



# QUARTERLY REVIEW

Summer 2011 (Issue 22)



## LETTER FROM THE PUBLIC COUNSEL

Dear Friends:

As the Texas State Legislative Session came to an end, it was time for OIEC's annual conference. This year a great deal of emphasis was placed on understanding and implementing the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment. The speaker highlighted the fact that the 4th and 5th editions do not have a provision for awarding an impairment rating of 15 percent for a lumbar spinal injury. Less serious injuries were rated below 15 percent, and the more serious injuries were rated at least 20 percent, thereby making the statutorily mandated 15 percent plateau for supplemental income benefits a nullity. Since lumbar spinal injuries are a common type of injury for Texas workers, it is obvious that this issue has become problematic.

OIEC will seek to upgrade the process of providing assistance to injured employees when medical treatment is denied. Educating treating doctors in the presentation of evidence-based medicine for their prescribed course of treatment will be a high priority for OIEC in the coming year.

I would like to express my appreciation to the legislators and their staffs for their commitment to enabling OIEC to have the tools necessary to fulfill its statutory mandates. Much remains to be done, though, and we look forward to educating all interested parties about the necessity for maintaining a balanced approach to solving problems.

Sincerely,

Norman Darwin, Public Counsel



# Office of Injured Employee Counsel Legislative Recommendations Adopted into Law

**The Texas Legislative Session ends successfully as many of the agency's recommendations pass and the Sunset Advisory Commission recommends the agency continue for at least six more years**

During a legislative session, OIEC is an exciting place to be, and the 82nd Legislative Session was no exception. As the State agency that represents the interests of injured employees and assists them in the Texas workers' compensation system, OIEC takes seriously its role as the voice of the injured employee in carrying forward legislation that improves workers' compensation benefits and the system as a whole.

OIEC Public Counsel Norman Darwin may recommend legislation that he determines would benefit the interests of injured employees as a class (Texas Labor Code §404.108). Mr. Darwin worked with Deputy Public Counsel/Chief of Staff Brian White and other key staff to identify issues that would benefit from a statutory change.

The agency has had legislative sponsors for 100 percent of its proposed legislation since the agency's inception. OIEC has made 21 recommendations to the Texas Legislature for the benefit of injured employees, and 13 of these recommendations passed.

The OIEC legislative recommendations that passed during the 82nd Texas Legislature include:

- House Bill (HB) 2692/Senate Bill (SB) 807 (amended onto HB 1774): OIEC will have the authority to seek and accept grant funding to enable the office to perform its duties;
- HB 2691 (amended onto HB 1774): OIEC's Legislative Reports will be due on January 1st instead of December 1st;
- HB 1870/SB 809: A party will be allowed 45 days to appeal a medical dispute decision in district court, which is the same timeframe as an appeal of an indemnity dispute decision;
- HB 1872 (amended onto SB 809): Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC) will be the appropriate venue for resolving Workers' Compensation Health Care Network disputes in cases where a carrier or employer fails to provide information to an injured employee;
- HB 3427/SB 511 (amended onto HB 2605): An injured employee will have the opportunity to seek the opinion of a treating doctor if he or she is not satisfied by the designated doctor's opinion regarding maximum medical improvement and impairment rating. It requires the insurance carrier to pay the cost of such an examination.

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OIEC was also reviewed under the Sunset Advisory Commission's review process (Sunset Review) during the 82nd Texas Legislature. The Sunset Review process requires all State agencies to be evaluated periodically to determine if they or their particular functions should be continued, modified, or abolished. The recommendations that were adopted based on the Sunset Review include:

- Labor Code §404.003: Continues OIEC for six years;
- Labor Code §404.007: Requires the agency to develop and implement negotiated rulemaking and alternative dispute resolution policies and to maintain a system of handling complaints (Note: OIEC has been in compliance with the complaint portion of this requirement since the agency's inception but did not possess the across-the-board language in the agency's statute);
- Labor Code §410.023: Directs OIEC to work with TDI-DWC to ensure injured employees are fully prepared by Ombudsmen before attending a TDI-DWC Benefit Review Conference;
- Labor Code §402.082(b): Limits OIEC's authority to access claim files for injured employees that OIEC is not directly assisting; and
- Directs OIEC to work with TDI-DWC to complete firewalls in the new database system.

The legislation passed during the 82nd Texas Legislature will help

protect the interests of injured employees and uphold the workers' compensation system goal of treating injured employees with dignity and respect.

