CPCU SOCIETY INSURING YOUR SUCCESS

Consulting, Litigation, & Expert Witness 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.

This is my first column as your chairman. I start by recognizing that the success that the CLEW Section enjoys is due, in large part, to those who have helped us to achieve the many objectives we have established for your section since we started it in 1994. We got here because of the outstanding leadership efforts of your committee and its past chairmen, **James A. Robertson, CPCU, Eric L. Routman, J.D., CPCU, Stanley L. Lipshultz, J.D., CPCU,** and **Donn P. McVeigh, CPCU, ARM.**

Your section's membership is strong, and among the CPCU Society's most active in many areas. We are a prolific bunch, and it is not hard to see why. We are people who enjoy what we're doing.

As always, we have ambitious plans. At the Leadership Summit in Phoenix, we will hold a retreat on Sunday and Monday, open to all CPCUs, but limited to the first 30 applicants, on a first-come, first-served basis. Retreat planners **Norman F. Steinberg, CPCU,** and **Steven A. Stinson, J.D., CPCU,** tell us the subjects will be the insurance industry response to Hurricane Katrina and the Spitzer investigations. The retreat will be held at the Pointe Hilton Squaw Peak Resort, the same location as the 2005 and 2006 CPCU Society Leadership Summit. If you plan to attend, make your reservation early, to assure yourself a spot. E-mail Norman F. Steinberg, CPCU, at nfsusa@aol.com or Steven A. Stinson, J.D., CPCU, at SASinvest@bellsouth.net.

George M. Gottheimer, Jr., Ph.D., CPCU, CLU, and **John G. DiLiberto, CPCU, CLU, ChFC,** are developing a new symposium. **Nancy D. Adams, J.D., CPCU, Gregory G. Deimling, CPCU,** and **Stanley L. Lipshultz, J.D., CPCU,** are working on a new mock trial for the CPCU Society's 2006 Annual Meeting and Seminars in Nashville, which will be a first-time-ever joint effort of the CLEW and Claims Sections. **Thomas H. Veitch, J.D., CPCU, CLU, CIC,** has proposed that we publish an annual "CLEW book," which would contain a collection of approximately 50 short articles that would be a reference source on topics of current value to CPCUs, non-CPCUs, and others. We have a lot going on, so stay tuned.

I would like to offer a special thank you to **Jean E. Lucey, CPCU,** for taking over as editor of your newsletter, and to **Vincent "Chip" Boylan Jr., CPCU,** for all of his work on the CLEW Section web page.

We welcome your submissions. In your work you experience things that you can share with your colleagues. Write them down and send them to Jean. ■

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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.

It has been my great pleasure to meet and work with the members of the Consulting, Litigation, & Expert Witness Section Committee—the committee is comprised of individuals who are exceedingly knowledgeable. But knowledge isn't everything, which is why I especially appreciate their dedication to hard and cooperative work. It is a bonus that they accomplish this work without losing their individual and collective senses of humor. Many of you, I am sure, have attended the mock trials organized and presented by the committee, so you know what I mean. When you read their contributions to this and to future newsletters, you will catch a glimpse of the people I have grown to know through committee work. You'll respect and like them too.

In this issue you will find a profile of CLEW Section member **Edward W.S. Neff, CPCU, ARM,** whose face will be familiar to you if you have attended recent mock trials. You will also find information about the newest CLEW Section Committee members—**James A. Misselwitz, CPCU,** and **George M. Wallace, J.D., CPCU.** I have written a couple of articles that I hope will be of some interest to all, and of particular interest to those who practice as expert witnesses. We are most fortunate to include It Could Happen to You—or to Your Customers (and They Might Not Like It) from **Donald S. Malecki, CPCU**. If you see his newsletter *Malecki on Insurance*, you know that he addresses real-life situations in comprehensive and incisive fashion.

Please consider contributing to future newsletters published by your section. I'm sure that many of you have ideas you'd like to see disseminated and that there are writing skills so far untapped for this forum. If you have something prepared, please send it along to me at jlucey@insurancelibrary.org. If you're looking for ideas, let me know. I greatly enjoyed writing my contributions to this edition, and look forward to receiving yours.

Jury Finds for SOSUMI—Shifting Sands Forced to Defend and Indemnify

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

Author's note: The CPCU players at the CPCU Society's 2005 Annual Meeting and Seminars in Atlanta could not have conducted this trial without the excellent narration provided by **John G. DiLiberto, CPCU, CLU, ChFC,** and the relentless efforts of our director, **Gregory G. Deimling, CPCU**. We dedicated this production to the memory of our friend, **Charles R. Shaddox, J.D., CPCU.**

Richard V. Rupp, CPCU, Debra L. Dettmer, CPCU, Kathleen J. Robison, CPCU, CPIW, Nancy D. Adams, J.D., CPCU, and Stanley L. Lipshultz, J.D., CPCU, get into character in the mock trial.

The courtroom was packed as the jury delivered its verdict in favor of SOSUMI Corporation—the world's largest conglomerate—and against Shifting Sands Mutual Insurance Company, whose tagline is "no claim is too small . . . to deny." This was to be no small claim for Shifting Sands.

