CPCU SOCIETY INSURING YOUR SUCCESS

Consulting, Litigation, and Expert Witness Section Quarterly

CLEWS

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From the Chairman

by Daniel C. Free, J.D., CPCU, ARM

■ **Daniel C. Free, J.D., CPCU, ARM,** is president and general counsel of Insurance Audit & Inspection Company, an independent insurance and risk management consulting organization founded in 1901 by his great-grandfather. He is past president of the Society of Risk Management Consultants (SRMC), an international association of independent insurance advisors.

Free is also a founding member of the CPCU Society's CLEW Section.

One of those folksy, old-Midwestern adages passed down to me by some of the older lawyers in my family was this: If you have a legal problem, you should hire the busiest lawyer in town. I was told that this was so because lawyers who liked to be extremely busy tended to accomplish more in less time with better results. Of course, this is human nature—a character trait that is found commonly in people of any calling who truly love their work. It is also one, I am pleased to say, that is shared by many of the members of your CLEW Section.

We have made our submission for the 2006 Circle of Excellence Recognition Program. I examined the materials presented, which included 16 addenda, and I know that you would be as impressed as I was by how much time our members give to our profession and the Society. Please accept my sincerest compliments for all that you have done in the past year.

In addition to the section activities that take place at the Leadership Summits and Annual Meetings, together with the newsletters, there were symposia, workshops, and articles published by CLEW Section members. We owe a special debt of gratitude to **Vincent "Chip" Boylan, CPCU,** for putting this all together. One wonders whether he knew what an undertaking it would be when he volunteered to do it. Then again, Boylan's efforts provide further support for my point about how generous our section members are with their time.

The 2006 Annual Meeting and Seminars in Nashville is fast approaching and we are preparing for our mock trial, which will be done in conjunction with the Claims Section. On behalf of the CLEW Section Committee, many of whom are members of the "CPCU Players," we cordially invite you to include our mock trial with the other activities you have planned for Nashville. Our mock trials are both educational and entertaining. This one has been filed for three or four CE credits, depending on Department of Insurance regulations in the individual states.

See you in Nashville! ■

What's In This Issue

From the Editor

by Jean E. Lucey, CPCU

■ **Jean E. Lucey, CPCU,** earned her undergraduate degree (English) and graduate degree (Library Science) through the State University of New York at Albany. After a brief stint as a public school librarian, she spent six years at an independent insurance agency outside of Albany, during which time she obtained her broker's license and learned that insurance could be interesting.

Upon moving to Boston in 1979, because of a career opportunity for her husband, she was delighted to find there actually exists an Insurance Library Association of Boston. Serving as director since 1980, Lucey attained her CPCU designation in 1986. She is a member of the CPCU Society's Consulting, Litigation, & Expert Witness Section Committee. The Boston Board of Fire Underwriters honored her as "Insurance Person of the Year" in 1995.

Lucey continues to learn on the job every day through constant exposure to insurance literature and the myriad of questions asked by people working in the insurance industry as well as lawyers, consultants, accountants, bankers, academics, consumers, and students.

What a pleasure it has been to collect and organize the items appearing in this issue of the *CLEWS* newsletter. I sincerely hope that you enjoy reading them and that they serve to stimulate thought and impart some bit of knowledge you didn't already have or maybe had forgotten. I fell into the "didn't previously know" category in several instances.

Some names and faces are familiar to many of us separately, but we can't put them together—the profile of CLEW Section member **R. Bryan Tilden, CPCU, CLU, ChFC, CIC, ARM, ALCM,** should remedy this situation for a well-known insurance educator.

George M. Wallace, J.D., CPCU, is a welcome recent addition to the CLEW Section Committee. He has written a cogent explanation of blogs and included a short directory of blogs and blog resources that have relevance to risk and insurance professionals, attorneys, and consultants.

Many CLEW Section members may be familiar with the writings of **Kevin M. Quinley, CPCU, ARM, AIC,** in a variety of insurance journals. Quinley expresses important ideas in an eminently readable and sensible style. His contribution "Win Your Case by Collaborating with and Managing Experts!" is an excellent example of this winning combination.

There is no substitute for experience, and **Billy L. Akin, CPCU, ARM,** is eminently well qualified both by experience and knowledge to lend advice to compatriots in the expert witness field, which he graciously does.

Anna Katherine Bennett, J.D., CPCU, is no doubt known to many readers from the parts she played in CLEW Section mock trials in several years' productions. In this issue of your newsletter she puts her lawyer hat on again to describe the roles played by expert witnesses in a case involving a hot water heater charged with causing the development of mold.

Through the good efforts of CLEW Section Committee member **James A. Misselwitz, CPCU,** we are fortunate to be privy to the experience of meteorological forensic experts **Joe Sobel, Ph.D.,** and **Steven Wistar, CCM,** who relate the process of investigating and establishing the cause of a roof collapse.

A *CLEWS* newsletter would not be complete without a question and answer contribution from CLEW Section Committee member **Donald S. Malecki, CPCU.** You better watch out for those policy forms that state "Includes Copyrighted Material of the Insurance Services Office, Inc."

Bernard J. Daenzer, CPCU, is an iconic figure to many in our industry. **Andrew J. Barile, CPCU,** reviews *The Daenzer Story,* recently published by Carolyn I. Furlong. ■

CLEW Section Member Profile

R. Bryan Tilden, CPCU, CLU, ARM, ALCM, ChFC, CIC

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Chapter: Eastern North Carolina

Current Position

Bryan provides training and consulting services for the insurance industry. The majority of the work is public presentations regarding insurance contracts for professional associations, insurance carriers, and agencies. Litigation services are provided like many of the members of the CLEW Section. For litigation work the typical client is an attorney who could represent the contract holder, insurance company, or agent/broker. He is also involved in some special projects regarding the drafting of a new insurance contract with insurance companies as the typical client.

Education

Attended University of North Carolina.
Designations: CPCU, CLU, ARM, ALCM, ChFC, and CIC

Career Path

- Started with a small independent insurance agency, went from there to a national broker, then to a regional broker, then back to a local independent insurance agency. During that 17-year time frame, set up several self-funded insurance plans, underwrote for several insurance companies, handled large claims, and was active in the Lloyd's marketplace.
- For the next seven years was director of education and then technical affairs for the Independent Insurance Agents of North Carolina.
- Founded Tilden and Associates nine years ago.

Professional Activities

- director of the CPCU Society's Blue Ridge Chapter, 1982
- grading panel member, Insurance Institute of America and American Institute of Property Liability Underwriters
- reviewer of CPCU/INS texts
- helped develop and frequently presents a series of workshops for the CPCU Society including:
  - Insurance Valuation Problems
  - Business Income Coverage
  - Tips, Tricks, and Traps of the CGL
  - Hidden Coverages
  - Insuring Defective Construction
  - The Additional Insured

Family

Spouse Sandy; daughters Leah (27) and Hilary (24).

Tilden is a native of North Carolina. He accepted transfers early in his career and lived in different parts of the east coast before deciding to come back to North Carolina.

Hobbies and Interests

- He volunteers in the fire and rescue community.
- Bryan's rescue team is deployed for man-made and natural disasters.
- He teaches technical rescue topics (high angle rescue, swiftwater rescue, confined space rescue). He also teaches arson investigation courses.
- For quiet time, he collects U.S. stamps and helps Sandy in the greenhouse.

What is the most interesting aspect of your job? The most frustrating?
For me the opportunity to learn new information is the most interesting. The most frustrating is an insured who has an uncovered loss without the financial means to fund it.

What was the most fascinating problem/case you have been involved with? The most challenging?
Each case has its own fascinating aspect. In order to be effective, an underlying understanding of the process/events has to be developed. I have come to learn the history of mold and what causes it to grow; how NASCAR drivers tune up their cars ("If you ain't cheating, you ain't competing"); what hazardous materials constitute the majority of the spills; how coiling and twist-tying an appliance cord can cause a kitchen fire; and how one spouse via a change order added $850,000 to the construction cost of a home without the other spouse knowing!

