

## Privacy in the Internet Era

Barbara O'Donnell

**W**ith information coming from every angle, as we strive to deliver quick results in a 24/7 Internet world, companies and their advisors face multiple challenges in protecting sensitive data from unwanted disclosure. Encouraged to increase productivity by implementing a dizzying array of technology, companies also need to take measures to ensure that employees are using these tools to promote business interests. This issue of *TortSource* offers timely features and practice tips to help attorneys protect their clients' sensitive information while taking appropriate measures to respect workplace privacy concerns.

Mercedes Colwin and Marian Rice debunk the myth that an attorney's duty to maintain client confidences is governed exclusively by the attorney-client privilege as they address the observation of client confidences under ethical obligations, discovery proce-

dures, and corporate governance. Margaret Grover tackles the balancing act between the monitoring of employees to protect company interests with the recognition of legitimate expectations of workplace privacy. Guylyn Cummins provides a fascinating review of judicial responses to media requests for public disclosure in high profile cases, ranging from the debate over disclosing the identity of Kobe Bryant's accuser to the disclosure of evidence developed in discrimination claims against some of America's largest companies. Michael Shpiece demonstrates that HIPAA privacy requirements are not just the concern of attorneys representing medical providers—they also change the procedure for obtaining discovery of medical information.

This issue explores critical areas in which expanding communications technology and information demands compete with the protection of privacy rights in the Internet era. ❖

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## Practice Pitfalls: Preserving the Client's Confidences in Today's Practice

Mercedes Colwin and Marian Rice

**T**oday's practitioner is presented with innumerable avenues of attack upon the confidences exchanged during the course of the attorney-client relationship, as well as traps that enable the inadvertent disclosure of client information. In October 2004, the American Bar Association announced the creation of the Task Force on the Attorney-Client Privilege, designed to highlight the value of preserving the privilege, among other things.

Attorneys commonly believe that the duty of confidentiality begins and ends with oral and written communications protected by the attorney-client privilege. Most jurisdictions provide that confidential communications made between an attorney and client during the course of professional employment are privileged. However, an attorney

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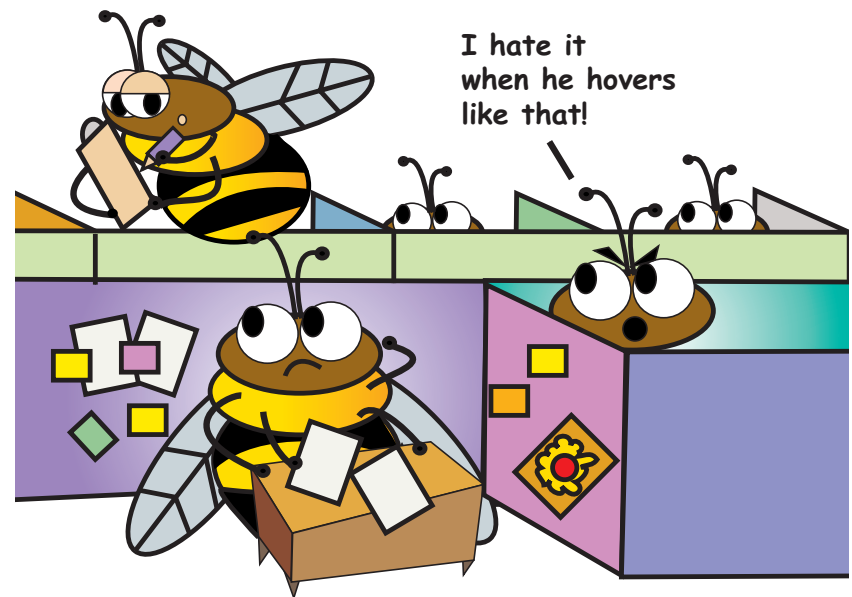


Illustration by Andrew O. Alcalá

## It's 2005—Do You Know Where Your Employees Are?

Margaret J. Grover

**P**rivacy has become increasingly important in all aspects of our lives. Telephones with cameras can snap candid and revealing photographs without the subject's knowledge. Sophisticated microphones that can be hidden easily in the wearer's clothing are readily available. Vast amounts of data can be stored on a device no larger than a finger. Medical testing can mark an individual as being likely to develop cancer or another disease, based upon genetic characteristics. Technology has enabled secret intrusion into many aspects of our lives.

Workplace monitoring of employees raises a host of issues, both legal and practical. Nurses in Boston were outraged when they were asked to wear ID badges that enabled them to be tracked wherever they were in the hospital. One large employer concluded that monitoring its employees' use of computers and telephones resulted in a substantial decline in morale and productivity, and thus publicly announced that it was ceasing all electronic monitoring.

The decision to forgo monitoring is contrary to the popular trend. For the past 15 years, management surveys have shown an annual increase in the number of companies that monitor their employees. A survey conducted by the American Management Association in 2001 revealed that almost 75 percent of mid- to large-sized American companies use some form of employee surveillance.

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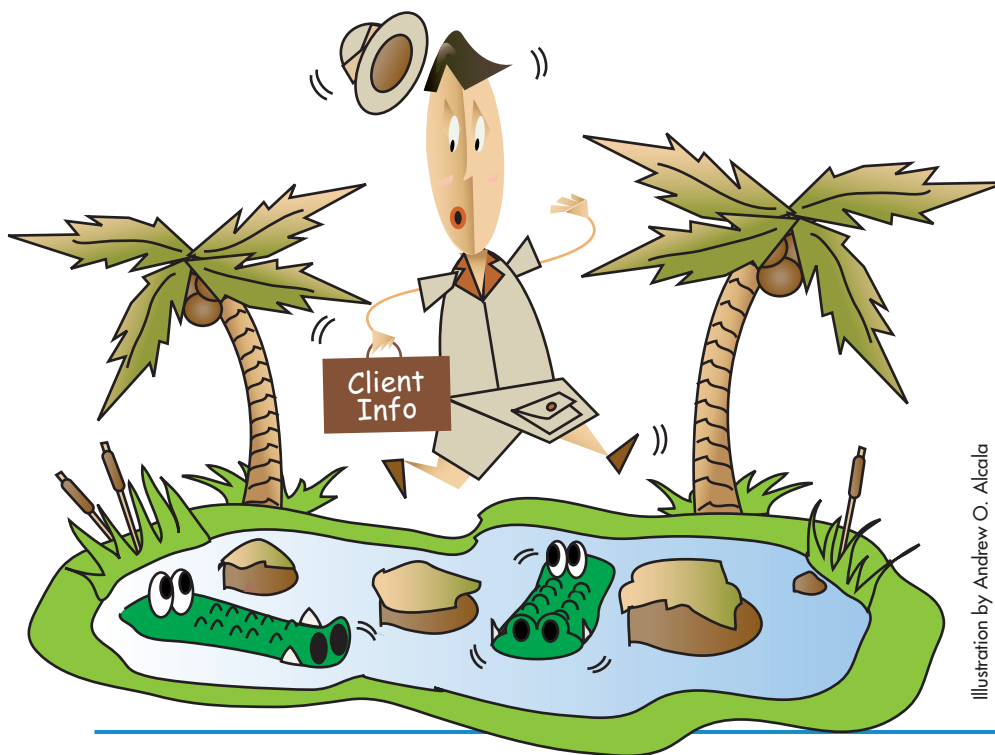


