CPCU SOCIETY INSURING YOUR SUCCESS

Consulting, Litigation, & Expert Witness Interest Group Quarterly

CLEWS

Volume 15 Number 3 December 2008

Message from the Chair

by Vincent "Chip" Boylan Jr., CPCU

Vincent "Chip" Boylan Jr., CPCU, is senior vice president of HRH of Metropolitan Washington, a subsidiary of Willis HRH. He is past president and a former education director of the CPCU Society's District of Columbia Chapter. Boylan has been a member of the CLEW Interest Group Committee for more than nine years, and has served as the CLEW webmaster. Currently, he is chairman of the Insurance Agents & Brokers of Maryland, that state's affiliate of the National Association of Professional Insurance Agents.

Accomplishments, Opportunities, Welcomes and Farewells

I am writing this after having just returned from the CPCU Society's Annual Meeting and Seminars in Philadelphia, where our CLEW Interest Group realized, and was recognized for, its accomplishments, presented with new opportunities, welcomed new committee members, and bid farewell to others.

Accomplishments

A host of CLEW members developed and presented another successful mock trial on the Sunday morning of the Society's yearly gathering. (See the recap written by **George M. Wallace, CPCU, J.D.**) At a CLEW seminar the next day, committee member **Nancy D. Adams, CPCU, J.D.,** with the assistance of Mintz Levin colleague **John Collier,** led a packed house through many intricacies of directors and officers liability exposures and coverage. We concluded our run of success by receiving formal recognition from the Society for having achieved the Circle of Excellence Gold Award with Distinction for the past year. Our interest group was one of only two that earned this top honor. Thanks to the many CLEW members whose work contributed to our achievement of this award. Special thanks to **Daniel C. Free, CPCU, J.D., ARM,** our immediate past chair, for leading us to two Gold Awards during his 2006–2008 tenure.

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What's in This Issue

Message from the Chair

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Opportunities

Even a cursory review of our Circle of Excellence Award submission reveals the impressive knowledge and experience of many CLEW members. We encourage all CLEW members to share their talents with others by:

- Writing an article for this publication: Contact your editor, **Jean E. Lucey, CPCU,** at jlucey@insurancelibrary.org with ideas and articles.
- Conducting a webinar for the Society. Webinars are simultaneous online and telephone presentations, typically one hour in duration, on a specific topic. The Society is encouraging CLEW and other interest groups to use webinars as educational opportunities for all members. Please e-mail me at vincent.boylan@willis.com to explore webinar ideas.

Welcome

Stanley L. Lipshultz, CPCU, J.D.; Robert L. Siems, CPCU, J.D.; and **Akos Swierkiewicz, CPCU,** have joined the CLEW Committee, bringing years of legal, consulting and expert witness experience we will put to good use. Stanley is a former chair and newsletter editor of *CLEW*, who is sure to provide much sage advice (whether asked for or not!). Bob, a practicing attorney, comes to us after serving as chair of the Information Technology Interest Group. Each of these three gentlemen will add much to make your interest group better.

Farewell

Three active and august members of our group, **John G. DiLiberto, CPCU, CLU, ChFC; Michael B. Vehec, CPCU, AIC, AIM;** and **Donn P. McVeigh, CPCU, ARM,** retired from CLEW after years of service. Many of you will recognize John as the narrator of this and prior years' mock trials. Donn was one of the inaugural CLEW Committee members in the early 1990s, a past editor of this newsletter, and our chair from 2004 to 2006. We will miss all three, and wish them health and happiness as they move in new directions.

Assuming the chair's position of the CLEW Interest Group is a new and exciting direction for me. With the support of individuals like those mentioned above, as well as other CLEW members, I am confident your interest group will continue its award-winning performance.

Our deep appreciation goes to the following CLEW members for their participation at the CPCU Society's Annual Meeting and Seminars in Philadelphia, Sept. 6–9, 2008:

Mock Trial: The Truth Revealed about Noah Omitian and the Liberty Bell

In addition to CLEW cast members Nancy Adams, Chip Boylan, John DiLiberto, Daniel Free, Stanley Lipshultz, Jean Lucey, Donn McVeigh, Bob Siems and George Wallace, we recognize the following mock trial players: **Joseph G. Burkle, CPCU, J.D., AIM; Gregory G. Deimling, CPCU, ARM, AMIM; Donald S. Malecki, CPCU; James A. Robertson, CPCU, ARM; Kathleen J. Robison, CPCU, ARM, AIC;** and **Norman F. Steinberg, CPCU.**

Special thanks to the following Claims Interest Group members who played important roles in this year's mock trial: **Elise M. Farnham, CPCU, ARM, AIM; Robert E. McHenry, CPCU, AIC, AIS; Tony D. Nix, CPCU;** and **Eric J. Sieber, CPCU.**

Other Seminars

Thanks to the following CLEW members who participated in other seminars during the Annual Meeting and Seminars:

