

group came in only his second year of eligibility.

Larry has continued to work in the "public eye" through national commercial ads including the popular Miller Lite commercials of the late 80's, numerous celebrity guest appearances on outdoor shows and host of the original popular competition series, American Gladiators from 1990-1993. He and Audrey Bradshaw, currently host and produce the outdoor adventure/travelogue series, "NAPA's North to Alaska" which airs on the VERSUS Network every Sunday morning at 10:30A, EST. This top-rated program showcases adventures in the Last Frontier, its people, culture, wildlife, rich history and Larry's enthusiasm for outdoor sports and conservation.

Csonka also travels the country visiting various clubs and corporations as a Sports Humor/Motivational Speaker. His speeches are laced with humor and dramatic personal experiences, and have been well received by some of the nation's top companies. Larry continues his charitable work with the Outdoor Dream Foundation where he assists with fundraising and helping kids with life-threatening and terminal illnesses realize their dream fishing or hunting adventure.

Csonka is an Alaska resident. After residing several years in Anchorage, he and longtime partner, Audrey Bradshaw, are new residents of Wasilla. They also maintain a home in Florida and a farm in Ohio. They are happily owned by their yellow lab, Lace.

FWCI Thanks:

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2011 Effort to Bring Daubert to Florida Fails

Sponsors again unsuccessfully sought to establish the “Daubert” evidentiary standard for expert testimony again in 2011. House bill 391 and Senate bill 822 would have imposed the “Daubert” standard and replaced the “Frye” standard that has long been the Florida foundation for determining the admissibility of expert opinion testimony. The effort fell short late in the session, along with multiple other efforts at redefining the Florida Courts generally, and tort reform specifically. The Following was excerpted from the Florida Senate’s Issue Brief 2009-331, 2008.

The standards governing admissibility of scientific evidence by expert witnesses are often discussed in the context of two federal court cases. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), articulated what some scholars characterize as the “general acceptance” test, under which the evidence may be admitted if the court finds that it has “gained general acceptance in the particular field in which it belongs.” That standard governed for most of the 20th Century until the U.S. Supreme Court articulated a different test in the case of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Under *Daubert*, and subsequent cases, the Court required federal trial judges to evaluate expert testimony based on factors such as testing, peer review, error rates, and acceptability in the relevant scientific community. The *Daubert* decision is cited for the principle that the judge should be a “gatekeeper” in the area of admission of scientific or similar evidence, and the decision has been embraced by some proponents of litigation reform as prescribing a tougher standard for admission of such evidence. Because it was interpreting the Federal Rules of Evidence, the *Daubert* decision is binding on federal courts. In addition, it has been adopted by some state courts. Florida, however, follows the *Frye* standard. During the 2007 and 2008 regular sessions of the Florida Legislature, measures were introduced to move the state toward a standard and procedures closer to that articulated in and stemming from *Daubert*. [See, e.g., SB 1960 (2007 Reg. Session) and SB 1448 (2008 Reg. Session).] The purpose of this issue brief is to review the standards governing admissibility of scientific expert witness testimony based on the *Frye* and *Daubert* decisions and other relevant case law, in order to provide the senators with a foundation for evaluating policy proposals in this area. The issue brief also examines the extent to which evidence law in Florida may be prescribed in statute by the Legislature versus in rules by the Florida Supreme Court.

WCEC 2011 Monday Highlights

Moot Court Program

Industry Keynotes

Case Law Update

Breakout for Risk Managers

Breakout for Healthcare
Providers

Breakout on Employment
Law

National Trends in Workers'
Compensation

National Workers'
Compensation Review

Medical Breakout

Cutting Edge Occupational
Health, NIOSH and Beyond

NIOSH ERC Regional
Seminar

National Workers'
Compensation Judiciary
College

Breakout on Workplace
Safety

In Florida, expert witness testimony is used when scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue. Expert testimony is used in a wide variety of both criminal and civil actions ranging from issues involving, for example, DNA, blood samples, toxic molds, crime scene reenactments, and battered spouse syndrome. An expert is defined in the Florida Rules of Civil Procedure as “a person duly and regularly engaged in the practice of a profession who holds a professional degree from a university or college and has had special professional training and experience, or one possessed of special knowledge or skill about the subject upon which called to testify.”¹ Thomas D. Sawaya, author of a Florida personal injury practice guide, points out that “[t]hese definitions distinguish expert witnesses from lay witnesses and establish the criteria that must be met in order for their opinions to be admitted into evidence and considered by the trier of fact.”²

To qualify, an expert must demonstrate knowledge, skill, experience, training, or education in the subject matter.³ If the subject matter involves new or novel scientific evidence, the party who wants to introduce expert opinion testimony on the evidence must show that the methodology or principle has sufficient scientific acceptance and reliability. This is what is known as the *Frye* standard.

Frye Standard

The U.S. Supreme Court adopted the *Frye* standard in 1923. At issue was the admissibility of an expert’s testimony on the result from a systolic blood pressure deception test (an early form of a polygraph test) taken on a defendant who was accused of second-degree murder. The Court considered this test a new and novel scientific theory of its time and held that:

while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.⁴

As a result of this standard, expert opinion testimony based on a new or novel scientific principle, theory, or methodology is admissible only when the scientific principle, theory, or methodology is generally accepted in the field in which it belongs. The procedures followed to apply the technique or process must also be generally accepted in the relevant scientific community.⁵

