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Court of Opinion

Amid Suits Over Mold, Experts Wear Two Hats

Authors of Science Paper Often Cited by Defense Also Help in Litigation

 By **DAVID ARMSTRONG**
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Soon after moving into a New York City apartment, Colin and Pamela Fraser say, they began to suffer headaches, rashes, respiratory infections and fatigue. They attributed it to mold.

But their lawsuit against the cooperative that owns the building hit a roadblock when the court wouldn't let their medical expert testify that mold caused their problems. This is "unsupported by the scientific literature," the state trial judge said.

She relied in part on a position paper from the American College of Occupational and Environmental Medicine, or ACOEM. Citing a substance some molds produce called mycotoxins, the paper said "scientific evidence does not support the proposition that human health has been adversely affected by inhaled mycotoxins in the home, school, or office environment."

Two Views of Mold

Passages from papers by two professional societies:

American College of Occupational and Environmental Medicine

"Scientific evidence does not support the proposition that human health has been adversely affected by inhaled mycotoxins [from mold] in the home, school, or office environment."

Institute of Medicine


"Studies have demonstrated adverse effects—including immunotoxic, neurologic, respiratory and dermal responses—after exposure to specific toxins, bacteria, molds or their products."

The paper has become a key defense tool wielded by builders, landlords and insurers in litigation. It has also been used to assuage fears of parents following discovery of mold in schools. One point that rarely emerges in these cases: The paper was written by people who regularly are paid experts for the defense side in mold litigation.

The ACOEM doesn't disclose this, nor did its paper. The professional society's president, Tee Guidotti, says no disclosure is needed because the paper represents the consensus of its membership and is a statement from the society, not the individual authors.

The dual roles show how conflicts of interest can color debate on emerging health issues and influence litigation related to it. Mold has been a contentious matter since a Texas jury in 2001 awarded

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\$32.1 million to a family whose home was mold-infested. That award, later reduced, and a couple of mold suits filed by famous people like Ed McMahon and Erin Brockovich helped trigger a surge in mold litigation. Insurers and builders worried it would become a liability disaster for them on the scale of asbestos.

The number of suits hasn't been as big as anticipated. One reason appears to be the insurers' success in getting many states to exclude mold coverage from homeowner's-insurance policies. But also helping turn the tide, lawyers and doctors say, is the ACOEM report. Building groups and the U.S. Chamber of Commerce have cited it to rebut the notion that mold in the home can be toxic.

James Craner, a Nevada doctor who has testified for scores of people who claimed ill effects from mold, says the paper "has been used in every single mold case. The lawyer asks, 'Isn't it true the American College of Occupational and Environmental Medicine concluded that there is no scientific evidence that mold causes any serious health effects?'"

The result, Dr. Craner maintains, is that "a lot people with legitimate environmental health problems are losing their homes and their jobs because of legal decisions based on this so-called 'evidence-based' statement."

Dr. Craner says a majority of his work is on the plaintiff side and he is paid when he testifies, but he says he currently is an expert for the defense in a case where he concluded the plaintiffs' health issues weren't related to mold.

Two other medical societies have also published statements on mold written, in part, by legal-defense experts. The societies didn't disclose this when they released the papers, although one later published a correction saying two authors served as expert witnesses in mold litigation.

READ MORE

- [Read the full text¹](#) of Dr. Borak's September 2002 email to the leaders of the American College of Occupational and Environmental Medicine about his struggles in drafting their position paper on mold.
- Read the official position statements of the [American College of Occupational and Environmental Medicine²](#) and of the [American Academy of Allergy, Asthma and Immunology³](#), as posted on their Web sites.



Mold reproduces through tiny spores. These can float into homes through windows and vent systems or be carried in on clothes or shoes. Indoors, mold grows when moisture is present.

There's debate about how much this matters. Plaintiffs attribute ills ranging from asthma to cognitive problems to inhalation of mold. The Institute of Medicine, a largely federally funded nonprofit, reviewed the research in 2004 and said "studies have demonstrated adverse effects -- including immunotoxic, neurologic, respiratory and dermal responses --

after exposure to specific toxins, bacteria, molds or their products." But it added that the dose required to cause adverse health effects hasn't been determined. The U.S. Centers for Disease Control and Prevention, for its part, says on its Web site that mold can cause wheezing and eye or skin irritation, but a link to more serious conditions "has not been proven."

'Highly Unlikely'

The ACOEM paper goes further. It says not only is there no evidence indoor mold causes serious health effects, but even if mold produced toxic substances, it's "highly unlikely at best" that anyone could inhale enough to cause a problem. The paper reaches this conclusion by extrapolating from animal studies in which rodents' throats were injected with molds.