- Nancy Adams. "D&O Insurance: Understanding Basic Coverages and Current Issues."
- **Frances M. Chmielewski, CPCU, J.D.** "Emerging Issues in Professional Liability: The Subprime Mortgage Crisis."
- **Ethan D. Lenz, CPCU, J.D.** "History of Insurance and Insurance Regulation."
- Donald Malecki. "Malecki and Tilden on the Evolution of the CGL" and "Workable Wrap-Ups for Large Construction Projects."
- **Bryan Tilden, CPCU, CLU, ChFC.** "Malecki and Tilden on the Evolution of the CGL." ■

■ *Attendees at the seminar "Workable Wrap-Ups for Large Construction Projects" at the CPCU Society's Annual Meeting and Seminars in Philadelphia, Pa. Presenters included CLEW member Donald S. Malecki, CPCU.*

Editor's Notes

by Jean E. Lucey, CPCU

Jean E. Lucey, CPCU, earned her undergraduate degree in English and graduate degree in 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.

Serving as director of the Insurance Library Association of Boston since 1980, Lucey attained her CPCU designation in 1986. She is a member of the CLEW Interest Group Committee.

Chair **Vincent "Chip" Boylan Jr., CPCU,** has summarized concisely the activities and accomplishments of your CLEW Interest Group over the past year. You are all invited to become more active in the affairs of the group. One excellent way to become more active is to respond to what you read in these pages or, of course, to write something that may elicit responses from others. You are urged to do either or both.

Norman A. Baglini, CPCU, Ph.D., CLU, was presented with the 2008 Gottheimer Award, and he upholds the high standard set by inaugural honoree **Donald S. Malecki, CPCU.** Baglini is professor of risk management, insurance and business ethics at Temple University in Philadelphia. He is also president emeritus and life trustee of the American Institute for CPCU and the Insurance Institute of America. Do you have suggestions for the 2009 winner? We'd like to hear them.

CLEW member **George M. Wallace, CPCU, J.D.,** known to many of you by face, if not by name, through his roles in the CLEW mock trials is, I assure you, considerably more accomplished than the characters he plays. He has provided a summary of the September 2008 Philadelphia mock trial presentation that is admirable for its succinctness as well as its attention to all key elements of the trial. And didn't he wear his wig with flair and aplomb?

Kevin Quinley, CPCU, ARM, AIM, and CLEW Interest Group member, can assist seasoned as well as aspiring expert witnesses and consultants in being sure they don't overlook critical questions when considering the appropriateness of a potential engagement. Sometimes it's more important to consider whether a job is right for you, rather than whether someone else thinks you are right for the job.

Meike Olin, CPCU, CIC, CRM, helps us to understand the rules and risks associated with electronic documentation and discovery of electronic records. This is most certainly a subject with which we should all be at least reasonably conversant. Judicial decisions have handed down that corporate e-mail transmissions are not private and that not even all communications with attorneys in this medium are privileged.

No issue of your newsletter would be complete without a contribution from Donald Malecki. This edition's article from him describes and disagrees with an insured's argument that the brief extension of a liability policy results in the availability of additional limits of coverage.

Lastly, I pose a challenge to you all. An imaginary word made it into the August 2008 issue (on page 2). If you didn't notice it, don't feel bad, as it made it through numerous reviews by several people. But if you spot it, or if you spot something similar in this issue or others, please let me know. **Donn P. McVeigh, CPCU, ARM,** was first to call it to my attention, and I do appreciate it: such abilities are certainly important in the realm of reading and interpreting insurance policies! ■

Norman A. Baglini Receives George M. Gottheimer Memorial Award

by Jean E. Lucey, CPCU

You may recall that in a previous issue of the *CLEWS* newsletter, we expressed our sadness concerning the death of our well-loved and respected colleague George M. Gottheimer, who died in 2007. In his memory and honor, the CLEW Committee voted to create the George M. Gottheimer Memorial Award.

The award is presented annually to a CLEW Interest Group member who has made an outstanding contribution to the fields of insurance, insurance litigation, risk management consulting, or service as an expert witness. A selection committee, comprising the current and two former chairs of the CLEW Committee, was appointed to receive and review nominations for the 2008 award.

We are pleased to announce that the 2008 recipient of the George M. Gottheimer Memorial Award, presented prior to the CLEW mock trial at the Society's 2008 Annual Meeting in Philadelphia, is **Norman A. Baglini, CPCU, Ph.D., CLU.**

Baglini is professor of risk management, insurance and business ethics at Temple University in Philadelphia, where he teaches graduate and undergraduate courses. He is also president emeritus and life trustee of the American Institute for Chartered Property Casualty Underwriters and the Insurance Institute of America (the Institutes), where he served for 25 years, 11 as chief executive officer.

Upon his retirement from the Institutes, the Board of Trustees established an ethics endowment in Baglini's name to support the projects of the Insurance Institute for Applied Ethics, which was established as part of the Institutes in 1995 to heighten awareness of the ethical implications involved in making business decisions and to promote ethical behavior among parties to the insurance contract. Baglini currently chairs the Ethics Policy Committee of the Board.