The most challenging is when the circumstantial evidence points to a logical conclusion, but the jury doesn't see it that way.

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CLEW Section Member Profile

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■ *Tilden is a frequent speaker at the CPCU Society's Annual Meeting and Seminars.*

What person (or event) had the most influence on your career and why?

The first person that I worked for told me to get my CPCU early, because as you get older, there is less and less time in the day. He sure was right about there being less time in the day. By working on my CPCU early in my career, it gave me the tools to begin learning about the insurance industry. That learning process has been continuous since receiving my designation.

What is good about the insurance industry? What is bad?

Reminds me of a test question that I loved to grade. "List the benefits of the insurance industry." It has been years since I have reflected on the good the industry does such as serving as the basis of the credit system, providing jobs, to name a few. The bad is the public perception that the industry is always trying to figure out how not to pay claims, which is incorrect in most cases.

What is good and bad about the legal industry?

Good in that the layperson sometimes needs qualified help to navigate the insurance arena. Unfortunately, the encouragement of needless litigation causes trouble.

What mistakes do you see carriers, agents, attorneys, witnesses, etc. commonly make?

- for the insured, failure to read the insurance contract
- for agents, failure to document the file
- for carriers, failure to investigate all facts before coming to a coverage determination
- for attorneys, failure to pursue further education in the field of insurance
- for witnesses, failing to advise the attorney that the case is a weak case

Where are you headed in your career? What are you going to do next?

For the present, continuing to teach and write about the new insurance contracts. For the future, considering how to help insurance professionals expand their skills. ■

Letting the Blogs Out: What Weblogs Have to Offer to Risk and Insurance Professionals

by George M. Wallace, J.D., CPCU

George M. Wallace, J.D., CPCU, is a partner in the small Pasadena, California law firm Wallace & Schwartz. His practice concentrates on property and casualty insurance coverage issues. He received his Juris Doctor degree from the University of California, Los Angeles, School of Law. He practiced with several insurance defense law firms in the Los Angeles area until 1995, when he and his partner established their current firm. He is admitted to practice before all California state courts, all four California districts of the United States District Court, and the Ninth Circuit United States Court of Appeals. Wallace served as president of the CPCU Society's San Gabriel Chapter, and is currently vice president of the Los Angeles Chapter. He was awarded the Rie R. Sharp Memorial Award (Insurance Person of the Year) by the Los Angeles-area chapters in 2000.

Wallace speaks and writes regularly on legal and insurance topics, and teaches CPCU 530 (The Legal Environment of Insurance) for the Insurance Educational Association. He maintains two online weblogs (blogs): the California law-oriented site Declarations & Exclusions (http://declarationsandexclusions.typepad.com/weblog/); and the more personal A Fool in the Forest (http://declarationsandexclusions.typepad.com/foolblog/), which received a 2005 Blawg Review Award.

Editor's note: Who better to tell us about the world of blogs than a person who is held in especially high esteem by his fellow bloggers, as is "our" George M. Wallace, J.D., CPCU.

Blogs. With a name that sounds like a race of cuddly aliens from an old episode of *Star Trek*, blogs have been drawing increasing attention over the past few years, but what interest do they hold, and what purposes can they serve, for litigators, consultants, or expert witnesses? Whether as an information resource or as a tool for expanding on your existing practice and expertise, blogs deserve your attention.

"Blog" is a shortened form of "web log" (or "weblog") and refers to a type of web site compiling a series of entries, articles, or posts, prepared by one or more authors—"bloggers"—on whatever subject or subjects they choose. A blog is usually arranged in reverse chronological order, i.e., with the most recent items first, and most blogs maintain an archive of older posts organized by date or by subject or both.

The origins of the blog format are usually traced to "online diaries" created around 1994; the term "blog" itself was coined in late 1997. The number and variety of blogs has grown at a head-spinning pace, particularly since 2001. As of April 2006, the blog-tracking service Technorati (www.technorati.com) was following more than 35 million blogs worldwide, a number 60 times greater than three years earlier. Like the universe itself, the online community of weblogs—the "blogosphere"—seems for now to be perpetually expanding.

While there are nearly as many approaches to a blog post as there are bloggers, certain conventions of form and content have established themselves. A post will typically include one or more hyperlinks connecting the reader directly to some other post, article, or online resource. Those links may provide source material or authority for some proposition the blogger is putting forward, or they may be to the article or other item that is the inspiration for the blog post. A news item on proposed safety legislation, for example, can serve as the jumping off point for commentary on the wisdom of the proposal, alternative approaches to the problem, etc.

Although not required, most blogs will implement a comments function, allowing readers to post their own responses to the original post. On some blogs with large readerships, vigorous communities of commenters grow up, debating and discussing with the blogger and one another. Another common feature of blogs is the "trackback," which monitors when other bloggers have themselves linked to a blog post. A single post on a popular blog can, through comments and trackbacks, generate a growing network of interconnecting material, a fabric of discussion and information much broader than itself.

The original web diaries of the mid-'90s were almost purely personal: the authors wrote about what they had been doing, reading, seeing, etc., and how they felt about it. Early on, however, blogs began to specialize, with bloggers focusing on more particularized topics. The first blogs to achieve wide public notice in 2001 were focused principally on politics and current events. Broad public participation in blogging was stimulated around that same time by the introduction of easy, inexpensive (often free) tools and services to facilitate blogging.

The vast majority of the 35+ million blogs remain purely personal, little more than online diaries of interest mainly to their authors and their friends or family. A significant minority of blogs disappear or become inactive within a few months, as the blogger loses interest or otherwise

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Letting the Blogs Out: What Weblogs Have to Offer to Risk and Insurance Professionals

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becomes unable or unwilling to maintain a stream of new material. The blogs that draw a wider or more regular readership are those that continue over time, post new material with some frequency, and offer something unique: a strong authorial voice or point of view, a broad range of current topics or an in-depth knowledge of a particular field. While political bloggers draw the most mainstream attention, there are strong communities of readers for specialized blogs on virtually any subject: culture blogs, music blogs, science blogs, knitting blogs, computer programming blogs, pet blogs, economics blogs, medieval history blogs, and on and on and on and on.

Keeping track of multiple blogs and accessing the most recent posts has become easier through the widespread implementation of RSS. Exactly what RSS stands for is open to dispute, but the most commonly used explanation is that it is an abbreviation of "Really Simple Syndication." When a weblog is equipped with an RSS "feed," which is a built-in feature of most blogging software and services, the blog generates a string of code each time a new article is posted. Readers subscribe to the RSS feed using either a standalone RSS reader or a free online monitoring service such as Bloglines (www.bloglines.com), and are able to discover quickly which of the blogs they follow has recently updated. The RSS feed can be checked however often the reader desires—some will check every few days, some daily, some hourly or more often—to access the most recent content and either to read it or to mark it for later review.

Legal professionals have begun to establish a presence as bloggers in a significant way; through blogs they author as individuals or through group-authored blogs sponsored by their firms. Tom Mighell, litigation technology coordinator for the Dallas law firm of Cowles & Thompson and creator of Inter Alia (www.inter-alia.net), a weblog focused on Internet legal research,

reported in a recent article for the American Bar Association's Law Practice Management Section that while there were fewer than 100 law-related blogs in 2002, lawyers, law professors, and law students were generating some 1,500 blogs as of early 2006.[1] Law-related weblogs have even gained their own nickname—"blawgs"—coined by Los Angeles attorney and early legal blogger Denise Howell.

A growing number of attorneys and non-attorneys produce blogs of interest to CPCUs generally and to CLEW Section members in particular, covering risk and insurance issues and the legal, practical, and public policy questions that surround them. A selection of law, risk, and insurance weblogs accompanies this article, and a review of some of those sites will provide a good idea of the range of approaches and content that blogs can provide.

