

The Internet: Effecting Global Changes in Our Laws and Lives

Guylyn R. Cummins

This issue of *TortSource* explores the universe of cyberspace as it changes our laws and lives. We have seen new challenges to our right to freely speak and “associate” or link to website content or postings arising from unfair competition and intellectual property laws. We have experienced threats to anonymous speech and freedom from retaliation because of the reach of Internet gripe sites and chat rooms, and aggressive subpoena use to Internet service providers. And we have seen a new privacy rage, stemming from information becoming available online that has long been public but is now “too public”—including electronic court records.

Megan Gray, former senior counsel to the Electronic Privacy Information Center, and Sara Rose, an IPIOP Fellow at the Center, discuss the time-honored tradition of protecting

anonymous speech, from John Peter Zenger’s acquittal from seditious libel charges for protecting anonymous pamphleteers who criticized the government, to the Supreme Court’s reaffirmation of protection for anonymous speech in its 2002 decision in *Watchtower Bible and Tract Soc’y v. Stratton*.

Lucy Dalglish, executive director of the Reporter’s Committee for Freedom of the Press, explores the tension between public access to court records—an American tradition safeguarded from time immemorial as fundamental to our form of government, to an informed citizenry, and to the rule of law—and privacy concerns arising from fears that immediate access will allow greater abuse of that information.

Guylyn Cummins discusses the clash of centuries-old constitutional safeguards for free speech and association on the Internet, with laws protecting privacy, intellectual property, and the war on terrorism, as companies scramble to control use of their intellectual property available online and foreign governments seek to protect their citizens.

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Illustration by Andrew O. Alcalá

Privacy and Public Access to Court Records

Lucy Dalglish

Federal and state courts across the nation are quickly developing the technology to provide Internet or electronic access to their records. Providing such access will make records searches quicker and more efficient for the press and the public. But while the media and some members of the public rejoice over the opportunity to make better use of court documents, some courts are questioning in the name of privacy whether to allow such access.

State and federal committees and commissions have met frequently over the past two years to sort out the “best” way to move court records into the digital

age. The results are remarkably varied. In a seemingly ironic twist, federal courts, which have long resisted efforts to allow cameras in courtrooms, have taken a generally more access-friendly approach to electronic records than have state courts.

Some state courts, which handle more family law cases than do federal courts, are campaigning for “two-tiered” access—a system in which electronic access is generally available to all records kept at the courthouse except for records concerning divorce, family, and children’s issues.

The tensions between the interests of
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Protecting Anonymous Speech

Megan Gray and Sara Rose

In June 2002, the Supreme Court reaffirmed the constitutional protection for anonymous speech. *Watchtower Bible and Tract Soc’y v. Stratton*, 536 U.S. ___, No. 00-1737, slip op. (2002). The Court held in *Watchtower* that a statute enacted by the small town of Stratton, Ohio, violated the First Amendment by compelling people who wished to go on private residential property to promote a cause to first register their identities and intentions with town officials and obtain a permit that they would then be required to display upon request of a resident or police officer. *Watchtower* is the latest in a line of Supreme Court cases upholding the value of anonymous speech. During the past 50 years, the High Court has repeatedly struck down laws that prevented people from speaking anonymously. The Court has said any law restricting the right to speak anonymously must be narrowly tailored to serve a compelling state interest.

The protection of anonymous speech in the United States goes back to before the Republic was born. In fact, the tolerance of the Founding Fathers toward the right to speak anonymously is not surprising: Many of the ideas incorporated into the Constitution were first published anonymously in the *Federalist Papers* under the pseudonym Publius, and Thomas Paine’s *Common Sense* was initially signed “An Englishman.”

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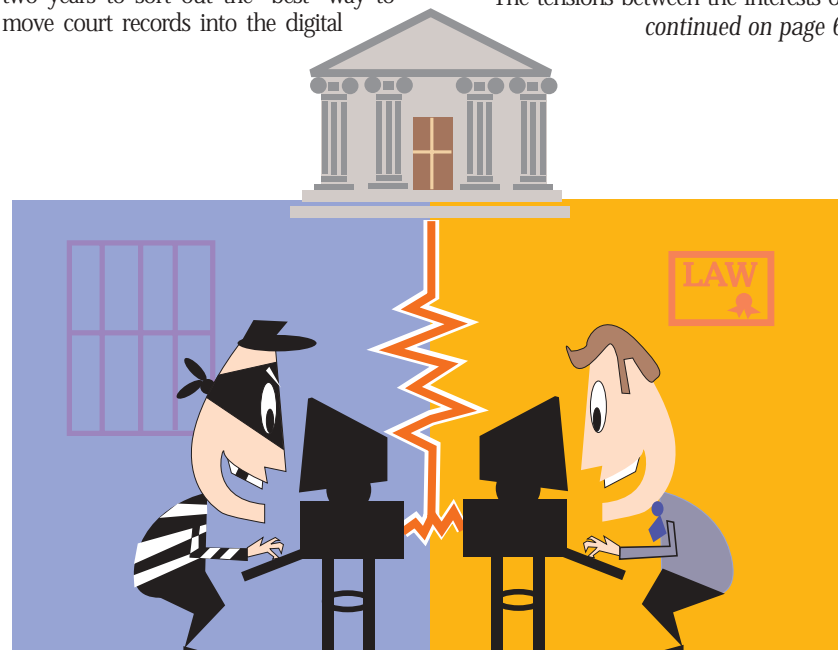