Testimony revealed that SOSUMI's seemingly impenetrable computer network, developed personally by Nobel Prize winning IT genius Gyro Gearloose (**Edward W.S. Neff, CPCU, ARM**) was hacked into by world famous Phisherman Bruno Giuseppe Domania—Domanio, aka "Tomorrow Man" (**Donald S. Malecki, CPCU**). Domanio had seized billions of bits of information about SOSUMI and had threatened to expose the mammoth breach of security, as well as the information collected, unless SOSUMI paid him $2 billion.

After the extortion threat was received, SOSUMI's president and chairman of the board, Seymour "Sy" Onara (**George M. Gottheimer Jr., Ph.D., CPCU, CLU**) immediately summoned Gearloose, along with SOSUMI's insurance agent, Ara N. Omitian (**Norman F. Steinberg, CPCU**) and SOSUMI's Corporate risk manager, Chancy Manouvere (**Daniel C. Free, J.D., CPCU, ARM**). As fate would have it, SOSUMI's entire insurance program was about to renew with Shifting Sands, and Omitian needed Onara's signature on the applications. Testimony revealed that there was serious disagreement about whether to inform Shifting Sands of the extortion threat in the applications. In the end, the only reference to the potential security breach was a footnote added to the 10K and 100 disclosures submitted with the applications.

Shifting Sands got the applications with little time to spare before the renewal. Recognizing that SOSUMI was the largest account Shifting Sands had ever landed, its underwriting manager, Jack "Old School" Headstrong (**Richard V. Rupp, CPCU**) and underwriter Prudence Block (**Debra L. Dettmer, CPCU**) quickly reviewed the applications, approved the submissions, and the policies were issued. In the meantime, SOSUMI made a partial payment of $300 million to Tomorrow Man's bank in the Cayman Islands.

Shortly thereafter, SOSUMI submitted its claim for the $300 million to Shifting Sands. It was promptly investigated by outside staff adjuster W. E. Neverpeigh (**Kathleen J. Robison, CPCU, CPIW**) and Shifting Sands IT consultant Dren R. Skeeg, (**Jane M. Wahl, CPCU, CLU**). Neverpeigh had made good use of her feminine charms to extract a volume of information from the hapless Manouvere, which would later be used to support her company's denial of the claim. Unfortunately, Neverpeigh and Skeeg unwittingly discussed the most intimate details of the IT breach within the earshot of notorious lawyer Hyman "Hy" Perbolee (**Robert L. Siems, J.D., CPCU**), who passed along the information to the local newspaper. The story became front-page news around the world, as Perbolee expected. He gave it just enough time to sink in before he filed a huge lawsuit on behalf of SOSUMI shareholders, who had seen the price of their stock collapse overnight.

Once Shifting Sands became aware of the magnitude of SOSUMI's claim, it

The CPCU players at the CPCU Society's 2005 Annual Meeting and Seminars in Atlanta at the conclusion of the trial.

contacted I. Kwit, senior partner of its outside law firm, Kwit, Yellen, & Settle, (**Nancy D. Adams, J.D., CPCU**), who advised Shifting Sands to deny the claim, refuse the tender, and sue for rescission of the entire SOSUMI insurance program based upon material misrepresentations made by Omitian and SOSUMI management. Shifting Sands' complaint was for rescission, fraud, breach of contract, negligent misrepresentation, and, of course, the kitchen sink.

The trial took place in the courtroom of the venerable yet not-too-crusty judge, Stan Neverquit (**Stanley L. Lipshultz, J.D., CPCU**). All of the above fact witnesses (except, of course, Tomorrow Man) were called to the stand and sworn in by the bailiff (**Jean E. Lucey, CPCU**) who never administered the same oath twice.

The testimony was lively, to say the least. Onara appeared nattily dressed in a pinstriped suit. His testimony caused one observer to suggest that: "he should get used to wearing stripes." And, in the opinion of this reporter, Manouvere's courtroom demeanor was deserving of multiple, lifetime contempt citations.

In addition to the fact witnesses, Shifting Sands called an insurance practices, underwriting, and reinsurance expert, I. O. Pine (**James A. Robertson, CPCU**) and defendant SOSUMI called John Henry "Doc" Holiday (**Donn P. McVeigh, CPCU**), who happens to be a dentist as well as an expert in insurance and risk management. The witnesses were vigorously examined and cross-examined by attorneys Kwit and Perbolee, who managed to keep hizzoner awake by making numerous vociferous objections, some of which actually had some merit.

Upon the close of all of the evidence, the usual dispositive motions were made and promptly denied. The judge instructed the jury and submitted the case to it. Although the factual and legal issues were rather complex, deliberation was surprisingly short. The announcement of the verdict in favor of SOSUMI Corporation and against Shifting Sands Mutual caused an unprecedented frenzy among the onlookers, as SOSUMI shareholders celebrated with hugs and "high fives," while representatives of Shifting Sands' foreign reinsurers nearly trampled each other running for the exits, cell phones in hand.

Following the jury verdict, the judge invited questions from the audience, who had followed the case more closely than one might have expected given its complexity. ■

CLEW Section Member Profile—Edward W.S. Neff, CPCU, ARM

Edward W.S. Neff, CPCU, ARM
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Position

President, The Compass Company, Inc., a provider of risk management consulting services to a variety of businesses, agencies, and organizations, both for-profit and non-profit. The company also provides expert witness and litigation support services and professional seminars on risk management issues in both the property and casualty and health and benefits areas.