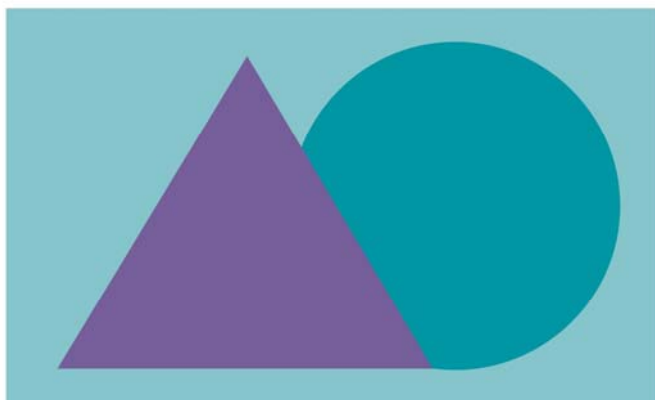
Florida first applied the *Frye* standard in 1989⁶ when it evaluated whether refreshed posthypnotic testimony of a defendant accused of murder was admissible. In the case, the Florida Supreme Court examined the practicality and reliability of posthypnotic testimony by evaluating the history of its admissibility in what the Court described as a “rollercoaster ride through the courts.”⁷ While the Court acknowledged that the *Frye* test had come under some criticism since its inception in 1923 as too harsh and inflexible, it found that other recognized judicial approaches to admissibility of expert testimony on this particular subject were not applicable to this type of testimony.⁸

The *Frye* test since has been broken down into a four-step process as outlined by the Florida Supreme Court in *Ramirez v. State*:⁹

First, the trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact in issue.

Second, the trial judge must decide whether the expert’s testimony is based on a scientific principle or discovery that is “sufficiently established to have gained general acceptance in the particular field in which it belongs.”

Third, the trial judge must determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue.



Atlantis
Orthopaedics

Fourth, the judge may then allow the expert to render an opinion on the subject of his or her expertise, and it is then up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject.

Professor Charles W. Ehrhardt, the author of a leading treatise on Florida evidence, explains that “not all expert testimony must be Frye-tested in order to be admissible....Expert opinion based solely on the expert's experience and training can be properly evaluated by the jury.”¹⁰ As recently as March 2008, the Florida Supreme Court reiterated this opinion in the case of *Marsh v. Valyou*.¹¹ In the case, the plaintiff sued her insurance company for refusing to cover medical treatment for her fibromyalgia, which she claimed was caused by four separate car accidents in a period of three years.

At issue in *Marsh* was whether the *Frye* test applied to expert testimony causally linking trauma to fibromyalgia. The Court held that it did not, stating that the expert medical causation testimony at issue was not “new” or “novel.” Under the *Frye* test, the proponent of the evidence has the burden of establishing the general acceptance of the underlying scientific principle and methodology by a preponderance of the evidence.¹² The Court stated that the published classification criteria for fibromyalgia in 1990 from the College of Rheumatology found that fibromyalgia was “widely accepted as a common generalized pain syndrome associated with characteristic symptoms and the finding of generalized tenderness.”¹³

The *Marsh* Court explained that when expert opinion testimony is not subject to the *Frye* test, it is still admissible to show causation when the opinion is based solely on the expert's training and experience. The Court stated that “[t]rial courts must resist the temptation to usurp the jury's role in evaluating the credibility of experts and choosing between legitimate but conflicting scientific views.”¹⁴ Although this opinion is in line with preceding Florida Supreme Court opinions on the continued adherence to a *Frye* standard when applicable, of interest is the lengthy special concurrence by Justice Anstead on why the Florida Evidence Code should have superseded *Frye*. He stated:

It is time for the judiciary system to recognize that the Evidence Code establishes a different standard in assessing the admissibility of novel scientific theories or techniques than does *Frye*. Their admissibility is not dependent solely upon proof that they have generally been accepted by the relevant field—although lack of general acceptance, when balanced against all counterweights, pursuant to section 90.403, is clearly a component to be considered in determining whether the probative value of such evidence is substantially outweighed by countervailing factors. If the challenged evidence, such as that in the present case, is logically relevant, and if balancing does not reveal it to be *substantially* outweighed by the factors enumerated in section 90.403, the trial judge should tip his hand in favor of admissibility.¹⁵

The Justice argued that the Florida Supreme Court has “never explained how *Frye* has survived the adoption of the rules of evidence.”¹⁶ He stated that the district courts have discussed the “tension between *Frye* and the terms of the Evidence Code” and reached the same conclusion the U.S. Supreme Court later reached in *Daubert*.¹⁷

Daubert Standard

The U.S. Supreme Court significantly changed the landscape for admissibility of scientific evidence when it issued its opinion in the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). At issue in *Daubert* was whether the Federal Rules of Evidence rather than the *Frye* standard should be used for admitting expert scientific testimony in a federal trial. Plaintiffs initially filed suit in the district court alleging that the birth defects of plaintiffs' two minor children were caused by the mother's ingestion of the prescribed



drug Bendectin while she was pregnant. Summary judgment was granted for the defendant in the district court based on the affidavit of a “well-credentialed” expert who concluded that the Bendectin had not been shown to be a risk factor for human birth defects despite the eight affidavits presented by the plaintiffs which showed that in animal studies birth defects had resulted from the ingestion of Bendectin.

The U.S. Supreme Court held that the adoption of the Federal Rules of Evidence superseded the *Frye* test.¹⁸ The Court explained that “under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”¹⁹

When there is a proffer of expert testimony, the Court stated, a judge must make “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.”²⁰ The Court presented some general observations about which factors would be involved in making the assessment:

- Whether the scientific methodology can be (and has been) tested;
- Whether the theory or technique has been subjected to peer review and publication;
- Whether in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error; and
- The existence and maintenance of standards controlling the technique’s operation.

