

Vol. 8, No. 2  
Winter 2006

# TortSource

American Bar Association

A Publication of the Tort Trial & Insurance Practice Section

## Disaster Relief

Jane Langan

Today, as I registered for the ABA Midyear Meeting in Chicago this February, it struck me that TIPS and other bar sections and committees were originally scheduled to meet in New Orleans. More than four months after Hurricane Katrina, our Gulf Coast friends are still reeling from three major Atlantic storms. As victims of Hurricanes Katrina, Rita, and Wilma try to untangle the wreckage, some also will face tangled legal issues.

In this issue, *TortSource* examines some of the issues that will arise in the wake of these natural disasters. Seth Tucker explains that even insured property owners may have difficulty recovering for loss because different types of property policies may include coverage for certain risks and exclude others. For example, if a policy covers wind damage but not flooding, what happens when property is damaged by both wind-driven rain and rising waters?

Next, Sandra Boyer urges lawyers and law firms to develop and implement a disaster plan. A thorough, well-planned disaster response can reduce the risk of lost information and clientele, and also can minimize business interruption.

Mark Fellows offers an alternative dispute resolution model that may speed decisions in postdisaster insurance disputes. The model is based on a system implemented after Hurricane Andrew, when the Florida Department of Insurance created an emergency rule giving homeowners the right to request mediation of claim disputes with their insurers.

Michael Neuron's Tech Tip provides an entertaining and enlightening discussion of technological varminths such as spyware, adware, malware, software pests, backdoor programs, worms, and viruses. He offers some easy prevention tips that even those of us who rely on *Computers for Dummies* can handle.

Also in this issue, Kim Hogrefe's personal profile emphasizes the value of mentoring relationships, and Scott Wolfe recaps TIPS's fall meeting in San Francisco. Looking toward spring, Leo Jordan encourages members to participate in ABA Day in Washington, D.C., and Pam Beckham invites us to savor sunny Miami Beach when TIPS travels to Florida for the spring meeting in May. ♦

Jane Langan is with Rembolt Ludtke LLP in Lincoln, Nebraska, and is a member of the TortSource editorial board.

## A Coverage Conundrum: Mixed Causation

Seth A. Tucker

The 2005 Atlantic hurricane season is at last behind us, but Katrina, Rita, and Wilma will live on—in the nation's memory, in the daily existence of thousands upon thousands whose lives were uprooted, and, eventually, in the case law. Prominent among the issues that the courts will be called on to resolve is the availability of insurance coverage in cases of mixed causation, i.e., where damage or loss was caused by two or more perils, with at least one falling within the coverage of a policy and at least one falling outside that coverage.

Generally speaking, property policies come in two flavors: "all-risk" and "named-peril." An all-risk policy is the broader of the two in that it protects the insured against the risk of loss or damage from any peril whatsoever other than those expressly specified in the

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Illustration by Andrew O. Alcalá

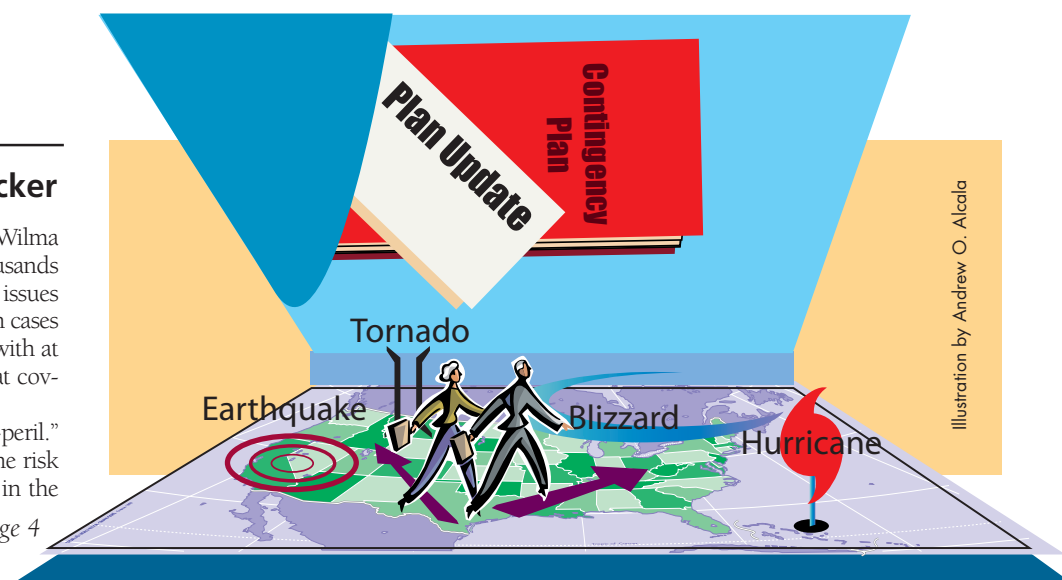


Illustration by Andrew O. Alcalá

## Law Firm Disaster Planning: A Necessity, Not a Luxury

Sandra J. Boyer

Disaster and contingency planning are essential parts of a law firm's strategic plan. Firms that are proactive rather than reactive in their planning are more successful in facing events that could potentially interrupt business operations, both short term and long term. Firms cannot make the mistake of thinking that disaster will not strike. The development of a disaster response plan is therefore a necessity rather than a luxury. Developing and regularly updating a disaster response plan can save lives, reduce financial liability and loss, protect firm assets, help firms recover more easily, and provide greater security and control.

The two most important goals of such a plan are ensuring the safety of employees and resuming business operations as quickly as possible.

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## Meeting Round-Up

### Fall Meeting in San Francisco

Scott R. Wolf

The magnificent city of San Francisco was the setting of our Fall Leadership Meeting, October 27–30, 2005. As one of the most elegant cities in the world, San Francisco was a perfect meeting place. From the fantastic food to the perfect fall weather, the City by the Bay truly charmed the TIPS membership.