Education

Bachelor of Science in Business, Miami University, Oxford, Ohio—1963

(Experiment in International Living—Sweden, Summer 1963)

CPCU Designation—1976

ARM Designation—1985

Career Path

1979 – 1987
President, Independent Insurance Service, Inc. (Wheeling, WV) Owner and principal in an independent insurance agency representing major national and regional multi-line insurers. Provided services to individual and corporate clients, with all product lines including extensive pension, life, disability income, and health production.

1970 – 1979
Agent, Independent Insurance Service, Inc.

1963 – 1970
Marketing Representative, International Business Machines, Inc.

Professional Activities

Numerous volunteer positions with CPCU Society including:

- 2005 – 2006 Governance Task Force Member
- 2004 – 2005 Annual Meeting Task Force Member
- 2001 – 2004 Nominating Committee Member
- 1999 – 2000 Member, Board of Governors
- 1991 – 1992 Regional Vice-President
- 1988 – 1991 Director, East Central Region
- 1987 – 1988 Chair, Chapter Affairs Committee

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CLEW Section Member Profile—Edward W.S. Neff, CPCU, ARM

Continued from page 5

- 1979 – 1981 President of the West Virginia Chapter
- Current member of the Northeastern New York Chapter; Past member of the Central Pennsylvania Chapter
- 1984 – 1997 Grader of CPCU and IIA examinations
- Current member of the Society of Risk Management Consultants

Family

Married to Jeanne Henry Neff, three adult children and two grandchildren. Both Jeanne and I are natives of West Virginia.

Hobbies

Skiing, scuba diving, reading, and travel.

How would you describe your current work?

We provide a variety of risk management services for clients including:

- risk management audits and exposure analysis
- specification and marketing (RFP) management
- merger and acquisition analysis
- workers compensation feasibility studies and audits
- litigation support and expert witness testimony

Our expertise extends from product and professional liability to employee benefits and workers compensation.

Clients have included state agencies, developers, contractors, heavy equipment distributors; health care professionals; architects; closely held corporations; retirement communities; and a non-profit foundation.

We have been retained by a lending agency to oversee all risk management issues for a multi-million dollar construction project. This endeavor went beyond the usual areas of construction project risk management to include management of unique soft cost and contingent loss exposures, sick building syndrome, and disaster recovery.

We also provide professional seminars on risk management issues in both the property and casualty and health and benefits areas.

What is the most interesting aspect of your job? The most frustrating?

As a risk management consultant I have the opportunity to see a broad range of issues and that is both a blessing and a curse. Researching an issue for a client and getting to the root of the issue is often the most interesting and frustrating, because getting to the root issue takes time, cooperation, and understanding of all of the individuals involved. Sometimes this happens quickly and sometimes it does not.

What was the most fascinating problem/case you have been involved with? The most challenging?

A flip answer might be: "The last case, I worked on," and often this is true. Actually, I have been blessed with several long standing client relationships and one of these relationships started decades ago when management thought they had more than adequate coverage from their "parent" organization. We determined that their most critical exposure had no coverage at all.

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

Several people and events have influenced my life and it would be difficult to single out any one person or event. Let me offer that my family and family responsibilities have kept me fully engaged in my career and the joy that I get from my family life sends me out the door each day to a new opportunity in my consulting practice.

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

We raised and educated our children and with that education offered the advice that they should plan on a job change every two years and a career change every seven. In my career of 35 years in the risk management and insurance fields, I continue to see my job change with every new assignment whether it is for an existing client or a new one. My wife plans a career change in a couple of years and with that I will possibly change my office address. I have done just that twice before with her as she has made career moves.

How have you seen our business change over the years?

When my father started in the business more than 80 years ago working in a Surety Department of a now merged insurance company, trust was a key component of the relationship. When I joined the family agency in 1970, the handshake was still valued and trust was still central to the relationship. Contracts were simple and adequate. As we all know, those days are but a memory in all industries and many relationships. I know that I did not listen long enough or completely enough in those early years and today I find that not listening or hearing what is being said is one of the major problems facing us all. ■

New CLEW Section Committee Member Profiles

James A. Misselwitz, CPCU

Misselwitz has been in the insurance industry since 1973. He specializes in refrigerated warehouses, construction, nursing homes, and retail franchises. Misselwitz has also built a strong practice insuring the unique risks of forensic scientists, expert witnesses, and independent medical examiner issues.

Misselwitz joined ECBM in 1999 and is a Chartered Property Casualty Underwriter (CPCU). Prior to that, he worked in several national and international brokerage firms in various general management and sales positions. Misselwitz spent the first 15 years of his career with the Hartford Insurance Group in various marketing, underwriting, and management positions.

Misselwitz brings a unique blend of underwriting experience and business knowledge into each specific business segment. Using his strong understanding of each of his clients business risks, he focuses his energy on the protection and preservation of assets. He is particularly strong in evaluating and designing coverages to respond to tough management liability and risk financing issues for your company.

George M. Wallace, J.D., CPCU

Wallace is a partner in the small Pasadena, California, law firm of Wallace & Schwartz. His practice concentrates in the area of property and casualty insurance coverage issues—including coverage opinions, representation of insurers, and insureds in declaratory relief actions and the litigation of "bad faith" claims—as well as civil appellate practice, defense of professional liability cases, and general business litigation.

Wallace received his bachelor of arts degree in English in 1978 from the University of California, Berkeley, and his Juris Doctor degree in 1981 from the University of California, Los Angeles, School of Law. He practiced with several established 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, as well as all four California districts of the United States District Court and the Ninth Circuit United States Court of Appeals.