Two subsequent cases, *General Electric, Co. v. Joiner* and *Kumho Tire Co. v. Carmichael*, have added to these observations in *Daubert* (often referred to as the *Daubert* trilogy) and ultimately resulted in an amendment to the Federal Rules.²¹ In *General Electric Co. v. Joiner*, the Court held that abuse of discretion is the appropriate standard of review for an appellate court to apply when reviewing a trial court’s decision to admit or exclude expert testimony under *Daubert*.²² In *Kumho Tire Co. v. Carmichael*, the Court held that the trial court’s gate keeping obligation is not limited to scientific testimony but extends to all expert testimony. It also held that a trial judge is not bound by the specific factors enumerated in *Daubert*, but can consider other factors, depending on the particular circumstances of the particular case at issue.²³

Frye and Daubert in the United States

While some advocacy groups and scholars differ on how many states still maintain the *Frye* standard and how many have transitioned to the *Daubert* standard, below is a chart indicating what Senate professional staff’s research found to be the most accurate representation on this issue.²⁸

States Accepting Daubert

Alaska
 Arkansas
 Connecticut
 Delaware
 Georgia
 Indiana
 Kentucky
 Louisiana
 Massachusetts
 Michigan
 Mississippi
 Montana
 Nebraska
 New Hampshire
 New Mexico
 Ohio
 Oklahoma
 Oregon
 South Dakota
 Texas
 West Virginia
 Wyoming

States Maintaining the Frye Standard

Arizona
 California
 Florida
 Illinois
 Kansas
 Maryland
 New York
 North Dakota
 Pennsylvania
 Washington

States using a hybrid standard of Daubert

Alabama
 Colorado
 Hawaii
 Idaho
 Iowa
 Maine
 Minnesota
 Missouri
 Nevada
 New Jersey
 North Carolina
 Rhode Island
 South Carolina
 Tennessee
 Utah
 Vermont
 Virginia

Advocates for changing Florida's law to a *Daubert* standard argue that *Daubert* is a stronger standard that will ensure that judges' and juries' decisions are based on sound science. They argue that the *Frye* standard, commonly referred to as "the general acceptance test," applies to the methodology of the expert and not to his or her opinion, reasoning, and conclusions. The result of this test, advocates argue, is the admission of testimony of almost any reputed expert. *Daubert* proponents further reason that if judges are not allowed to be gatekeepers, they are "largely powerless to consider the reliability of an expert's reasoning or the connection between an expert's conclusions and the supporting scientific principles."²⁹

These advocates suggest that because the Florida Legislature is responsible for seeing that the state's judges properly handle expert evidence, adoption by the Legislature of the American Legislative Exchange Council's model will strengthen the integrity of Florida courts by replacing the *Frye* standard with the more stringent standard found in *Daubert*.³⁰ They state that this model act will "require judges to consider whether an expert's testimony is reliable, relevant and has been subject to peer-review."³¹ This will in turn, the advocates argue, give Florida lawmakers "the ability to ensure that expert testimony submitted to our state courts is reliable and not merely based on speculation and opinion but is based on sound science for the purpose of serving justice in Florida courts."³²

Those opposed to adopting a *Daubert* standard in Florida raise concerns about the impact on the courts system. The *Daubert* standard, they argue, has "proven to be too difficult, time-consuming, burdensome, and costly for courts to



WCEC 2011 Tuesday Highlights

Breakout for Adjusters

Breakout for Attorneys

**Breakout for Paralegal and
Assistants**

**Breakout for Rehabilitation
Providers/Medical Case
Managers**

**Breakout on Using Health
Science**

**Employee Leasing/PEO
Breakout**

**First Responder Heart Claims,
Law and Medicine**

National Regulators Roundtable

**Breakout on Workplace Safety
National Workers'**

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apply.”³³ Thus, they argue, requiring the judges to be “gatekeepers” in a system with limited judicial time and resources does not make sense. These advocates for keeping Florida a *Frye* state argue that “the *Frye* Standard ensures that scientific evidence meets an acceptable level of reliability without placing an impossible burden on judges.”³⁴

Frye advocates argue that since there is no current crisis in Florida, there is no need to change the existing law that has been effect for decades and “has had the desired effect of screening out „junk science” based on questionable scientific methods and techniques.”³⁵

In practice, however, it may be difficult to discern which standard is the “better standard.” In a 2003 Minnesota law review article, the author compared and contrasted the criteria for admissibility for three types of scientific evidence used in criminal proceedings in *Frye* and *Daubert* states in order to determine if either standard is “more determinative” of admissibility of scientific evidence.³⁶

Although there were significant differences in courts’ decisions on the admissibility in two of the types of evidence studied, the author found that these differences could not be attributed to the *Frye* or *Daubert* standards. The author found that:

Frye and *Daubert* opinions have considerable commonality in their concerns and practical solutions. Both recognize the challenge in defining the point at which experimental science, which is constantly evolving, becomes sufficiently firm to aid in the resolution of a specific legal dispute.³⁷ The author points out that not only is the “general acceptance” standard in *Frye* also the fourth guideline in *Daubert*, but the importance of acceptance in the larger scientific community extends to other guidelines enumerated in *Daubert* as well, including an aspect of the definition of scientific knowledge and the latitude granted expert witness in their testimony.

In a 2005 University of Virginia Law Review article, the authors conducted statistical studies for purposes of determining whether adoption of a *Frye* or *Daubert* standard in state courts has had any practical impact in tort cases. Noting that in federal courts “*Daubert* has become a potent weapon of tort reform by causing judges to scrutinize scientific evidence more closely,” especially in the areas of medical malpractice, products liability, and toxic torts, the authors found that *Daubert* decisions in this context “have been decidedly pro-defendant” by allowing defendants to exclude certain types of scientific evidence.³⁸

With regard to state courts, the authors conducted both a preliminary study of Connecticut and New York, as well as in-depth statistical national study of all available and relevant states, and examined whether formal, doctrinal standards have any effect on scientific admissibility determinations. The authors concluded that there was no evidence that *Frye* or *Daubert* standards made a difference.³⁹

Changing the Evidence Code

When the Legislature passes bills to amend the Florida Evidence Code, the Florida Supreme Court has jurisdiction under Article V, s. 2(a), Fla. Const., to determine whether the amendments should be adopted as a rule of court. The Legislature may repeal the rule by general law enacted by two-thirds vote of the membership of each house. Generally, the Legislature has jurisdiction over substantive matters, and the Florida Supreme Court over procedural matters.⁴⁰