For a consultant, litigator or expert, creating and maintaining a weblog can have definite advantages. A specialized weblog provides its author the opportunity to gain exposure as an expert in his or her field and to make contact with other experts and professionals. When Tom Mighell surveyed prominent legal bloggers for his recent ABA article, his respondents agreed that the number-one benefit of blogging was the opportunity to network online with fellow professionals and potential clients. Because the Internet is not limited by geography, a blog permits interaction with interested or like-minded readers from across the nation and around the world. Moreover, blogs provide bloggers an opportunity to call attention to themselves and to develop a reputation for expertise. In that respect, a blog can serve many of the same functions as writing articles or attending and presenting seminars, with the advantage of potentially reaching a much wider audience than might read a journal or newsletter on paper or be personally present in a lecture hall or conference room. Major search engines track blogs and incorporate blog posts into search results. Recently, Google has implemented a search function focused entirely on blogs. The Technorati service focuses entirely on tracking blogs, and Bloglines launched a blog-search service in addition to its RSS services, all as part of its acquisition by Ask.com.

One of the attractions of blogging is the relative absence of barriers to entry. While a full-scale web site can be expensive to design and costly to maintain, blogging can provide an online presence at little or no cost. As a practical matter, anyone with an Internet connection, the time, and the inclination can become a blogger. Two of the most popular blogging software packages are readily available online. Blogger (www.blogger.com), now a part of Google, is a free service that provides tools for creating, formatting, and posting a blog, and also provides free online hosting for blogs through its Blogspot service. TypePad (www.typepad.com) is a slightly slimmed down version of the popular stand-alone blogging package Moveable Type, both the creations of the software firm Six Apart (www.sixapart.com). TypePad, like Blogger, includes an array of formatting, hosting, commenting, and tracking tools; it also provides hosting services at a modest cost, ranging from $4.95 per month for one blogger with one blog and all the basic features up to $14.95 per month for multiple bloggers jointly producing a potentially unlimited number of blogs with the most elaborate blog-management tools. Both Blogger and TypePad make it possible to produce an attractive and flexible blog, even if the blogger knows nothing about HTML coding or other "under the hood" aspects of the Internet.

While the thousands of partisan political bloggers have given the blogosphere a reputation for wild-eyed irresponsible rhetoric, wider public knowledge of and experience with blogs are permitting a more nuanced assessment. Blogs are increasingly recognized as a credible source of expertise and specialized information. Whether as a reader or as an author, blogs have much to offer to consultants, experts, and legal professionals practicing in risk and insurance-related fields. Pick up the mouse, fire up your browser, and join the conversation. ■

Endnote

1. "The Next Stage of Lawyer Blogging," *Law Practice,* April/May 2006; the article is available online at http://www.abanet.org/lpm/magazine/articles/v32/is3/an2.shtml.

A Brief Catalog of Blogs and Blog Resources

by George M. Wallace, J.D., CPCU

Here is a very short list of weblogs and resources of interest to risk and insurance professionals, attorneys, and consultants.

Three Blogs from Two CLEW Section Members

- **Declarations and Exclusions: declarationsandexclusions.typepad.com/weblog/**
  The author's own blog focusing on California insurance law and related subjects. Although it began with a focus on recent court decisions and legislation affecting insurance, "Decs&Excs" has recently broadened its coverage of the politics of insurance, with particular attention to the upcoming election of a new insurance commissioner in the state.
- **California Personal Injury and Insurance Blog: jonathangstein.typepad.com/california_personal_injur/**
  Written by Jonathan Stein, a CPCU and attorney in the Sacramento area. The target audience, consistent with the author's law practice, is primarily consumers and claimants, rather than fellow professionals, with a stream of tips and suggestions for dealing with insurers and presenting insurance claims.
- **The Practice: jonathangstein.typepad.com/the_practice/**
  Also written by Jonathan Stein, The Practice is aimed at fellow attorneys and focuses on the nuts and bolts of running a solo or small law firm.

Insurance Law Blogs by Attorneys

- **Insurance Scrawl: www.insurancescrawl.com/**
  Attorney Marc Mayerson of the Washington, DC, firm of Spriggs & Hollingsworth posts in-depth, article-length discussions of insurance law and business insurance issues ranging from policy interpretation, litigation of "bad faith" claims, and international insurance questions. Posts appear with less frequency than some other blogs, but tend to be longer and more detailed in their discussion of the topic at hand.
- **Insurance Coverage Blog: www.insurancecoverageblog.com/**
  Overseen by David Rossmiller of the Portland, Oregon, firm of Dunn Carney Allen Higgins & Tongue, the blog reports and comments on new court decisions and news stories bearing on coverage issues from across the country.
- **Insurance Defense Blog: strattonblawg.typepad.com/**
  Washington, DC, defense litigator Dave Stratton covers new legal developments and practical issues arising in defending insureds, with a regional focus on the District of Columbia, Maryland, and Virginia.

Risk, Insurance, and Tort Reform Blogs

- **RiskProf: riskprof.typepad.com/**
  Martin Grace, James S. Kemper Professor of Risk Management and Insurance at Georgia State University, with his collaborator Ty Leverty of the University of Iowa, provides witty commentary and in-depth analysis on current events affecting public policy on risk and insurance issues. Professor Grace also contributes as PointofLaw.com, cited below.
- **Unintended Consequences: www.dougsimpson.com/blog/**
  Doug Simpson of Wethersfield, Connecticut, is an attorney but focuses his blog on "the collision of law, networks and disruptive technologies." Recently, the blog has explored the problems posed by hurricanes, flooding, and large-scale climate issues.

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A Brief Catalog of Blogs and Blog Resources

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- **Overlawyered: www.overlawyered.com/**
  Under the editorship of Walter Olson of the Manhattan Institute and Ted Frank of the American Enterprise Institute, Overlawyered lives up to its name, reporting and commenting with a strong point of view on excessive litigation, overregulation, and pressures to expand liability exposure around the country.
- **Point of Law Forum: www.pointoflaw.com/**
  A more scholarly, less anecdotal cousin to Overlawyered, PointofLaw.com is a group blog jointly sponsored by the Manhattan Institute and the American Enterprise Institute Liability Project. Walter Olson and Ted Frank edit and contribute, with assistance from an array of experts, scholars, and commentators.
- **Specialty Insurance Blog: specialtyinsurance.typepad.com/specialty_insurance_blog/**
  Tennant Risk Services of Hartford, Connecticut, produces this blog offering "News & Commentary on Specialty Insurance, Risk Management & Private Equity—with an emphasis on professional liability and entrepreneurship."
- **Mike the Actuary's Musings: www.triskele.com/actuary/**
  The combination professional, personal, and political weblog actuary Michael Adams of Windsor, Connecticut. Insurance and risk issues are frequently discussed as part of an eclectic mix of such related and unrelated topics as strike the author's fancy.

Useful Directories and Compilations

- **Blawg Review: blawgreview.blogspot.com**
  Not a blog itself, Blawg Review is a weekly "carnival" of links and referrals to the most interesting, thought-provoking, and worthwhile recent posts from throughout the legal blogosphere. A different legal blogger hosts the Review each week, presenting it in his or her choice of format and theme. Posts linked and discussed are drawn from submissions, the personal choice of that week's host and suggestions from the anonymous editor of Blawg Review. Locations vary week to week, but can always be found through the Blawg Review home page.
- **myHQ Blawgs: http://www.myhq.com/public/b/l/blawgs/**
  A directory of law-related blogs compiled in connection with Blawg Review, organized by type of blawger, subject area, locale, etc.
- **3L Epiphany Taxonomy of Legal Blogs: 3lepiphany.typepad.com/3l_epiphany/2006/03/a_taxonomy_of_l.html**
  Begun as a project by a third-year law student, the Taxonomy is a thorough and growing directory of legal weblogs, broken in to a variety of specialized subcategories. ■

Win Your Case by Collaborating with and Managing Experts!

by Kevin M. Quinley, CPCU, ARM, AIC

"An expert is someone who borrows your watch to tell you what time it is . . . "
—Anonymous

Kevin M. Quinley CPCU, ARM, AIC, is senior vice president of Medmarc Insurance Group, Chantilly, VA. He is the author of 10 books and more than 500 published articles on various aspects of claims-handling and risk management. He also serves as an expert witness on claim and coverage disputes. You can reach him at kquinley@cox.net, at www.kevinquinley.com or by phone at (703) 652-1320.