Wallace earned the CPCU designation in 1991. He has been active in both the CPCU Society's San Gabriel Valley and Los Angeles Chapters, as well as the committee organizing the annual All-Industry Day jointly sponsored by the CPCU Society's Los Angeles-area chapters. He served as an officer and director of the San Gabriel Valley Chapter beginning in 1992, and was president of that Chapter for 1996–1997. He has served on the board of directors of the Los Angeles Chapter since 2001, and is currently vice president of that chapter. He was the recipient of the Rie R. Sharp Memorial Award as "Insurance Person of the Year" for the year 2000, awarded by the Los Angeles-area chapters.

Wallace speaks and writes regularly on legal and insurance topics, and teaches CPCU 530 (The Legal Environment of Insurance) as an instructor with the Insurance Educational Association (IEA).

Since 2003, he has maintained two online weblogs, or "blogs:" the law-oriented site Declarations & Exclusions (http://declarationsandexclusions.typepad.com/weblog/), which reports and comments on California insurance law, recent developments in California case law, legislation and regulation, and related subjects, and the more personal A Fool in the Forest (http://declarationsandexclusions.typepad.com/foolblog/), which focuses on whatever else happens to interest him at the moment, whether law-related or not. A Fool in the Forest received a 2005 Blawg Review Award as "Best Personal Blog by a legally-oriented male blogger" (http://blawgreview.blogspot.com/2005/12/blawg-review-awards-2005.html).

Wallace lives with his wife and their two sons in Glendale, California. ■

The "Crown Jewel" of the Federal Judiciary System: The Federal Judicial Center

by Jean E. Lucey, CPCU

The three branches of our federal government—Executive, Judicial, and Legislative—coexist to balance the interests of all citizens and to provide checks on the powers of any particular individual or group. I remember thinking when I first learned about this tripartite system that it bears a certain resemblance to the old paper-rock-scissors game. Some may recall that game participants produce hand signals from behind their backs that represent one of those three things. The game winner is determined on the basis that:

- paper covers rock
- rock smashes scissors
- scissors cut paper

This is certainly an over-simplistic comparison. Nonetheless, the tension (as contrasted with the tensions, at least some of the time) among the governmental branches was crafted in such a way that ill-advised decisions by any would be subject to review by the others under a clearly fixed protocol. Some may argue that the protocol hasn't always worked just right, but it seems clear that having a rulebook to follow has been a stabilizing influence on our society. I find it greatly encouraging that our judicial branch has a unique source of aid and support in its work, the Federal Judicial Center. Much of the work of the Center is of interest to those of us who are not judges or employees of the federal courts. It is available to us all.

The Federal Judicial Center was established by Congress in 1967 on the recommendation of the Judicial Conference of the United States. Its many duties are said to fall within several broad categories, namely:

1. Conducting and promoting orientation and continuing education and training for federal judges, court employees, and others.
2. Developing recommendations about the operation and study of the federal courts.
3. Conducting and promoting research on federal judicial procedures, court operations, and history.

A Board governs the Center, and by statute the Chief Justice of the United States chairs that Board (so I guess they just got a new boss). Other Board members include the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference. The Board appoints the Director and Deputy Director (there have been nine directors since 1967), and the director appoints the staff. The 2004 Annual Report indicates an annual budget of $21,214,000 and a staff of 130.

More details on the Center and its operations are readily available through its web site at www.fjc.gov. The site is produced and maintained as a part of its statutory mission. Of particular interest is the list of "FJC" publications, most of which can easily be downloaded. All are encouraged to review the results of the Center's research division and to use them as is seen fit: they belong to the public.

Six web site pages comprise the list of approximately 200 publications. The titles make the subject matter quite apparent (clarity is obviously favored over creativity). Some are designed to further the mission of training and educating judges ("Appellate Opinion Writing" and "Effective Use of Courtroom Technology: a Judge's Guide to Pretrial and Trial," for example). Some are aimed at court employees ("Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks;" "Chambers and Case Management"). Some are relevant to criminal proceedings ("Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues;" "Resources for Managing Capital Cases Site"). Many are of potentially great interest and use to those of us in the insurance field. Among those of particular interest is "Expert Testimony in Federal Civil Trials, A Preliminary Analysis," produced in 2000. The authors are Molly Treadway Johnson, Carol Krafka, and Joe S. Cecil.

This report summarizes the analysis of data gleaned from a 1998 survey of federal judges. It was preceded by a similar survey conducted in 1991, shortly before the Supreme Court issued a ruling in *Daubert v Merrell Dow Pharmaceuticals, Inc.* (this case has been previously discussed in a *CLEWS* newsletter). Subsequent to the survey of judges, input was solicited from attorneys involved in the trials described in the survey. Preliminary analysis of the data focused on (1) comparing judges' experiences with expert testimony before and after the *Daubert* case and (2) exploring the concerns of judges regarding testimony in civil cases. In the 1998 survey, 59 percent of all judges indicated they allowed all proffered expert testimony without limitation, compared to 75 percent in 1991. The parallel survey of attorneys confirmed that judges were more likely after *Daubert* to examine the basis of expert testimony before trial and to exclude at least some of it. Regarding changes in their practice in the same time period, many (32 percent) of attorneys said they "make more motions *in limine* to exclude opposing experts," and 29 percent said they "scrutinize more closely the credentials of expert witnesses I am considering."