## OIEC Holds Stakeholder Meeting

### Gathers Input on New Rules, Procedures, and Notices



OIEC's Central Office in Austin held a Stakeholder Meeting on Monday, June 13th, to discuss several working items within the agency. The agenda included the Sunset Advisory Commission's Across-the-Board Recommendations to the agency, proposed Ethics Rules, and possible amendments to the Notice of Injured Employee Rights and Responsibilities in the Texas Workers' Compensation System. OIEC stakeholders and legislative staff were invited to provide input on the agenda items via email or in person at the meeting.

The agency is moving toward finalizing each of the items:

### Sunset Advisory Commission's Across-the-Board

**Recommendations** – A committee of OIEC employees developed new agency procedures in order to comply with the recommendations. The procedures will go into effect on September 1st, 2011.

**Proposed Ethics Rules** - The proposed rules were published in the Texas Register on February 25th with a comment period that ended on June 10th. OIEC plans to adopt the Rules in August.

### Notice of Injured Employee Rights and Responsibilities in the Texas Workers' Compensation System (Notice)

- The Notice is a document created by OIEC and approved by TDI-DWC in order to educate injured employees on their rights and responsibilities in the workers' compensation system. It is eligible for review at any time. OIEC obtained internal feedback on the Notice in May and developed a new draft Notice. External feedback on the draft Notice was accepted until July 8th, and TDI-DWC provided comments on July 19th. A new Notice is being drafted to incorporate the input received, and OIEC intends for the document to be adopted by November 2011. The revised Notice is likely to be effective in September 2012 to give all stakeholders ample time to prepare for any informational technology changes that are made.



# Texas Workers' Compensation Fatalities Include Firefighters Killed During Texas Wildfires



More than three million acres of land have burned as a result of Texas wildfires this fire season, with 14,480 fires confirmed and new fires reported almost daily. The Texas Forest Service monitors the firefighting operations, which has included personnel from 34 states. State, local, and volunteer firefighters as well as men and women from out of state have bravely battled the wildfires, risking their own safety for the good of Texas. It is a dangerous job that can result in the loss of life. OIEC employees working on wildfire-related claims are touched by the firefighters' injuries and loss of life.

Volunteer firefighter Mr. J died of fire-related injuries after suffering third-degree burns over 60 percent of his body. He and two other firefighters were stranded in a field when their fire trucks would not start, and the grass fire moved toward them. The other

firefighters suffered smoke inhalation but did survive.

Volunteer firefighter Mr. G lost his life while assisting the Texas Forest Service at a brush fire near his residence. He was a retired city firefighter who had continued working as a volunteer firefighter for 30 years.

The most recent fatality claimed the life of Mr. H, a member of the Bureau of Land Management's Bonneville Interagency Hotshot crew from Salt Lake City, Utah. He collapsed while working on the fire line and passed away while being evacuated to a nearby hospital. Weather conditions were very hot, with afternoon temperatures exceeding 105 degrees. An autopsy will determine the exact cause of death, but indications point to the extreme heat as a primary factor.

Approximately 35,000 active volunteer firefighters make up 70 to 80 percent of all firefighters in Texas. Volunteer firefighters may or may not be covered by workers' compensation. If they are covered, they may be entitled to income benefits at the minimum rate as well as medical benefits.

## Succession Plan Survey Results Help OIEC Prepare for Retirements

The Succession Planning Survey conducted in May provides a clearer picture of the impact

retirements will have on the OIEC workforce over the next six years. This information is helping OIEC identify future staffing needs and develop an action plan to address them.

Of the 157 staff members employed by OIEC at the time of the survey, 136 (86.6 percent) responded to the survey. Of these, 55 are eligible to retire within six years. Not all those eligible to retire plan to do so within that timeframe: 26 plan to stay with the agency beyond six years. Of the 29 who do plan to retire within six years, five expect to do so within 12 months, four in one to two years, 10 in three to four years, and 10 in five to six years. These 29 employees include 16 from the Ombudsman Program and 10 from the Customer Service Program. To protect the confidentiality of the respondents, additional information provided by the survey will not be reported.

OIEC's Succession Plan will involve efforts to retain staff as well as developing "bench strength" within the organization so that current employees will have the knowledge, skills, and abilities to perform successfully as they move into positions opened by retirements or other departures. Staff is in the process of identifying critical skills and knowledge (also called competencies) necessary for OIEC to reach its goals, analyzing potential gaps in competencies due to vacancies, and assessing training and other workforce development practices to address the gaps.