Editor's note: Some years ago I was asked by a Texan if the Insurance Library could provide information on "all insurance"; when I asked for a more specific request, it was clarified that the person was interested in "O-I-L" insurance; none of us can be expert in all things, including regional accents!

Whether clients have insurance or are self-insured, winning a claim often comes down to a contest between experts. Through testimony, the client's experts battle those of the other side. They may be experts from the field of orthopedics, life care planning, accident reconstruction, human factors, engineering. Liability battles are won or lost by the testimony, presentation, and appearance of the experts.

Did the defendant's conduct fall below the applicable standard of care? Was there negligence? Was the product designed appropriately? These are issues on which liability can turn.

On damages, expert testimony can make or break one's ability to contain or discount case value. Are the injuries complained of causally related to the accident? What is the plaintiff's true physical capability? Are symptoms and complaints consistent with the accident? Which economist is credible in projecting a claimant's $3 million in future wage earning loss? In an insurance bad-faith case, experts weigh in (as I do occasionally) on whether an insurer followed generally accepted claim practices in handling a coverage dispute. Hundreds of thousands—perhaps millions—of dollars are at stake as experts tackle these issues.

Having the right experts can spell the difference between a defense verdict or a runaway jury award, between a deeply discounted settlement or an awkward conversation with the boss, delivering some unexpected bad news.

To manage case defense, here are 14 questions for clients to ask—or to have their defense attorneys ask—candidate experts. To those who provide expert witness and consulting services, here are 14 questions to anticipate and to nail in order to competitively package your services:

How much of your annual income do you derive from testifying?

Ideally, an expert will draw only a portion (less than 50 percent) of his or her annual income by being an expert witness. If most income comes from expert witnessing, the opposing side can paint you as a hired gun. Ideally, the specialist is gainfully employed in his or her relevant field and does expert witnessing as only a sideline, not full-time.

What is your specialty?

Clients will beware of any expert who answers, "everything." How likely is it that you would find an attorney who specializes in ***all*** areas of the law—personal injury, maritime, intellectual property, and initial public offerings? Slim!

Anyone professing to be an expert in all fields should be immediately suspect. Consider insurance, for example. The field is so broad that it is virtually impossible for one person to be an expert on all kinds of insurance. Within insurance, you can find discrete specialties in issues such as: interpreting the intent and meaning of the commercial general liability policy provisions, accepted claims-handling practices, sound underwriting procedures for fire insurance policies, actuarial techniques for rate-making, interpretation of agent/company marketing contracts, etc. The realm of insurance is broad, and like other fields, people become highly specialized. Any would-be expert professing to be an authority on all topics should arouse immediate concerns.

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Win Your Case by Collaborating with and Managing Experts!

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How long have you been an expert witness?
Months? Years? If years, how many? This is another indicator as to the expert's experience. Would this case be one of the first for the expert, or is she a veteran who has testified for 15 years? This reflects the person's seasoning and helps you decide if he or she is right for your case.

What is your split of time between testifying for plaintiffs and testifying for defendants?
Does the expert, for example, testify mostly for defendants or for plaintiffs? Who is the expert's typical client? The answer points to the expertise and the general "slant," orientation, or leanings of prior testimony.

On what cases have you testified?
If you get the case citations, you might then obtain deposition transcripts. With prior transcripts, you can review them and assess independently the strength and coherence of an expert's testimony, how nimble he is on his feet, etc. These are useful to know when hiring a witness.

In how many trials have you testified?
What were the cases' outcomes? Many so-called experts may have rarely (never?) seen the inside of a courtroom. This is not their fault. Most cases settle before trial; many that go to trial resolve during the proceeding. There is nothing like being "fire-tested," though, in a courtroom as a way to gauge the expert witness' effectiveness.

Have you ever been disqualified as a witness?
Hopefully, the answer is "no." Ask if the witness has ever been disqualified by virtue of opining on an area outside his realm of expertise. If this applies to your expert, your adversary will likely discover it. If this is the case on your adversary's expert, it will be useful in impeaching testimony.

Can you provide the names and phone numbers of three references?
If the expert cannot, that is a "red flag." Get the references' names and phone numbers. Contact them. Were they happy customers? Did the expert add value to the case? Would they use the expert again? Were the costs reasonable?

What is your fee schedule?
Costs add up! What is the hourly rate of the proposed expert? Does he bill for time spent in transit or just for time spent working? Can he provide an estimate or mini-budget of the amount of time he expects to sink into the case? You (and your client) want to avoid nasty surprises later when you get a bill with a whopping price tag.

Can you provide a budget or estimate of costs and expenses?
Inability or refusal to do this is another "red flag" and potential showstopper. Would you start a kitchen remodeling project or add a sunroom at home without knowing the cost up-front? Get a written budget or estimate but do not view this as an ironclad contract. Do, though, urge the expert to phone you immediately if it looks like he will exceed the budget for whatever reason.

Have you written or published articles?
On what topics? Any topics dealing with the issues involved in the case at hand? Published articles in respected trade journals reaffirm that the expert is an authority. Absence of any published articles may indicate that the expert is a greenhorn. Another reason to ask is to make sure that the published views do not contradict the testimony or opinions that the expert might give in your case. Inconsistencies can be embarrassing. Better to learn these (or rule them out)

Seven Ways to Manage Experts

1. Be cost conscious, but don't go nuts. If you lose because of a lame witness, no one will console you over negotiating a real good hourly rate.

2. Use defense counsel as a resource. Unless the claim is in your own geographic backyard, ask your defense attorney to scour the area for good witnesses. If counsel is asking you who you want to use—and the venue is 500 miles away—that is a bad sign.

3. Get an up-front estimate. Avoid surprises.

4. Ask for a mini-budget.

5. Impress defense counsel with the need for frugality. It's your money, not counsel's.

6. View expert retention as an investment in your case. This is no time to scrimp.

7. Avoid "professional witnesses." Jurors discount their credibility.

at an early stage of the case instead of learning at trial or deposition.

Opposing counsel will likely "Google" any expert witness that you identify. You, your adjuster, or defense counsel should do likewise. Enter the name of any expert into Google (www.google.com), hit "enter" and see what pops up. Opposing counsel will Google your expert and you should too, both for witnesses you retain and those named by the opposing side.

Do you advertise?
If so, where? In what publications or periodicals? It helps to know whether your expert is a heavy advertiser or not and where he advertises. Opposing counsel may highlight this to paint your expert as one who is constantly trying to generate business, hoping that such inferences will turn jurors against the expert.

Do you have a web site?
Most experts do (as do most law firms these days). Check it out. Does it project a professional image? Compare the representations on the web site with those given to you by the insurance expert. Any deviations are red flags.

Can I see a copy of your curriculum vitae (c.v.)?
This should list all academic degrees, work history, published articles, monographs, books, etc. It should include past speeches, presentations, and might list prior cases involving the expert. Peruse the c.v. to determine if, based on that document, the expert might be suitable for your case.