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The Court concluded that substantive law includes those rules and principles that fix and declare the primary rights of individuals as respect their persons and their property, while procedure includes the administration of the remedies available in cases of invasion of primary rights of individuals.⁴¹ The Court has stated: “In the past, recognizing that the Florida Evidence Code is both substantive and procedural in nature, this Court has adopted the Evidence Code as originally enacted as well as later amended by the Legislature.”⁴²

However, the Court has on occasion declined to adopt amendments enacted by the Legislature. In 2000, it declined to adopt an amendment by the Legislature to the Hearsay Rule, s. 90.803(22), F.S., stating that it “is not based on well established law; nor is it modeled after the Federal Rules of Evidence.”⁴³ The Court stated that it would wait until a case came before it challenging the rules’ constitutionality before it would address whether the rule was substantive or procedural.⁴⁴ The rule was challenged in 2003, and the Court held that it violated the Confrontation Clause of the Sixth Amendment in criminal proceedings to the extent that it allows the prosecutor to use at trial a witness’s testimony from a previous judicial proceeding without a showing by the prosecutor that the witness is unavailable.⁴⁵ Professor Ehrhardt points out, however, that the decision does not affect the application of the section to civil cases or when it is used by a defendant in criminal proceedings.⁴⁶

¹ Fla. R. Civ. P. 1.390(a); ² Thomas D. Sawaya, *Florida Personal Injury Law and Practice with Wrongful Death Actions*, s. 24.12 (2007-08 edition); ³ Section 90.702, F.S.; ⁴ *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir., 1923); ⁵ Charles W. Ehrhardt, *Florida Evidence*, s. 702.3 (2006 edition); ⁶ *Stokes v. State*, 548 So.2d 188 (Fla. 1989); ⁷ *Id.* at 190; ⁸ *Id.* at 195; ⁹ 651 So. 2d 1164, 1166-1167 (Fla. 1995); ¹⁰ Charles W. Ehrhardt, *Florida Evidence*, s. 702.3 (2006 edition); ¹¹ *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2008); ¹² *Id.* at 547; ¹³ *Id.* at 548 (quoting Frederick Wolfe, et al., *The Fibromyalgia Syndrome: A Consensus Report on Fibromyalgia and Disability*, 23 J. Rheumatology 534 (1996)); ¹⁴ *Id.* at 549; ¹⁵ *Id.* at 556 (quoting from Judge Ervin’s concurring opinion in *Hawthorne v. State*, 470 So. 770 (Fla. 1st DCA 1985)); ¹⁶ *Id.* at 551; ¹⁷ *Id.* at 554; ¹⁸ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); ¹⁹ *Id.* at 589; ²⁰ *Id.* at 592-593; ²¹ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), and *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); ²² *General Electric Co.*, 522 U.S. at 139; ²³ *Kumho Tire Co.*, 526 U.S. at 147-152; ²⁸ Wisconsin has its own test. See *Wisconsin v. O. Walstad*, 351 N.W. 2d. 469, 486-487 (Wis. 1984); ²⁹ *Florida’s Antiquated Frye Rule Allows Junk Science Into Our Courts*, White Paper from Florida Justice Reform Institute, 2008; ³⁰ The American Legislative Exchange Council has provided language for a model act on expert testimony, which can be found at its website under the heading Model Legislation and the subheading Civil Justice. See <http://www.alec.org/am/template.cfm?section=home>; ³¹ *Florida’s Antiquated Frye Rule Allows Junk Science Into Our Courts*, White Paper from Florida Justice Reform Institute, 2008; ³² *Id.*; ³³ *The Daubert standard is the wrong choice for Florida*, White Paper from Florida Justice Association (received in 2008 by professional staff of the Senate Committee on Judiciary); ³⁴ *Id.*; ³⁵ *Id.*; ³⁶ Pamela J. Jensen, *Frye Versus Daubert: Practically the Same?*, 87 MINN. L. REV. 1579 (2003); ³⁷ *Id.* at 1584; ³⁸ Edward K. Cheng and Albert H. Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 471-473 (2005); ³⁹ *Id.* at 511; ⁴⁰ *Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000); ⁴¹ *Id.* at 60.; ⁴² *In re Amendments to the Florida Evidence Code*, 782 So. 2d 339 (Fla. 2000).; ⁴³ *Id.* at 342; ⁴⁴ *Id.* at 341; ⁴⁵ *State v. Abreu*, 837 So. 2d 400, 406 (Fla. 2003); ⁴⁶ Charles W. Ehrhardt, *Florida Evidence*, s. 102.1 (2006 edition).



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Did you see FWCI TV at the 2010 WCEC? Throughout the conference, FWCI TV anchor Carrie Ferenac covers the WCEC from every angle. Throughout the program, the FWCI crew interviews speakers, panelists, sponsors, and attendees. These interviews are broadcast throughout the conference. Based on the overwhelming success of FWCI-TV at the 2010 Workers' Compensation Educational Conference, we will be producing FWCI-TV again this year, and you can be a part of the action. FWCI-TV will feature daily video headlines that highlight the events at the conference. By investing in a commercial or advertorial, your message will be delivered to conference attendees, as well as, FWCI's database, a targeted industry audience. Your company's message will become part of the daily newscast, and it will be distributed in the following ways:

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- Posted on You Tube
- Played in both Corporate Theaters
- Played on video screens in conference shuttle busses
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The WCEC Multi-State Program

By David Imahara

Whenever we talk about the Florida Workers' Compensation Institute, we need to think of "Big," "Massive," or "Gigantic." In my legal career, I have never been to a program where you have literally thousands of people attending a conference. At this conference, some of the programs include: medical, OSHA, safety, employment issues, insurance issues, legal issues, mediation, live oral arguments, and even live surgeries. Also, we can't forget that we always have a wonderful guest speaker—Mike Ditka, Terry Bradshaw, Emmitt Smith, and Dan Marino. It was pretty cool to meet the all-time leading rusher and "Dancing with the Stars" Champion. To say the least, if you are involved in workers' compensation, it has something for everyone.