We began with a bang on Thursday with numerous committee meetings and an exceptional CLE program on juries. Later, the Committee on Diversity in the Profession held a dazzling reception and wine tasting, sponsored by Sonnenschein, Nath & Rosenthal, LLP. That night, the Welcome Reception, sponsored by JAMS at the Armani Café, presented our members with an interesting mix of high-end clothes, great food, and a unique atmosphere. There is nothing like eating chicken fingers right next to a rack of \$1,000 suits.

On Friday, we conducted a full slate of committee meetings and informative CLE programs, including presentations on mediation, trial skills, and witness preparation. The TIPS Corporate Counsel Committee and the Forum on the Entertainment



Women golfers needed! A handsome—though imbalanced—TIPS group gathers to tee off at the Presidio Golf Course.



Jill Berkeley, Janet Davis, and Barbara O'Donnell enjoy the Plaintiff Involvement Task Force reception.



Pursuit of Justice Award recipient Mary Alexander celebrates her honor with Michael Blum, TIPS chair Sandra McCandless, and Plaintiff Involvement Task Force chair Rick Morefield.

## A TIPS Venue's Place in Legal History

Jim Fletcher

The TIPS Fall Leadership Meeting took place at the historic St. Francis Hotel in San Francisco. Sixty years before our meeting, in the very spot outside the hotel's Post Street entrance where TIPS members would load buses to *Beach*



*Blanket Babylon*, another hotel guest was injured when an overstuffed chair landed on him during V-J Day celebrations in 1945. In *Larson v. St. Francis Hotel*, 188 P.2d 513 (Cal. Ct. App. 1948), the guest brought a negligence case against the hotel for the injury, relying on the doctrine of *res ipsa loquitur* to show that the hotel's ownership and exclusive control of the falling chair "speaks for itself." But the court chose not to hold that hotels have exclusive control over the furniture in guests' rooms and instead limited the doctrine to require more evidence of ownership and control to prove negligence in less obvious situations. Fortunately, no TIPS members were victims of excited chair throwing. We did, however, have a fun and

exciting time at one of San Francisco's most beautiful and historic hotels, and given the chance to return—well . . . *res ipsa*. ❖

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and Sports Industries hosted a corporate counsel luncheon sponsored by the generous support of Navigant Consulting. The guest speaker at the luncheon was none other than Ed Goines, the vice president of business affairs and general counsel to the San Francisco 49ers. In the afternoon, the golfers among us participated in a tournament at the stunning Presidio Golf Course. Before dinner, we honored Mary Alexander with TIPS's Pursuit of Justice Award during the Task Force on Plaintiff Involvement reception. At the evening's end, many of our members danced the night away with music from Danilo and His Salsa/Latin Jazz Quintet. I had no idea our membership had such remarkable moves.

Several early risers participated in the fun run on Saturday morning. The remainder of day was filled with committee meetings and several outstanding CLE programs, including "Tips on Mediation," "The Effective Use of Demonstrative Evidence" (sponsored by the Trial Techniques and Civil Procedure and Evidence Committees), and "Ethical Considerations for Insurance Lawyers." Incidentally, both mediation CLE programs were sponsored by the Alternative Dispute Resolution and Insurance Coverage Litigation Committees. On Saturday night, our meeting culminated with a delectable meal at the Stinking Rose restaurant that was followed by an uproarious show, *Beach Blanket Babylon*, a hilarious spoof of politics and current affairs.

The fall meeting was a rousing success. Thanks go to Sandra McCandless, Jan Mulligan, Sue Popik, and all the TIPS staff and members who made this meeting such a winner. It will be great to visit San Francisco again for the Annual Meeting in 2007. We hope to see you before then at the Midyear Meeting in Chicago, February 9–12, 2006. ❖

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# Hurricane-Related Insurance Claim Disputes

## Postdisaster Insurance ADR Delivery Models

Mark Fellows

**H**urricane Katrina made landfall along the central Gulf Coast near Buras-Triumph, Louisiana, on August 29, 2005. Its storm surge breached the levees protecting New Orleans from Lake Pontchartrain, flooding the city. Over 200 continuous miles of coastline—stretching from Louisiana across Mississippi and Alabama and onto the Florida panhandle—were inundated by a 10- to 30-foot storm surge and buffeted by strong winds, causing catastrophic damage. Recent Congressional Budget Office estimates place damage to homes, government buildings, oil refineries, and other businesses at \$70 to \$130 billion. Of that total, an estimated \$40 billion is covered by private insurance. Katrina thus easily tops 1992's Hurricane Andrew as the most expensive natural disaster in U.S. history.

Attention previously paid to Katrina response and recovery is now being redirected to rebuilding homes and businesses. The insurance industry has dispatched over 15,000 adjusters to handle an estimated 150,000 insurance claims. At the top of the list of anticipated disputes is coverage for wind versus water damage. The small percentage of Gulf Coast property owners who purchased flood insurance will be promptly paid with federal funds. Many others, however, will become embroiled in disputes with their insurers over water damage exclusions and whether wind, water, or wind-driven water destroyed their property.

Policy makers and commentators unanimously agree that these disputes could overwhelm court systems that were themselves damaged by the storm. Property owners with claims already are reaching out to insurance commissioners, legislators, and the courts to try to expedite the settlement process. Alternative dispute resolution (ADR) techniques and the large-scale claims resolution expertise of the major dispute resolution organizations are capable of breaking this logjam. The important remaining issue is determining which model of ADR delivery provides the most efficiency and fairness in resolving the accumulating disputes in the affected states.

### Hurricane Andrew Mediation

In 1992, facing the prospect of more than 25,000 claims that threatened to overwhelm the courts and insurance industry, the Florida Department of Insurance responded to Hurricane Andrew by enacting an emergency rule creating a public-private dispute resolution partnership giving homeowners the option of mediating claims disputes with their insurers. Under the rule, after a homeowner requested mediation, the insurer had 21 days to resolve the claim. If it remained unresolved, a mediation session had to be scheduled within an additional 20 days. Mediations were conducted without counsel present, although Department of Insurance and Attorney General's Office staff were on site to clarify legal and procedural issues that arose.