Illustration by Andrew O. Alcalá

Meeting Round-Up

ABA Annual Meeting in Washington, D.C.

Elizabeth Bondurant

Who could have predicted that the weather in Washington, D.C., in August would have been spectacular! TIPS members thoroughly enjoyed themselves at the ABA Annual Meeting in Washington, D.C., which was held August 9-12. The beautiful weather was completely conducive to strolling on the Mall and gazing in awe at our nation's capital and its beautiful monuments and buildings. The success also was due to the efforts of TIPS staff and leaders who planned a spectacular meeting. The J.W. Marriott on Pennsylvania Avenue, just steps from the White House, was the hub of most TIPS activity, including business meetings, standing committee meetings, the TIPS bookstore, and TIPS members who were seen scurrying through the halls to their various meetings.

The TIPS social festivities kicked off with a wonderful party at the Museum for Women in the Arts. A lovely art-filled venue, coupled with good food and drink and especially good company, was a great way to start the meeting.

The new format for continuing legal education proved to be a positive experience for TIPS. The "pay as you go" format was uncharted ground. TIPS sold passes to enable its members to attend all of its TIPS programs. TIPS sold more passes than it expected, and the CLEs were well attended. The CLEs were first rate and included such topics as insurance coverage for terrorist acts; the science, evidence, and admissibility of DNA; tomorrow's litigation torn out of today's headlines; the future of fault and the duty to inform; and how to use trial techniques to get better results from mediation.

On Sunday evening, the TIPS leadership dinner was held at the Russian Embassy, a truly awesome place. Dick Campbell mused on the happenings of the year and seemed ready to pass the baton to Alex Gonzales. Numerous awards were bestowed. The Health and Disability Committee received an award for its work encouraging and promoting women and minorities. Deborah Hensler won the McKay Law Professor Award. Robert Hirshon



Dick Campbell passes along Section chair responsibilities to Alex Gonzales.



Robert Hirshon receives the Edmund Muskie Pro Bono Award from James Myrick.

received the Edmund Muskie Pro Bono Award. William Levasseur was awarded the Andrew Hecker Award. Tom Minton won *TortSource's* award for best article.

During the meeting, TIPS Council met to discuss and make important decisions about the Section's ongoing work. Due to the hard work of TIPS Council members, the TIPS name has been changed to Tort Trial and Insurance Practice Section.

The Annual Meeting was tremendously successful. And, as we approach the anniversary of September 11, TIPS members were mindful of the past year and aware that Washington, D.C., in all its grandeur, was a most appropriate venue for the 2002 Annual Meeting.

Elizabeth Bondurant is with Carter & Ansley in Atlanta, Georgia..



Mark Your Calendar

TIPS 2002 Fall Meeting, October 17-20 in Sedona, AZ (312.988.5672)

2002 Aviation Litigation Seminar, October 17-18 in Washington, DC (312.988.5672)

Fidelity & Surety Law Committee Fall Meeting, October 24-25 in Washington, DC (312.988.5708)

Joint Committee on Employee Benefits, Health and Benefits Welfare Plans, October 24-25 in Washington, DC (312.988.5672)

Joint Committee on Employee Benefits, ERISA Litigation, November 14-16 in Chicago, IL (312.988.5672)

U.S. Supreme Court Admission Ceremony, December 15-16 in Washington, DC (312.988.5708)

LHPREB Program, January 16-19 in Boca Raton, FL (312.988.5597)

Fidelity & Surety Law Committee Annual CLE Midwinter Meeting, January 30-31 in New York, NY (312.988.5672)

ABA Midyear Meeting, February 5-11 in Seattle, WA (312.988.5672)

Insurance Coverage Litigation Committee Midwinter CLE Program, February 20-22 in Miami, FL (312.988.5597)



To register or receive additional information on any of these programs, call 312.988.5672 (unless specified otherwise) or visit www.abanet.org/tips.