One of the programs that is now in existence for approximately 10 years is the Multi-State program. When we first started this program, we had maybe five southern states participating. Now, it is close to fifteen states.

The idea behind the program is that experts—attorneys and regulators from that state come to present an update and analysis on what is going on that state. With many adjusters, as well as attorneys, handling more than one state, this program has provided an invaluable tool to keep abreast on the nuisances of each state's workers' compensation issues. Attendees enjoy moving from one state's presentation to another, especially when interested in a particular topic/update.

One of the most informative and enjoyable programs is the comparative law program where all the "experts" from the states sit together and address how each state handles common issues. This program always gives good perspective on your state's workers' compensation system vis-à-vis other states, especially on particular issues—delivery of medical treatment, undocumented workers, settling claims, etc. Further, by learning how other states handle common issues to all, we have seen positive improvements in various states workers' compensation process.

At the end of the Multi-State, a tradition was started many years ago and continues now. Those who attend receive a bound book containing the workers' compensation laws of each state. This is a great reference guide that many have found invaluable over the years.

I encourage those who handle workers' compensation in multiple states to attend this program. Rather than attending a number of individual conferences on particular states programs, you have it all right in one location on one day.

WCEC 2011 Wednesday Highlights

**Florida Bureau of
Rehabilitation Breakout**

**Florida Department of
Financial Services Breakout**

**Breakout on Medical Issues
for Adjusters and Case
Managers**

**Breakout on Longshore and
Harbor Workers' Act**

**Breakout on Advanced
Mediation Techniques**

**Breakout on Multi-State
Workers' Compensation Laws**

**Taking Medicare's Interests
into Account**

**Breakout for Medical Practice
Management**



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Breakout for Risk Managers 2011

On Monday August 22, the WCEC program includes a breakout for Risk Managers. An exceptional group of industry leaders presents on a breadth of subjects surpassing any 2011 business program. There are challenges for business participating in the legislative process, the appropriate presentation of data to internal decision-makers, and maintain the safety of the work place.

Marc H. Salm (Publix Super Markets, Inc.) will moderate a panel titled “The Politically Active Risk Manager,” with William Large (Florida Justice Reform Institute), Roy Franco (Franco Signor, LLC), and Lloyd Hudson (American Electric Power Company). Business today is challenged by a variety of statutory and regulatory parameters for operations, accounting, safety and more. Legislative change has become increasingly important for risk



William Large

managers. In state after state and on the federal level, changing legislation and case law interpretations dramatically impact the costs and importance of risks. Decisions are influenced by legislators, committees, interest groups, and lobbyists. Many competing interests will struggle in the legislative and regulatory arena to promote their respective positions. Risk managers have to take a role in the process if they want to be proactive and not mere spectators as costs and liability are decided by legislators and public agencies.



Roy Franco

This session will feature four people who have been involved in, among other activities, the political processes involving Federal Medicare Secondary Payer Reform, Slip and Fall Reform in Florida, Workers’ Compensation Reform in West Virginia and Ohio and the 2009 fight over claimants’ attorney legal fees in Florida. These legislative efforts will serve to illustrate the challenges of the process, and suggest strategies for assessing potential impacts of government actions.

Lloyd Hudson (American Electric Power Company) will moderate a panel on “Predictive Modeling: Mine the Data That Will Improve Your Bottom Line.” This panel includes Max Koonce (Walmart Stores, Inc.), Michael Ryan (Sedgwick CMS), and Gary Nesbit (Advance Auto Parts). Predictive modeling is a person’s ability to use data and information in an effort to accurately predict future events. Predicting the future is fraught with challenges, and the complexity of the modern world promises many variables affecting these efforts. However, the benefits of understanding the probabilities of the future are clear. This

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panel will highlights some of the ways that employers can use data in an effort to predict workers' compensation costs, trends and outcomes.

Daniel H. Kugler will lead a discussion about the challenges of "Communicating Metrics to the CFO to Impact the Finances of the Company." Certainly, every discipline has its own language, acronyms, and accepted norms. A natural consequence of this will be that accountants and risk managers may use terminology that is not consistent with each other's. A panel including David Hopps (The ServiceMaster Company) and Fred O. Pachon (Select Staffing) will address these challenges. Communicating workers' compensation performance metrics in the language of the CFO is critical. The Risk Manager needs to be able to translate workers' compensation metrics to financial performance terms that the



Fred Pachon

CFO can incorporate into the organization's strategic goals. This presentation will focus on how three successful programs communicated workers' compensation performance to the CFO, which resulted in the CFO fully supporting the workers' compensation initiatives at each of the companies.

William R. Wandel (INTEGRIS Health) and Katrina A. Zitnik (Costco Wholesale) will present "Developing and Implementing a Corporate Safety Culture." This program will provide the foundation for transforming your company and your risk management program by developing a grass roots safety culture that is driven by senior management support. Learn to relate the cost benefit of safety initiatives that address the expense concerns of senior management and the safe work environment concerns of employees. Hear the way two safety conscious companies sought to align the goals related to safety from the top of the organization to all employees by associating best practices with reward and recognition. This results driven presentation will discuss practical ways of making safety an integral part of any organization and the critical role risk managers can take to achieve this transformation.



Max Koonce

William R. Wandel (INTEGRIS Health) and Katrina A. Zitnik (Costco

Wholesale) will present "Developing and Implementing a Corporate Safety Culture." This program will provide the foundation for transforming your company and your risk management program by developing a grass roots safety culture that is driven by senior management support. Learn to relate the cost benefit of safety initiatives that address the expense



Daniel Kugler

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WCEC 2011 Healthcare Provider Breakout

This year's Healthcare Provider Breakout (Monday August 22) will discuss the problems physicians and other healthcare providers sometimes face when treating injured workers. Using Pareto's Principle (aka, the 80/20 rule), we won't discuss the 80% of patients who are compliant, have injuries with well-defined treatment paths and just want to get better and back to work. We are going to talk about the 20% of cases that are difficult to diagnose and treat, patients with other agendas, and all those other interested parties that get between healthcare providers and their patients.