The paper's authors say their conclusions are validated by the Institute of Medicine's paper. But the author of the Institute paper's mold toxicity chapter, Harriett Ammann, disagrees, and criticizes the ACOEM

paper's methodology: "They took hypothetical exposure and hypothetical toxicity and jumped to the conclusion there is nothing there."

Dr. Ammann, a recently retired toxicologist for Washington state's health department, recently helped the plaintiff side in a mold case. She says this was the only time she has done so for pay. In the Fraser lawsuit in New York, after the judge barred testimony that mold caused health problems, Dr. Ammann, on her own and without pay, provided an affidavit filed with the appellate court saying the judge misinterpreted the research.

The ACOEM, a society of more than 5,000 specialists who investigate indoor health hazards and treat patients with related illnesses, first moved to develop a position paper on mold in early 2002. Dean Grove, then the medical society's president, asked the head of its council on scientific affairs, Yale medical professor Jonathan Borak, to set the process in motion.

He turned to a retired deputy director of the National Institute for Occupational Safety and Health -- part of the CDC -- to spearhead the project. Dr. Borak says he wanted someone with "no established background record of litigation related to mold."

For the Defense

The person he chose, Bryan Hardin, says he hadn't worked on any mold lawsuit at that point, though he was a consultant on other matters for GlobalTox Inc., a firm that regularly worked for the defense in mold cases. And Dr. Hardin says he consulted for the defense in a mold case while he was helping write the ACOEM paper.

In a Feb. 27, 2002, email, Dr. Borak told Dr. Hardin: "That position paper would be prepared by you and your GlobalTox colleagues." Dr. Borak says he believes he didn't know at the time that GlobalTox did mold defense work.

A GlobalTox colleague who aided Dr. Hardin was Bruce Kelman, now president of the firm, which recently changed its name to Veritox Inc. Drs. Kelman and Hardin, now principals at the firm and entitled to a share of its profits, were two of the ACOEM paper's three authors. They are paid \$375 to \$500 an hour for work on mold cases, court records say.

EXPERT WITNESSES

- **The Situation:** Mold defendants rely on medical-society position papers that reject a link to serious ills, but papers were written by scientists who often work for defense side in mold cases.
- **The Debate:** Whether courts get accurate or skewed view of possible health effects of indoor mold.
- **What's at Stake:** Outcome of widespread litigation over mold.

The paper's third author was Andrew Saxon, then chief of clinical immunology and allergy at the medical school of the University of California, Los Angeles. He, too, has served as a defense expert in numerous mold suits. Dr. Saxon says he is paid \$510 an hour for his help. If called to testify in court, his rate rises to \$720 an hour, according to a deposition he gave.

Until he retired from UCLA in September, money he earned as a legal-defense expert was paid to the university, and he says UCLA then gave him a little less than half of it. Dr. Saxon estimates he generates \$250,000 to \$500,000 a year from expert defense work, which includes non-mold cases.

The ACOEM knew about mold defense work by the authors of its paper. Dr. Hardin informed the society in a Sept. 23, 2002, document under his letterhead. Labeled "confidential" and "share only with the ACOEM board of directors," it told of his work as a defense expert on one mold case.

The letter said the other two authors, Drs. Saxon and Kelman, "have been retained by both the defense

and plaintiff bar in litigation relating to indoor mold." Both say they work mostly for the defense in mold cases.

Internal ACOEM documents indicate that as the paper was being written in August 2002, there was concern within the society that the paper was too friendly to defense interests. Its authors were asked to modify the first draft's tone "because of the concern about possible misinterpretation of 'buzz words' and phrases such as 'belief system,' 'adherents may claim,' 'supposed hypersensitivity,' and 'alleged disorder,'" according to a June 2002 email to Dr. Hardin from the society's communications director. (The email was obtained by a plaintiff's attorney in a mold case, Karen Kahn.)

Dr. Borak, the head of the society's council on scientific affairs, suggested sending a draft for review to one particular mold authority, Michael Hodgson, director of the occupational safety and health program at the U.S. Veterans Health Administration. Dr. Hardin objected. He said it would be "inappropriate to add ad hoc reviewers who are highly visible advocates for a point of view the draft position paper analyzes and finds lacking." The draft ultimately wasn't sent.

'A Defense Argument'

In September 2002, Dr. Borak emailed colleagues that "I am having quite a challenge in finding an acceptable path for the proposed position paper on mold." He said several reviewers "find the current version, much revised, to still be a defense argument."