In Motion

Regina Chu of Minneapolis, Minnesota, was appointed as a Hennepin County District Court Judge.

David H. Levitt, a partner with Hinshaw & Culbertson in Chicago, Illinois, recently accepted the position of editor-in-chief of *IDC Quarterly*, official publication of the Illinois Association of Defense Trial Counsel.

Richard Turbin, of Honolulu, Hawaii, has been elected president of the Hawaii Trial Lawyers, the local ATLA affiliate, for 2002-2003. He also was sworn in as a Civil Rights Commissioner for the state. This fall, as a Traphagen Distinguished Alumnus at Harvard, he will give a speech to students.

Todd A. Smith, a partner at the Chicago firm of Power Rogers and Smith, has been elected vice president of the Association of Trial Lawyers of America (ATLA).

Robert L. Byer, a partner at Kirkpatrick & Lockhart LLP in Pittsburgh, Pennsylvania, was elected a member of the American Academy of Appellate Lawyers.

Michael J. Cox, a member of the firm Miller, Griffin & Marks, P.S.C. in Lexington, Kentucky, was recently elected chair of the Kentucky Bar Association Young Lawyers Section and will sit on the KBA Board of Bar Governors.

Howard Wexler has joined Balboa Insurance Group as executive vice president, secretary, and general counsel.

TIPS CLE programs are now available online. Earn your MCLE credits online at WestLegalEdcenter.com. For more information, call 1.800.272.7032 or visit www.westlegaledcenter.com.

The First Amendment: Adrift in Cyberspace

Guylyn R. Cummins

In a historic step in 1997, the U.S. Supreme Court recognized that the Internet is a "unique and wholly new medium of worldwide human communication" deserving of full First Amendment protection. In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), the Court found that the Internet's unique characteristics—low entry barriers to engage in speech, identical barriers for both speakers and listeners, availability of astoundingly diverse content, and significant access to all, creating a relative parity among speakers—preclude America's government from regulating Internet content without a compelling reason to do so. Chronicling the history of the Internet from its 1969 military beginnings to its present civilian networks linking millions of people, the Court struck down two provisions of the Communications Decency Act of 1996 (CDA) that sought to protect minors from indecent material. While the Court agreed with Congress that protecting minors is a compelling interest, it forcefully concluded "it is axiomatic" that "the level of discourse reaching [a computer] simply cannot be limited to that which would be suitable for a sandbox." Given numerous other ways of protecting children from indecent online material, the CDA provision amounted to "burning the house to roast the pig" and cast a "far darker shadow over free speech which threatened to torch a larger segment of the Internet community[.]" including medical and scientific debate.

From this extension of centuries-old safeguards for free speech and association to the Internet, the First Amendment has been set adrift in the sea of cyberspace. Laws protecting privacy, intellectual property, unfair competition, and the war on terrorism have begun to reshape America's constitutional landscape with respect to these rights, not to mention the effect of extensive foreign regulations. A whole new lexicon of infringements has sprung up, including cybersmearing, cybersquatting, cyberpirating, cyberframing, cyberdatastripping, cyberlinking, and a host of others.

Unfettered Freedom to Associate Via Link?

Internet "associations" or links have given rise to a spate of lawsuits about the freedom to link oneself with another's postings, content, or trademarks, despite cyberspace's infancy where unfettered linking was an essential part of its allure. Our Internet forefathers envisioned free linking of information to be so basic and essential to the success of the web, that it could not possibly be unlawful.

But outside of academicians and information seekers, an imbalance was brewing in the business world, where the goal is increased sales and business growth. Unauthorized Internet links can mean lost profits, false advertising, unfair competition, trademark and copyright infringement, product disparagement, tarnishment of property rights, "passing off," "palming off," commercial misappropriation, and interfering with one's business expectancies. So "cyberturmoil" arose, pitting constitutional protections against business and government interests.

Perceived Ills of Linking Copyright Infringement Through Direct Linking

The chill "linking" wind began blowing in 1996, from an electronic newspaper rivalry in the Shetland Isles of Scotland. An established newspaper, the *Shetland Times*, complained that a brash Internet upstart's direct hyperlinks to the *Times*'s news stories constituted copyright infringement. The upstart touted its news product as superior to the *Times*'s but admitted it would, on occasion, link for a missed story. Such "linking" is not a "fair use"—copyright law's analogue to the First Amendment—where the hypertext links reproduce the *Times*'s headlines, a Scottish court ruled. The links are enjoined, in part because they bypassed the *Times*'s front page and missed its advertising. The case settled with a new device—a "cyber link license."