■ *Norman A. Baglini, CPCU, Ph.D, CLU, left, receives congratulations from Donn P. McVeigh, CPCU, ARM, on being named the recipient of the 2008 Gottheimer Award.*

Before joining the Institutes, Baglini was employed by the Aetna Life & Casualty Company and Marsh and McLennan. He is the author of *Risk Management in International Corporations* and *Global Risk Management* and a co-author of the early editions of two other books, *Principles of Property and Liability Underwriting*, and *Insurance Company Operations*.

Baglini also has written numerous articles and professional papers on risk management, professional education and business ethics. His invited speeches and papers at risk management and insurance industry conferences and academic meetings have been presented in 46 states and 13 countries. Baglini is a member of the Scientific Committee of the Geneva Association and an associate editor of the *Geneva Papers on Risk and Insurance Issues and Practice*, *The John Liner Review*, and *Insurance Research and Practice*, the journal of the Chartered Insurance Institute of Great Britain.

A consultant and trainer, Baglini has developed corporate ethics programs for two Standard & Poor's 500 companies, and has designed and developed corporate risk management and insurance training programs for insurance companies and brokers. Before joining the faculty at Temple University, he taught undergraduate courses and executive education at the Wharton School of the University of Pennsylvania.

Baglini earned a bachelor's degree and a master's degree in business administration from the University of Rhode Island, and a master's degree and doctorate in economics from Temple University. ■

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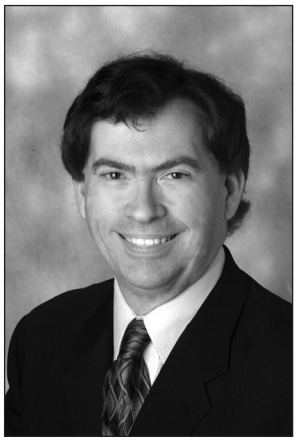
CLEW Interest Group Presents Historic Mock Trial in Philadelphia

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



George M. Wallace, CPCU, J.D., is a partner in the law firm of Wallace & Schwartz in Pasadena, Calif. His practice centers on litigation in the field of insurance coverage and insurance bad faith (for both insurers and insureds) and defense of professional liability claims in addition to general business litigation and appellate practice. He is currently a member of both the Los Angeles and the San Gabriel Valley Chapters as well as a member of the CLEW and the Claims Interest Groups.

Bewigged barristers mixed with historical figures, real and imagined, as the CLEW Interest Group mounted its annual mock trial presentation at the Society's 2008 Annual Meeting and Seminars in Philadelphia on Sept. 7, 2008. Inspired by Philadelphia's ties to the nation's founding, this year's mock trial, "The Truth Revealed: Noah Omitian and the Liberty Bell," explored a hitherto unknown chapter in the Colonial history of insurance. *CLEWS*' exclusive inside sources provided this summary of the proceedings:

Preamble — Ambitions and Assurance

Born in New York in 1705, Noah Omitian (**Norman F. Steinberg, CPCU**) developed an early and pioneering interest in the subject of insurance when he heard of the arrangements negotiated in Edward Lloyd's London coffee house. Noah made the acquaintance of the young Benjamin Franklin (**Donald S. Malecki, CPCU**) in 1723, and the two traveled together to Philadelphia to seek their fortunes. Both young men throve in the City of Brotherly Love. Noah, in particular, accumulated a substantial fortune as a retailer and soon founded a successful bank.

The Assembly of the Colony of Pennsylvania began erecting its impressive State House in 1732, topping it with a spire and bell. The elaborate project was completed in 1753. As revolutionary sentiment grew in the 1770s, the Assembly became concerned lest any untoward harm should befall the State House property, particularly its valuable bells. Aware of the Assembly's concerns, and always one for seeking new opportunities, Noah Omitian recalled his youthful fascination with insurance and, with substantial input and advice from Franklin, founded the Mirage Along the Nile Assurance Society (forebear of today's Shifting Sands Mutual Insurance Company) to craft and propose "An Insurance Arrangement for the Province of Pennsylvania for Bells and Various Other Special Hazards."

■ *Donald S. Malecki, CPCU, in his incarnation as Benjamin Franklin, exudes intelligence and goodwill.*

Mirage Along the Nile was backed by the assets of Noah's Bank of the American Colonies. As an additional innovation, Noah established the colonies' first insurance brokerage house, Omitian Brothers Assurance and Cover Agency, to be run by his sons, Noah Omitian Jr. (**Eric J. Sieber, CPCU**) and Ara N. Omitian. The terms of the "Insurance Arrangement" were hammered out in early 1776 in lengthy negotiations between the younger Omitians and representatives of the Assembly. Ultimately, it was agreed that coverage would extend to harm sustained by the State House building and by "chattels inside which belong to the Assembly, including any bell should such bell be

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hanged from the spire," resulting from "[f]ire, lightning, high winds and/or hailstones, smoke from fires, damage by horses or horse-drawn carriages, damage by water in various forms, uprising and/or civil disorder, and damage by hooligans." At Franklin's suggestion, the policy incorporated a series of exclusions for damage arising from "[w]ar, ... the use of a horse and carriage, actions which deliberately cause harm to others, and floods." In the end, the Assembly received its contracts, the younger Omitians collected their commission, Mirage Along the Nile (and thus Noah Sr.'s bank) collected the premium, and all parties seemed well satisfied.