Picking the right expert can be useful in successfully defending or pursuing a claim. By contrast, neutralizing an opposing expert can be beneficial to your case. Those providing expert services should ponder these questions and prepare compelling answers for discerning clients. These questions can help clients choose wisely and separate true gold from fool's gold among experts. ■

Expert Witness Experiences

by Billy L. Akin, CPCU, ARM

■ **Billy L. Akin, CPCU, ARM,** has had more than 50 years of experience in almost every facet of the insurance business. After a 30-year career with an insurance company, he was affiliated with an excess and surplus lines agency. For the last couple of decades, he has been involved in litigation assistance and expert witness work, while enjoying some retirement. Akin has been an active member of the CPCU Society's Mid-Tennessee Chapter for the last 45 years, in the past serving as president and on various committees. In addition to CLEW Section membership, he has served on the Senior Resource Section Committee, and has taken part in several seminars for this section. Akin can be reached in Tennessee at (615) 826-7294 or bakinpcs@aol.com. His web site is www.pcandsinc.com.

Editor's note: Akin gives us some words to the wise from a practical viewpoint as well as reminding us of the appropriate ethical approach to expert testimony.

What will come along next? I'm sure this thought crosses your mind from time to time if you are a fellow litigation consultant/expert witness. After a half century in the insurance business, my days in partial retirement as an expert witness often bring the rhetorical question: "The agent did **what**?" or "The claims adjustor indicated **what**?" or "The insured expected **how much**?"

First, an "on balance" observation. As litigation consultants, we mainly see the problem situations that evolved into lawsuits. However, let's recognize that the overwhelming majority of situations involving insurance industry personnel and their insureds find persons conducting themselves in an honorable manner. Thank goodness! But when the unprofessional agent, the uneducated underwriter, the unconcerned claims manager, or the unscrupulous insured have their real self catch up with them, it is usually not a pretty sight.

The expert witness business (for me at least) is generally enjoyable, although the likes of a vicious and unethical opposing attorney occasionally come upon the scene. This activity can be challenging. While being very conscious of, and concerned with, the issue of confidentiality, I enjoy sharing some "war stories" from my experience. It would be interesting to read of your experiences in future issues of the *CLEWS* newsletter.

Here are a few samples that come to mind. Names are changed and details are camouflaged to protect the innocent . . . and the guilty. Admittedly, personal opinion/conviction finds its way into these summaries.

I remember the agency we shall call **Commission Crazy, Inc.** This multi-state organization forgot that, even in this age of impersonal, mechanized commerce, insurance is still a "people's" business. In spite of the adage "If a deal seems too good to be true, it probably is," this agency started doing business with a group who (mis)represented themselves as brokers for Lloyd's of London for

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Expert Witness Experiences

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certain types of businesses. About three months after more than $700,000 in premium was sent to the broker and an authentic-looking binder for $48,000,000 excess liability coverage was received, there was a mysterious delay in the policy being issued. You know the old excuse . . . "Lloyd's takes forever to get a policy issued."

Prompted by the suspicion of the insured, the agent began to make serious inquiry concerning the validity of this (so-called) broker, and discovered that he had *no relationship whatsoever* with Lloyd's. About the time another large premium installment was being demanded, the truth about the phantom broker surfaced. It turned out that this insured (and this agent) were not the only victims of this scheme. A web of deception had been skillfully woven.

With all the evidence presented, and with case law support, it was my conclusion that the agency did not come close to meeting an acceptable Standard of Care in placing this business. At least some personnel at Commission Crazy, Inc. were, indeed, intoxicated with an incessant desire for the almighty commission dollar (about $145,000 in this case). In fact, when one agency member expressed his concern with the integrity of the "broker," his superior reportedly suggested that he keep this quiet, or the "home office" might take away this great market for them. To further complicate things, the agent, at one point, received a threat on his life if he talked much more about his concern.

Oh, by the way, between the time that coverage was allegedly bound and later replaced through an authentic broker, some accidents that would likely give rise to very serious losses to the insured had occurred. In my opinion the settlement against Commission Crazy, Inc. was very just.

And then there was an agent whom we shall call **Mr. No Attention.** It seems that Mr. Attention evidently felt that there was really no need for a liquor package store to have liquor liability coverage. As a background, it should be pointed out that this agent, for many years, had handled various coverages for this insured and the insured clearly relied upon the agent for advice and counsel. He was, in some ways, the insured's risk manager.

When recommending insurance coverages under a Business Owners policy, and even on renewal, Mr. Attention evidently failed to recognize what, to me at least, was an obvious and huge exposure that needed to be transferred to an insurance carrier. The insured was never given the opportunity to accept or reject this coverage, although it would have admittedly been expensive.

But what subsequently happened was even more expensive. When a claim involving an alcohol-related death was received, the insurance company properly denied coverage. This brought on a lawsuit against the agent, and finally a substantial settlement in favor of the insured.

And then there was the insurance company known as **Fine Print, Ltd.** This case involved a company declining to pay a claim due to an alleged misrepresentation in the application for coverage. There was a loss to a dwelling that had been insured by the company for several years. While it has been my experience that most residential property applications inquire about loss history for the last three to five years, this application called for disclosure of any claim at any time in the past. When the insured told the captive agent of a small non-suspicious electrical fire some 13 years earlier, the agent told the insured that any claim more than 10 years prior would not be of concern of the company underwriter.

As an expert witness, based on my extensive underwriting experience, I was asked my opinion as to whether or not an electrical fire some 13 years earlier would increase the risk, and legitimately sway the judgment of a company underwriter. I was aware that the applicable state statutes provided that for any misrepresentation to be used by the company to deny a claim it had to be "material" or made "with actual intent to deceive," or that it "represented increases in the risk of loss." My opinion to the attorneys and to the court was a definite "no," that hazard was not increased by this 13-year old event.

From sworn testimony by the insured, the agent, and the company underwriter, I was not convinced that knowledge of this prior loss would have any effect on a legitimate decision as to whether or not the policy would have been acceptable to the company, Fine Print, Ltd. The jury agreed.

It is with some reluctance that I embellish these serious situations with humor. To those involved, there was nothing funny about these lawsuits. As is usually the case, the loss of productive time was one of the most serious costs to those involved in errors and omissions cases. Unfortunately, the innocent parties were also called upon to waste a terrific amount of time that could have been used in valid production.

Ending on a serious note, would those of you actively involved in expert witness work please join me in always having a firm conviction about the facts and truth of a situation, reached in an uncompromising manner, before espousing a position. Even if there were no other motivation, the CPCU Code of Ethics demands this! ■

Mold—Where Bodily Injury and Property Damage Intersect

by Anna Katherine Bennett, J.D., CPCU, CFE

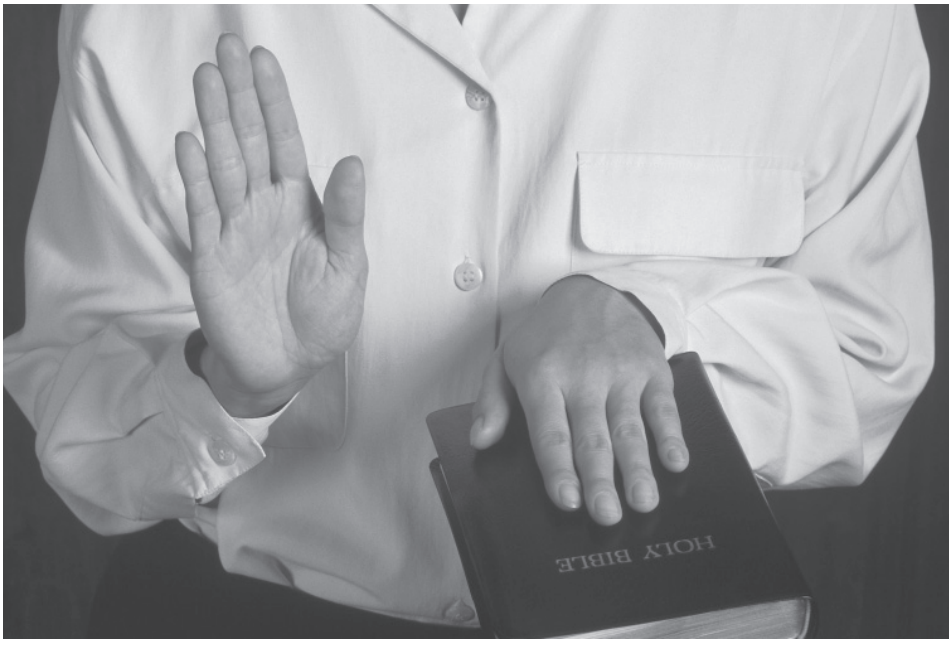
Anna Katherine Bennett, J.D., CPCU, CFE, is a graduate of Boston College and Boston College Law School. She has represented insurers on complex first- and third-party coverage issues for more than 25 years. She is a Certified Fraud Examiner and is a member of the Association of Certified Fraud Examiners, the CPCU Society, the Defense Research Institute, the Massachusetts Defense Lawyers Association, and the Massachusetts Bar Association.