What might be most instructive to those of us who now function or who may aspire to function as expert witnesses are what judges and attorneys deem to be the prevailing problems with expert testimony. The information solicited from attorneys was coordinated with that from judges to produce a table displaying "Frequency of Problems with Expert Testimony in Civil Cases as Reported in the FJC Surveys of Judges and Attorneys." In general, the opinions of judges and attorneys tracked quite closely. Both groups identified the most frequent problems as:

1. experts abandon objectivity and become advocates for the side that hired them
2. excessive expense of party-hired experts

With little disparity between the two groups, the following issues were ranked next:

3. expert testimony appears to be of questionable validity or reliability
4. conflict among experts that defies reasoned assessment
5. disparity in level of competence of opposing experts
6. expert testimony not comprehensible to the trier of fact
7. expert testimony comprehensible but does not assist the trier of fact
8. failure of parties to provide discoverable information concerning experts
9. attorneys unable adequately to cross-examine witnesses
10. indigent party unable to retain expert to testify (shades of the movie *The Verdict*, although that certainly had a satisfactory ending!)
11. delays in trial schedule caused by unavailability of experts

As noted in the report, the only notable difference in the perceptions of judges and attorneys is that judges ranked the problem of experts being "poorly prepared to testify" lowest, whereas attorneys ranked that slightly higher on the list of problems.

It is heartening that such competent work is available at all, and even more so that it is in the public domain. I have heard the Federal Judicial Center referred to as the "crown jewel" of the U.S. judicial system: that does not seem like hyperbole to me. ■

Reliability of Eyewitness Testimony

by Jean E. Lucey, CPCU

Just as the reliability and proper use of expert testimony is the subject of scrutiny and modification, so too is that form of testimony that on its face (pun intended) may intuitively seem most trustworthy—eyewitness testimony. A number of studies have shown that people are not good at identifying other people whom they have seen only fleetingly, especially under stressful circumstances such as those inherent to witnessing a crime. Cross-racial identifications have been proven to be particularly unreliable. In fact, several studies have revealed error rates as high as 50 percent.

Those of us who have personal experience in this realm can probably vouch for the findings of such studies. Some years ago, a burglar was caught in the act of stealing some prints from the walls of the Insurance Library Association of Boston. I was called in by the security company (good for that responding guard!) and the police to confirm that our property was still on-site (albeit removed from their frames and rolled up for easy transport), so I saw the burglar. In the coming days I described him to others as about 6 feet tall and of average build with brown hair. When I saw him in court—and yes, I am sure it was the same person—I realized he was about my height (5'3"), very slight, and with light hair. I suppose the circumstances under which I first saw him were somewhat stressful, as I had been called out in the middle of the night, and yet I was hardly threatened by the criminal, given the presence of a burly guard and the police. At least in court the guard still looked burly! Several years after this incident, in my only other similar experience, I was accosted as I walked home from work (a word to the wise: don't walk anywhere at dusk with a purse or bag over your arm as you read a newspaper). The crook's net was $2—he didn't take my purse—but the Boston police were quite responsive and anxious for a description of the thief. I told them I thought my description would be worthless, and since in coming days I pointed out to my husband a wide range of physical types as my possible accoster, I think I was right that my description wouldn't have been trustworthy.

> ***A number of studies have shown that people are not good at identifying other people whom they have seen only fleetingly, especially under stressful circumstances such as those inherent to crime incidents.***

The studies reassure me that my failings are not unusual, but they are not reassuring in the larger context. Exacerbating the problem of honest misperception and failing memory is the likely and somewhat understandable reaction of jurors to witnesses who stick to a story or description despite cross examination. However close a peer, a juror may be more likely to identify with the victim of, or innocent bystander to, a crime than with a defendant. And even in the absence of a recognized bias, jurors may tend to believe a police witness or other person of perceived authority more than a civilian giving testimony.

Another factor should not be overlooked: sometimes witnesses do not testify in good faith. In fact, they lie for one reason or another.

Many states recognize similar principles of evidence law regarding expert testimony. In New York, the principle states that an expert can testify on matters outside the "day-to-day experience" of the ordinary citizens called to serve on juries, as long as such testimony would "aid a lay jury in reaching a verdict." The corresponding federal test allows for the introduction of expert testimony if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." How may these principles be applied in the contest of expert testimony concerning the accuracy and veracity of eyewitness testimony? Expert opinions differ!

Writing on FindLaw Legal News and Commentary (http://writ.findlaw.com/dorf/20010516.html), Michael C. Dorf of Columbia University discusses alternatives with reference to *The People v Lee* in the New York Court of Appeals (New York's highest court). The upshot of that case is that trial judges have discretion to admit expert testimony on the subject of eyewitness testimony, and indeed that they must consider it when it is offered (in the *Lee* case the judge considered it and then did not admit it). Dorf, citing the demonstrable failings of eyewitness testimony, indicates that expert testimony may be a crucial tool in impeaching such testimony (the other being cross examination). Especially in the realm of eyewitness testimony that is falsified, he asserts that an expert might well assist jurors in reaching a fair verdict. "Many practiced liars," he writes, "are cool as a cucumber, while first-time witnesses are often nervous about testifying, quite apart from whether they are telling the truth or not." He points out that a major reason for not admitting such expert testimony is one of efficiency: in cases where eyewitness testimony represents a large or preponderant portion of the prosecution's case, experts' testimony may be appropriate. In cases bolstered fully by other forms of evidence, it is less so.