The program will be moderated by Ann E. Crutchfield (Rehabilitation and Electrodiagnostics, PA) and Gary Newcomer, MD (First Care of Gainesville), and will include pharmaceutical issues and distinctions of treating the workers' compensation patient.



Ann E. Crutchfield



Arlene Guzik

The first portion of the program will feature Dr. James McClusky, of the University of South Florida and Tracey Davenport, the National Managed Care Director for Argonaut Insurance Company, and attorney E. Louis Stern, of McConaughay, Duffy, Coonrod, Pope & Weaver, P.A.

They will address the complexities of pharmacological management. This is a difficult topic for healthcare providers, but it is exacerbated when the workers' compensation patient may be treating with additional physicians who are prescribing medications that may be the same or similar to those you are prescribing. This over-utilization issue is perplexing for the physician. More troublesome though is when the other providers are not aware of your care and are prescribing medications that may have severe interactions with what you have prescribed?

This breakout focuses on what medications you prescribe on initial examination when an injured worker has complaints of severe, and how the physician balances the need to treat the acute injury while maintaining awareness of the potential for addiction and diversion. The panel will also evaluate and compare the role of various tools, such as a Pharmacy Benefit Management Company or the Prescription Medication database recently undertaken by the State.

Michele Hand (ConservCare, Inc.) will moderate a panel that includes Brenda Gray (Marriott International, Inc.), Peggy Robins (Broadspire), Arlene Guzik (Lakeside Occupational Health), and Marty E. Davis (Legal Solutions Group, P.L.).

This panel addresses difference between treating patients who present with a workers' compensation claim and those who have group health, Medicare or other insurance? They will discuss the implications of treating workers' compensation patients, such as the tendency to sometimes feel more like an insurance clerk and not a doctor. The implications of paperwork requirements, patient motivation, and dealing with the medical/legal questions are all pertinent to this comparison.

This panel of experts will discuss the what, why and how of all those extra requirements necessary in treating a workers' compensation patient, such as: dealing with non-compliant patients, dealing with employers that do not allow its employees to follow the physician's light-duty orders, lingering questions of when and what needs additional authorization.



Dr. James McClusky

WCEC 2011

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The 2011 Florida Legislature

In a legislative year marked significantly by the measures that failed, the Florida Legislature nonetheless passed some significant bills affecting workers' compensation in 2011. Senate Bill 2132 addresses return-to-work issues in State employment. House Bill 7095 revives Florida efforts to establish a statewide electronic database known as a prescription drug monitoring program (PDMP). Finally, House Bill 723 provides limitations on injuries that occur outside of Florida.

Titled "Extraterritorial Reciprocity in Workers' Compensation Claims," HB 723 provides:

If an employee in this state subject to this chapter temporarily leaves the state incidental to his or her employment and receives an accidental injury arising out of and in the course of employment, the employee is, or the beneficiaries of the employee if the injury results in death are, entitled to the benefits of this chapter as if the employee were injured within this state.

This provision restates existing application of the Florida Workers' Compensation Statute. However, the Bill further provides that if an employee from another state is similarly in Florida temporarily, and injured during that time, the employer is "exempt" from Chapter 440 if the employer "has furnished workers' compensation insurance coverage under the workers' compensation insurance or similar laws of the other state," and the "extraterritorial provisions of this chapter are recognized in the other state," and "Employees and employers who are covered in this state are likewise exempted from the application of the workers' compensation insurance or similar laws of the other state."

Essentially, there must be reciprocity of state's laws. If the state where the injury occurred has provided by law for their residents to be covered by their law, when temporarily out-of-state, then likewise a Florida employee injured in that state may be limited to Florida workers' compensation. According to the House of Representative's Staff Analysis, "At least 11 jurisdictions recognize another state's extraterritorial provisions under limited conditions." These are: California, Maryland, Mississippi, Montana, Nevada, North Dakota, Ohio, Oregon, Rhode Island, Utah, Washington and the District of Columbia.

Titled "Prescription Drugs," HB 7095 is intended to address "the problem of prescription drug abuse in Florida." House Staff Analysis. According to the Staff Analysis:

The bill bans dispensing of Schedule II and Schedule III controlled substances by a physician and makes such dispensing both a third degree felony and grounds for licensure discipline. Dispensing physicians must return existing inventories of these controlled substances to the wholesale distributors from which they were purchased within 10 days of enactment of the bill, or turn in all inventories to law enforcement to be destroyed. Wholesale distributors are required to buy back the controlled substances at the practitioner's purchase price.

According to the Drug Enforcement Agency, (<http://www.justice.gov/dea/pubs/scheduling.html>), Schedule II includes medications such as codeine, Hydrocodone, Dilaudid, Methadone, Oxycodone and others. Schedule III includes codeine compounds, Hydrocodone compounds and others.



FWCI Thanks the Spring Forum 2011 Speakers

James N. McConaughay, Esq.
Steven A. Rissman, Esq.
Betty Justin, Esq.
Kemmerly Thomas, Esq.
Hon. Diane Beck
Hon. John Lazzara
Hon. Tom Sculco
Hon. Donna Remsnyder
Bob Donahue, Esq.
Louis Stern, Esq.
Rafael Gonzalez

This Bill “makes such dispensing both a third degree felony and grounds for licensure discipline.” House Staff Analysis. Physicians who have inventories of these controlled medications will have to return those inventories to the distributors from whom they were purchased, and the wholesaler distributors are required to repurchase those inventories. The effects of this Bill are intended to be immediate. The Department of Health is directed by the Legislature to “declare a public health emergency on the third day after enactment of the law.” House Staff Analysis. The Florida Department of Law Enforcement and local police are authorized to secure unreturned inventories of these pharmaceuticals until they are returned to the wholesale distributors. The inventories become “contraband” on the tenth day following enactment of the law.