This program is generally recognized as the first large-scale deployment of ADR in response to a natural disaster. Experienced neutrals handled over 2,400 claims in "mediation centers" located in the affected area. Mediation was cost-free to the homeowners. Bilingual case administrators ensured access for Spanish speakers. The results of the program were impressive. The department cited a 92 percent settlement rate and noted that many cases were resolved in a matter of hours. Florida considered the program such a success that the emergency rule was incorporated into a permanent hurricane mediation rule, and the legislature passed a mediation statute covering all disputed property insurance claims. Section 627.7015 of the Florida Statutes effectively summarizes the expected benefits of mediation:

There is a particular need for an informal, nonthreatening forum for helping parties who elect this procedure to resolve their claims disputes because most . . . policies obligate insureds to participate in a potentially expensive and time-consuming adversarial appraisal process prior to litigation. The procedure set forth in this section is designed to bring parties together for a mediated claims settlement conference without any of the trappings or drawbacks of an adversarial process.

The statute authorizes the Department of Insurance to adopt a property insurance mediation program guided by state supreme court mediation standards. The rules must provide for (1) an insurer duty to inform insureds of their right to mediate, (2) reasonable mediation request processing, (3) certified mediators, (4) mediation confidentiality, (5) the right to legal counsel if requested by the insured, and (6) a three-day period within which the insured may rescind a settlement agreement. Acknowledging the unique burdens imposed by natural disasters, the department may also "adopt special rules which are applicable in cases of an emergency within the state."

The baseline ADR model under which disaster-related insurance disputes can be resolved is a strictly private sector arrangement: predispute contractual mediation or arbitration. Insurance policy ADR provisions are generally enforceable for first-party claim disputes. Policies may be drafted to mandate mediation and/or arbitration or to require it upon the election of either party. However invoked, signatories to a policy containing ADR language are already protected from the potential delays of prolonged litigation. Another strictly private sector option is a postdispute agreement to mediate and/or arbitrate. Although attractive in theory, postdispute ADR agreements are rare in practice because, after the dispute has arisen, one party often sees strategic advantage in delaying resolution.

### State Regulation of Insurance ADR

State regulatory or legislative initiatives can channel parties into ADR by requiring or encouraging participation. Through the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, Congress explicitly empowered states to regulate the "business of insurance."

Courts have concluded that the McCarran-Ferguson Act "reverse preemption" of the Federal Arbitration Act permits state regulation of insurance ADR to a far greater extent than ADR applied in most other sectors of interstate commerce. *See, e.g., Mut. Reinsurance Bureau v. Great Plains Mut. Ins. Co.*, 969 F.2d 931 (10th Cir. 1992). Florida's particular approach requires insurer participation in mediation upon the request of the insured.

Other states are also putting disaster ADR models in place. On September 30, 2005, Governor Schwarzenegger (R-Cal.) signed into law amendments to California's Insurance Code that convert emergency mediation provisions enacted in response to the 1994 Northridge earthquake into a permanent program. The new provisions authorize the creation of mediation rules to cover claims resulting from a fire or earthquake "for which the Governor has declared a state of emergency." In contrast to the Florida statute, insurers are not required to inform insureds of the program but can be compelled by the insurance commissioner to mediate after an "unreasonable or arbitrary refusal" to do so, upon request of the insured.

Interestingly, Alabama created a Hurricane Insurance Issues Task Force to issue recommendations for claims resolution in the wake of 2004's Hurricane Ivan. The resulting report, which was released just 25 days before Hurricane Katrina landed, recommended creating a mediation program to settle claims that remained unpaid within 90 days of filing.

### Gulf Coast ADR Solutions

Officials in the Katrina-affected states have been weighing options and starting to institute disaster ADR programs. In recent weeks, both Louisiana and Mississippi announced mediation programs largely modeled after Florida's. Reports indicate that Alabama is still considering instituting mandatory mediation, either managed in house or through a contract with a national ADR organization. Officials clearly see the value in partnering with a major dispute resolution organization while utilizing the services of experienced, local mediators. However, each state will likely come up with its own method of linking public oversight with private administration, processing, and mediation service delivery.

The larger lesson to be learned is that these programs—like other types of disaster relief—can be "staged" ahead of time, either through permanent insurance department rules or insurance ADR statutes. The Gulf Coast states will be wise to move in the direction of permanent ADR programs based upon the experience derived from their recently announced emergency programs. For example, California's permanent program is invoked by declared emergencies, while Florida's covers all property insurance claim disputes. Now is the time for other states to update their disaster preparedness and devise their own formulations.

Additionally, there is room for disaster insurance dispute resolution planning on a national level, either through the National Association of Insurance Commissioners or some other body. It is important to note that most current programs focus solely on residential insurance disputes. States should also consider postdisaster commercial insurance dispute resolution programs to address business interruption insurance and other lines of coverage. Regardless, officials will be wise to look to existing models and avail themselves of the claims resolution expertise of established ADR administrators. ♦

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## A Coverage Conundrum: Mixed Causation

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policy as excluded. By contrast, a named-peril policy protects only against the causes of loss that are set forth in the policy. A fire insurance policy is a familiar example.

The problem of applying either type of policy to the claims left in the wake of the hurricanes becomes apparent when one considers two facts: (1) a wide range of perils caused losses in the recent hurricanes, and (2) any given insurance policy may have offered coverage for some of these and attempted to exclude others from its scope.