# Employees Gather in South Texas for OIEC Annual Conference

More than 150 employees arrived in San Antonio ready to build up their knowledge, teamwork, and morale at OIEC's annual conference. The main purpose of the conference was the provide in-house adjuster's license credit to the employees. The theme "Five Years of Helping Hardworking Texans" highlighted the agency's anniversary. The Denton and Lufkin Field Offices proudly displayed their team spirit with creative, matching shirts. The entire OIEC team was happy to be together, even for only a few days.

Public Counsel Norman Darwin opened the conference. One person commented, "You can

see and feel the great ideas he has and what he wants OIEC to become." Over the course of three days, the team learned how American Medical Association Guides, ethics, causation, intoxication, and the recent legislative session fit into their important work with injured employees.

The most popular presentation occurred on the final day. Joyce Sparks, the Director of the Governor's Center for Management Development, delivered the fun yet powerful presentation, "Organization, Energy, and Results: Getting Your Ducks in a Row!" Ms. Sparks enthusiastically discussed how to use time effectively, overcome time wasters, and work effectively with others. The team shared ideas and built consensus on how to "work smarter," thus benefiting the injured employees OIEC serves. Laughter erupted as employees good-naturedly teased one another, demonstrating the friendships that have formed within the OIEC

team. At the end of the presentation, executive management handed out yellow rubber ducks to the staff as a reminder that they have the skills to keep their ducks in a row.

To close out the conference, OIEC recognized 26 employees who celebrated milestone state service anniversaries this year. They include Rachel Escamilla (Corpus Christi) and Patricia Treadaway (Victoria) with 25 years, Rosaline Godfrey (Houston West) with 30 years, and Linda Jenkins (Fort Worth) with 35 years of state service.

One conference attendee commented on her evaluation, "Bringing us together makes us a stronger team. It reminds us we need each other. One purpose, many hands!" Those hands will join together again next year as the team travels to Fort Worth for the annual conference June 18th-20th, 2012.

*(Continued on page 6.)*





## Technical Achievement Award Winners

The conference ended with the highly anticipated announcement of the Technical Achievement Award Winners. This award is presented to one Customer Service Representative and one Ombudsman for exceptional skill and proficiency in his or her position.



**Ombudsman - Judy Bouchum-Todd, Dallas Field Office.** Ms. Bouchum-Todd is an Ombudsman who also serves as the Dallas Field Office Ombudsman Team Lead. Her leadership abilities are recognized by coworkers and customers alike. She is responsible, reliable, and always a step ahead. Her knowledge and experience of workers' compensation allows her to exhibit professionalism and patience at all times. She manages her time effectively and is an excellent mentor within the training program. Her efforts will continue to have a positive impact on the Ombudsmen she mentors today, tomorrow, and in the years to come.

**Customer Service Representative – Debra Setliff, Lufkin Field Office.** Ms. Setliff is the Customer Service Team Lead for Beaumont, Lufkin, Tyler, and Waco Field Offices. She has showed excellent leadership qualities in this position and has traveled to train new employees in other offices. She is a member of the Fatality Project Team, which helps educate workers' compensation beneficiaries who have lost a family member to a work-related accident. She is extremely knowledgeable about workers' compensation and assists OIEC's customers with determination and excellence. She is courteous, professional, and has the deserved respect of her team.

## Question of the Quarter

**Q: I don't understand why there is a focus for employees to return to work so soon after they are injured. Doesn't it make more sense for me to take some extra time to stay at home, rest, and get fully healed before I return to work?**

**A:** Although in some cases rest and time is required before an employee can return to work, often it is more beneficial to return to work soon after the injury occurs. One important thing is to talk to your doctor and find out when it is medically appropriate for you to return to work. This includes talking to your doctor about what types of work you can do while you are healing. It might be your regular job, modified parts of your regular job, or different job at your work place. It is equally important to keep in close contact with your employer so you can request to return to work in some capacity when the doctor says you are ready.

Studies show that the longer you are off work, the less likely you will return to your job at all. Maintaining your job is good for you financially and keeps your spirits up during a difficult time. For more information about returning to work, you are invited to attend one of the monthly educational presentations in each OIEC field office at noon on August 26th or September 30th, 2011.



# OIEC Increases Public Awareness at Conferences and Job Fairs

OIEC has delivered 75 presentations so far this fiscal year, educating auto makers, community groups, healthcare providers, law enforcement agencies and associations, unions, and injured employees of Texas. The primary goal of these presentations is to raise public awareness about OIEC and the services it provides.