HB 7095 also “creates a standard of care for all physicians prescribing controlled substances for treatment of chronic non-cancer pain, regardless of setting, and provides an exemption for physicians meeting certain requirements.” House Staff Analysis. Dispensers of these

medications currently are obligated to report the dispensing to the state database within 15 days; the Bill reduces that time to 7 days.

HB 7095 refines who may dispense these medications, creates a standard of care in chronic pain situations, and reinforces the state database by requiring more contemporaneous reporting of the patient receiving these medications.

SB 2132 requires that “all state agencies with more than 3,000 full-time employees that are provided insurance coverage from the Division of Risk Management, within the department, establish and maintain return-to-work programs for injured state workers.” Senate Staff Analysis. This has a broad application, affecting the Agency for Persons with Disabilities, the State court system, the Department of Financial Services, the Department of Agriculture and Consumer Services, the Department of Health, the Department of Revenue, the Department of Transportation, the Department of Corrections, the Department of Children and Family Services, the Department of Juvenile Justice, the Department of Education, the Department of Environmental Protection, the Department of Highway Safety and Motor Vehicles, and Florida Atlantic University, Florida Intl. University, Florida State University, University of Central Florida, and University of Florida.

Additionally, the Division of Risk Management will begin to use each agency’s “claims history” in determining the premiums for workers’ compensation coverage for that agency. Risk Management will also perform regular evaluations of agency risk management programs every five years, and will provide state agencies with recommendations for those agency programs.

Efforts to alter the composition of the Florida Supreme Court, to alter the involvement of The Florida Bar in judicial appointments, and to reduce funding for the Courts all fell short of passage this session.



WHY STAY FOR WEDNESDAY?

By **Steven A. Rissman, Program Chairman**
Workers' Compensation Educational Conference

For a very long time the Workers' Compensation Educational Conference started on Monday morning and "essentially" ended Tuesday night. Of course, the Division of Workers' Compensation and the Florida Bureau of Rehabilitation had Breakouts on Wednesday morning. Although they were fairly well attended, the vast majority of convention attendees simply checked out of the hotel on Wednesday morning and went home. All of that has now changed. It has happened gradually over the last four or five years, but now Wednesday is not only a full time partner in the Workers' Compensation Educational Conference, but to some, the best day of all.



Robert Bamdas

For the last several years Wednesday morning has meant one of the finest and best known breakouts on Longshore and the Defense Based Act that there is in the country. Organized and moderated by Rob Bamdas, this session draws a large audience and some of the most renowned Longshore speakers in the country. The audience is composed of employers, adjusters and lawyers, each group taking away meaningful advice to use in their everyday practices.

For many years, the conference had a Breakout on Mediations, but it was limited to workers' compensation mediations. That has changed completely. The Florida Mediation Institute has been formed for the express purpose of organizing and presenting this extraordinarily comprehensive program which is broad based and not limited to workers' compensation in any way. As noted, the Florida Mediation

Institute prepares the program, but I would like to offer a special thank you to Robert Dietz for his diligence in putting together one of the most meaningful and broad based programs for the convention. This program starts at 8:50 am and goes all the way to 5:00 pm. Credits are available for this mediation training session. For much of the day, multiple programs are presented, all of which are accredited. Some of the programs are substantive and other parts are tactical. There are even ethics sessions and credits available.

Another recent all day Wednesday addition to the convention is called "The Bold New World of Taking Medicare's Interests Into Account". This comprehensive course is a response to the Federal Medicare Secondary Payer Act which compelled litigants to take Medicare's interest into account when monetary funds are being provided to an injured party to cover past and future medical expenses associated with the accident and resulting injuries. The breakout, which includes presentations from some of the best known experts in the country on this subject, is the brain child of General Chairman, Jim McConaughay and Rafael Gonzalez, who is the CEO of the Center for Lien Resolution and the Center for Medicare Set-Aside Administration. The topics cover Medicare Set-Aside Allocations, mandatory insurance reporting, conditional payments

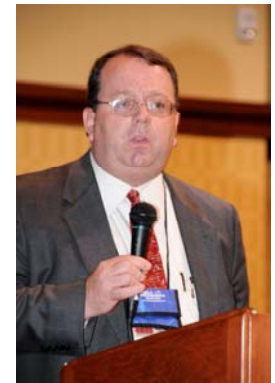
and even use of Medicare Set-Asides in liability claims. Its initial offering last year drew a crowd of 300 – 400 people.

For the first year, there is a Breakout for Healthcare Providers on Wednesday. The focus of this session is really on the medical offices themselves. The recommended audience is practice administrators, office managers and billing specialists in healthcare provider offices. Subjects include billing, coding and getting paid.

One of the programs that has been a staple for Wednesday over the last ten years is called Breakout on Medical Issues. This is a program for adjusters and nurse case managers but focuses more on medical problems than on adjusting concerns. This year, there are sessions on hand injuries, eye injuries and psychiatric or psychological problems.



Steven A. Rissman
WCEC Program Chair



Robert Dietz, President
Florida Mediation



"The Bold New World"

As noted, the long time foundation of Wednesday morning sessions provided by the Division of Workers' Compensation and the Bureau of Rehabilitation. These are highly informative programs educating insurance companies on their rights and responsibilities under the law with respect to audits, medical services, EDI and reemployment.