Illustration by Andrew O. Alcalá

## Meeting Round-Up Autumn in New England

Scott R. Wolf

Wow! What a great time we had at the TIPS fall meeting at the beautiful Samoset Resort in Rockport, Maine, October 7-10, 2004. If you weren't there, you missed some great lobster rolls! Kudos and much-deserved thanks must go to TIPS chair James Carroll and all those who took part in planning our meeting at such a scenic and magnificent location. The views of Penobscot Bay and the Atlantic Ocean were breathtaking.

We could not have asked for better weather: only a few clouds and just a little rain—not enough to dampen our mood. Temperatures hovered close to 70 degrees and the nights never grew uncomfortably cold. Mother Nature must have been expecting us.

Our meeting started on Thursday with a wide array of committee meetings and an ethics CLE program, co-sponsored by TIPS and Minnesota Lawyers Mutual/Prolegia, titled "Professionalism on Trial." A welcome reception overlooking the bay was outstanding—the only way the lobster could have been fresher was if we'd all caught our own minutes before the start. (By the way, did anyone try the chocolate lobster?)

Friday's committee meetings cranked into action at 8:00 a.m., and the final meeting of the day led right into the evening hospitality hour—committee work is never done. Many TIPS members also participated in the golf tournament, where they proved that their success is not limited to the legal profession (only a few balls actually made it into the Atlantic). The golf course is absolutely spectacular—truly the Pebble Beach of the East.



At the crack of dawn on Saturday, early risers participated in the Fun Run/Walk, a great way to get the morning started right. Again, a tremendous amount of work was performed during committee meetings throughout the day. Many of us found ourselves running from meeting to meeting, especially because all

members are encouraged to get involved and attend any committee meeting that interests us. Being a part of committees is rewarding, participating in cutting-edge discussions of many substantive legal areas and helping TIPS grow.

On Saturday evening, a reception and dinner took place at the Owls Head Transportation Museum, which contains several unique automobiles and other rare vehicles, including a replica of the Wright brothers' airplane. This was particularly relevant in light of the recent 100th anniversary of its first successful flight. Post-dinner entertainment by the Maine Hysterical Society, a trio of comedians, kept us laughing and crying for hours. The evening ended with informal socializing, as well as karaoke tunes from many TIPS staff and members.

Thanks to everyone who made the fall meeting such a success, and we hope to see you all at the Midyear Meeting in Salt Lake City, February 10–13, 2005. ♦

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## Practice Management

Michael R. Shpiece

### HIPAA Privacy: Grappling with the Five-Ton Gorilla

Almost every attorney who deals with individuals who have had or are seeking medical treatment will come across the mysterious acronym "HIPAA." No, it is not shorthand for a large animal but an acronym for a broad bill, the Health Insurance Portability and Accountability Act, which was enacted in 1996 and covers many topics. This article highlights only a few of the issues in one significant part of HIPAA: the 401,034 words comprising the HIPAA privacy regulations.

• **Applicability.** Some people claim HIPAA covers more than it does. It applies only to health information held by a health provider, health insurer, or a health benefit plan. (Technically, every employer that provides health coverage to its employees has a plan, which is a separate legal entity.) But if the information is from somebody else, HIPAA probably does not apply. This gets tricky: Medical information held by a physician is covered, as is that same information if

it is provided to a self-funded employer plan administered by the employer. But the same information, provided to a workers' compensation carrier or to the employer in support of a leave request, is not covered. (Of course, other privacy laws may apply.)

• **Business associate agreement.** If you work for a person governed by HIPAA, that person can give you protected information only if you sign a "business associate" (BA) agreement. The regulations set forth what is required in that agreement; by signing it, you agree to be bound by the HIPAA privacy regulations, which may require additional attention to privacy considerations. Many BA agreements include indemnification clauses that may go beyond what is reasonable. Other agreements go beyond what is required and address other business issues. Although BA agreements must state that you return or destroy all protected information when the agreement ends, that may

not always be appropriate. You may want to retain some information—if for no other reason than to protect against a later malpractice claim.

• **Discovery implications.** When seeking protected information from a covered entity, traditional discovery methods must be modified. Traditional discovery must be accompanied by (a) a consent signed by the patient, (b) a documented statement that you have made reasonable efforts to provide the patient with notice and an opportunity to object, or (c) a documented statement that you have made reasonable efforts to obtain a protective order limiting the use of the information to the proceeding and requiring the return or destruction of the information thereafter. Alternatively, a court order will suffice.

The first criminal conviction for a HIPAA privacy violation occurred in August 2004 and resulted in a 16-month sentence. It behooves attorneys to understand the implications of these regulations for themselves and their clients. For additional information, see the regulations at 45 C.F.R. Parts 160 and 164 or go to [www.hhs.gov/ocr](http://www.hhs.gov/ocr), and click "View Health Information Privacy FAQs." ♦

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## Mark Your Calendar

**Insurance Coverage Litigation Committee Midyear CLE Program: What's New in Insurance Coverage**  
February 17–19, 2005, Phoenix, AZ  
(312-988-5597)

**Transportation MegaConference VII**  
March 3–4, 2005, New Orleans, LA  
(312-988-5708)

**Emerging Issues in Motor Vehicle Product Liability**  
March 30–April 2, 2005, Phoenix, AZ  
(312-988-5708)

**Toxic Torts & Environmental Law CLE Meeting**  
March 31–April 1, 2005, Phoenix, AZ  
(312-988-5597)

**TIPS National Trial Academy**  
April 2–6, 2005, Reno, NV (312-988-5708)

**Property Insurance Law Committee Meeting**  
April 14–16, 2005, Antonio, TX  
(312-988-5708)

**Staff Counsel Committee Meeting**  
April 27–28, 2005, New Orleans, LA  
(312-988-5708)

**TIPS Section Spring Meeting**  
April 27–May 2, 2005, New Orleans, LA  
(312-988-5672)

# Secret Justice vs. the Presumption of Public Access to the Judicial System

Guylyn R. Cummins

Although litigants of the past have frequently stipulated to “secrecy” with respect to judicial records and proceedings, media companies throughout the country slowly are changing that trend. A ruling in the well-publicized Kobe Bryant case is one example. In October 2004 a federal judge rejected the request of Bryant’s rape accuser to remain anonymous in her civil lawsuit against the NBA star, finding that open court proceedings outweighed the plaintiff’s desire to shield her identity.