Dorf cites an historical precedent of interest in this context. In 1949, accused communist agent Alger Hiss was charged with perjury. In his retrial, after an original jury could not reach a conclusion, the defense hired an expert witness to discredit the testimony of Hiss's chief accuser, Whittaker Chambers. The expert witness testified that Whittaker was a pathological liar, but his testimony was rather completely nullified by an effective cross examination. Since then, defendants have not frequently called expert witnesses to challenge eyewitness testimony.

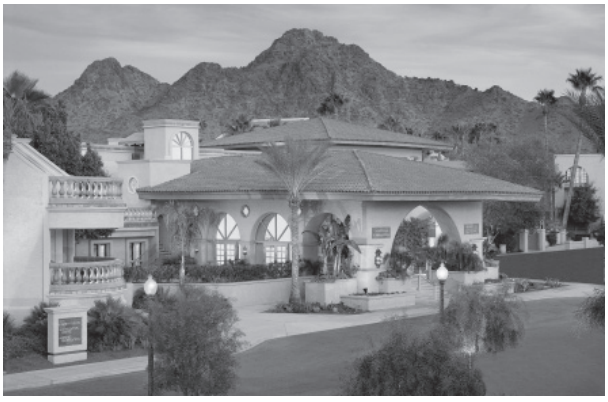
Gary Wells of the Department of Psychology at Iowa State University (http://www.psychology.iastate.edu/faculty/gwells/homepage.htm) is a recognized expert on the subject of eyewitness testimony. Among (many) other activities, he assisted the National Institute of Justice in developing guidelines on the proper use of eyewitness testimony. He has published "Frequently Asked Questions of Gary L. Wells" (see the URL above). He agrees with the basic premise that eyewitness identification "is less reliable that jurors believe it to be." However, he does not see expert testimony as the answer to the problem:

> Although many have suggested that the appropriate answer to the eyewitness problem is to permit testimony by eyewitness experts in cases that rely on eyewitness identification evidence, there are several reasons why this is not a significant answer to the eyewitness problem. First, there are too few experts to actually service this problem and eyewitness testimony is expensive. Also, although an expert can cite various factors that make eyewitnesses more or less reliable, no one, even an eyewitness expert, can tell whether this particular eyewitness made a mistake. Once an eyewitness identification error has occurred, it has most of the same appearances that an accurate identification has. Borrowing a quote from the brilliant Boston defense lawyer James Doyle "The scientific eyewitness literature can tell you that something happens 80 percent of the time, but it cannot tell you whether a given case is one of the 80 or one of the 20."

Another factor should not be overlooked: sometimes witnesses do not testify in good faith. In fact, they lie for one reason or another.

Well's argument is that the best policy, rather than ". . . bringing jurors' beliefs about the reliability of eyewitness identification evidence down to the current level of eyewitness testimony" is to adopt systems to prevent eyewitness identification errors.

Like many things in law and life, there is no pat solution to the dilemma of the fallibility of eyewitness testimony and its use in the courtroom. As in the movie *My Cousin Vinnie*, sometimes circumstantial evidence such as tire tracks can and should trump honest yet mistaken testimony. ■



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Who's Keeping an Eye on Eyewitness Testimony?

■ **Gary L. Wells** is a distinguished professor of Psychology Department at Iowa State University in Ames, Iowa; and is president of the American Psychology-Law Association. More information can be obtained at the following web sites:

http://www.psychology.iastate.edu/faculty/gwells/homepage.htm

http://www.ap-ls.org/

Editor's note: Just as expert testimony is imperfect, so too is eyewitness testimony. Here are the views of one expert on the subject.

Because there is DNA testing now, doesn't this solve a lot of the problem with eyewitness identification evidence?

Definitely not. Only a very small fraction of crimes can be solved with DNA testing. The vast majority of perpetrators in assaults and murders and virtually all robberies, drive-by shootings, and other major crimes do not leave behind definitive biological trace evidence that can show that the eyewitness was mistaken. The need for reliable eyewitness evidence is not significantly diminished by the advent of forensic DNA tests. The Gary Graham case in Texas, in which he was executed based largely on a single (and very questionable) eyewitness identification, is more representative of the actual state of affairs. Like most all eyewitness cases, there was no biological evidence in the Graham case to be analyzed. Every year, over 77,000 Americans become criminal defendants after being identified by an eyewitness. Perhaps a few thousand of these can now be resolved one way or another using DNA tests. The remaining tens of thousands rely on the diagnosticity of the eyewitness identification procedure to produce the appropriate result.

The DNA exoneration cases are almost exclusively cases of sexual assault because those (sexual assault cases) are the cases in which definitive biological evidence tied directly to the perpetrator is left at the scene of the crime. As my former student and current friend and colleague John Turtle said: "Unless the guy robbing that 7–11 store gets pretty damned excited, he's not going to be leaving behind any biological fluids."

The New York Supreme Court recently ruled that testimony by eyewitness experts can be permitted at trial. Isn't expert testimony the answer to this problem?