Article I — A Nation Is Born, and a Bell Is Crack'd

As hostilities grew between the American colonies and Britain, the Assembly and other Philadelphian worthies became concerned for the safety of their bells. In 1777, as British forces drew ever nearer to the city, the bells were removed from their spires and hidden away, lest they be captured and melted down for use in cannons or ammunition turned against the Americans. While it is generally believed that the State House bell and others from Philadelphia were transported and hidden in outlying districts, tireless CLEW researchers learned the amazing truth: During the 21-year construction of the State House, members of the secret Society of Coopers, Printers, Carpenters and Upholsterers (CPCU) incorporated a vast warren of subterranean chambers beneath the building. The horse carts that traveled from Philadelphia to the supposed places of concealment were empty: The State House bell never left the State House, but was instead concealed by the clever CPCU Society members in the catacombs below.

Unfortunately, while the bell was being conveyed down many flights of stairs from the top of the building to its bottom, the impetuous young CPCUs entrusted with the move were inattentive of the various thumps and bumps that they inflicted upon it. The bell developed a micro-fissure under the strain. Unnoticed at the time, that fissure ultimately developed into the famous "crack" in what would become known as the Liberty Bell.

■ *The members of the mock trial cast manage to preserve decorum for a group photograph.*

Article II — Some Battles Conclude, and Another Is Join'd

By the time the bell was removed from its hiding place in 1778, the crack was apparent to all. The Assembly promptly conveyed to Mirage Along the Nile its demand for payment for the damage to the State House bell. Mirage Along the Nile just as promptly conveyed its view that the "war exclusion" in the Arrangement precluded any obligation on its part to make good on the loss. Outraged by the denial of its claim, the Assembly instituted the young nation's first insurance coverage action, seeking a determination that Mirage Along the Nile must pay the cost of containing the crack. Moreover, believing that it may have been inadequately represented by its brokers, the Assembly joined the Omitian Brothers as defendants, thus launching the nation's first professional liability suit.

Trial convened in the Philadelphia courtroom of the honorable Judge Stan Nuewell (**Stanley L. Lipshultz, CPCU, J.D.**), a bastion of justice run with exemplary efficiency under the watchful eye of the bailiff (**Jean E. Lucey, CPCU**). The Assembly, present at the counsel table in the person of Pennsylvania Assistant Attorney General Lexington "Lex" Concord (**Joseph G. Burkle, CPCU, J.D., AIM**), retained the high-powered services of Hyman "Hy" Perbole (**Robert L. Siems, CPCU, J.D.**) as its principal advocate. Mirage Along the Nile relied upon K. Wit (**Nancy D. Adams, CPCU, J.D.,**), senior barrister in the firm of Quit, Yellen & Settle, seconded by the firm's new junior partner, Huey D. Louie (**George M. Wallace, CPCU, J.D.**). In an unusual arrangement, Noah Omitian Jr., whose professional liability insurance was also underwritten by Mirage Along the Nile, was defended by the same attorneys as his insurer.

Article III — Witnesses Are Heard, and Justice Is Done

The Assembly launched its case with the testimony of State Archivist Georgette (Social) Clymer (**Elise M. Farnham, CPCU, ARM, AIM**), who narrated the history of the Assembly's entry into the Insurance Arrangement. She was followed on the stand by Inspector General of Pennsylvania Paul Re. Vere (**Tony D. Nix, CPCU**), whose remarkably unkempt and rodent-like periwig was as notable as his tale of investigating the causes of the bell's famous fracture and discovery of the astonishing truth of the bell's actual hiding place during the hostilities. The plaintiffs also relied on the testimony of insurance coverage expert I. Kahn Turn (**Daniel C. Free, CPCU, J.D., ARM**) and "bad faith" expert Benedict Arnold (**Vincent "Chip" Boylan Jr., CPCU**).

As Arnold's testimony was concluding, defense counsel received an urgent message from Mirage Along the Nile's Director of Professional Liability Claims Edgar O. Scrooge III (**Robert E. McHenry, CPCU, AIC, AIS**), who expressed a panicked desire to settle the case in light of the early testimony and to avoid the consequences of the apparent conflict of interest between the company and its insured Noah Jr. After heated discussion, it was decided that the defense would soldier on unchanged, hoping for the best.

The case for the Assembly concluded with a surprise witness: the eminent founder of Mirage Along the Nile, Noah Omitian Sr. Despite the valiant attempts of "Hy" Perbole to obtain his admission that the Assembly had been assured that "everything is covered," Noah Sr. stuck to his guns, affirming that the Assembly had been advised that war-related losses would not be covered by the Arrangement. On that note, the plaintiff rested its case.