Regional Staff Attorney Jose Cuellar hosted an informational booth at the TexMed 2011 Convention. OIEC was one of more than 200 exhibitors who provided product and services information on a variety of topics that benefit doctors, medical practice staff, and patients. Approximately 1,500 providers attended this event and almost as many visited OIEC's booth. Mr. Cuellar also hosted a booth and presented at the Second Chance for Success Job Fair 2011. Hundreds of workers from the Rio Grande Valley attended the event organized by South Texas government agencies and federal, state, and local employers.

Regional Staff Attorney Gina McCauley and Ombudsman Program Associate Director Anthony Walker hosted a booth at the Texas Orthopaedic Association Conference. It was a successful event because some



attendees had not heard about OIEC prior to the conference, and Ms. McCauley and Mr. Walker were able to provide them with valuable information and resources. The attendees who were aware of OIEC reported that they regularly refer their patients to OIEC and spoke highly of the Ombudsman Program.

Regional Staff Attorney Ann Reeves spoke to the Pachyderm Club of Denton County and the Denton Hispanic Chamber of Commerce, while Stephen Gossett presented to the Denton Black Chamber of Commerce. These groups include members of the public involved in various aspects of their communities. OIEC's information was appreciated by attendees whose work puts them in contact with injured employees. Mr. Gossett and Ms. Reeves also hosted a booth at the Texas AFL-CIO Constitutional Convention where Public Counsel Norman Darwin served as co-chair on the Workers' Compensation Committee. Mr. Gossett also has an upcoming presentation with a subcontract group that installs

AT&T telecommunication equipment.

Regional Staff Attorney Veronica Boulden has presented to several diverse groups. In addition to presentations for the Texas Medical Association and the Department of Assistive and Rehabilitative Services, Ms. Boulden spoke with a group of elementary school students and staff on Career Day. She explained how dropping a pencil on the floor could cause a teacher to be injured in a slip-and-fall incident. The children were very interested in how many days the teacher might miss work due to the compensable injury and how to pronounce "Ombudsman."

OIEC has been able to gain valuable feedback from its attendees at these presentations. Many workers' compensation claim participants desire education so they can be more active in the claim. Others have suggested that OIEC make training available in electronic media formats such as webinars or videos. *(Continued on page 8.)*





These ideas will be considered when planning the upcoming fiscal year. OIEC seeks new opportunities and venues to share information about the agency and the services it provides. If you have an event that you would like OIEC to attend, please email [OIECInbox@oiec.state.tx.us](mailto:OIECInbox@oiec.state.tx.us) with the details.

OIEC would like to thank the Texas Medical Association and Texas Orthopaedic Association for providing exhibition booth space free of charge at their annual conventions.

## Customer Service Early Intervention Successes

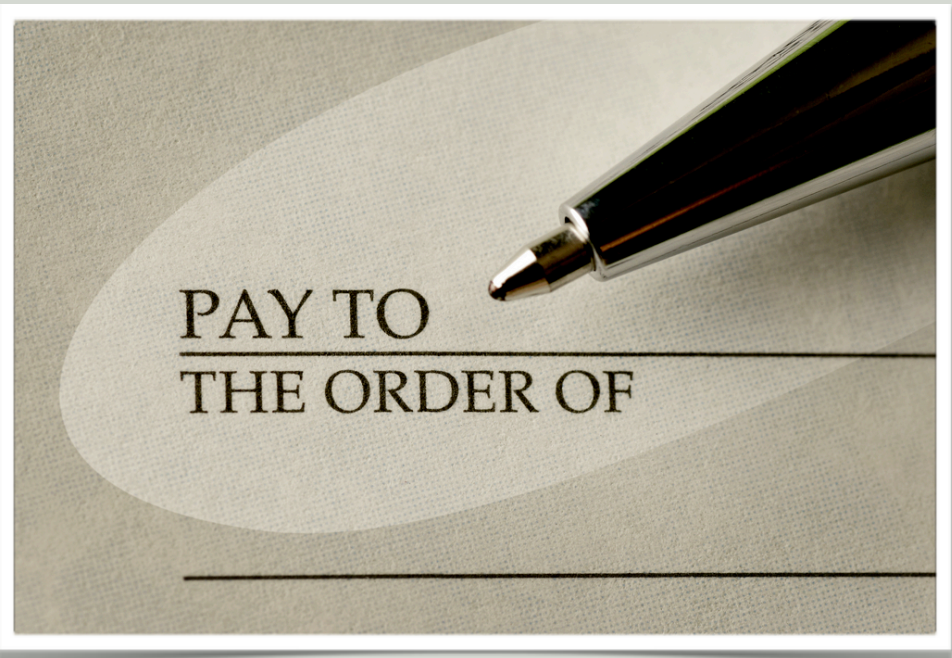
Valeria Ledezma, a new Customer Service Representative (CSR) in the Dallas Field Office, recently assisted two injured employees with average weekly wage issues. It is critical for an injured employee's average weekly wage to be accurate because all income benefit amounts are based on this wage.