Editor's note: Even when a case is lost for one party, its case may establish precedents that affect future litigation. Anna Bennett describes just such a circumstance.

The insurer was presented with a "sick building" claim under a homeowner's policy. The insured's water heater, it was claimed, had ruptured, resulting in water damage and mold growth in her basement. The mold, known as *aspergillus ochraceus*, had in turn generated Ochratoxin A (OA), a potent mycotoxin, causing her to become severely ill, with high fever, dizziness, joint pain, and garbled speech. Her dogs urinated frequently and the family's pet guinea pigs died. She was diagnosed, at various times, with rheumatoid arthritis and Lyme disease. Her suspicions that her house was the cause of her illness were first aroused when she went on vacation, during which she felt better, becoming ill once more upon her return. She ultimately moved out of her house altogether.

The insured believed that the OA originated in the furnace and was disseminated throughout her house through the ductwork of the heating system. The insured's argument was straightforward: the insurance policy covered "all risks" of loss, even though it excluded mold. Therefore, she claimed, since the proximate cause of the water—the ruptured water heater—was an insured peril, the excluded result—mold—should be covered.

There were a few problems with the claim. While the presence of OA was not disputed, the water heater failure had occurred six years before a loss notice was provided to the insurer, by which time both water and water heater were long gone: there was nothing for the insurer to inspect. There were also many other sources of moisture sufficient to support mold growth. The property was located in Cape Cod, Massachusetts, where summertime humidity is chronic and dehumidifiers are a necessity. The house lacked gutters and downspouts, the basement walls were porous concrete blocks, and an outside shower stall lacked a drain and when used, directed water toward the foundation. The insured had added a humidifier to the furnace in the 1990s to add moisture to the air. The galvanized steel duct work in the basement was badly corroded, indicative of long-term moisture. A little sleuthing found that the highest levels of OA were found, not at the furnace, but in kitchen floor grates near the kitchen table and dog dishes, where food particles would provide nutrients for mold. The insurer advised that liability was not conceded, and a lawsuit ensued.



To establish causation, the insured relied on two experts. The first, a microbiologist from an agricultural testing laboratory in the midwest, opined that the OA originated in the furnace, despite any credible evidence that the furnace possessed a food source or temperature conditions conducive to mold growth. The insurer rebutted with the testimony of a heating contractor to establish that any water due to the water heater failure would not be present for long, since any water that flowed into the bottom of the furnace from the water heater failure would promptly flow out, and the operating temperature of the furnace would dry out any residual moisture.

The insured's second expert was a physician specializing in occupational and environmental medicine, who had examined the insured and was prepared to testify that, based on his examination, the insured's medical history, her medical

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Mold—Where Bodily Injury and Property Damage Intersect

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records, and the results of environmental testing conducted at the home by himself and others, he had arrived at a "differential diagnosis"[1] of allergy hypersensitivity reaction as a result of exposure to mold at the property.

The insurer mounted a *Daubert*[2] challenge to the scientific reliability of the physician's testimony, arguing that even if "differential diagnosis" was a scientifically-acceptable methodology, the physician had failed to apply the principles and methods of differential diagnosis to the facts at hand. Specifically, the insurer argued that it was error to permit the expert to testify that he had "ruled in" a diagnosis of hypersensitivity as a result of OA where no air tests had been performed to establish a pathway from the found deposits of OA into the insured's body, no blood tests showed elevated levels of OA, no studies had been introduced to establish the quantity of OA needed to produce illness, and no medical literature established a connection between the symptoms complained of (neurological deficits, dizziness, garbled speech) and OA. However, the court, after an evidentiary hearing, admitted the "differential diagnosis" testimony, holding that the method of diagnosis was sufficiently reliable to permit testimony as to the proximate cause of the symptoms experienced by the insured, even though, as the court recognized, the accuracy of the insured's medical history as related to the expert would be the subject of rigorous cross-examination at trial.

Ultimately, the insured's failure to provide a complete medical history to the testifying physician proved to be her downfall. The cramped, handwritten medical notes, transcribed with great difficulty, were revealing, reflecting complaints by the insured of joint pain, sinusitis, and dizziness commencing at least a decade prior to the water heater failure. The court found that the physician had not been provided with a complete and adequate medical history, and, while there may have been mycotoxins present in the home for a number of years, the medical testimony did not establish to any reasonable degree of probability precisely when the exposure began. Having found no causal connection between the water heater failure and the mold, the exclusion applied and the action was dismissed. The court did not need to, and did not, address the insurer's late notice argument.

While both sides presented well-credentialed experts, the court found most reliable the "hands-on" witnesses, such as the insured's own general practitioner, long since retired, whose treatment of the insured established a timeline for the insured's symptoms. The judge was also impressed by the insurer's mechanical contractor, who had examined thousands of furnaces such as that owned by the insured and who was able to educate the judge, simply and clearly, on the furnace's operation.

While the right result was reached, the court's recognition, in the abstract, of "differential diagnosis" as a scientifically-reliable technique, without verifying that the technique had been reliably applied to the facts of the case, resulted in longer and more expensive litigation. ■

Endnotes

1. Differential diagnosis is a common method of diagnosis through the ascertainment of symptoms and then testing to confirm or exclude all possible diseases and conditions that might result in those symptoms.
2. *Daubert v Merrill Dow Pharmaceuticals,* 509. S. 579 (1993).

Roof Collapse . . . Shoddy Construction or Unusual Snow Accumulation?

by Joe Sobel, Ph.D., and Steven Wistar, CCM

■ **Joe Sobel, Ph.D.,** and **Steven Wistar, CCM,** are consultants with Expert Network, a division of DJS Associates, Inc. and can be reached at (800) 332-6273 or Experts@forensicDJS.com.

Editor's note: Joe Sobel's discussion of the cause of a collapsed roof illustrates how things might be built right, yet yield to the forces of nature; and Mother Nature isn't going to appear in court!

Following a snowy winter in the northeast, we were called upon to conduct an investigation of the collapse of a roof of a large industrial warehouse. The basic issue being investigated was whether the construction was shoddy or whether there was simply too much snow. The defendant was the company that manufactured the prefabricated metal building.

The first task was to gather the relevant weather data. The roof collapsed during the third in a series of major snow and ice storms. Therefore, the data collected had to cover the entire period of snowpack buildup, starting before the first storm began and continuing through the day of the collapse. The data acquired included hourly weather observations from nearby airports along with once-per-day summaries of 24-hour temperature, precipitation, and snowfall data from numerous cooperative observation sites. These volunteer observers are trained and provided with weather instruments by the National Weather Service and supply a denser network of official observations by filling in the gaps between the airports. The snowfall measurements at these cooperative observation sites have become especially vital in the last decade as most airports now use an automated observation system that is unable to measure the depth of snow accumulation.