For the insurer, K. Wit launched the defense with the testimony of Ms. Gage (**Kathleen J. Robison, CPCU, ARM, AIC,**), the freshly-minted vice president of claims for Mirage Along the Nile. Although she acknowledged having no prior claims experience (there having been no prior claims in the colonies), Ms. Gage stood firm in defending her analysis and denial of the Assembly's request for payment. For his part, Noah Omitian Jr. was equally firm that he and his brother had told the Assembly members repeatedly during the arduous negotiation of the terms of the Arrangement that war would not be covered and that the bells were insured only while hanging from their spires.

The defense pressed on with the testimony of its expert witnesses, Bunker "Bunkie" Hill (**James A. Robertson, CPCU, ARM**) and Tye Conderoga (**Donn P. McVeigh, CPCU, ARM**). In conclusion, the defense offered a "surprise" witness of its own — none other than Benjamin Franklin himself — who ably explained the prudent rationale behind the policy language, particularly the exclusion of war.

■ *Trial participants [standing, left to right] K. Wit (Nancy D. Adams, CPCU, J.D.), Noah Omitian, Sr., (Norman F. Steinberg, CPCU), and Ms. Gage (Kathleen J. Robison, CPCU, ARM, AIC) wrangle over the facts of the case.*

Article IV — The Court Stands Adjourn'd

A jury of six of Philadelphia's most prominent and circumspect citizens (identities withheld) deliberated at length and in secret before returning its verdict. To the obvious relief of the defense team, the jury determined both that Mirage Along the Nile provided no coverage for the loss to the State House bell and that the Omitian Brothers agency had not been negligent in obtaining and selling the Arrangement to the Assembly. Judgment was entered in favor of all defendants.

As CLEW departs from Philadelphia and looks toward next year's Annual Meeting and mock trial in Denver, mention must also be made of the invaluable contributions to this year's mock trial of The Narrator, **John G. DiLiberto, CPCU, CLU, ChFC,** and of the tireless director of the Mighty CLEW Players, **Gregory G. Deimling, CPCU, ARM, AMIM.** ■

When the Phone Rings ... Twelve Questions for Prospective Expert Witness Assignments

by Kevin M. Quinley, CPCU, ARM, AIC

Kevin M. Quinley, CPCU, ARM, AIC, is vice president, advisory board, at the Council on Litigation Management. He is a leading authority on insurance issues, including risk management, claims, bad faith, coverages and litigation management. Quinley is also a business writer, speaker, trainer and expert witness. He is the author of more than 600 articles and 10 books. You can reach him at kquinley@cox.net.

Consultants and expert witnesses are more used to answering questions than asking them. When the phone rings, there may be an attorney or prospective client on the other end of the line. He or she poses questions to the consultant or expert, trying to gauge whether there is a good "fit" between the client's needs and what the practitioner can offer in the way of experience and expertise.

After answering prospective clients' questions, effective consultants and expert witnesses may have some queries of their own. In fact, they *should*. Here are 12 questions that can form the basis of an effective fact-gathering process which unearths aspects of a case to help the consultant and expert witness gauge the degree of fit:

(1) **What does the case involve?** This is a threshold question to assess whether the subject matter of the case falls within your area of expertise. If you are a nephrologist and the issue involves hematology, this is a tip-off that the caller may need a different expert. If you are an authority on agent errors and omissions but the case involves an underwriting mistake, it may not lodge in your "sweet spot." Best for you to know this before investing time burrowing down fruitless rabbit trails. Or maybe the answer will confirm that the matter is well within your wheelhouse.

(2) **Do you represent the plaintiff or the defendant?** This can be useful to know if you are trying to "balance" your practice and representation between plaintiffs and defendants. If you can strike a balance, you better the odds against opposing counsel painting you as a biased gun for hire. For example, thus far my insurance claim practice in litigation support has been split almost evenly down the middle — half for policyholders and half for insurers. If you have a preference and comfort level in representing one particular side in your area of expertise, this question brings that factor to the surface, inviting you to weigh it when deciding whether the case is a good fit with your interests and expertise.

(3) **Who is the opposing party?** (Any conflict?) You can avoid wasting time if you find out up front that you have a conflict, or clear the decks for a possible retention by confirming that you don't. As an example, I was recently approached about the possibility of serving as an expert witness concerning an insurance coverage dispute. The dispute was between a large medical device manufacturer and one of its excess insurers. I have never represented the medical company, but I do own shares of its stock. I disclosed this quickly to the inquiring attorneys. Neither they (nor I) feel it is a conflict, but I would rather have them make that call early on.

(4) **What is the key issue or issues for which you need an expert?** This is what I call framing the issue. Attorneys often do what I call a "data vomit," spewing facts over the phone. Often, it is easy to lose sight of the forest for all the trees. Yes, you need an overview and a lay of the land. At some point — off the meter, of course — you may need to diplomatically ask counsel, "On what issue exactly might you need my opinion?"

This steers the attorney and the discussion to an outcome-oriented conclusion. You may find that the issue is outside of your realm of

expertise. If so, best to know that now. Maybe you know of another expert who could be a better fit. Alternatively, you might find that the issue is right in your "sweet spot" of expertise. If you let counsel meander interminably, his or her need may not be clear. Do not be shy about asking, diplomatically.