Some of the perils that afflicted New Orleans during and after Hurricane Katrina, for example, were evident from the nightly news. These included hurricane force winds, flooding, wind-driven rain, fire, looting, lack of electricity, mold, and the widespread dispersal of sewage, oil, and chemicals. In addition, some plaintiffs have pointed to other possible causes as allegedly responsible for some or all of their loss. These allegations range from alleged negligence in the construction or maintenance of the levees protecting New Orleans to the acceleration of global warming, fueling an increase in the ferocity of the annual hurricanes. A policyholder's property may have been damaged by any combination of the physical factors (such as water and fire), and if the more debatable causation allegations are proven, the damage may have stemmed from still another identifiable cause.

Many policies, whether all-risk or named-peril, will offer coverage for one or more of these perils but exclude coverage for others. For example, as the popular press has widely reported, homeowner's policies typically provide coverage for wind damage or the damage caused by wind-driven rain while excluding coverage for damage caused by flood. A homeowner who flees from the oncoming storm and returns to a damaged or destroyed house faces the task of piecing together not only what happened to his or her home but also how the insurance policy will apply to the loss.

In such situations, many courts apply the "efficient proximate cause" approach. This considers whether a covered cause of loss was the "efficient" and/or "dominant" cause of the loss, notwithstanding that the loss may have been aggravated by an excluded peril or even "caused" by such a peril as the last step in a trail of causation. As one commentator put it, under this approach, "[t]he cause to which the loss is attributed is the efficient, dominant cause, the one that sets the others in motion, although other and incidental causes may be even nearer in time and place to the result and may operate more immediately in producing the loss." Sidney I. Simon, *Proximate Cause in Insurance*, 10 Am. Bus. L.J. 33, 37 (Spring 1972).

Applying this approach to a claim under the standard policy described above by a homeowner whose house was destroyed by flood, a court could hold the entire loss covered by finding that the efficient, dominant cause of the flooding was hurricane winds (a covered peril). Similarly, if the homeowner had an all-risk policy and a court concluded that negligence in maintaining the New Orleans levees (or even negligence in exacerbating global warming) was the dominant cause that set the other causes of loss in motion, there should be coverage. However, in the absence of an "efficient proximate cause" find-

ing, the insured might be limited under either policy type to coverage for the damage attributable solely to covered causes of loss, such as wind damage or rain damage to the portions of a house located above the flood's high-water mark.

As always, the devil will be in the details as policyholders, insurers, and courts attempt to apply policy language to a particular factual situation in light of governing law. An added complication arises from the fact that although the high courts of Alabama, Louisiana, and Mississippi have all endorsed the efficient proximate cause test, the federal courts have not always followed suit.

A further wrinkle that seems destined to ensure years of coverage litigation in a host of jurisdictions is the prevalence of so-called "anti-concurrent causation" clauses in modern policies. A typical clause provides that loss that was caused by an excluded peril is not covered "regardless of any other cause or event contributing concurrently or in any sequence to the loss." Returning to the example of the homeowner, if this clause applies to damage due to flood, it may not matter whether the flood was caused by high winds, negligent levee design, or global warming linked to negligence: all damage attributable directly to the flood might be excluded.

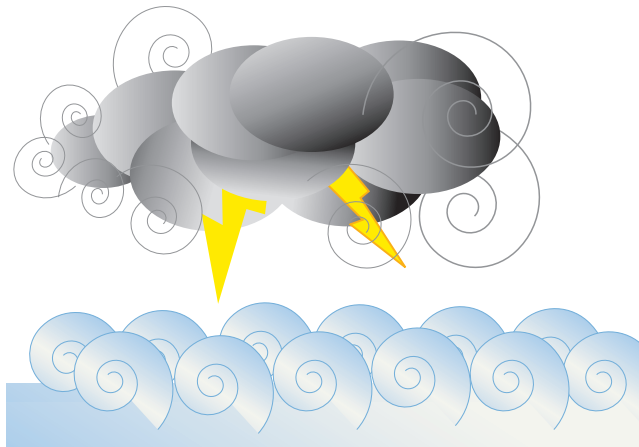
The fate of the anti-concurrent causation clause remains to be determined in the pertinent jurisdictions. The clause has received a mixed reception elsewhere. Courts in a number of jurisdictions have upheld the clause on the ground that insurers may elect to

contract around the efficient proximate cause doctrine, see, e.g., *Alf v. State Farm Fire & Cas. Co.*, 850 P.2d 1272 (Utah 1993), but in Washington state, the clause has been rendered unenforceable on grounds of public policy, see *Safeco Ins. Co. v. Hirschmann*, 773 P.2d 413 (Wash. 1989) (en banc). In West Virginia, the clause has been struck down as ambiguous and contrary to the reasonable expectations of the policyholder. See *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1 (W. Va. 1998). The Supreme Court of Alabama has upheld the clause, see *State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293 (Ala. 1999), but the facts of that case, which involved the assertion that a lightning strike had triggered subsequent earth movement, call to mind the famous *Palsgraf* case. See generally *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928). On more straightforward facts that would more readily implicate the expectations of the parties to

the contract, such as hurricane winds causing flooding along the Gulf Coast, a court might take a second look at the clause. Neither the Mississippi nor Louisiana high court has yet considered the applicability of the anti-concurrent causation clause.

The difficult process of applying policy language to property damaged or destroyed in one of the recent hurricanes is well underway, and countless adjusters are at work making those judgments daily. But it is likely to be years before some of the thorny issues arising from the 2005 hurricanes—and, in particular, problems of mixed causation—are finally resolved by the courts. ♦

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A Publication of the Tort Trial & Insurance Practice Section

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ISSN # 1521-9445.

TortSource is published quarterly by the Tort Trial & Insurance Practice Section of the American Bar Association and is generously funded by Thomson West.