While the depth of the snowfall at these observing sites is important, the most significant data for the purposes of the reconstruction is the liquid content of the snow, sleet, and freezing rain that falls. As anyone who has shoveled deep snow can attest to, the water content of the snowpack determines its weight.

Official observations of snowfall are taken in multiple ways. The depth of newly fallen snow (and sleet) is measured on a flat snowboard that has been cleared of any older snow accumulation. This recent snowfall is also melted in a rain gauge to determine its all-important liquid content. Additionally, the total depth of snow cover on the ground is recorded.

The reconstruction began with the first storm in the series. Since the temperature was below the freezing point throughout the storm, and the weather had been quite cold during the week prior, we were able to assume that all of the snow, sleet, and freezing rain that fell remained on the ground. Thus, the total liquid content of the precipitation in the storm determined the snowpack weight as the storm came to an end. To convert the liquid content to weight, we used the known relationship that one inch of water weighs 5.2 pounds per square foot.

In this same way, we determined the weight of the precipitation that fell in the second and third storms in the series. The next challenge was to accurately describe the evolution of the snow cover between the storms. During these periods, melting, compaction, and sublimation affected the depth and weight of the accumulated snow. When the underlying ground is frozen, melting takes place at the top of the snowpack. If only a little meltwater is created, it can refreeze down in the snowpack. If larger volumes of meltwater are produced due to significant warming, some of it will usually run off, lowering the weight of the snow cover. Compaction, or settling, reduces the depth of the snowpack, but not its weight. Sublimation is a process similar to evaporation in which a top layer of the accumulated snow is converted directly to water vapor. This process reduces the depth and weight of the snow cover. In certain situations, the opposite process happens when frost is deposited on top of the snowpack, adding a little additional depth and weight. We adjusted the weight of the snowpack day by day throughout the period of concern as needed depending on the ongoing weather conditions. Daily snow depth observations from cooperative observation sites near the site of the collapsed building provided guidance regarding these changes in the snowpack.

Another important factor for roof loading with snow is drifting. Due to a significant amount of sleet and freezing rain, little drifting occurred in the first two storms during the period being studied. In the third storm on the day of the collapse, however, low temperatures resulted in

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Roof Collapse . . . Shoddy Construction or Unusual Snow Accumulation?

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a powdery snow that was easily drifted by strong winds. Drifting can cause substantial variations in the depth and weight of accumulated snow as snow is blown from one portion of a roof to another. Drifting impacts vary with roof shape, obstructions to wind flow on the roof, and orientation to the prevailing wind direction. The hourly weather data from nearby airports provided the wind speed and direction information required to understand the impact of drifting leading up to the time of the warehouse roof collapse.

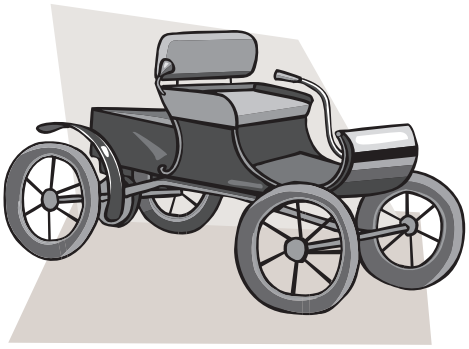
Once the weight of the snow cover at the time of the collapse was determined, the next step was to use statistical analysis of historical weather data to find out how often, on average, a snowpack with such a weight would be expected to occur at the location of the warehouse. This analysis revealed that the weight of the accumulated snow and ice at the time of the collapse occurs, in that location, on average once every 75 to 100 years. At the trial, after hearing testimony to this effect, the jury found for the defense, based partly on the fact that the meteorological events that triggered the roof collapse were so unusual.

This case is just one example of the variety of meteorological investigations performed by the forensic department. Other areas for which weather analysis is provided include slip-and-fall cases, highway accidents, aviation and marine cases, flooding situations, and severe weather occurrences. Recently we have undertaken extensive work along the Gulf coast in the aftermath of Hurricane Katrina. A loss of nearly all official weather data during the storm and disputes between homeowners and their insurance companies have necessitated intensive detective work to reconstruct a timeline of wind and storm surge at numerous property locations. ■

The More Things Change . . . They Don't Always Stay the Same

by Jean E. Lucey, CPCU

Current controversies regarding what factors are relevant and fair to use when underwriting and rating automobile insurance coverage may, like most things, be better understood given some historical perspective. *The History of Automobile Liability Insurance Rating* by H. Jerome Zoffer (University of Pittsburgh Press, 1959) is an excellent source for gaining such perspective. Indicating that "Automobile liability insurance can be traced back to about 1898 when two hundred cars were manufactured in the United States…Since the automobile was of slight importance in the United States prior to 1900, automobile liability insurance rating can be traced back only to that year," Zoffer says that insurers' rates were in 1900 "far from being uniform or stable." Apparently the only factor commonly used in rating was the horsepower of the vehicles being underwritten. One company, for example, charged $50 for a 12-horsepower car, plus



$5 for every horsepower increase over 12. Used today, this system might certainly discourage some who are muscle car aficionados from pursuing that interest (depending on where they live and other factors, of course!).

This volume is bound handsomely in red hardcover format and includes extensive sections on the history of automobile liability rating prior to 1932 and from 1932 to 1946 and 1952 to 1957, along with scholarly discussion of the proper and most efficacious means of rating this line. Much of the discussion could be contemporaneous ("Rating and the Uninsured Motorist," "The Effect of Competition on Automobile Liability Insurance Rating"). In case we need to remind ourselves that it is not a contemporary book, we can consider the total premiums earned for automobile property damage liability insurance by 30 of the largest stock carriers in 1955 (the most recent year data available to the author) was some $351 million and the loss ratio was 58.1. If any more proof is needed, the price of the book was $4. ■

Q&A with Don Malecki, CPCU

by Donald S. Malecki, CPCU

Donald S. Malecki, CPCU, is a principal at Malecki Deimling Nielander & Associates L.L.C., based in Erlanger, KY. During his 45-year career, he has worked as a broker, consultant, archivist-historian, teacher, underwriter, and insurance company claims consultant; and as publisher of *Malecki on Insurance,* a highly regarded monthly newsletter. Malecki is the author of 10 books, including three textbooks used in the CPCU curriculum. He is past president of the CPCU Society's Cincinnati Chapter; a member of the American Institute for CPCU examination committee; an active member of the Society of Risk Management Consultants; on the Consulting, Litigation, & Expert Witness Section Committee of the CPCU Society; and a past member of the Commercial Lines Industry Liaison Panel of the Insurance Services Office, Inc.

Editors' note: Fine print can be critical. How lucky we are to have Don Malecki available to analyze this nuance for us with his laser vision!

We were provided with a commercial general liability form that contains the wording "Includes copyrighted material of the Insurance Services Office, Inc., with its permission." A number of the policy provisions are worded differently than what we are accustomed to seeing in a standard ISO form. Two conditions, in particular, caused us to pause and we would like your input on the impact this modified wording might have on coverage. The policy provisions at issue are the Employer's Liability Exclusion (e) and the Other Insurance Condition 4.

Subpart 1 of the Employer's Liability Exclusion is the same as found in the standard form. Subpart 2, however, encompassing consequential injury to family members of the employee, has been modified to read as follows:

(2) The spouse, child, parent, grandparent, brother or sister of that "employee" of the insured, ***its parent, subsidiary or affiliate.***

The last five words appearing in bold are not found in ISO forms. What is the significance of these additional words in relation to this exclusion?

The wording comprising subpart 2 quoted above, exclusive of the portion in bold, is an exposure intended to be covered as part of Employer's Liability coverage of the Workers Compensation policy, and Stop Gap endorsements (available for use in monopolistic fund states). In a standard ISO general liability form, this exclusion applies only to the employer of the injured employee. The wording provided has been modified such that the exclusion will now apply not only to liability incurred by the employer, but also any related entities (parent, subsidiary, or affiliate).