Misappropriation Based on Cyberframing

The chill wind of cyberframing blew next. In *Washington Post Company v. Total News, Inc.*, the *Post* and other publishers sued a small company for operating an independent gateway to their news pages—without the publisher's advertising. Instead, *Total News* "framed" the

pages with its own advertising. The publishers alleged that, because readers were cut off from the original advertisements and publishers' own Internet addresses, *Total News* was engaging in common law misappropriation, federal and state trademark dilution, unfair competition, trademark infringement, copyright infringement, and tortious interference with the publishers' business expectancies. *Total News* was "cyberpirating," or unfairly operating a parasitic site with a free ride on the publishers' backs. The case again settled with a link license.

Trademark Infringement Through Deep Linking

In 1998 and 1999, Microsoft's conduct of "deep linking" to Ticketmaster Corp.'s city guides—bypassing Ticketmaster's front web door containing paid advertising and proceeding directly to event and ticket information—was tested. Ticketmaster alleged the hyperlink bypass constituted trademark dilution and unfair competition. Microsoft must have agreed. It settled the case with an agreement to directly link to Ticketmaster's homepage.

Metalinks as "Passing Off" and Unfair Competition

In 1999, "metalink" lawsuits arose. Metalinks are optional codes embedded in a web page's HTML software code that can act as hidden bait for indexes created by web search engines. Metatags of a famous trademark, such as "Playboy," are used to increase "hits" to a non-Playboy website. Whether the use of such a trademark is fair or a deceptive trade practice turns on the specific facts.

In *Playboy Enterprises, Inc. v. AsiaFocus International, Inc.*, a judge held that AsiaFocus's metalink use of various Playboy trademarks to increase its website hits constituted "deceptive tactics," resulting in a hefty statutory sanction of \$3 million. However, in Playboy's suit against Terri Welles (279 F.3d 796 (9th Cir. 2002)), who had been "Playmate of the Year," Welles's metalink use of the famous trademark was a fair use. Her use of those terms to attract Internet viewers was not deceptive but truthful speech.

Software-Prompted Links—Search-Term Responsive Banner Advertising

Customized personal pages have become popular through commercial Internet portals and news sites. Website operators often customize pages without the viewer's knowledge to offer products or services similar to what a customer has searched for. The website takes "cyberdata" from viewer input, and customizes a web display to appeal to that viewer.

In 1999, Estee Lauder and Playboy Enterprises sued, claiming that offering customized banner advertisements on another's website—particularly for competing products—constituted trademark infringement. While at least one court found such a practice does not involve trademark use, trademark infringement, or trademark dilution at all—but rather First Amendment-protected advertising—similar issues are now being litigated by the *Washington Post* and other publishers against Gator, a company that sells ads for profits on the publishers' websites without authorization.

Trademark Use in Content and Web Domain Names

Federal courts have split on whether use of trademarks in parody or other text is infringement. In *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 28 (1st Cir. 1987), a court found that "expressive" or noncommercial use of a trademark in a parody was a fair use, whereas a commercial use would not be. In *Anheuser-Busch, Inc. v. Balducci Publications*, 28 F.3d 769 (8th Cir. 1994), however, the court refused to recognize the expressive/commercial distinction where a "superficial observer" might be confused as to whether the trademark owner had approved of the speech. In *Jordache Enterprises, Inc. v. Hogg Wyld Ltd.*, 828 F.2d 1482 (10th Cir. 1987), the court also looked to whether "tarnishment" of the trademark had occurred to determine if the use was fair.

These principles came to bear in *People for Ethical Treatment of Animals v. Doughney*, 263 F.3d 359 (4th Cir. 2001), where the court confronted the unauthorized use of a trademark as a domain name to a parodic web page. The court found that the use of the domain name "peta.org" for a web page touting "People Eating Tasty Animals" violated the Anticybersquatting Consumer Protection Act. The court reasoned that, to be protected under the First Amendment, the parodic use of a trademark in a domain name must be clear from the domain name itself, not merely from the website's content.