Arguments for secrecy in the Bryant trial were based upon fairly common claims, which tend to be heard by media lawyers in both civil and criminal courts: the complainant contends that “sordid” publicity might affect the fairness of the trial and that opening the proceedings would be invasive of the parties’ privacy. Those in favor of an open judicial system say it protects against false accusations and provides an avenue for vindication, or at least for an understanding of the judicial resolution of societal issues.

A recent massive gender discrimination lawsuit filed against one of America’s largest government contractors proceeded under a blanket sealing order until the media intervened to request access to thousands of documents and pages of deposition transcripts designated as secret by the defendants. See *Beck v. Boeing Co.*, Case No. C00-301P (W.D. Wash. 2003). Discrimination charges against some of America’s biggest companies—with employee populations larger than those of some U.S. cities—proliferate and become indisputably a topic of tremendous importance to workers of all colors, ages, genders, and backgrounds (not to mention society at large). But the presumption of public access in such cases often requires media enforcement against strenuous opposition.

Until the end of the 1970s, secret justice was the norm in America’s courts. Public access rested within the unbridled discretion of the courts and the parties. In 1980 the U.S. Supreme Court changed that norm and established a First Amendment right of public access to criminal court proceedings. Such a right was necessary, the Court reasoned, to permit the public to understand and form independent views of the manner in which justice is administered on its behalf. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572–73 (1980).

For the past 25 years, the public access guarantee has been expanded in a steady march of legal cases that have established public access rights to virtually every portion of civil and criminal trial and pretrial proceedings, as well as to the underlying files and records. Many companies and individuals do not realize that not only is the presumption in favor of public access to America’s courts a high hurdle to clear to obtain secrecy, but “stipulated secrecy” orders also are far from enforceable. Mindful of the decision in *Richmond Newspapers*, litigants should beware that blanket protective orders routinely fall prey to judicial nullification when challenged.

## Legal Rules for Public Access

The U.S. Supreme Court has repeatedly held that the First Amendment guarantees the press and the public a right of access to criminal proceedings. The First Amendment public access guarantee requires that the “compelling interest” test be applied before any portion of a court’s proceedings is closed to the public. In *Press-Enterprise v. Riverside County Superior Court*, 478 U.S. 1, 10 (1996) (*Press-Enterprise II*), the Court said the test requires that the closure of a court proceeding must be a *rare occurrence* and be allowed only where “specific, on the record findings are made demonstrating that ‘closure is essential to preserve higher values and is narrowly tailored to serve that interest.’”

The substantive requirements of the First Amendment, explained the Court, require that (1) closure or sealing serves a compelling interest, (2) would be harmed, and (3) no alternatives to closure or sealing exist that would adequately protect the compelling interest. In addition, procedural requirements mandate that the public be heard on all access issues, and courts must not base access decisions on conclusory assertions alone but must make specific, factual findings to meet the test based upon evidence. *Press Enterprise II* also found that the party seeking clo-

sure has the burden to present facts supporting closure and to demonstrate that available alternatives will not protect that party’s rights—but noted that speculation that some harm or prejudice *might* occur cannot meet the compelling interest test. Once access has been found to be appropriate, a necessary corollary of the presumption is that it should be “immediate and contemporaneous.” *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994).

## Procedure Rules

In the same vein, to some litigants’ surprise, pure discovery also is subject to a presumption of public access. The Federal Rules of Civil Procedure establish a presumption that all information produced in discovery in a civil action is public—a presumption that may be overcome only by a showing of good cause. Rule 26(c) of the Federal Rules governs the issuance of protective orders as follows:

Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

Rule 26(c) and Rule 5(d) of the Federal Rules of Civil Procedure dictate that discovery materials are presumptively open to public inspection unless a valid protective order directs otherwise. See *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 789–90 (1st Cir. 1988) (citation omitted), *cert. denied*, 488 U.S. 1030 (1989).

Rule 26(c) furthermore ensures that the party seeking a protective order has the burden of establishing good cause. That burden is not a light one. The moving party must present a factual showing of a particular and specific need for the protective order. A demonstration of good cause must show that “(1) the documents in question truly are confidential and (2) disclosure of the documents would cause a ‘clearly defined and very serious injury.’” *Traveler’s Insurance Co. v. Allied-Signal Inc. Master Pension Trust*, 145 F.R.D. 17, 18 (D. Conn. 1992).

*Cipollone v. Liggett Group*, 785 F.2d 1108, 1121 (3d Cir. 1986), moreover, found that the injury must be “significant, not a mere trifle”; broad allegations of harm, “unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.” Mere embarrassment from the release of information “is insufficient to constitute serious harm,” and an “applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious.”

In recent years, civil litigants have increasingly invoked Rule 26(c) as grounds to support the entry of stipulated, umbrella protective orders governing the exchange in discovery of documents and information that the parties may thereafter designate as confidential. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981). Precisely because such a procedure does not require a district court to make the particularized good cause determination required by Rule 26(c), the propriety of such orders has been sharply questioned, and they have often been invalidated. See *Richmond Newspapers*, 448 U.S. 555 (citation omitted). Stipulated protective orders thus are often subject to challenge and modification.

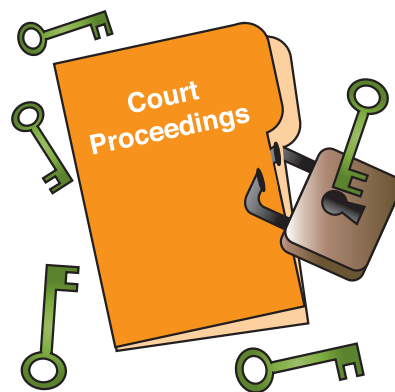
## Conclusion

The right of the public to the free flow of information about the administration of its judicial system is crucial to a democratic society. In *Nebraska Press v. Stuart*, 427 U.S. 539, 587 (1966) (Brennan, J., concurring), the Supreme Court held that secrecy of judicial action

can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.