No. Although many have suggested that the appropriate answer to the eyewitness problem is to permit testimony by eyewitness experts in cases that rely on eyewitness identification evidence, there are several reasons why this is not a significant answer to the eyewitness reliability problem. First, there are too few experts to actually service this problem and expert testimony is expensive. Also, although an expert can cite various factors that make eyewitnesses more or less reliable, no one, even an eyewitness expert, can tell whether this particular eyewitness made a mistake. Once an eyewitness identification error has occurred, it has most of the same appearances that an accurate identification has. Borrowing a quote from the brilliant Boston defense lawyer James Doyle, "The scientific eyewitness literature can tell you that something happens 80 percent of the time, but it cannot tell you whether a given case is one of the 80 or one of the 20."

It is true that eyewitness identification evidence is less reliable than jurors believe it to be. However, instead of bringing jurors' beliefs about the reliability of eyewitness identification evidence down to the current level of eyewitness reliability, we need to bring the level of eyewitness reliability up to the level that jurors expect it to be. The best policy for the legal system to adopt is one of prevention of eyewitness identification error, not catching eyewitness identification errors after they have occurred.

Your research shows that the methods that law enforcement uses for conducting lineups is contributing to mistaken identifications and false confidence by eyewitnesses. Since the scientific evidence is now clear that sequential lineups are better and that blind testing should be used, why isn't the legal system adopting these new procedures?

That is a simple question, but the answer is compound. First, keep in mind that some jurisdictions are now (finally) changing. The most prominent example is the state of New Jersey. New Jersey has now adopted blind testing and sequential lineups for all police in the state (see the *New York Times* article). However, New Jersey is clearly the exception for two reasons. First, unlike other states, the Attorney General of New Jersey has authority over all police in the state of New Jersey. Second, New Jersey Attorney General John Farmer has an excellent staff (I particularly commend Lori Linskey and Debra Stone) who have pursued this matter vigorously and Attorney General Farmer had the good judgment to exercise his authority to issue instructions to NJ police requiring them to use sequential lineups, blind testing, and other safeguards that we have been advocating. This method of adopting better lineup procedures cannot happen in other states. The Attorneys General of Kansas, or Pennsylvania, or New York, for instance, have no authority to order police in their states to adopt particular procedures for gathering evidence. In some places, such as Philadelphia and New York, there have been concerted attempts to have judges order the police to conduct lineups in ways that we have shown to be more reliable, but these efforts have been stalled by opinions that say that judges have no authority to order these things.

In some jurisdictions, prosecutors are openly opposing any declarations that would suggest that sequential lineups and blind testing are needed. They seem to be driven by a concern that such declarations might raise doubt about people they have prosecuted or open up lines of appeal for people who have been convicted using the riskier procedures. ■

It Could Happen to You—or to Your Customers (and They Might Not Like It)

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.

Editor's note: Donald S. Malecki, CPCU, brings a wealth of knowledge and experience to any insurance forum. If you see his publication *Malecki on Insurance*, you know that he consistently provides guidance concerning issues that may just be rising above the insurance horizon for most of us. His treatment of subjects is not just in the abstract, as he often summarizes cases relevant to his subject matter or answers questions sent him by readers. Please read on for two descriptions of real life situations, followed by Malecki's commentary.

We have heard of situations where a high judgment of liability damages was awarded against a commercial entity. While this entity was covered by an umbrella liability policy for limits sufficient to pay those damages in excess of the primary liability limits, the umbrella liability insurer has refused to pay those damages because, unlike the primary policy, the umbrella policy is on an indemnification basis and the entity in this case has been declared bankrupt. The umbrella liability insurer, therefore, has maintained that until the bankrupt entity pays those damages, the umbrella insurer has no obligation to indemnify its insured.

Is the insurer of the umbrella liability policy on firm ground here? Are you aware of any cases on this subject?
Whether the insurer is on firm ground here really depends on the circumstances. Generally speaking, and in a literal sense, there is a distinct difference between "indemnify" and "pay on behalf " contracts.

Under an excess indemnity policy, the insurer arguably may not be required to pay damages on behalf of the insured. Rather, the excess of loss above the primary or SIR is reimbursed after the insured pays. Some of these policies have a wording that allows payment by the insurer when the insured is obligated to pay, as opposed to actually paying the damages and other applicable costs, although this is the exception. Many insurers, however, disregard the formality of requiring the insureds to pay first, and instead pay damages on behalf of the insured as soon as a court renders a judgment making damages payable.

Whether an insurer of an umbrella or excess liability policy will elect to disregard the word "indemnify" in actual practice may hinge on the size of the action. Thus, the greater the amount of the damages payable, the more likely is the insurer to enforce its policy language of requiring the insured to incur the payment of damages first before the insurer honors its promise to indemnify the insured.

The propriety of this approach is questionable, particularly since, with excess coverage, the insured may easily be bankrupted by paying an award before triggering excess coverage, especially since the insurer's duty is to the insured and this approach taken by the insurer could actually be injurious to the insured. This approach seems inconsistent and is difficult to justify, given the industry precedent of disregarding the indemnify/pay on behalf of distinction in many instances.

But it should be pointed out that when it comes to insolvency of the insured, certain provisions of the umbrella liability policy may preclude the insurer's requiring the insured to pay the damages first, before the insurer is obligated to indemnify the insured. In this regard, all provisions of the umbrella liability policy should be reviewed carefully.

If the umbrella policy, for example, contains a provision that in effect states that bankruptcy or insolvency of the insured will not relieve the insurer of its obligation under the policy, a strong argument can be made that the insurer should "pay on behalf of " such insured, because when the bankrupt insured cannot pay the judgment, there is nothing to "indemnify." This is one situation, however, where it is not the interests of the insured that are being protected but rather those of the injured claimant and the creditors. While this argument has merit, it lacks the persuasiveness it would have if the insured's interests were involved.