American Bar Association  
 321 N. Clark St., Chicago, IL 60610

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<http://www.abanet.org/tips>

## Beyond Legal: TIPS Corporate Governance Conference in NYC

It will be worth a spring trip to New York to participate in "Beyond Legal: A Business Approach to Corporate Governance," a unique interactive exploration of corporate governance issues. TIPS will produce the May 11-13, 2006, conference at Le Parker Meridien, steps from Central Park. The program will examine the nature of the relationship among responsible corporate behavior, corporate profitability, and litigation risk. The Honorable George J. Mitchell, former U.S. Senate Majority Leader and Chairman of the Board of the Walt Disney Company, will give the keynote address. Designed to encourage continuing dialogue on what really drives good corporate governance, the conference will be of interest to corporate executives and board members, insurance professionals, accountants, attorneys, regulators, and politicians. For program details and registration information, go to [www.corpgovern.org](http://www.corpgovern.org) or call 312-988-5587. ♦



## Tech Tips

Michael Neuren

### The Spyware That Came In from the Cold (And How to Freeze It Out Again)

Is your computer running as slow as molasses in January? This could be a sign that it has been infected by spyware or viruses. These pests often run surreptitiously in the background, doing mischief without being seen. They can pose a security threat by secretly recording keystrokes and stealing confidential information or by opening a “back door” that allows hackers to access or delete anything on your computer.

So what exactly is spyware? The Anti-Spyware Coalition has posted a simple, formal definition on their Web site (<http://www.antispywarecoalition.org>):

Technologies deployed without appropriate user consent and/or implemented in ways that impair user control over:

- material changes that affect their user experience, privacy, or system security;
- use of their system resources, including what programs are installed on their computers; and/or
- collection, use, and distribution of their personal or other sensitive information.

Essentially, the term covers a panoply of technologies that negatively affect a user's computing experience, especially by intruding upon the user's privacy and overriding his or her computer's security system. “Spyware” is a generic term that loosely envelops spyware, adware, malware, software pests, backdoor programs, worms, viruses, etc.

Microsoft estimates that spyware is responsible for 50 percent of all personal computer crashes. Some spyware can steal financial data, spreadsheets, personnel records, bank account numbers, passwords, credit card information, or private e-mail messages. Other spyware can collect information on users' Web surfing habits or display advertisements while you are working. Endless pop-up ads can be generated, making your Web browser so slow that it becomes unusable. Some spyware redirects your Web searches, controlling the results you see, sending you to sites that paid a fee to direct you to them. Spammers can also take over a computer and force it to send out their e-mails for them, making the e-mail appear to be from you.

Spyware runs undetected, stealing your computer's system resources and memory so that it can steal from you. This often interferes with other programs on your computer, and can cause your computer to crash frequently or lock up. Pests in your computer create an environment that prevents your software from working properly. Dial-up Internet users have even more concerns. Certain types of spyware can modify their computer settings so that the modem dials out to expensive pay telephone numbers in the Caribbean or Eastern Europe.

Like a bad guest, some spyware changes your computer's firewall protection settings, inviting in even more unwanted pieces of software. Some forms of spyware are smart enough to know when you try to remove them and they override your attempts to do so.

#### So Where Does It Come From, and How Do I Stop It?

Pests can be installed on a computer in several ways. The worst types of pests—viruses and worms—spread via e-mail and other shared computer files. They also can be introduced when a user clicks on a web link from an instant message or opens an attachment to an e-mail. Just visiting certain web sites can cause infection from spyware. Unsolicited commercial e-mail, popularly referred to as “spam” or “junk mail,” is also a frequent source of infection.

Another cause of infection involves clicking on a pop-up message that offers free peer-to-peer music sharing or free browser enhancements such as search bars, animated pals, or “smileys.” What such messages really offer is an unusually large bundle of different programs that may harm your computer. Click “OK” once and your computer will take a turn for the worse—with no opportunity to cancel. The spyware will secretly invite all its friends over to install even more spyware on your computer.

Perhaps even more pernicious are spyware pop-ups that state that they are tools that will detect and cleanse spyware from your system, but when you activate them to clean your computer, they actually install further spyware of their own.

A report commissioned by EarthLink and Webroot Software performed over two million scans in the first six months of 2004, finding over 700,000 different pests. So the problem is by no means a minor one. Nevertheless, a number of options can be followed to minimize or eliminate threats posed by spyware and viruses.

First, educate yourself by visiting Web sites such as Microsoft, Symantec, and F-Secure to stay abreast of new security alerts. Clearly, computer users should install and frequently use antivirus programs such as Norton Security or MacAfee, as well as antispyware programs. (Note that antivirus software usually will not remove spyware, and most antispyware programs will not remove viruses.) A number of products are available free for downloading. Three examples are Webroot SpySweeper (<http://www.webroot.com>), LavaSoft's Ad-Aware (<http://www.lavasoft.com>), and Computer Associates eTrust Pest Patrol (<http://www.pestpatrol.com>). Recently, Microsoft purchased an antispyware product and made it freely available to licensed Windows users. Windows AntiSpyware can be easily downloaded and installed from <http://www.microsoft.com/spyware>.

Patching and updating your operating systems regularly can be a major help because this makes it more difficult for viruses or worms to negatively affect your computer. Likewise, you need to regularly download the virus definition updates from your antivirus provider, so that you have protection against the newest pests. Ditto for your antispyware software.

Being smart about Internet use is essential. If an online ad offers something free, beware. Download and install software only from trusted vendors whose names you recognize as reliable. If you do not recognize the source, you should likely stay away or do further research online regarding the company or software. Similarly, do not open e-mail from people that you do not know or that somehow looks fishy. Call the person of origin (if you know him or her) or write back to confirm before opening attachments. It especially helps to scan any attached files for viruses before you open them.

What else can you do? Well, using the basics of good computer “hygiene” can help tremendously. Before you impulsively click on a pop-up offer, think about the consequences. Be careful about the Web sites that you visit. Do not visit suspicious sites. Stay on the main roads of the Net; do not wander off down small, dark alleys. Do not be lured by deals or items that seem too good to be true: they are. Use passwords that are not easily guessed and change them periodically for both your machine and the Web sites you visit.