As *Craig v. Harney*, 331 U.S. 367, 374 (1947), established, “[W]hat transpires in the courtroom is public property.” ♦

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## Preserving the Client's Confidences in Today's Practice

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ney's obligation to preserve the confidences of a client is much broader than the standard definition of what ordinarily constitutes material covered by the attorney-client privilege.

### Ethical Duty of Confidentiality

Rule 1.6 of the ABA Model Rules of Professional Conduct requires that, absent the client's informed consent to disclosure or implied authorization due to the nature of the representation, an attorney must keep confidential all information "relating to representation of a client." The duty of confidentiality includes not just matter communicated to the attorney by the client but may include other information related to the representation—regardless of the source of the information.

### Permissible Disclosure

Rule 1.6(b) further provides that an attorney may reveal information relating to a client's representation in order to accomplish the following:

1. Prevent reasonably certain death or substantial bodily harm.
2. Prevent the commission of a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another, and in furtherance of which the client has used or is using the lawyer's services.
3. Prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the commission of a crime or fraud, in furtherance of which the client has used the lawyer's services.
4. Secure legal advice about the lawyer's compliance with the Rules.
5. Establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or respond to allegations in any proceeding concerning the lawyer's representation of the client.
6. Comply with other law or a court order.

To the extent any of the exceptions apply, a lawyer is not granted *carte blanche* to disclose confidences but may do so only to the extent reasonably necessary to achieve the purpose of the exemption. Disclosure beyond that point may subject the attorney to disciplinary action or civil liability.

### Discovery Seeking Client Communications

Attorneys are often served with subpoenas seeking disclosure of material relating to a current or former client's representation. Absent the existence of a superceding law, an attorney must consult with the current or former client about a third party's efforts to obtain materials or testimony related to a client representation. When confronted with an attempt to compel production of material related to the representation, the attorney should first determine whether the client will give "informed consent" to a waiver of the confidentiality. Informed consent under Rule 1.0(e) is "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." What must be communicated to obtain the client's informed consent to disclosure depends upon the circumstances of each situation. However, if the disclosed material could impact the client in any manner, the consequences must be reviewed and explained. Although there is no requirement that the client's consent be in writing, the attorney should obtain the client's explicit written permission before any disclosure is made.

If other counsel presently represents the client, the attorney's first call should be to that attorney, who may be able to assist in providing direction.

If the former client does not consent to the discovery disclosure, under Rule 1.6 the attorney must resist the subpoena if the testimony or the production of documents is related to the representation of the client so as to invoke either the attorney-client privilege or the ethical duty of confidentiality. It is the attorney's obligation to raise all non-frivolous arguments against disclosure or to limit the scope of disclosure. In the event of an adverse ruling, the attorney must consult with the client about the possibility of an appeal. Upon receipt of a final order of the court, Rule 1.6(b)(6) allows the attorney to comply with the court order. Although the language of the Rule is permissive and not mandatory, an attorney's failure to disclose a client confidence in the face of a final court order may result in a finding of contempt.

### Corporate Governance

The Sarbanes-Oxley Act directs the Securities Exchange Commission (SEC) to establish standards of professional conduct for attorneys who appear and practice before the Commission. In response, the SEC promulgated rules requiring attorneys to report evidence of a material violation of securities laws or breach of fiduciary duty "up the ladder" within the company to the chief legal counsel or officer. If there is no appropriate response,

the SEC requires the attorney to report the evidence to the audit committee, to another committee of independent directors, or to the full board of directors. The rules originally proposed by the SEC included the requirement for a "noisy withdrawal" by the attorney in the event the remedial up-the-ladder reporting was ineffective. Implementation of the noisy withdrawal provisions, however, was not included in the final rule.

In March 2003, the ABA released revised standards for corporate governance that, if adopted by the individual states, apply to all attorneys representing business organizations, not just to attorneys appearing before the SEC. Under Rule 1.13(b), up-the-ladder reporting is triggered only if the attorney actually knows of a current legal violation. If warranted under the circumstances, the ABA rules anticipate up-the-ladder reporting "to the highest authority that can act on behalf of the organization." Unlike the SEC rules, the ABA rule's reporting obligation is not triggered if the attorney reasonably believes that reporting is not necessary to the best interest of the organization. Noisy withdrawal is also permitted but not required under Rule 1.6(e).

If the "highest authority" within a business organization continues to act (or not to act) in a manner that is a clear violation of law, under Rule 1.13(c) the attorney may reveal information relating to the representation in order to prevent substantial injury to the organization, whether or not Rule 1.6 permits such disclosure.

### E-mail

As with any other mode of communication, attorneys must take all reasonable steps to ensure that client confidences in e-mails are not disclosed. Premising that the expectation of privacy for e-mail is the same as for ordinary telephone calls and that the unauthorized interception of an electronic message is illegal, the ABA concluded that a lawyer may communicate with a client via e-mail without encryption. ABA Formal Ethics Op. 99-413 (1999). In *United States v. Councilman*, 373 F.3d 197 (1st Cir. 2004), however, the First Circuit recently held that interception of an e-mail by the employee of an Internet service provider (ISP) was not illegal under the Wiretap Act because the definition of "electronic communication" protected by the statute, unlike the definition of "wire communications," did not include the storage of communications after delivery to the ISP. In light of this decision, the rationale for the ethics opinion may be undermined, and further review is warranted.

### Inadvertent Production of Client Confidences

Despite the implementation of safeguards, attorney-client communications may be inadvertently disclosed through document production or even within a misdirected letter or e-mail. Under ABA Model Rule 4.4, upon the receipt of materials inadvertently produced, an adversary has the ethical obligation to promptly notify the sender of the mistake. However, the failure to promptly seek return of inadvertently produced documents may act as a waiver. As a result, immediate steps must be taken to retrieve the materials. In appropriate circumstances, a ruling should be obtained to the effect that the adverse party may not use any information gleaned from the inadvertent production to disadvantage the client.

Regardless of the circumstances presented, an attorney should act with care and consult all available resources before disclosing a client confidence that may subject the client to a disadvantage and the attorney to disciplinary action or civil liability. ♦

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## Legislative Update

Leo J. Jordan

### The 109th Congress Convenes

The House of Representatives has remained safely in Republican hands—moving even more firmly within the GOP's grip in the November 2004 election—and should be more inclined than the Senate to carry out a presidential agenda.