(5) **What is the due date for the expert report?** Before saying "yes" to any assignment, it's best to find out. It takes only one case coming in on Dec. 23 with an expert report deadline of Jan. 3 to teach you this lesson. This scenario befell me, and I still have memories of spending my Christmas "vacation" with multiple bankers' boxes on an insurance excess coverage dispute. "Deck the halls with boughs of declaratory judgment actions, tra-la-la-la ... ." No whining here — I willingly agreed to take the assignment.

In hindsight, though, my rate structure may have been different on the rationale that "rush jobs cost more" in any line of endeavor. Before agreeing to an engagement or quoting your hourly rate, find out how close you are to the due date and adjust your fee structure, and even your willingness to take the case, accordingly. As an aside, it is amazing to see the procrastination bent of many legal counsel. Scheduling orders typically set forth months in advance the dates for designating expert witness, the dates expert reports are due and so forth. Yet procrastination often rears its ugly head (or its ugly rear) among attorneys who scramble for an expert two weeks before they must designate names.

(6) **In what court or jurisdiction is this: State or Federal Court?** This may impact the speed of the docket, the caliber of the judge in the case, and the amount of leeway you will have in offering expert opinion.

(7) **Where are you in discovery?** Have any depositions been taken? Have they been completed? Has document production been finished or is it in progress? Is there any motion practice? Are you coming onto the scene at the beginning, middle or end-game of the pre-trial process?

(8) **Is this a rebuttal report?** Has the other side disclosed its experts? If you are being asked to provide a rebuttal report, odds are that there is already an opposing expert who has weighed in on the issue for which your view is being sought. There may be situations that present not an outright conflict, but a potentially awkward situation. If the opposing expert is a good friend, business colleague, mentor, etc., you may be uncomfortable in opposing him or her.

You may want to know the identity of the opposing expert before agreeing to take the case. Maybe the person has some business tie to you. Maybe she is a friend or mentor. Perhaps he is an industry guru whom you do not feel comfortable contradicting. Maybe he is a buffoon and you relish the chance to go head-to-head. It's best to know up front before saying yes or no to the engagement.

(9) **Is there a trial date yet?** If so, when? This also gives you a sense of the expected pace and timeline of the case. This can be highly relevant, especially if you are in a busy phase and juggling many engagements. You may have conflicting trial dates on other cases, or be scheduled for a deposition or attending a conference for which you have

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When the Phone Rings ... Twelve Questions for Prospective Expert Witness Assignments

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pre-registered. An imminent trial date may portend, "Fire Drill!" A futuristic or unset trial date may suggest that you will have ample time to analyze and digest the requisite materials without a crisis atmosphere. Some people thrive on crises; others have a hard time functioning effectively in this atmosphere. The proximity of the trial date may suggest the degree of "juggling" you may or may not have to do with other assignments and obligations.

(10) **How voluminous are the materials that need to be reviewed?** It may matter to you whether the answer is 200 pages or six bankers' boxes. Again, consider the deadline for submitting expert reports in conjunction with the estimated amount of material to be reviewed. The relationship between these two may impact your interest and ability to take the case, especially if you are stretched thin juggling other commitments. Extensive document review under a tight time frame may impact your willingness to take the case, your ability to devote the needed time to it, and the pricing level you quote for the engagement.

(11) **When is it likely that expert depositions would be taken?** Have dates been set? If not, would my deposition likely be taken in the next 30 days? Sixty days? Ninety days? This can be handy to know in terms of your own preparation, especially in conjunction with the amount of documents or materials you may need to review on a given case. A compressed time frame may also impact your fee structure, based on the idea that rush jobs cost more and merit premium pricing. Ask if the court has entered a scheduling order and, if so, determine the deadlines for depositions.

(12) **How did you find me?** The answer can be valuable "intel" about your marketing and where you get the most bang for your promotional buck. Did the lawyer find you through a paid ad, a directory, an Internet listing, a Google search, by word of mouth? How? Keep track of how you get referrals. Consider beefing up your investment in those media. This question helps you fine-tune your business development efforts, though chances are you may want to have fishing lines in each of these marketing "ponds" to maximize the odds of getting calls.

This is not an exhaustive list, and some of these questions may be unnecessary, depending on what the prospective client covers in the initial discussions. Other consultants and experts may adapt this template to the needs of a particular case. Getting these questions out in the open and getting straight answers can help the expert make a fully informed decision about accepting a case and determining the appropriate pricing approach. ■

2008–2009
Consulting, Litigation, & Expert Witness Interest Group Committee

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E-Discovery Rules and Risks: Understanding the Real-World Rules for the Virtual World of Electronic Documentation

by Meike Olin, CPCU, CIC, CRM

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Editor's note: This article was adapted by Meike Olin, CPCU, CIC, CRM, from a version of an article by the same title written by Mike Herlihy, ARM, an executive vice president and an equity partner of Ames & Gough, and Gregg Bundschuh, an executive vice president and an equity partner of Ames & Gough, and published in the Summer 2008 issue of *The John Liner Review*.