The society released a paper two months later, and its authors, as well as ACOEM officials, say it accurately reflects the science on indoor mold exposure. The authors' "views, if prejudicial, were removed," Dr. Borak says. "It went through a dramatic change of top-heavy peer reviews." He says objections come mainly from "activist litigants" who find it "annoying."

Drs. Hardin and Kelman say the paper has been controversial because it challenged "a belief system" that mold can be toxic indoors. "A belief system is built up and there is anger when the science doesn't support that belief system," Dr. Kelman says.

The Manhattan Institute, a conservative think tank, paid Veritox \$40,000 to prepare a lay version of the paper. That version said "the notion that 'toxic mold' is an insidious, secret 'killer,' as so many media reports and trial lawyers would claim, is 'junk science' unsupported by actual scientific study." Its authors were the three writers of the longer paper plus a fourth, who also is a principal at Veritox.

Lawyers defending mold suits also cite a position paper from the American Academy of Allergy, Asthma and Immunology. This paper says it concurs with the ACOEM that it is highly unlikely enough mycotoxins could be inhaled to lead to toxic health effects.

Among the academy paper's five authors is Dr. Saxon. Another, Abba Terr, a San Francisco immunologist, has worked as a defense expert in mold cases. The academy published the paper in its *Journal of Allergy and Clinical Immunology* last February, not citing the mold-defense work of either man. The publication later ran a correction disclosing their litigation work.

The academy's president says officials were aware Dr. Saxon was an expert witness. "We should have published their [disclosure] statements with the paper," says the official, Thomas Platts-Mills. He says the lapse resulted from a variety of factors, including confusion about whose responsibility the disclosure was.

Unhappy Author

A third author of the academy's paper, Jay Portnoy, chief of allergy, asthma and immunology at the Children's Mercy Hospital in Kansas City, Mo., says he "felt that there was an agenda" -- the effort "seemed very biased toward denying the possibility of there being harmful effects from mold on human health." He says he considered removing his name from the paper, but it was published before he could decide.

Dr. Portnoy says a section he contributed was rewritten by Dr. Saxon to be "a lot more negative." He says the paper wrongly says mold isn't proven to cause allergic rhinitis, with symptoms like wheezing, sore throat and sneezing. Dr. Saxon denies the authors had a bias but says they applied a high standard for proving mold causes a particular effect. He says he didn't skew the content of Dr. Portnoy's section but rewrote it because it was "too diffuse." Dr. Terr in San Francisco didn't return a call seeking comment.

In New York, the Frasers are appealing the refusal of the trial judge, state Supreme Court Justice Shirley Werner Kornreich, to let their expert testify that indoor mold caused their health complaints. The Frasers had moved into the East Side Manhattan apartment in 1996. Their 2002 suit said they repeatedly complained to the co-op's board of dampness and leaks as their health deteriorated.

Their appeal attacks the credibility of mold position papers drafted by scientists who work for defendants. "What you have here is defense experts authoring papers under an official guise," says their attorney, Elizabeth Eilender. Justice Kornreich declined to comment.

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From: Jonathan Borak ~~XXXXXXXXXX~~
Sent: Friday, September 06, 2002 2:45 PM
To: Dean Grove (E-mail)
Cc: Edward J. Bernacki MD, MPH (E-mail); Barry Eisenberg (E-mail); Tim Key MD (E-mail)
Subject: mold



ACOEM Mold - revised
draft.rtf...

Dean et al:

I am having quite a challenge in finding an acceptable path for the proposed position paper on mold. Even though a great deal of work has gone in, it seems difficult to satisfy a sufficient spectrum of the College, or at least those concerned enough to voice their views.

I have received several sets of comments that find the current version, much revised, to still be a defense argument. On the other hand, Bryan Hardin and his colleagues are not willing to further dilute the paper. They have done a lot, and I am concerned that we will soon have to either endorse or let go. I do not want this to go to the BOD and then be rejected. That would be an important violation of Bryan -- I have assured him that if we do not use it he can freely make whatever other use he might want to make. If we "officially" reject it, then we turn his efforts into garbage.

As this was an effort that you, Dean, asked me to initiate I thought that you might have a good idea about what might be done.

The problem is the same as when this began. Mold is a litigation mine field. Everybody involved in the topic has a strong view and there is little middle ground. If we have a statement that deals only with science, we will be accused of ignoring the "Public Health" issues. If we embrace the Public Health, then we will be regarded as not scientific.

I have not previously been involved in an ACOEM issue that raised provoked emotions among member peer reviewers. My own feeling is that it may not be worth the disruptive effects that might result from forcing the issue. Also, I think that the authors are not willing to let this just sit for awhile. they have done a lot of work and want to see it in print.

For your interests, I have attached the latest version.

Jonathan