I had predicted that the Senate would in the end retain a slight Republican majority. I was only partly correct. The Senate did retain its majority, but seven new Republicans were elected. Republicans lost seats to Democrats in Colorado and Illinois. The Republicans now control 55 Senate seats, and the Democrats control 45. One of the newly elected Republican senators is Mel Martinez of Florida, former head of the Florida Academy of Trial Lawyers. Most of our readers are well aware of the 60 votes required to cut off Senate debate and force a floor vote on pending legislation. Although the hand of the Republicans is surely strengthened by this election, the total count still rests somewhat uncomfortably—for both parties—below the required 60-vote level. Realistically, in terms of legal reform measures, what can we expect from the 109th Congress?

#### Asbestos Trust Fund

When last we visited this pending legislation, Senate Majority Leader Bill Frist and Minority Leader Tom Daschle were exchanging “polite” letters to each other, attempting to stake out individual positions. They seemed to have moved closer on the size of the trust fund (\$140 billion), but the loud cheer you heard from manufacturing and other business lobbyists on election night was due to Daschle's defeat in South Dakota by Republican John R. Thune. The business community viewed this as good news, getting rid of an obstructionist to the President's agenda. The importance of this vote was made patently obvious by the amount of money spent: Daschle, \$18 million; Thune, \$13 million. Much of the money came from outside the state.

Daschle appeared to be working in good faith to resolve differences in the trust fund legislation; however, opponents were uncomfortable with his position on lawsuits already in the pipeline, which would have allowed lawsuits farther along the litigation pipeline to continue toward resolution. Asbestos defendants and their insurers preferred that most pending claims and litigation be moved immediately into the trust fund.

Daschle's defeat somewhat improved the chances of a successful asbestos reform bill's passing the 109th Congress. Although the trust fund remains the preferred vehicle of reform proponents, support is growing for the “medical criteria” approach, under which claimants would be prohibited from bringing a lawsuit unless they met the minimum medical criteria.

#### Class Action Legislation

The business community is involved in several important facets of civil justice reform, yet none has galvanized the overall community more than the move for class action litigation reform. It has been the number one priority for the U.S. Chamber of

Commerce and its members and will remain the top business priority in the 109th Congress. According to *Legal Times*, November 9, 2004, class action reform, which would move most large class actions from state courts to federal courts, is a business-supported measure likely to pass. There is also strong support from a group of six or seven Democrat senators who favor class action reform. Getting the 60 votes necessary to cut off debate appears more likely in the new Congress.

#### Medical Malpractice Reform

Although there were widespread pre-election criticisms from administration supporters about the evils of “trial lawyers,” I was never convinced that the cry for medical liability reform was anything more than an election clamor. The 108th Senate was not about to enact a law placing limits on general damages. During the final presidential debate in Tempe, you might have noticed a nuanced treatment of this issue when President Bush called for medical malpractice reform and, specifically, for caps (\$250,000) on damages. In response, John Kerry affirmed the need for some reform and appeared to agree that caps on punitive damages might be in order. Even John Edwards stated on more than one occasion that sanctions would be appropriate for lawyers who repeatedly file frivolous medical malpractice lawsuits.

Because the President made so much of this issue, congressional Republicans will insist on his support of medical liability legislation and, thus, strengthen the possibility of its enactment. Anticipated reform will call for caps on “pain and suffering” damages, as well as on punitive damages. We also can expect efforts to reduce the statute of limitations on claims, to restrict attorney fees, and to ease the collateral source rule. We may expect early House passage and, somewhat later, a compromise Senate bill modifying the general damage cap size at \$500,000. Even Senator Mel Martinez appears to favor a \$500,000 cap.

#### Terrorism Risk Insurance

In late fall of 2004, the House Financial Services Committee approved an extension of the Terrorism Risk Insurance Act (TRIA) to December 31, 2007. The extension had broad bipartisan support in both houses, and Washington experts predict passage in some form by mid-2005. Supporters anticipate that new TRIA legislation will include group life insurance, but at this time, neither the full House nor Senate appears ready for further action.

Although I have offered some encouragement for pending insurance-related legislation, no one is yet prepared to predict the effect of recent insurer-broker problems. *The ReReport*, an international reinsurance newsletter, suggested on October 24, 2004, that insurers can expect no favors from politicians and might as well abandon any hope of tort reform or related legislation for the foreseeable future. But *The Hill* reported an important balancing factor, in that Senator Arlen Specter (R-PA), the probable next chair of the Judiciary Committee, has promised Senate Republicans that he will not be an obstacle on tort reform issues.

The 109th Congress shows promise of an interesting and possibly stress-inducing session for tort and insurance lawyers. ♦

*Leo J. Jordan is chair of the TIPS Governmental Affairs Committee.*

### Trial Themes Where You Least Expect Them

*continued from back page*

lem, both in history and in Hollywood: “Houston, we have a problem.” We explained in our opening that the exhibit opposing counsel ignored was an admission of a significant problem, and we tied that problem to the theme and story of our case. Thus we put a spotlight on our opponent's problem. It got even better when the opposing counsel in his final argument decided to address our use of “Houston, we have a problem” by mocking the argument and claiming the issue was “minor” and “trivial.” We modified our closing to “Houston, we have a *minor* problem,” with compelling effect.

Another gem came from opponent's counsel's argument that the language limiting the majority shareholder's sole and absolute discretion to setting compensation “for work as employees” was coincidental and did not demonstrate intent to limit his compensation rights. In anticipation of this argument, we had carefully

gone through the agreement and found that the limitation relating compensation to being for work as an employee was found three times in that very paragraph. Our response: “Once is a coincidence, twice is a habit, and three times is a tradition. There is a tradition of limitation in this paragraph.” We also wove this theme into the cross-examination of the majority shareholder, who testified that he frequently had seen things repeat by coincidence, and that three times in one paragraph was still a coincidence. It was not a coincidence that his testimony was not found credible.

By the time closing arguments arrived, these themes had become prominent. And, yes, the other side “had a problem.” Broaden your horizons in your search for compelling themes. You might find something good where you least expect it. ♦

*John Buckley is the chair of the TIPS Trial Techniques Committee. He is a partner and trial lawyer at Ungaretti & Harris in Chicago and can be reached at [jbuckley@uhl.com](mailto:jbuckley@uhl.com).*

## Edmund S. Muskie Pro Bono Service Award

The Edmund S. Muskie Pro Bono Service Award recognizes TIPS members who represent the dedication to justice, public service, and role as a lawyer and distinguished TIPS leader that were embodied by Senator Muskie. Letters of nomination for the 2005 award describing how an individual or group has provided outstanding pro bono service as defined in Rule 6.1(a) of the ABA Model Rules of Professional Conduct must be submitted by February 15, 2005. Submit nominations online at [www.abanet.org/tips/muskieawardreg.html](http://www.abanet.org/tips/muskieawardreg.html). ♦

## It's 2005—Do You Know Where Your Employees Are?

continued from page 1

Because of this increased surveillance, privacy in the workplace is a growing concern. Employees have certain legitimate expectations that they do not give up simply by coming to work. Employers also have legitimate business reasons to obtain information or to intrude upon areas that the employee might believe to be private. In some situations, the rights are defined by statute or state law. For the most part, however, balancing employers' and employees' respective rights is done through case-by-case analysis. It is important for both employers and employees to understand the proper balance between employees' legitimate expectations of privacy and employers' legitimate business needs to conduct searches or obtain information.