Courts have generally upheld as fair the use of a trademark in criticizing a product or service. For example, use of the Bally trademark on a "Bally Sucks" website "dedicated to

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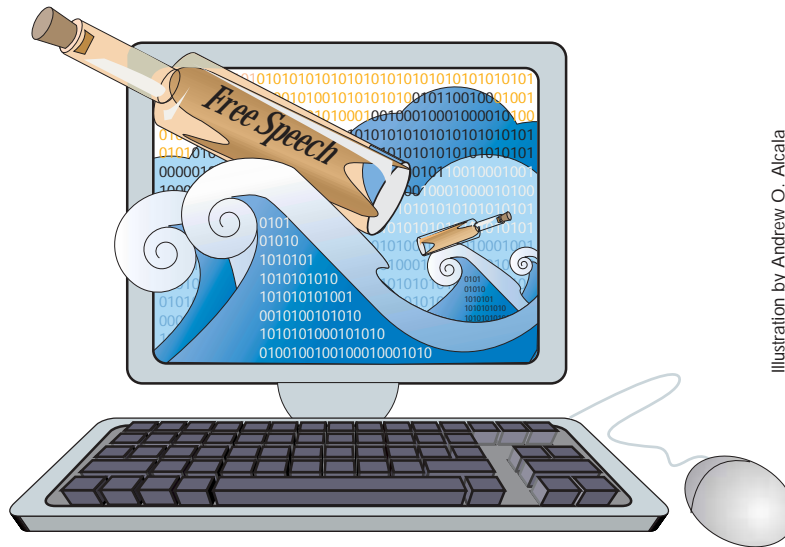


Illustration by Andrew O. Alcalá

Protecting Anonymous Speech

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The Supreme Court has traditionally weighed in favorably on the side of anonymous speech, noting that anonymous pamphlets, leaflets, brochures, and even books have played an important role in the progress of mankind. Despite the long history of valuing anonymous speech in the United States, the Supreme Court's holdings on the issue are fairly new. The first cases implicating the First Amendment right to anonymity involved challenges by civil rights groups to state laws requiring organizations to disclose their membership lists. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958); *Bates v. City of Little Rock*, 361 U.S. 516 (1960).

In striking down the laws, the Court emphasized the importance of anonymity for unpopular groups, noting that past revelation of the identity of NAACP members had resulted in "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." 357 U.S. at 462. The Court recognized that laws compelling people to reveal their identities go straight to the heart of the First Amendment, saying, "[i]nviolability of privacy in a group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group endorses dissident beliefs." *Id.*

Although these first cases involving the right to anonymity under the First Amendment involved freedom of association, the Court held a short time later that anonymity is just as important to free speech. In *Talley v. California*, 362 U.S. 60 (1960), the Court struck down a Los Angeles ordinance barring the distribution of anonymous handbills. Unlike the situations in the earlier civil rights cases, there was no showing that the plaintiff would face specific harm if forced to reveal his identity. Instead, the Court cited historical examples in which speakers resorted to anonymity to avoid persecution in order to demonstrate that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." *Id.* at 64-65. By eliminating the need for plaintiffs to show a likelihood that they will face injury if forced to reveal their identities, the Court strengthened the protection for anonymous speech.

Thirty-five years later, the Court issued its strongest decision to date affirming the constitutional protection for anonymous speech, holding that requiring speakers to disclose their identities is "a direct regulation of the content of speech." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995). As a result, restrictions on anonymous speech must be "narrowly tailored to serve an overriding state interest."

The compelling state interests that have been advanced most often as justifications for prohibiting anonymous speech include: (1) restricting the ability of people to publish libelous or fraudulent statements with impunity, and (2) informing the electorate and preventing electoral misconduct. Less frequent justifications include "preventing the world-wide Communist conspiracy from accomplishing its purpose in this country" and enforcing tax or business regulations.

Although the Court has acknowledged that the states' interest in preventing libelous or fraudulent speech is compelling, every time it has examined the issue it has found such laws unconstitutional overbroad. Such statutes usually outlaw protected speech as well as unprotected speech because they do not, for example, require only the authors of libelous speech to identify themselves but the authors of all speech as well.

Similarly, the Court ruled in *McIntyre* that the state of Ohio's interest in preventing the publication of fraudulent or libelous statements did not justify a prohibition on the distribution of anonymous campaign literature. Although proponents of the law claimed that an additional interest—providing the electorate with relevant information—distinguished the case, the Court found the statute to be overbroad because the benefits of providing voters with additional information did not outweigh the right of authors to remain anonymous.

In another case involving election-related speech, *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), the Court struck down a Colorado statute requiring petition circulators to wear identification badges stating their names despite the state's argument that such a measure was necessary to prevent electoral misconduct. Relying on *McIntyre*, the Court compared circulating a petition to distributing a handbill because both involve "one-on-one communication." However, the Court noted that the restraint on speech in *Buckley* was even more severe than that at issue in *McIntyre* because petition circulation is the "less fleeting encounter," with circulators both expressing a desire for political change and discussing the

merits of the proposed change with potential signators. The Court placed particular importance on the fact that Colorado could achieve its stated goal of enabling the public to identify—and the state to apprehend—petition circulators who engage in misconduct through a provision in the statute requiring petition circulators to submit an affidavit containing their names and addresses with their petitions. *Buckley* illustrates the Court's particular reluctance to compel speakers who wish to remain anonymous to reveal their identities simultaneously with their speech.