Back in the relative safety of your home or office, back up your data frequently so that nothing is inadvertently lost. To be even more secure, remove Net access from computers in your office that do not need it. The fewer the machines on the Net, the less easy access you provide hackers or spyware. By installing the fewest applications and services needed on each computer, you can decrease the harm should spyware eventually overwhelm your computer. If you follow these leads and think before you act, you can navigate in relative safety and keep the spyware out in the cold.

*In a future issue of TortSource, Tony Vittal will advise us on phishing and pharming schemes to separate you or your clients from your money. ❖*

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## Law Firm Disaster Planning: A Necessity, Not a Luxury

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Paul Sullivan, in the Law Office Management and Technology column in the May 2002 issue of the ILLINOIS BAR JOURNAL, suggested a checklist of the important features of a disaster response plan:

1. Designate a responsible person to prepare the plan, coordinate it with others in the office, and review it periodically.
2. Determine whether to evacuate or take an alternative approach for specific incidents.
3. Designate exit routes for each part of the office.
4. Designate an assembly area.
5. Assign specific persons the job of accounting for employees.
6. Assign someone the task of reporting emergencies.
7. Establish a training program, i.e., specific training for emergencies, optional training in First Aid, cardiopulmonary resuscitation, etc.

I would expand upon his list by noting some specific steps that law firms should take in developing a successful response plan.

- **Appoint a disaster planning and response team.** The firm managing partner or management committee should appoint a committee to address disaster planning and response. The team should include the legal administrator, a responsible support staff person, lawyers who have an interest and who have the time to devote to the committee, the IT person, and practice group chairs or designees.

Once the team is appointed, a committee chair must be established. The person must have authority within the firm, the respect of others, and the time to commit to the effort. The committee must be given specific authority to develop and implement the plan and must have clear lines of authority in advance of, and during, a disaster response. The support of top management is essential when developing the plan and, most importantly, when implementing it.

The first focus of the committee should be to create a timeline for developing and completing the plan. It must start by creating an outline of what the plan should include. The committee should then schedule and hold regular meetings, identifying deadline dates for the development of documents to be included in the plan and providing regular updates to the firm regarding the committee's activities.

- **Perform a risk analysis to identify potential disasters.** Before developing the disaster response plan, the committee must identify the most likely types of disasters to face

the firm. A risk analysis should be performed to determine which types of disasters might affect the firm, taking into consideration how much advance warning there may be, how long the event will affect the firm, and what parts of the firm will be most affected. Among the events that could interrupt business operations are (1) software or hardware failures, including virus attacks, power failures, and sabotage; (2) a network crash; (3) a fire, either catastrophic or minor; (4) a flood; (5) an earthquake; (6) a hurricane or tornado; (7) a bombing or bomb threat; (8) snow, wind, or ice storms; (9) personnel, including unexpected lawyer, administrative or support staff issues; and (10) unexpected financial issues.

The committee should create a list of events that could most likely affect the firm and then develop the plan accordingly, creating a response to each type of disaster.

- **Draft the plan.** The committee must select persons who will play a role in implementing the plan; identify the responsibilities to be assigned to each person; locate the outside resources that may be needed to implement the plan; determine expenses that might be incurred when implementing the plan; create a communication process, both internal and external; generate forms, checklists, contact lists, etc., to be used during the disaster response; and determine the security measures to be taken before, and during, the disaster response.

The committee must create a written manual that can be provided to all members of the firm. This manual is a working document to be reviewed regularly. The manual must be kept within reach in case of emergency.

- **Communicate the plan.** Communication both internally and externally is essential. The committee must develop and implement a communication process by which to inform lawyers, administrators, and support staff that the plan has been developed and will be implemented if the need arises. Everybody in the firm must be told how to use the manual. The committee must clearly inform everyone of the person who is in charge of implementing the plan at the time it is needed.

In the plan, specific assignments will have been given to individual positions within the firm. The committee must make sure all people who have responsibilities outlined in the plan are aware of the plan and their roll in it. The chair of the committee must also communicate regularly with outside sources that will be used in the implementation of the plan.

- **Implement and test the plan.** Once the plan is completed, a test program should be created. The committee should identify the parts of the plan that can be tested to ensure effectiveness. A "fire drill" schedule should be generated and implemented on an annual basis to test the elements of the plan. If the fire drill demonstrates ineffective elements of the plan, the committee should make appropriate changes to allow for a more effective response. After a fire drill has occurred, circulate questionnaires to firm personnel testing their comprehension of the plan and the role they played.

The committee should schedule and conduct appropriate training sessions for all people who have responsible roles within the plan. This is especially true if the firm experiences regular turnover of firm personnel who have a role in the plan.

- **Update the plan regularly.** It is essential to review and update the plan annually. The plan should be an agenda item for lawyer and staff meetings at least quarterly. Committee members will also rotate off the committee and will be replaced by new members. The forms, checklists, contact lists, etc. that have been created as part of the plan will need to be updated annually. As changes take place in the firm, the plan should be reviewed to see if those changes affect the plan.

For additional information regarding disaster planning, visit the American Red Cross online guide at <http://www.redcross.org> and consult "disaster services, be prepared," or consult the Federal Emergency Management Agency at <http://www.fema.gov> and go to "library, preparation & prevention." ♦

*Sandra J. Boyer is a law firm management consultant who works with firms in strategic planning, administrative reorganization, recruitment, and business planning. She is vice president of the Network of Leading Law Firms, an international network of affiliated law firms. She can be reached at [sjb@andersonboyer.com](mailto:sjb@andersonboyer.com).*



## In Motion

**Leo J. Jordan** was named arbitrator of the year for New York County by the New York City Small Claims Court Arbitrators Association. Jordan, a retired vice president and counsel for State Farm Insurance Companies, was recognized on October 20, 2005, for his services as a volunteer arbitrator several times a week in city civil courts in Manhattan, Mid-Town, and Harlem. He is a past TIPS Section Chair (1991–92), current chair of the TIPS Governmental Affairs Committee, and a regular contributor to *TortSource*.