Ms. Ledezma was contacted by an injured employee who did not agree with the amount of benefits she was being paid. Ms. Ledezma contacted the insurance adjuster and found that the adjuster had not received updated employment information from the employer. Ms. Ledezma let the injured employee know she had other options available

to her while she waited for the employer to provide the actual amount of wages paid. Ms. Ledezma educated the employer's Human Resources department about the time frame for notifying the insurance carrier of an on-the-job injury and for providing the wage information so that benefits can be accurately calculated. She also reminded the employer that fines could be exacted for not timely submitting the required information. The employer then sent the insurance carrier a wage statement of a similar employee. The issue was resolved when the temporary income benefits rate was adjusted by the insurance adjuster and a check was issued for the underpayment to the injured employee.

Shortly thereafter, Ms. Ledezma was contacted by another injured employee with a similar wage problem. He was a short-term employee who had been taken off work by his treating doctor but was not being paid temporary income benefits by the

insurance carrier. The injured employee turned to OIEC for help when he was unable to resolve the issue with the insurance adjuster. Ms. Ledezma contacted the adjuster's supervisor who informed her that the benefits had been initiated but were sent to an incorrect address. They also discussed the amount of the checks because there had been a delay in getting updated information from the employer. The supervisor sent the benefit checks to the injured employee by overnight mail. Ms. Ledezma followed up with the injured employee, and he confirmed his weekly income benefits had been adjusted and that he agreed with the amount he was being paid.

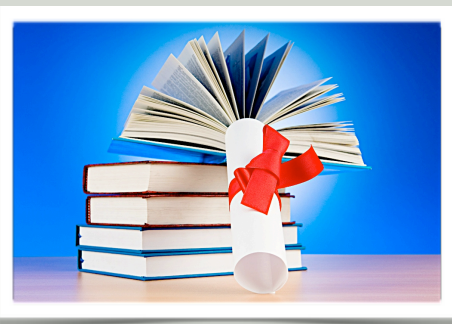




# Case Study

## Validation of Individual Plan for Employment

Mr. M worked as a painter for a large painting company in San Antonio, and in September 2004 he suffered multiple, serious injuries when he fell from a 20-foot scaffold and landed on concrete. He sustained injuries to his skull, arms, and teeth, among other injuries. He received a 15 percent impairment rating and began receiving supplemental income benefits. The injuries were serious enough that he could no longer perform his job, or any other job as a painter, and so Mr. M enrolled in a vocational rehabilitation program with the Department of Assistive and Rehabilitative Services (DARS). From December 2008 through December 2009, Mr. M attended St. Philips Community College in pursuit of an associate's degree in refrigeration technology. Mr. M is planning to graduate in the Spring of 2012.



In evaluating entitlement to supplemental income benefits, the critical document that is used to assess whether an injured employee has satisfied the good faith effort to seek employment through a vocational

rehabilitation program is known as an individual plan for employment (IPE). Mr. M's initial IPE was developed in January 2007. DARS is required to evaluate every IPE at least once a year and update them with any changes in a participant's goals in order for the IPE to remain valid. If there are no changes to a participant's goals, then DARS makes a joint annual review of the IPE, and this review serves as the update to the IPE.

The insurance carrier denied Mr. M's 10th quarter for supplemental income benefits on the basis that his IPE was not valid. The insurance carrier's primary argument was that Mr. M's initial IPE had expired, and that alone was sufficient to preclude Mr. M from collecting supplemental income benefits for the 10th quarter. Secondly, the insurance carrier argued that Mr. M was not enrolled in college full time because some of his course work (an art class) was not related to refrigerator technology. A contested case hearing was held in March 2011 to resolve the question of Mr. M's eligibility to supplemental income benefits. Mr. M was assisted by Irma Elizaldi from the OIEC San Antonio field office.