### Statutory Privacy Protections

Both state and federal statutes may control the balance between employees' privacy rights and employers' legitimate business needs. Some of the areas governed by these statutes include the following:

- Monitoring or intercepting electronic communications.
- Monitoring or tape recording telephone calls.
- Monitoring employees' activities in areas designed for the employees' personal comfort, such as restrooms, locker rooms, or lounges.
- Using or disclosing personnel records.
- Using or disclosing medical records, including genetic data and records of disabilities.
- Using consumer reports that contain information on a consumer's character, general reputation, personal characteristics, or mode of living.
- Using polygraphs.
- Using arrest records.

### Common Law Privacy Protections

When privacy rights are not protected by statute, the question of whether surveillance invades an employee's right of privacy is often decided under one or more theories of invasion of privacy. Most claims for invasion of privacy fall into one of four generally recognized tort claims: (1) intrusion upon seclusion, which is also called intrusion into private affairs; (2) public disclosure of private facts; (3) false-light publicity, which places the plaintiff in a false but not necessarily defamatory position in the public eye; and (4) appropriation of the plaintiff's name, likeness, or other element of the plaintiff's personality for a commercial use.

Despite the many recognized privacy causes of action, employers often prevail in claims for invasion of privacy in the workplace. The challenges employees face were outlined by J. Flannagan in the article *Restricting Electronic Monitoring in the Private Workplace*: "Under the common law action for invasion of privacy, a private employee may claim that the electronic monitoring practiced by the employer constitutes an intrusion into the employee's privacy that would offend a reasonable person. An employee alleging

this tort must surpass several formidable obstacles. First, the employee faces difficulty in framing the work environment as a sufficiently private atmosphere. Second, the employee must establish the monitoring conduct as highly objectionable. Third, some courts maintain that publication of the information discerned from the surveillance must accompany the invasion of privacy. The combination of these requirements typically defeats the employee's tort claim." 43 DUKE L.J. 1256, 1267 (1994).

Courts have recognized that employers may have several legitimate business purposes that impinge upon employees' rights of privacy. Common business situations involving private information or employee observation include the following:

- Gathering information for employment purposes, such as Social Security numbers and documentation of ability to work.
- Obtaining medical information in order to determine the employee's ability to perform the job, to respond to a request for accommodation or medical leave, or to conduct drug testing.
- Ensuring internal or physical security through surveillance, whether by individuals or cameras.
- Monitoring employees' e-mail, computer use, and Internet access to ensure data security.
- Monitoring employees' telephone calls, e-mail, computer use, and Internet access to check job performance or customer satisfaction.

• Gathering information about an individual's relationships or personal finances in order to investigate a claim of sexual harassment or other workplace impropriety. In evaluating whether workplace monitoring is within prescribed limits and acceptable, courts also weigh employees' legitimate expectations of privacy. Employees' legitimate expectations may include:

- Privacy for personal functions, such as changing clothing or going to the restroom.
- Protection of medical information and records.
- Protection of person, including medical and drug testing.
- Protection of Social Security and financial information.
- Ability to maintain personal belongings.
- Freedom from surveillance.

### Best Practices for Employers

Employers that plan to monitor the workplace should adopt and distribute express policies permitting the monitoring. Employers also should avoid monitoring private areas and should articulate a legitimate business need for any monitoring that will be conducted. Some of the best employer practices include:

- Adopting policies that disclose the areas the employer intends to monitor, including employees' offices, desks, voice mail, e-mail, computer files, and computer use.
- Adopting policies that explain why the employer has a legitimate business need to conduct surveillance or monitoring.
- Adopting policies governing employee personal use of business telephones and computers. The best policies recognize that personal use will occur, permit it, but place definite restrictions on it.
- Promptly ceasing the monitoring of any communication that is obviously private, except to the extent necessary to determine whether the employee is using business telephones or computer lines for unlawful purposes or in violation of company policies.
- Placing cameras (if used) where they are visible, as long as this placement will not jeopardize the surveillance. In addition, when practical or mandated by statute, employees should be given written notice of the surveillance. If the cameras record voices as well as pictures, employers must review and be sure to follow all applicable state and federal statutes and regulations.
- Avoiding the monitoring of restrooms, locker rooms, or other areas where employees have legitimate expectations of privacy.
- Identifying and complying with all applicable statutes and regulations governing surveillance.
- Engaging in collective bargaining before implementing any workplace monitoring in unionized areas.

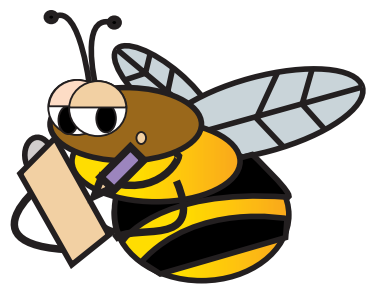
### Employee Challenges to Monitoring

In litigation, employees often assert privacy claims, either independently or as an element of a wrongful termination claim. Employees who discover that restrooms were monitored may claim severe emotional distress upon learning that co-workers or security personnel were observing their private bodily functions. Employees accused of selling drugs in the workplace may attempt to exclude evidence of this by claiming that the employer unlawfully searched purses, duffel bags, lockers, or desk drawers. Employees terminated for improper use of the Internet may claim that the employer discovered that use only by invading the employees' right to privacy, or that the company policy was only selectively enforced.