**J. Timothy Eaton** has joined Shefsky & Froelich in Chicago as partner, after several years at Ungaretti & Harris where he was chair of the firm's litigation department for nearly a decade. A litigator and appellate lawyer who represents corporations, universities, and health care institutions, Eaton is a past chair of the TIPS Appellate Advocacy Committee and a former member of the ABA House of Delegates (1998–2002).

**David S. Evinger**, partner at Robins, Kaplan, Miller & Ciresi L.L.P. in Minneapolis, Minnesota, has been appointed to serve on the national Fire Protection Association Technical Committee on Fire Investigations. As a principal member of the Technical Committee, he is participating in the preparation of a revised edition of the NFPA 921 document, *Guide for Fire and Explosion Investigations*. ♦

## ABA Pro Bono Publico Award

Nominate a colleague or law firm for the 2006 ABA Pro Bono Publico Award, which will be presented during the ABA Annual Meeting on August 7, 2006, in Honolulu, Hawaii. The ABA Pro Bono Committee encourages nominations of lawyers of color and women. For information about past recipients, nomination guidelines, and a nomination form, go to [www.abanet.org/legalservices/probono/pbp\\_current\\_recipients.html](http://www.abanet.org/legalservices/probono/pbp_current_recipients.html). The deadline for nominations is February 17, 2006. ♦



## “When I Was a Young Lawyer”

**Kim D. Hogrefe**  
**Senior Vice President and**  
**Worldwide Specialty Claim Manager**  
**Chubb & Son**  
**Warren, New Jersey**

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

I grew up in a home where helping people was valued. The Manhattan District Attorney's Office taught me that the law was a powerful tool to help others and advance the cause of justice.

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

I attended the University of Pennsylvania Law School. My first job after graduating from law school was as an assistant district attorney in the Manhattan DA's Office.

### 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 had great teachers in the DA's Office. I learned that trying a case fundamentally differs from reading the reports about it. Experiencing the show in the theater is not the same as reading the book. You need witnesses that jurors will believe—there is real truth to the aphorism “no witness, no case”—and you need to establish personal credibility with the jury.

At Chubb, I have been blessed with great mentors who have taught me the value of delegating and holding people accountable.

### Whom do you most admire?

My dad. Hands down. He dedicated his life to helping people. He served as a social service executive in Chicago and positively touched the lives of thousands of inner-city youths. He did not teach me about diversity; he lived it.

### What is your greatest source of professional pride?

I take tremendous pride in trying to assist others in moving forward in their careers and lives.

### What got you started with ABA involvement?

Roberta Cooper Ramo publicized the ABA Annual Meeting in 1996 in Florida as a family-friendly event. I went with my family. I attended a number of CLEs and

events from several ABA sections. I felt at home with the TIPS people and have been active in TIPS ever since.

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

Almost all advice that begins with the word “never.”

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

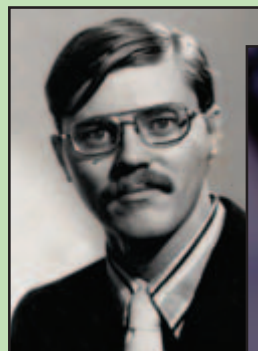
Remain flexible. Investigate, plan, and prepare, but always be open to throwing out the script and looking at the situation afresh.

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

Tenacity.

### What challenges you the most?

Technology. I understand its power, but it challenges and confounds me more than it should.



Kim D. Hogrefe  
then and now



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

Being out-lawyered. If both sides are balanced and one prevails, that's the adversary system. If one side prevails because of superior use of legal talent, shame on the loser.

### What is your favorite type of legal work?

I truly enjoy a diversity of legal work. I am fortunate to have a job that constantly exposes me to different issues in divergent areas of the law. I thrive on the challenges that presents.

### What are your future ambitions?

To be better at helping others achieve their ambitions.

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

Provide opportunities to grow professionally, learn from savvy mentors, and work on projects relevant to their “day jobs.” ❖

### Kim Hogrefe's Advice for Young Lawyers:

- Get involved in an organization that will expose you to diverse people and ideas.
- Develop a relationship with a mentor and make use of her or him.
- Look at each challenge as a new opportunity to learn.
- Look for the chances to help others develop the skills and experiences you have acquired. ❖



## Mark Your Calendar

**Insurance Coverage Litigation Meeting**  
 February 16–18, 2006,  
 Marina Del Ray, CA  
 (312-988-5597)

**TIPS National Trial Academy**  
 March 11–15, 2006, Reno, NV  
 (312-988-5656)

**Emerging Issues in Motor Vehicle Product Liability Litigation Meeting**  
 April 5–7, 2006, Phoenix, AZ  
 (312-988-5708)

**Toxic Torts & Environmental Law Meeting**  
 April 6–8, 2006, Phoenix, AZ  
 (312-988-5597)

**Fidelity & Surety Law Committee Spring Meeting**  
 April 19–22, 2006, Scottsdale, AZ  
 (312-988-5708)

**Property Insurance Law Committee Meeting**  
 April 27–29, 2006, Carlsbad, CA  
 (312-988-5597)

**Corporate Governance Program**  
 May 11–13, 2006, New York, NY  
 (312-988-5587)

**TIPS Section Spring Meeting**  
 May 18–26, 2006, Miami, FL  
 Eden Roc, a Renaissance Resort & Spa  
 (312-988-5672)

**ABA Annual Meeting**  
 August 3–8, 2006, Honolulu, HI  
 (312-988-5672) ❖



## Legislative Update

Leo J. Jordan

### ABA Day in Washington, D.C.

On May 3 and 4, 2006, our chair, Sandra McCandless, will lead a delegation of TIPS leaders to our nation's capitol to join with ABA and state, local, and specialty bar leadership to help implement the organized bar's legislative priorities. This annual ABA presidential event is called ABA Day in Washington, and 2006 represents the tenth anniversary of this important occasion.