When the Federal Rules of Civil Procedure (FRCP) changed dramatically on December 1, 2006, architectural, construction and engineering firms learned there were some tough new rules on e-discovery, the production of electronic documentation as part of defending a firm in a lawsuit. According to a recent survey of professionals who have faced the new rules, as many as one in five businesses have settled lawsuits rather than face the cost of electronic discovery. Nearly half of the survey respondents indicated that their legal teams were not up to the task. And the costs of litigation were pegged at an average of $200,000, with 8 percent of respondents indicating average costs in excess of $1 million.[1]

The increased focus on electronic documentation in the December 1, 2006, revisions to the FRCP has raised the stakes. Because anything written could be held against an individual in a court of law, it is important to understand proper creation — and prudent handling — of electronic documents.

The Legal Landscape

While state courts are not bound by the federal rules, many states use the FRCP as the model for their own rules. Most design and construction firms should consider FRCP as a minimum threshold for compliance when a lawsuit may be in the offing and become familiar with the particular rules in the states in which they regularly practice.

One significant change to the FRCP is that the courts and the parties to a lawsuit, both defendants and plaintiffs, are required to give early attention to information stored electronically. The parties must meet within 99 days of a civil action to determine what information will be produced and in what format.

But the legal obligations can begin prior to litigation if the parties know — or could reasonably be expected to have known — that a lawsuit would be forthcoming. For example, firms involved in major projects that have been the subject of negative press about cost overruns, such as the Boston Central Artery/Tunnel Project, could anticipate litigation long before it happened. Before the complaint and summons hit the door, firms need to take care not to destroy any documents even if such documents were otherwise scheduled to be purged from the server or the backup tapes were scheduled to be overwritten.

Design and construction firms have a duty to protect any data that might pertain to a claim or a potential claim. This includes not only the contract for work, but also the plans and electronic communications exchanged on a given project among those who work at the firm and with those who work elsewhere.

Firms involved in a lawsuit should be prepared to retrieve large volumes of information. They must make — and demonstrate — a good faith effort to identify any discoverable electronic data and notify opposing counsel.

For a firm facing a claim or the potential for a claim, there are a number of steps that should be taken, including the following:

- Obtain legal representation from a professional liability insurer. Request that the services be provided as "free pre-claims assistance" if possible.
- Gather and inventory data *before* a request for documents arrives.
- Provide the opposing party with a description of the data you have by category and by location of documents.

Electronic Document-Retention Plans

The legal requirements in discovery all point to the need for a formal document-retention plan. Courts do not favor defendants that do not have a plan and destroy documents in an inconsistent manner. And the courts have been known to impose sanctions on those without a policy — or with a policy that is not followed. Sanctions have even been applied for the unintentional failure to preserve electronic information. Even worse, juries have been instructed to infer spoliation — the intentional destruction of information — based on the inability of a party to produce requested documents.

As with the rules of evidence, the length of time documents — both electronic and hard copy — should be retained varies from state to state. Every state has a statute of repose that defines the time period during which, for example, a design or construction firm can be sued for a defective design that results in the damage to or the failure of a structure. More importantly, the statute defines the time *after* which said design or construction firm *cannot* be sued for the damage or failure.

One common length of time for statutes of repose in a number of states is 10 years, but this time period is not a universal constant.

For design and construction firms operating in only one state, the document-retention policy should reflect the statute of repose plus some nominal time period to allow for documents that have been sent, but not received. To be ultra-safe, that nominal time period should be at least one year. So in a state with a 10-year statute of repose, your firm would keep documents for 11 years.

For design and construction firms operating in more than one state, there are two possible approaches: establish a separate document-retention policy for each state or determine the longest statue of repose for any state in which the firm operates and establish a document-retention plan for that length plus one year.

Corporate E-Mail Policies

E-mail transmissions are not private, according to judicial decisions. The only exception to this is specific privileged communications between an attorney and his/her client. Even then, the courts may challenge the attorney to demonstrate that the communication is privileged.

Consider including an e-mail policy in the employee handbook. The following are some of the issues that should be covered in any firm's policy:

- E-mail transmissions are not private. There should be no expectation of privacy.
- The firm reserves the right to read any or all e-mail transmissions at its sole discretion.
- E-mail should be used primarily for the firm's business. E-mail may also be used to contact family members and personal friends; however, this usage should be minimal.
- Unauthorized use of the firm's e-mail system may be grounds for discipline, up to and including termination of employment.

In addition, there should be rules or at least guidelines for authorized e-mail. These may vary, depending on your firm's "style" — formal or informal — and that of its clients and suppliers.

The rules for effective e-mail communication are particularly important when the e-mail pertains to the firm's projects. The following are some suggestions for project-related e-mail:

- E-mail should convey concise information with the appropriate

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background so that the meaning of the message is not misconstrued.