Finally, there is my favorite breakout of Wednesday, "The Breakout on Multistate Workers' Compensation Laws". As the convention gets less and less Florida-centric, the multistate portion is an important component of its growth. There are now nine states outside of Florida involved. They are Alabama, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee and Texas. This program is another one that lasts all day starting at 8:45 am and concluding at 3:00 pm. The audience consists of adjusters, nurse case managers and attorneys. The presenters are state regulators and attorneys from each of the member states



Nat Levine
Medical Issues

combining to put on the most comprehensive multistate presentation in the country. Where can you go, as an adjuster or an attorney, to hear information about so many different jurisdictions from so many experts? Almost every state has regulators or judges who attend and present. The attorney speakers are the best known and highest regarded experts in their state. This incredibly comprehensive educational session is organized by the Multistate Committee but a special vote of thanks goes to Briggs Peery for his particularly noteworthy organization skills.

Each year, the convention expands into new and exciting areas. I thought you might like a brief look at what has gone on recently.



Multistate Breakout

2011 Multistate Committee Members

Jim Anderson, Mississippi
Mark Davis, South Carolina
Terry Hill, Tennessee
Kyle Kinney, Alabama
Steven Rissman, Florida

Trula R. Mitchell, North Carolina
Jeffrey Napolitano, Louisiana
R. Briggs Peery, Georgia
Philip J. Reverman, Kentucky
Robert D. Stokes, Texas



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Breakout on Advanced Mediation

The WCEC has partnered with the Florida Mediation Institute to present an exceptional mediation program at the WCEC. Although this is held in conjunction with other elements of the WCEC, this is not a program just for worker's compensation mediators. This program brings marquee speakers from around the country to present the most essential continuing mediation training available.

Rod Max has mediated and published extensively. He is one of the most sought-after mediation speakers in the country. He is an exceptional planner, and will lecture for two full hours on how to plan your mediation. If you don't know where you are going, how do you know when you get there? Planning is an essential element of every successful endeavor in the professional world, why should mediation be any different? It is critical to make a careful plan, identify the route you will take and



understand the obstructions that may impede your progress. Rod Max and a panel of veteran attorneys will help you with the preparation techniques that will make your mediations successful for you and your clients. This information is "mission critical" for the mediator, the HR manager, lawyers, and insurance adjusters.

Ethics for mediators will be addressed in three distinct sessions, ranging from one to two credit hours. Mediators can craft their schedule to obtain the ethics credit that they need. Michelle Riley will present a one hour ethics program, both in the morning and afternoon sessions. She is a mediator and instructor at the



International Center for Cooperation and Conflict Resolution, at Columbia University. She brings a unique perspective on how to spot the ethical challenges and how to deal with them. Ross Stoddard, an iconic mediator from Texas, will lead a two-hour panel discussion on mediator ethics with an "all star" cast of commentators, Donna Doyle, Clem Hyland, and Juliet Roulhac. This combination will bring an outstanding array of personal experiences and professional expertise on mediator ethics, gleaned over almost 100 years of combined legal experience. Ross Stoddard will also present a separate one-hour mediation ethics program in the morning. The focus of his presentation will be how mediators should proceed with they find themselves between the proverbial "rock and a hard place." Each of these ethics education opportunities will be presented twice on Wednesday of the WCEC, maximizing opportunities to attend.



Donna Doyle

The FMI program also provides the best in Mediator training for domestic violence. Haley Cutler is the founder of Small Steps Big Change Consulting and



John Trimble

Training. She has spent years with Americorps and with Women In Distress of Broward County, Inc. She is the former Prevention and Social Change Initiatives Coordinator at the Florida Coalition Against Domestic Violence. She brings to the podium a wealth of critical information for the mediator, and will present two sessions of her program, "the Abusive Use of Technology within Domestic Violence.

There are those that suffer from "mediation pessimism" and those that are simply "carriers" of this malady. John Trimble will present two hours on avoiding pessimism in mediation. All of us who attend mediation on a regular basis soon come to realize that pessimism is one aspect of mediation that occurs in every mediation session. We learn that if we let pessimism cause us to quit, we would never settle anything. However, pessimism on the part of the parties and their counsel (coupled with impatience) can prevent

success. Parties frequently come to mediation with a pessimistic view of the potential for success. Even optimistic or neutral parties can become pessimistic after the first demand and offer or as the negotiation proceeds toward apparent impasse. John will provide guides, principles and tools for addressing pessimism and getting past it. John is an Indiana mediator who brings a wealth of experience to the table on overcoming pessimism and mediating effectively.

Kim Kim is a mediator and attorney in St. Louis. In “Difficult Conversations,” she will discuss the best-seller “Difficult Conversations,” initially published in 2000, has just released a second edition with even more practical suggestions for understanding why those conversations are so tough and how to prepare for them. While there is some soul-searching to be done to determine why a conversation is causing you anxiety, the remainder of the presentation will focus on new ways to



Kim Kim



Dr. Beverly Pennachini

analyze the parties and their behavior, thus enabling you to move them towards settlement. The book has great ideas for making difficult conversations a bit less difficult. The presentation will apply the principles detailed in the book to real life mediation situations and give mediators advice for meeting the challenges of those very difficult conversations.

Who is more familiar with success through self-motivation and focus than Dale Carnegie? The WCEC mediation program will include two presentations by Dr. Beverly Pennachini, a Dale Carnegie associate. The Dale Carnegie method is a time proven communication and presentation process. The process focuses on applying foundational principles to reduce stress, measurably improve confidence, communications, and interpersonal skills of individuals and teams. The successful mediator must effectively communicate and works in an environment that requires effective formation of relationships and consensus.

Dr. Deri Ronis, is a mediator, facilitator and author with an impressive background in overcoming anger and violence issues. She will provide methodologies for identifying the presence of these issues, and effectively interacting with the individuals who are affected by them, with a focus on navigating these critical obstacles and accomplishing resolution despite them. A successful mediator recognizes impediments to the process and perseveres. This program reinforces the skills to do so effectively.

The Florida Mediation Institute is proud to bring this vast assortment of acclaimed presenters to the Advanced Mediation Training program co-sponsored with the WCEC. For more information on the FMI, visit their website <http://www.freewebs.com/mediationinstitute/>.



Michele Riley

Thanks to George Kagan for
Providing a Humorous Photo.
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