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A review of the loss payable provision of the umbrella policy also is important. If this kind of a provision states that the insurer's obligation attaches when the ultimate net loss is finally determined by final judgment, it likewise might be difficult for the insurer to enforce its agreement to "indemnify."

The indemnity language has been upheld at least twice in cases involving insolvent insureds. These cases, however, involved the protection and indemnity (P&I) coverage of a marine policy and are: *Ahmed v American Steamship Mutual Protection & Indemnity Assn.*, 640 F.2d 993 (9th Cir. 1981) and *Miller v American Steamship Owners Mutual Protection and Indemnity Company*, 509 F.Supp. 1047 (U.S.D.C., N.Y. 1981), as cited in *Arthur L. Flitner and Arthur E. Brunck, Ocean Marine Insurance*, Vol. II, 2d ed., Malvern, PA: The Insurance Institute of America, 1992.

As a matter of interest, one of the significant differences between a P&I policy and a commercial general liability policy is that the P&I policy is always on an "indemnify" basis, whereas the CGL policy is on a "pay on behalf of" basis.

Suppose a parent company (A) has three subsidiary companies, (B), (C), and (D). Neither (B) nor (C) has any employees. The treasurer of the parent company, who also is a director of all subsidiaries, charges the subsidiaries a fee for handling the financial affairs. The fee is paid to the parent company. The treasurer is compensated for his services by the parent company.

Unfortunately, the treasurer embezzled a considerable amount of money from subsidiaries (B) and (C) and fled to Mexico. We are wondering whether the loss sustained by the two subsidiaries is covered under the parent company's employee dishonesty coverage. If not, would it be possible to maintain that the loss is therefore covered under the theft, disappearance and destruction coverage as it applies to the subsidiary companies?

Assume, for purposes of this question, that these subsidiaries otherwise meet the eligibility rules for coverage and are, in fact, listed as named insureds along with the parent company (first named insured).

Part of the question has been answered by stating that neither subsidiary company (B) nor (C) has any employees. That being the case, it can hardly be argued that any employee dishonesty coverage, as may be applicable to the subsidiaries, would apply, since this coverage is contingent on "employee dishonesty."

This opinion, however, is subject to the caveat that inherent in this fact pattern are a number of complex legal issues. For example, consider the potential for the parent company's direct liability, thus allowing coverage to apply to the treasurer as an employee of the parent. Since there were no employees in the subsidiaries, it may be argued, for example, that there was no independent function performed by the subsidiaries and that they were mere instrumentalities of the parent.

It also could be argued that the lack of separate employees made the conduct of the subsidiaries a joint venture with the parent, thus exposing the parent to direct liability on that basis. These and other legal precedents might be used to obtain coverage in your situation by arguing that it applies to the treasurer as an employee of the parent.

Furthermore, it is doubtful that the treasurer, who performed work for the subsidiaries, could be considered to have been an "employee," as that term is defined in the policy, insofar as subsidiary companies (B) and (C) are concerned.

The term "employee" is defined in General Crime Provisions, CR 10 00 as follows:[1]

1. "Employee" means
   a. Any natural person:
      (1) While in your service (and for 30 days after termination of service; and
      (2) Whom you compensate directly by salary, wages, or commissions; and
      (3) Whom you have the right to direct and control while performing services for you; or
   b. Any natural person employed by an employment contractor while that person is subject to your direction and control and performing services for you excluding, however, any such person while having care and custody of property outside the "premises."

   But "employee" does not mean any:

      (1) Agent, broker, factor, commission merchant, consignee, independent contractor, or representative of the same general character; or

      (2) Director or trustee except while performing acts coming with the scope of the usual duties of an employee.

While the subsidiaries paid the parent company for the services of the treasurer, the treasurer was an employee of the parent and compensated by it for all services rendered. Thus, definition a.(2) above makes clear that the treasurer was an employee of the parent and not an employee of the subsidiaries who sustained the loss, because neither such subsidiary compensated the treasurer directly by salary, wages or commissions.

Another issue to be considered here

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is whether the treasurer/director was performing acts as a director that would normally be done by an employee. If not, the treasurer/director would not qualify as an employee based on the above definition of employee, part 1.b.(2).

One might argue that since the treasurer is not an employee of the subsidiaries, coverage therefore should apply under the Theft, Disappearance and Destruction Coverage Form CR 00 04, since the embezzlement was clearly a theft of money. The problem with this reasoning, insofar as this question is concerned, is that this coverage form not only excludes dishonest or criminal acts committed by the named insured's employees, but also by its directors, trustees, or authorized representatives.

Since the treasurer was a director of the subsidiaries and the subsidiaries were named insureds on the policy issued to the parent company, as the first named insured, the theft loss would not be covered under this form either. However, here, too, legal precedent may allow for coverage to apply to the parent company, assuming the insured is successful in its efforts to show that the subsidiaries were the "alter ego" of the parent.

While this approach might succeed in getting coverage for the loss at hand, it might also be used to defeat coverage for other types of losses and even lead to fines and penalties against the entities involved. A number of complex legal issues must be taken into consideration before allowing the parent company to argue that its subsidiaries are its instrumentally as opposed to separate and distinct entities. ■

Endnote

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