At the contested case hearing, Ms. Elizaldi presented evidence showing that Mr. M's grade point average was in good standing and that his becoming a refrigerator technician was a feasible goal. Most importantly, however, Ms. Elizaldi presented a letter from DARS explaining that an IPE is only updated if a participant's goals have changed and that in cases where goals have remained the same, a joint

annual review letter constitutes the legally required IPE update. By presenting the joint annual review letter in Mr. M's case, Ms. Elizaldi plainly established that Mr. M had satisfied the DARS requirement for a valid IPE and was therefore entitled to supplemental income benefits for the 10th quarter. The hearing officer concurred and ruled in Mr. M's favor. The insurance carrier appealed, but the appeals panel affirmed the decision of the hearing officer.

The question of whether or not an elective class should remove Mr. M from full-time enrollment status due to its content wasn't directly addressed in either the CCH or the appeals panel decision as it was not the place of the insurance carrier to dictate the coursework that can be considered in a degree plan.

Mr. M's eligibility for supplemental income benefits for the 10th quarter depended on a fine technicality—the standard within DARS for what constitutes a valid IPE. Ms. Elizaldi did an expert job of researching the internal policies of DARS to determine the exact requirements for a valid IPE, and did a thorough job in presenting her findings to the hearing officer.

Currently, the insurance carrier has also denied entitlement to 11th quarter supplemental income benefits for the same reason as it did for the 10th quarter. The dispute was scheduled to be heard in July 2011.

# Employee Spotlight

## Gary Kilgore, Legal Services Associate Director

If you walk into Gary Kilgore's office and ask him who was the vice president for Andrew Jackson, he'll reply, "Well, there were two—John C. Calhoun and Martin Van Buren; and the interesting thing about John C. Calhoun is that he was the only vice president to serve under two different presidents; and the interesting thing about that was that one president was a Republican and the other was a Democrat; and . . ." If Gary is in his office and you have a question, there's no need to bother using Google for the answer.

Gary was born in Chattanooga, Tennessee, the oldest of six children, and moved to Jackson, Mississippi right after the Civil Rights Bill was signed into law. At Murrah High School he was the captain of the debate team and was a Double Ruby Member of the National Forensic League, the highest honor bestowed in high school debate. During his senior year, he was the runner up in the state championships for debate. He was also in the National Honor Society and was a National Merit Scholarship finalist.

Gary continued with debate at the University of Virginia and graduated with distinction with a degree in economics. After college, he attended law school at the University of Texas and was a research editor of the American Journal of Criminal Law. Following law school, he worked at a small

law firm and then went into private practice in criminal defense, followed by personal injury trial law. After 16 years in private practice, Gary went to work for the Texas Workers' Compensation Commission as an appeals judge and then for TDI-DWC as a hearing officer. In June 2009, he started working for OIEC as the Associate Director of Legal Services.

For Gary, all conversations lead to hyperbole. It's his favorite thing to do. For example, he has no shortage of stories about the time he spent in Congress—the International Betta Congress, that is. For clarification, the Betta Congress is a non-profit organization that is dedicated to Chinese fighting fish. And Gary, at one point, kept hundreds of them. This is no small feat, as each betta fish requires its own bowl. Betta fish were a full-on obsession, so he had to attend Betta Fish Collectors Anonymous. He doesn't keep betta fish anymore, but he routinely recounts the political power struggles within the International Betta Congress. And each story will invariably arrive at the conclusion that the Betta Congress Board of Directors has a lot in common with some of history's most infamous dictators. Only Gary can get away with a comparison like this.

Even though Gary has, by definition, spent plenty of his adult life passing judgment, he is a non-judgmental person. He spent his developing years in an environment of gross judgment—Mississippi in the 1960s. Of course, we're all taught in school about the segregated water fountains and restrooms, but it is a very different thing to have the memory of that system. In fact, it

may almost be a necessity for Gary to exist and work in adversarial environments. One imagines him as a kind of young Atticus Finch who was drawn to debate as a way of making sense of what was an openly hostile time and place. The law is the system that both discriminates and liberates; and it was the thing that allowed Gary to engage the world. And Gary certainly feels that the law was the only thing he could use to make things better for people.

As far as what Gary has done to make things better for himself, it can be said that his love of hyperbole has endeared him to many. As a knowledge resource, he is probably second only to IBM's Jeopardy-playing supercomputer, "Watson." In his ability to think logically, he is second only to Mr. Spock. In his knowledge of the law, he may be greater than any living Supreme Court Justice. And his popularity is certainly great enough to inspire this writer to pay homage with some hyperbole of his own.

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