ABA Day participants who arrive on May 2 can attend President Michael S. Greco's Commission on Idealism and Renaissance in the Profession's program and reception featuring Supreme Court Justice Ruth Bader Ginsburg. The program officially begins the following morning with a lobby workshop and opening session luncheon, where attendees will receive tips for meeting with their congressional representatives and the latest information about the three primary ABA Day issues. Funding for the Legal Services Corporation is always one of the three priorities; tort issues frequently have been among the other two selected priorities. Through the efforts of senior legislative counsel Lillian Gaskin and her staff, TIPS representatives also will receive up-to-date briefings on the status of key legislative items important to our Section. We will have the opportunity to meet with senators and representatives, in addition to their highly trained staffs, for insight on what is really going on in Washington.

We all know the key issues pending in Congress that have the greatest potential to affect the justice system and our law practices. Despite strong bipartisan support, fund-

ing for the Legal Services Corporation recently was cut again because of Congress's inability to balance the budget. With less than one year remaining before the 109th Congress adjourns, it is difficult to predict which of the pending tort and insurance issues have any chance of being enacted into law. Some possibilities may include a broad-based natural catastrophe insurance plan to assist in the widespread cost of disasters such as Katrina and Rita, the pending asbestos fund legislation, and medical liability reform.

For those of you interested in these public policy issues, ABA Day represents an excellent opportunity to visit Washington, D.C., and to meet with your members of Congress about key legislative priorities. Under the direction of Julie M. Strandlie, ABA Day Planning Committee counsel in the ABA Government Affairs Office, you will experience a well-organized and thoroughly planned lobbying program. As preparations proceed, you will receive many communications from Strandlie.

A final highlight of ABA Day will be the Capitol Hill reception. We will have an opportunity to interact one-on-one with congressional members at a reception where President Greco will honor several members of Congress for their specific efforts to improve the American justice system.

Walking the halls of Congress and recognizing the beautiful flags outside the offices of individual members is in itself a real treat. You will receive a warm welcome from your local representative; they love to visit with lawyers from home. The ABA is a non-partisan organization; the ABA does not have a PAC, nor does it endorse candidates. One of the reasons for our success is based on the direct contacts between ABA members and their own senators and representatives.

I hope many of you will join McCandless and the TIPS leadership team in Washington, D.C., on May 3 and 4, 2006. You can register to attend ABA Day at [www.abanet.org/poladv](http://www.abanet.org/poladv). ♦

*Leo J. Jordan is chair of the TIPS Governmental Affairs Committee and a member of the ABA Standing Committee on Governmental Affairs.*

*Pamela Beckham is a partner at Beckham & Beckham in North Miami Beach, Florida. She is a member of TIPS Council and TIPS's Finance and Appellate Advocacy Committees. Pam can be reached at [pbb@beckhamlaw.com](mailto:pbb@beckhamlaw.com).*

♦ May  
Gene and I look forward to welcoming you all to Miami, and we will see you in the country. Dolphin Mall and Sawgrass Mills Mall, are just a car ride away. To the Bal Harbour Shops—is in nearby Coral Gables. Two of the largest outlet malls minutes away from the hotel, and Merrick Place—the recently opened competition in the world. The Surf Rider Foundation named South Beach the premier urban beach in the entire United States. Miami has an eclectic array of outstanding restaurants, with every cuisine, price range, and ambience well represented. True food-ies will enjoy Vish, Talula's, Azul, Chef Allens, Normans, and Oranique. For a truly great steak there is, of course, the original Shulas Steak House; also consider Smith & Wollensky and Prime 112, as well as Douglas Rodrigues Ola Steak. Don't forget classics like Joe's Stone Crab, Versailles, and The Forge. In addition, there are many moderately priced Cuban, Argentinian, and Latin American restaurants to entice you.

W  
elcome to Miami for the TIPS spring meeting at the Eden Roc Resort on Miami Beach. Luckily for all of us, we will not be back in hurricane season yet, and TIPS has picked a spectacular venue to enjoy the salsa and sun.  
Our TIPS hotel, the Eden Roc, was established in 1956 and has hosted such luminaries as Elizabeth Taylor, Lucille Ball, Desi Arnaz, Lena Horne, Jerry Lewis, Milton Berle, Ann-Margaret, and now TIPS leaders. The Eden Roc was designed by Morris Lapidus and is a South Beach landmark. A recent complete restoration of the hotel included the addition of a spa and several new restaurants.  
During the spring meeting, I hope you will take the opportunity to explore Miami's beautiful beaches and terrific weather, its Latin beat and style, and Miami Beach's fabulous Art Deco District. The Art Deco District has the largest concentration of 1920s and '30s architecture in the world. Listed in the National Register of Historic Places, the district is one of Miami Beach's most unique attractions.  
South Beach's beautiful seashore is among the Travel Channel's top 10 beaches in the world. The Surf Rider Foundation named South Beach the premier urban beach in the entire United States. Miami has an eclectic array of outstanding restaurants, with every cuisine, price range, and ambience well represented. True food-ies will enjoy Vish, Talula's, Azul, Chef Allens, Normans, and Oranique. For a truly great steak there is, of course, the original Shulas Steak House; also consider Smith & Wollensky and Prime 112, as well as Douglas Rodrigues Ola Steak. Don't forget classics like Joe's Stone Crab, Versailles, and The Forge. In addition, there are many moderately priced Cuban, Argentinian, and Latin American restaurants to entice you.

TIPS Spring Meeting  
May 18-21, 2006

Pamela Beckham

"My Miami"



A Publication of the Tort Trial & Insurance Practice Section  
American Bar Association  
321 N. Clark Street, Chicago, IL 60610  
Vol. 8, No. 2 Winter 2006

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