In the recent *Watchtower* decision, the Court cited *Buckley* in dismissing the argument that the village ordinance did not implicate anonymity because canvassers necessarily revealed their identities by appearing in person. People do not waive their right to anonymity by revealing their physical characteristics, the Court said, noting that "strangers to the resident certainly maintain their anonymity, and the ordinance may preclude such persons from canvassing for unpopular causes." Defenders of the Stratton ordinance said the restriction on anonymous speech was necessary to protect the town's mostly elderly population from fraud, crime, and privacy violations. Though the Court acknowledged that these interests were compelling, it found the ordinance overbroad because it applied not only to commercial activities and the solicitation of funds, but also to religious causes, political activity, and even "ringing doorbells to enlist support for employing a more efficient garbage collector."

Furthermore, the Court held that the statute was not narrowly drawn because, as in *Buckley*, there existed a more constitutionally benign way for the town to achieve its stated interests. An unchallenged provision of the ordinance at issue established a procedure by which any Stratton resident could prohibit solicitation altogether and thus gain protection from fraud or crime by filing a "No Solicitation Registration Form" and posting a "No Solicitation" sign on his or her property. The Court held that this provision of the ordinance, "coupled with the resident's unquestioned right to refuse to engage in conversation with unwelcome visitors, provides ample protection for the unwilling listener."

Although it seems as though the Supreme Court has established a difficult test for the government to meet when it seeks to restrict anonymity, there have been cases in which the government has met that standard. In 1961, the Court upheld an order requiring the Communist Party to disclose the identity of all its rank-and-file members. *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 103 (1961). The Court held that the government's interest in preventing "the world-wide Communist conspiracy from accomplishing its purpose in this country" justified the membership disclosure requirement. The Court distinguished its decision in *Communist Party* from those striking down state laws requiring the NAACP to disclose its membership lists by saying that the legislative history demonstrated the "magnitude of the public interests which the registration and disclosure provisions are designed to protect..." Although it is extremely unlikely that the Court would uphold a similar law requiring Communist organizations to divulge their membership lists today, *Communist Party* provides a precedent for placing limitations on the First Amendment right to anonymity when the state's interest in compelling the identity of a speaker—or association member—is great. In other words, national security may outweigh the right to anonymity.

The state's interest in ensuring fair elections has also been held to justify restrictions on anonymous speech. The Court held in *Buckley v. Valeo*, 424 U.S. 1 (1976), that a campaign finance law requiring political committees and candidates to disclose the names and addresses of people who contribute more than \$100 in a year was narrowly drawn to serve the compelling state interest of informing the electorate and preventing the corruption of the political process. The law's challengers claimed that the law was overbroad as applied to minor political parties because the law would be more likely to deter people from contributing to lesser-known candidates supporting unpopular causes than candidates from the two major parties. However, as in *Communist Party*, the Court relied heavily on congressional findings relating to the need for campaign-finance reform in determining that "the governmental interests sought to be vindicated by the disclosure requirement" were of the same magnitude as those in *Communist Party*: "the free functioning of our national institutions."

Communist Party and *Buckley* make clear that the Court does not consider the right to anonymity absolute. If the government can present a compelling reason why a speaker's identity should be disclosed, the Court will listen. The government, however, still has a difficult test to meet—a test whose stringency was reaffirmed by the Supreme Court's decision in *Watchtower*. For the government to restrict anonymous speech, the interest sought to be protected must be important enough to justify forcing someone to speak, and the law restricting anonymity must be the only way to achieve that interest. But *Watchtower* was a decision based on one of the oldest forms of communication—going door to door to talk to people in person. Many question what protection anonymous speech will have in one of the newest forms of human communication—the Internet.

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“When I Was a Young Lawyer”

Earle F. Lasseter
Partner

**Pope, McGlamry, Kilpatrick, Morrison and
Norwood, Columbus, Georgia**

What was your background like and what inspired you to become a lawyer?

I was born in Gadsden, Alabama. I attended public school through the eighth grade and spent my high school years at Georgia Military Academy in College Park, Georgia (now Woodward Academy). I graduated from Auburn University with a bachelor of science in business administration. Lawyer friends of my family inspired my interest in the bar.

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

I attended the University of Alabama School of Law and went into the Judge Advocate General's Corps, U.S. Army, upon graduation.

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?