Employees' counsel should thoroughly investigate any potential privacy issues. Some of the key questions to ask the suspect accused employee and co-workers include:

- Did you believe that your employer could not examine your locker/desk/e-mail, etc.? If so, why?
- Does your employer have a written policy that allows it to examine your locker/desk/e-mail, etc.? If so, was a copy given to you? How did you learn about the policy?
- Does your employer enforce the policy?
- Do you know of others who have done the same thing you did but were not disciplined or terminated? In some cases, an employee who is fired because of distributing joke e-mail will often be able to point to managers who use the company e-mail in a similar manner. An employee who is fired for excessive personal use of the Internet may know of senior managers who often check their investments or follow sporting games using company-provided Internet. ❖

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# “When I Was a Young Lawyer”

**Dennis W. Archer**  
Immediate Past President, American Bar Association

## What is your background and what inspired you to become a lawyer?

I was born in Detroit, but I grew up in Cassopolis, Michigan, which is 187 miles from the city of Detroit, population 1,500. I started working at the age of eight as a caddy on a golf course, and I set pins in a bowling alley and did other odd jobs. My father had a third-grade education, and my mother had a high school education. My parents made it very clear to me that education was absolutely imperative, and that I was going to go to college.

After college, I enjoyed teaching learning-disabled students in the Detroit public schools. When I decided to return to school for a master's degree so that I might become a principal, I found we were using the exact textbooks I'd used at Western Michigan University, from which I graduated to become a teacher. I expressed my frustration to the young lady whom I was dating and she said, “Why don't you go to law school?” I said, “I don't know anything about law, there's no one in my family who is a professional. I've never had to use a lawyer; I don't even know any lawyers.” She said, “I think you'd be good.” And so I took the LSAT exam (the first year it was offered), passed, started law school, and fell in love with the law. I also married the woman who made the suggestion.



Dennis Archer then and now.



## Where did you go to law school and what did you do right after that?

I went to Detroit College of Law and received my JD in 1970. I practiced law as a trial lawyer and a partner in several Detroit firms and served as an associate professor at the Detroit College of Law and adjunct professor at Wayne State University Law School. I also became very involved in bar associations. I've been privileged to be president of the Wolverine Bar, the National Bar Association, and the State Bar of Michigan.

## Do you have any young lawyer experiences that particularly stand out in your memory? If so, what have you learned from them/how have they helped you to become so successful?

I became active as a young lawyer with the Wolverine Bar Association, the Young Lawyers Section of the State Bar of Michigan, and the American Bar Association Young Lawyer Section. I was elected president of the Young Lawyers Section of the then Detroit Bar Association.

I had several milestones. At my first National Bar Association annual meeting in 1971, a lawyer from Florida, Chesterfield Smith, came to our association and said, “We want you [African-American lawyers] involved in the work of the American Bar Association, and the House of Delegates has granted a seat for a representative of the National Bar Association.” The NBA president at that time was Judge Edward F. Bell, from Detroit. I was quite intrigued and impressed that the ABA had invited the NBA to participate, so I became involved in the ABA the following year during its 1972 Annual Meeting in San Francisco, at the direct invitation of Harry Hathaway, chair of the Young Lawyers Section.

The second milestone was in 1983 when William Reese Smith, also of Florida and then ABA president, and Jane Barrett, chair of the then Young Lawyers Section, invited the leaders of the national ethnic bars to meet in Washington to talk about how to improve the opportunities for lawyers of color.

In 1984 ABA President Wallace Riley from Michigan created a special task force to look into the myths and realities of what was holding back lawyers of color.

In 1986, as a result of the work and the report of the task force, President William Falsgraf created the Commission on Opportunities for Minorities in the Profession and appointed me as its first chair. The following year, the Commission on Women in the Profession was created, chaired by Hillary Rodham Clinton. Together, we opened doors and knocked down glass ceilings.

## Whom do you most admire?

Justice Thurgood Marshall was an inspiration, but there are so many others: Charles Hamilton Houston, Judge Constance Baker Motley, Judge Damon Keith, Judge/Solicitor Wade McCree, former Supreme Court Justice Otis Smith, Congressman George Crockett, Jr., and those who mentored me through the ABA, like Harry Hathaway, John Krsul, Joel Boyden, and former ABA Presidents Chesterfield Smith and William Reese Smith. I must also mention my wife, Trudy, who serves as judge of Michigan's 36th district, because she was the person who convinced me to go to law school.

## What is your greatest source of professional pride?

In 1990 the *Michigan Lawyers Weekly*, a statewide publication for lawyers and judges, did a survey to find the state's 20 most respected judges. I came in as number one.

## What got you started with ABA involvement?

I was drawn to the ABA as a student and a member for two reasons. One, because they had formally invited the National Bar Association to have a seat in the House of Delegates, as I mentioned; and two, because Harry Hathaway, who was the incoming chair of the Young Lawyers Section, was making a statement about inclusion.

## What was the worst professional advice you ever received?

Don't get involved with the ABA because of its past discrimination practices.

## What was the best professional advice you ever received?

Always keep a clean desk, go out and meet your clients in the lobby, and walk them back to your office. Always return your telephone messages the same day. Always keep your clients fully informed.

## What personality trait has served you best over the years?

The ability to listen.

## What challenges you the most?

Expectations so high that they are impossible to meet.

## What is the one thing you cannot stand (regarding the law/lawyers)?

Discrimination.

## What is your favorite type of legal work?

I love it all.

## What are your future ambitions?

I am pleased to return to the full-time practice of law at Dickinson Wright and to successfully contribute to the corporate boards on which I am privileged to serve.

## What can the ABA do to be a good home to young lawyers?

To paraphrase John F. Kennedy: “Ask not what the ABA can do for you, but what you can do for the ABA.” The ABA is only as good as the participation of its members. It's the members who make the work of the association relevant—to our profession, to our justice system, and, ultimately, to our society. And the voice of our young lawyer members is among the most important because they are the future leaders of the profession. I became involved as a young lawyer, and my steady participation has enriched me and enhanced my career path and personal life every step of the way. Furthermore, I know that my work in the organized bar, along with that of more than 405,000 of my colleagues, has made a difference in America and world civilization.❖

## Dennis Archer's Advice for Young Lawyers:

- Take time to smell the roses.
- Practice ethical law.
- Return telephone calls the same day.
- Get malpractice insurance as part of your professional practice.
- Charge reasonable fees.
- As an alumnus, give back to your school.❖



## In Motion

**David V. Wilson II** of Hays, McConn, Rice & Pickering in Houston, TX has been named one of Houston's Top Lawyers Under 40 by *H Texas Magazine* and has been named to *Who's Who in American Law*. David is a vice-chair of the Appellate Advocacy Committee.

**Andrew Hardwick, Pamela Asjes, and Elizabeth Disana** have joined Evans & Dixon, L.L.C. as associates in the firm's worker's compensation practice. Andrew and Elizabeth are based in the firm's St. Louis, MO office, and Pamela is based in the firm's Kansas City, MO office.