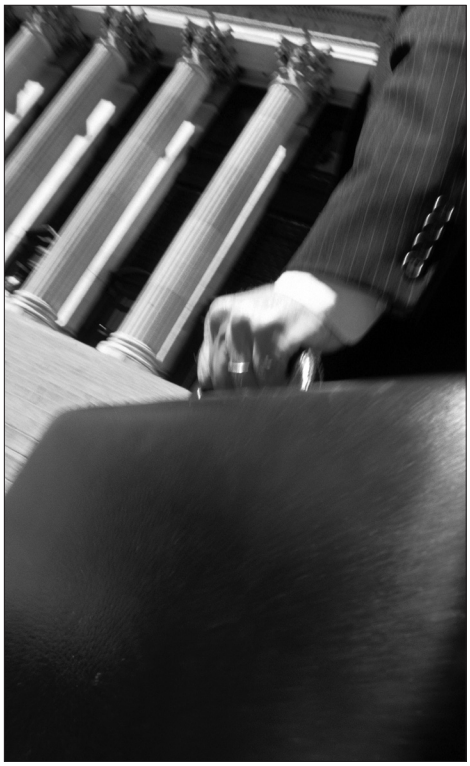
- All project-related e-mail should be preserved in the project work file in hard copy — this, in addition to being filed electronically in a virtual project work file on the server.
- Adhere to the general rules of file documentation, including the following:
  - Do not speculate.
  - Do not offer opinions as facts.
  - Do not express feelings about the project itself or about anyone involved in the project.
  - Provide concise, consistent, and factual statements only.
  - Address only one project in any given e-mail. Addressing issues for both Project A and Project B in the same e-mail will pose problems regarding where to store the particular e-mail.

Never hit the send button right away. It's all too easy to let a little "attitude" creep into your words. Reread the e-mail to be certain your meaning is clear. A good rule of thumb before hitting that send button is to ask yourself if you would want to see the contents of the e-mail on the front page of a newspaper — or perhaps worse, in front of a jury. Once communication leaves the hard drive, the e-mail and any attached documents are out there in cyberspace forever.

In Summary

The rules for electronic documentation are essentially the same as for hard copy, but the December 1, 2006, revisions to the FRCP have put more emphasis on the virtual world and e-discovery. Remember the basics:

(1) Know the legal landscape. Understand your firm's legal obligations for preserving and providing electronic documentation.



(2) Have a formal document-retention plan, and enforce it.

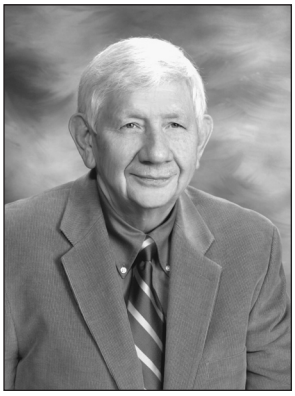
(3) Keep e-mails factual and concise, but also be sure to provide the appropriate background and context so that information will not be misconstrued.

Endnote

1. "Survey Shows One in Five Businesses Have Settled a Lawsuit to Avoid the Cost of Recovering and Searching Through E-mail," November 27, 2007, Fortiva, Inc., http://technology.findlaw.com/articles/01179/011040.html.

Q&A with Donald S. Malecki, CPCU

by Donald S. Malecki, CPCU



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One of our insureds has a dispute with its insurer over the application of a liability policy. Specifically, we had our insured's commercial general liability (CGL) policy extended for one extra month (for a total of 13 months) in order to make the inception date concurrent with the other liability policies of this insured. The CGL policy has a per occurrence limit of $1 million.

Our insured, who maintains no umbrella or excess liability insurance, was sued for an amount well in excess of the policy limit. The insured is maintaining it has $2 million of limits available for the suit. Its rationale is based on the fact that an additional $1 million limits for the extra month added to the policy. We dislike having to lose this insured, but we disagree with this rationale. What is your opinion?

The insured is incorrect in its thinking that a mere extension of an existing policy period automatically increases the limit of insurance. The fact the insurer makes a charge for the extension period does not signify that the charge represents the addition of a new set of limits. Instead, the charge signifies the application of existing limits and coverage for the additional time, in this case 30 days. It makes no sense to maintain that simply because a premium was charged, the insured is going to receive an entirely new set of limits for the additional 30-day period. The additional time added is an extension, not a separate or new policy period for 30 days.

If coverage is renewed at the end of the policy period and canceled after 30 days, claims falling within that 30-day period would have the benefit of a new and complete policy period. Where the existing policy period is simply extended for a period of 30 days, however, only the remaining limits of the policy period extended are available for claims during that 30-day period.

An old case supporting this position and explaining that the extension of the policy period does not add additional limits to the policy is *Diamond Shamrock v. Aetna*, 609 A.2d 440 (N.J. Super. A.D. 1992). This is a long and involved case dealing with a variety of coverage issues over Agent Orange. It is not practical to explain the numerous issues of this case but only that it squarely addresses the subject of this discussion on page 649. ■

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Printed on Recycled Paper

Consulting, Litigation, & Expert Witness Interest Group Quarterly
CLEWS
Volume 15 Number 3 December 2008

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