The Young Lawyer experience that stands out to me was my first political endeavor in the YLD: the active campaign support of a close friend of mine, Charlie White, who was running for clerk. What I learned from that campaign applies today in the ABA politics: If you want to accomplish something, gain solid support from a number of close friends. Then, make certain that you check everything.

Whom do you most admire?

Practicing attorneys.

What is your greatest source of professional pride?

Being elected treasurer of the ABA.



Earle F. Lasseter then and now



What got you started with ABA involvement?

In 1971 I was stationed in the JAG Office, U.S. Command, Berlin. My boss in Heidelberg was Brigadier General George S. Prugh, who is a great ABA member and supporter. The 1971 Annual Meeting was in New York/London, and General Prugh gave all the lawyers who wished to attend the London portion seven days admin leave. That got me started in the Young Lawyers and the ABA. Since 1971 I have missed only two Annual and two Midyear Meetings. Those were due to military duty in the Far East.

What was the worst professional advice you ever received?

Don't join the ABA.

What was the best professional advice you ever received?

Join the ABA and get active in the Young Lawyers Division.

What personality trait has served you best over the years?

Don't talk too much, and listen thoughtfully.

What challenges you the most?

Not having enough time to do all the things I would like to do in service to the bar.

What is the one thing you cannot stand about the law?

The excessive time-consuming activities necessary to take a case to fruition.

What is your favorite type of legal work?

Plaintiff litigation.

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

Bar and Section leaders must listen to, consider, and understand the issues identified and addressed by the young lawyers.

Earle Lasseter's Advice for Young Lawyers:

- Involvement
- Commitment
- Balance
- Observation

Adrift in Cyberspace

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complaint, issues, problems, beefs, grievances, grumblings, accusations, and gripes of Bally Total Fitness health clubs,” is fair. But while the First Amendment protects expressive domain names like “balleysucks.com,” the court in *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573 (2d Cir. 2000), ruled it does not protect “.com” or “.org,” which are “3-letter afterthoughts . . . lacking in expressive content.”

In *American Libraries Ass'n v. Pataki*, 969 F.Supp. 160 (S.D.N.Y. 1997), a federal court—noting the decision whether to allow linking to copyrighted material publicly available on a web page is far from clear—stated, “the Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether.”

Cyberdirectories

Creating a “thumbnail” directory of copyrighted pictures from web pages is also a “fair use,” the court ruled in *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002), but posting web code that allows direct importation of a full-sized image from another's website, is not.

That is true despite the fact that, under the Digital Millennium Copyright Act (DMCA), computer code, which combines nonspeech and speech elements, is “speech” for purposes of the First Amendment. Nevertheless, web publication of DVD decryption software is copyright infringement (*see Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001)); and Napster can lawfully be enjoined from facilitating MP3 file sharing, but only if it knows the files are copyrighted and shared without consent (*A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001)). Otherwise, the First Amendment protects file sharing or free association.

Cybersmearing

In one of the first trials in the country to address cybersmearing—i.e., speech defaming an individual or entity—a Texas jury recently rejected a \$700 million suit by an Internet company that claimed harmful postings by an employee of a competing company harmed it by destroying its product market and stock prices. According to lawyers for the “cybersmearers,” the jurors found the First Amendment protects fair criticism and, further, awarded no damages as Internet companies fail for “lots of reasons.”

Enforcement of Foreign Judgments

While foreign restrictions regulating Internet content are numerous, foreign plaintiffs may not be able to enforce their judgments against American companies given First Amendment protections. In *Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antifeminitisme*, 169 F.Supp. 2d 1181 (N.D. Cal. 2001), a California court held that a French court's order requiring Yahoo! to block French citizens' access to Nazi materials displayed or offered for sale on Yahoo!'s U.S. website was unenforceable. The court underscored that the United States Supreme Court has respected the Internet as a unique and wholly new medium of worldwide human communications, and that orders of foreign courts that contravene the Constitution and laws of the United States will not be enforced. Yahoo! had complied with French restrictions, with respect to its French Internet site, that criminalize the display and sale of highly offensive Nazi-related propaganda and memorabilia.

Conclusion

A host of cyberproblems are pitting First Amendment protections against business laws and foreign regulations, as companies scramble to protect public uses of their intellectual property via the Internet and governments seek to protect their citizens. With the growing economic viability of the Internet, the controversial cyberspace battles will continue. Which interests will survive, and how, remain open questions.

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Privacy and Public Access to Court Records

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openness and privacy were apparent when the federal judiciary solicited comments on its proposed electronic access rules in early 2001. The request for comments from the Judicial Conference of the United States recognized “a long tradition—rooted in both constitutional and common law principles—of open access to public court records.” However, the judiciary also referred to some U.S. Supreme Court decisions and stated, “access rights are not absolute, and that technology may affect the balance between access rights and privacy and security interests.”