**Jane Harper-Alport**, an attorney who has worked in legal publishing for several years, is the new ABA staff editor for *TortSource*, *The Brief*, and *Perspectives*, the newsletter for the ABA's Commission on Women in the Profession. Contact Jane at 312-988-6046 or harperj2@staff.abanet.org.❖



## Trial Tips

John Buckley

### Trial Themes Where You Least Expect Them

“A cowboy’s work is never done.” The same holds for creative trial lawyers. Over here and over there, ideas for trial themes are everywhere. There is no need to stop with George Martin—a cowboy interviewed by the Writers Project in the 1930s—and Dr. Seuss, the respective sources for the quote and paraphrase noted above. Familiar quotations, scenes, and stories are all potential material for persuasive trial themes. And imitation is the sincerest form of flattery for the trial lawyer.

A few guidelines are in order. The theme is an effort to persuade. It must be familiar or it will not register with the jury. It must be memorable or it will be forgotten by the time decisions are made. It must provide a framework for analyzing and deciding the issues in your client’s favor. With those guidelines in mind, good hunting.

Common and familiar sayings, like the cowboy reference above, are always a fruitful source. Every good trial lawyer owns a copy of *Bartlett’s Familiar Quotations* or a similar collection of familiar sayings. History, and the lessons learned from it, are another fertile ground for themes. Hollywood is still another resource.

Businesses are just about the most sophisticated players in the field of persuasion. They often have entire departments devoted to marketing. One of their primary goals is to develop a brand—an identity in the marketplace that is synonymous with the product itself (e.g., Coke for cola and Xerox for copy). That is what you want to achieve with your jury.

Marketing/branding techniques are also trial lawyers’ techniques. Although many lawyers win at the thought of a trial lawyer as a salesman, our stock-in-trade are the same: persuasion. Salesmen are trying to get the public to buy a product; trial lawyers are trying to get a judge or a jury to accept a point of view.

In one recent case, several of these sources came together to create a compelling trial theme. The case involved a shareholders’ agreement between a majority shareholder and our clients, the minority shareholders, in a close corporation. The shareholders’ agreement provided that the majority shareholder “shall determine the compensation of the shareholders for work as employees of the Company in his sole and absolute discretion.” During the five years of this agreement, the majority shareholder took from the Company amounts necessary to pay his personal loan payments, to set up off-balance sheet reserve accounts in his name, and to pay all of the related income tax liability that went with making these payments to himself. The majority shareholder relied on the “sole and absolute discretion” language to justify his actions. We relied on the “for work as an employee” language to challenge these payments.

A theme that was readily apparent to us before trial was breach of fiduciary duty. The majority shareholder owes this duty regardless of the breadth of his discretion; he denied owing one; and the concept of the fiduciary holds a special place in the law—one of trust and obligation. Thus a piece of our story line became how the Company went from the rallying cry of “all for one and one for all” to just “all for one.” This theme focused the trial on the majority shareholder’s behavior and his greed.

Themes also develop during the trial. During the opening argument in this trial, the majority shareholder’s lawyer glossed over a key exhibit. The attempt to downplay a problem gave us the opportunity to use one of the most memorable examples of understating a prob-

## Correction!

The article “My Salt Lake City” in the Fall 2004 *TortSource* included an error in the identification of the statue atop the Church of Jesus Christ of Latter-Day Saints. The statue should have been identified as Moroni. The incorrect text was written by an interim staff editor and was not authorized by the author. *TortSource* regrets the error.

continued on page 5

Ellis B. Murov is a general partner in the firm of Deutsch, Kerrigan & Stiles, L.L.P., in New Orleans, Louisiana. He is also chair of the TIPS Employer-Employee Relations Committee.

Sound tempting? Be sure to join us—and get ready to *laissez le bon temps rouler!* by the number of napkins used.

learned the hard way not to drink a hurricane or eat a Lucky Dog, and rate a po-boy what it means to miss New Orleans? If you do, you judge a restaurant by its bread. A local phrase (and song made famous by Louis Armstrong) asks, “Do you know cafe au lait and beignets at Cafe du Monde.

at breakfast and late at night—such as the “grits and debris” offered at Mother’s and French, Creole, Cajun, and other cuisine. Unique dishes, however, can also be found Commander’s Palace, Emeril’s, Galatoire’s, Mr. B’s Bistro, and so many others offer fine delights at one of the city’s famed restaurants. Antoinette’s, Arnauds, Breman’s,

You might find this especially enjoyable after indulging in world-class gastronomic and a light breeze.

tourists to view the city’s unique architecture while basking in pleasant temperatures

buggy rides and strolls through the French Quarter and the Garden District allow New Orleans also offers a range of quiet and relaxing entertainment. Horse and troops on Omaha Beach in France during World War II ([www.worldwar2museum.org](http://www.worldwar2museum.org)).

New Orleans, of the then-innovative amphibious boats used to transport and land Andrew Higgins Boulevard. Higgins designed and arranged for the construction, in unique resource, the National D-Day Museum, at the corner of Magazine and Moreover, anyone with an interest in World War II will find an incomparable and one of the Louisiana State Museum’s five French Quarter sites (800/568-6968).

hasn’t seen Mardi Gras should check out the Mardi Gras installation at the Presbytere, aquarium, and—for the kids if not the parents—an insectarium. And anyone who means the only reason to come. Our 250-year-old city offers a world-class zoo, an The Festival and the excellent CLE programs TIPS offers, however, are by no

and to many other locations in the nearby Warehouse District and Faubourg Marigny. French Quarter to hear New Orleans music—from jazz to blues to Cajun and more—

In addition, you can also head to the House of Blues and Preservation Hall in the everything from daiquiris to more traditional libations.

*étouffée*, gumbo, jambalaya, and other exotic foods and drinks, washed down with in the rays, fans ranging from babies to teenagers to agings hippies enjoy crawfish blues—every type of music except classical. While celebrating the music and soaking wearing shorts, tennis shoes, and sunscreen enjoy performances of gospel, jazz, at the Fair Grounds Race Course ([www.nojazzfest.com](http://www.nojazzfest.com)). Each year 10,000 people For example, our meeting coincides with the renowned Jazz & Heritage Festival

filled with numerous activities for visitors and their families that are readily accessible from our meeting base at the Sheraton, next to the French Quarter.

am excited for the opportunity New Orleans has to host the Spring 2005 TIPS Meeting, April 28–May 1, 2005. TIPS picked one of the best weekends possible,

TIPS Spring Meeting  
April 27–May 1, 2005

Ellis B. Murov

“My New Orleans”



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