Consider, for example, a situation where a large commercial entity (parent organization) with multiple subsidiaries are all named as insureds (named insureds) under a general liability policy using the wording referenced in your question. Assume an employee of one of the subsidiaries is injured. After collecting workers compensation benefits, the employee's family members bring suit against the subsidiary (employer) and the parent. Allegations against the parent company are that it controlled the subsidiary and was somehow responsible for the working conditions or other factors leading up to the employee's injury.

Under standard ISO wording, the subsidiary would have no coverage because it should be covered by Employer's Liability insurance. However, the parent organization would be covered assuming, of course, it is not found to be the statutory employer or involved in a dual employment relationship. Under the wording you provided, coverage also is excluded for the parent, despite the fact that it is not the employer. (This is what is referred to in risk management parlance as passive retention or "surprise," from the perspective of the parent who assumes it will be covered.)

Note, however, that neither the standard ISO version of this exclusion, nor the one you provided, applies to liability assumed by the insured under an "insured contract." The reason for this exception is that Employer's Liability coverage under the Workers Compensation policy, and Stop Gap endorsements specifically excludes liability assumed under a contract.

Parenthetically, it should be mentioned that most states permit an employee to collect workers compensation benefits and then to sue third parties. However, there are seven states that only permit the employee to make a choice; that is,

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Q&A with Don Malecki, CPCU

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file for workers compensation benefits or file suit against a potentially negligent third party. The states in this category are: Colorado, Maine, Maryland, Minnesota, New Mexico, Oklahoma, and South Dakota.

The Other Insurance Condition 4 of the standard ISO CGL form is comprised of two parts: a. Primary Insurance and b. Excess Insurance. Under part b. Excess Insurance, it states that this insurance is excess over any other insurance, whether primary, excess, contingent or any other basis and then goes on to itemize three coverage categories: (1) Builders Risk, Installation Risk, and kindred property coverages; (2) Fire Legal Liability coverage; and (3) Non-owned aircraft, auto, and watercraft liability coverage.

The other CGL form does not itemize those three coverage categories and we are wondering what the potential impact might be. What are your thoughts?

By itemizing these coverage categories, the standard ISO form would apply on a primary basis in the event no other similar insurance is maintained. For example, it is not unusual for insureds to forgo the purchase of a separate Fire Legal Liability policy and, instead, to rely on the CGL policy that would then apply on a primary basis. However, when such other coverage is maintained, the CGL applies excess of those other applicable coverages.

In the absence of any specific reference to these other coverages, this wording could automatically make the CGL coverage primary, unlike standard ISO wording, which requires that Builder's Risk, Installation Risk, kindred property coverages, Fire Legal Liability, Non-owned aircraft, auto and watercraft apply first. At first blush, there appears to be nothing wrong with this. For some insureds, however, the prospect of having their CGL limits depleted before other applicable coverages are triggered is not a good thing. Also, this wording poses a potential for disputes between insurers, given its lack of clarity on the order in which coverage applies.

A caveat to observe: Whenever you see an insurance policy or endorsement that looks like a standard ISO form but says it includes copyrighted material of ISO, it should serve as a red flag, because some provisions may not be the same as what you may be used to seeing, such as the foregoing. ■

The Daenzer Story: A Book Review

by Andrew J. Barile, CPCU

■ **Andrew J. Barile, CPCU,** is president and CEO of Andrew Barile Consulting Corporation, Inc. (www.abarileconsult.com). He first met Daenzer at the 1970 CPCU Society Annual Meeting and Seminars in Los Angeles, and later joined the Alexander Howden Group to start the Howden Reinsurance Corporation, in New York City.

The biography of **Bernard John Daenzer, CPCU,** written by Carolyn I. Furlong, CPCU, CLU, CEBS, CPIW, is a must-read for all insurance professionals, as this dedicated insurance industry personality over his long lifetime "would paint the insurance industry not as it was, but as it ought to be."

As Furlong makes clear in *The Daenzer Story*, the book is written to cover the 100-year period from 1900 through December 31, 1999. Although Furlong is quick to point out "in early 2005, having just turned 89 years old, Daenzer was instrumental in founding an insurance agency, Angelfish Risk Management, owned and operated by several businessmen in Ocean Reef Club, Key Largo, Florida."

The Daenzer Story is a detailed account of Daenzer's insurance industry exploits, and all of the insurance executives he influenced along the way, and there were many. In 1947, Daenzer was the 88th person in the country to get a Chartered Property Casualty Underwriter designation. Daenzer was rightly considered a pioneer in the field of personal packages. *Rough Notes* magazine made Daenzer the authority for homeowners insurance.

Many of us referred to Daenzer as the "Father of the Surplus Lines Insurance Industry." Furlong writes, by 1957, Daenzer found that there was no body of literature in the United States or England on the broad field of excess and surplus lines or Lloyd's-type coverages. This led to his writing a series of articles for the *Weekly Underwriter*, about 400 over the years, in a biweekly column called Cover Notes. Booklets were made from the articles that later became the *Excess and Surplus Lines Manual* published by The Merritt Company. These publications included thousands of pages on several hundreds of topics peculiar to the business. "I made them required reading by all of us at Howden Reinsurance Corporation."

In the field of risk management, Daenzer was also instrumental in "leading the way." Daenzer and several other CPCUs were working on a professional designation for risk managers and came up with Associate in Risk Management. He wrote one of the textbooks for the ARM course, and a later one for RIMS on risk analysis of company locations.

On November 27, 1968, Daenzer was the first non-Briton to go through ROTA and to be elected a name at Lloyd's. "This broadened membership base is good for both Lloyd's and the insurance-buying public in general," Daenzer noted, "because it helps to fill the need for a greater capacity in the world-wide insurance market."

Daenzer, in 1978, was elected chairman of the Board of Trustees of The College of Insurance, the only fully accredited college and graduate school under the support of one industry.

Furlong does a great job in documenting the institutions that had touched Daenzer's life and have undergone changes, such as:

- The College of Insurance that Daenzer worked to support and promote over the years remains the prominent source of higher insurance education. It merged with St. John's University and is now known as the School of Risk Management and Actuarial Service, a part of the Tobin College of Business, the New York City branch of St. John's University.
- RLI Corporation of Peoria, Illinois continues to flourish.

Daenzer had an almost encyclopedic knowledge of how the insurance industry worked, but he did not stop there. As related in this story of his life, Daenzer responded to new types of risks by creating new coverages to protect policyholders and by carving out niche products to respond to the needs of industry.

This book should be read by all in the insurance industry, and set the example for the actions of future insurance leaders. ■

You can order *The Daenzer Story* at Amazon.com. Royalties from the sale of this book will be shared by the CPCU–Loman Education Foundation and the Insurance Scholarship Foundation of America—NAIW Education Foundation.

Don't Miss this 2006 Annual Meeting Seminar Developed by the CLEW Section

Mock Trial: Ring of Fire

Monday, September 11 • 1:30 – 5:05 p.m.

The Mock Trial is always one of the most popular seminars at the Society's Annual Meeting. At the 2006 Annual Meeting, the trial will feature a first-party arson case, where it is alleged that the insurer denied a claim in bad faith; and will focus on implications for agents/brokers, underwriters, and claims professionals. Attendees will want to view the aftermath of the trial, as depicted in the companion seminar presented by the Claims Section on Tuesday morning. *Filed for CE credits.*

Presenters:

Nancy D. Adams, J.D., CPCU
Mintz Levin, Cohn, Ferris, Glovsky & Popeo, PC

Gregory G. Deimling, CPCU
Malecki Deimling Nielander & Associates L.L.C.

Stanley L. Lipshultz, J.D., CPCU
Lipshultz & Hone Chartered

Robert L. Siems, J.D., CPCU
Robert L. Siems PA

Register today for the Annual Meeting and Seminars at www.cpcusociety.org.

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http://clews.cpcusociety.org

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