Federal Policy

The Judicial Conference, a policymaking group for the nation's federal court system, approved policies in September 2001 to permit electronic access to certain court case files. The access plan provides that documents in civil cases will be available electronically to the same extent they are available at the courthouse. The plan exempts Social Security cases, and the judges said litigants should partially redact “personal data identifiers” such as Social Security numbers, birth dates, financial account numbers, and names of minors.

The policy also applied to bankruptcy cases. But the Judicial Conference voted that the Bankruptcy Code should be amended to allow sealing of bankruptcy files where privacy concerns were present and to allow the court to collect a debtor's entire Social Security number but display only the last four digits in the records.

After initially declining to extend the policy to criminal records, the Judicial Conference launched a pilot program offering Internet users access to criminal court files in 11 federal jurisdictions. The high interest in recent terrorism cases, such as the prosecution of Zacarias Moussaoui, apparently sparked the change of policy. On March 13, the judges voted to allow online access to criminal case files in high-profile cases and to create a pilot program to examine the effects of improved electronic access on the federal court system. Internet users will be able to access the records through the courts' Public Access to Court Electronic Records system, or PACER, at seven cents a page, conference officials said in a statement.

State Policies

Each state has dealt differently with the issue of electronic access to court records, but common issues arise. Officials seem to recognize that court records are public records that should be readily available so that the public may monitor how court officials perform their duties. On the other hand, officials worry that the speed, efficiency, and anonymity of the Internet create problems that have not existed with paper files. Again, privacy and security concerns are most often cited.

A coalition of state court administrators over the summer offered a model policy on access to court records designed to establish a consistent standard for state courts to follow with regard to access to court records. The State Justice Institute funded the effort to draft a model policy for the states, a project undertaken by the Justice Management Institute. The National Center for State Courts on behalf of the Conference of Chief Justices, the Conference of State Court Administrators, and the Model Policy Project Advisory Committee asked for public comments on the model policy. Although the committee initially explored a model policy for electronic access, the final recommendation dealt with access to all court records.

The committee included representatives from courts, the judiciary, the press, and privacy interests. The author was a member of the committee representing press interests. Reaching a consensus was difficult. Initial drafts of the policy declared that access to some records may be “inappropriate.” The proposal cut off access entirely to certain categories of records. One section denied access to a wide variety of material including financial information, “proprietary business information,” copyrighted material, sealed records, and “information that is not to be accessible to the public” pursuant to federal or state laws. The proposed policy suggested that a balancing test be used to close off access to other records. This test weighs “risk of harm” and “privacy interests” against general interests in favor of access.

Media representatives on the committee urged that the policy state that access to records may be denied only where there is a compelling interest at stake and the denial of access is narrowly tailored to serve that interest. Most cases on the subject have held that privacy or a theoretical risk of harm is insufficient ground to restrict access. Thus, if the proposed policy were to become effective, it would substantially change the public's right of access to court records.

The media representatives urged that the model policy reflect the compelling interest standard reflected in numerous court cases that have found a presumptive right of access to court documents. See, e.g., *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (finding a common law right of access to judicial records); *Republic of Phil. v. Westinghouse Elec. Corp.*, 949 F.2d 653 (3d Cir. 1991) (right of access to trial records); *Globe Newspaper Co. v.*

Pokaski, 868 F.2d 497 (1st Cir. 1989) (right of access to trial records); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (right of access to documents filed with a summary judgment motion); *Anderson v. Cryovac*, 805 F.2d 1 (1st Cir. 1986) (stating that there is a long-standing presumption in the common law that the public may inspect judicial records); *Associated Press v. U.S. (DeLorean)*, 705 F.2d 1143 (9th Cir. 1983) (finding a First Amendment right of access to court records); *Brown & Williamson Tobacco Co. v. Federal Trade Commission*, 710 F.2d 1165 (6th Cir. 1983), cert. denied, 465 U.S. 1100 (1984) (noting a First Amendment and common law right of access); *United States v. Myers (In re Nat'l Broadcasting Co.)*, 635 F.2d 945 (2d Cir. 1980) (strong presumption of a right of access); *Globe Newspaper Co. v. Fenton*, 819 F. Supp. 89 (D. Mass. 1993) (right of access to court record indexing system).

The committee's recommendation included the compelling interest standard, but when the committee presented the proposed policy at the joint annual summer meeting of the Conference of Chief Justices and Conference of State Court Administrators, the delegates rejected language in the model policy implementing the compelling interest test. It is difficult to predict the impact of the model policy as many states are well underway implementing their own policies.

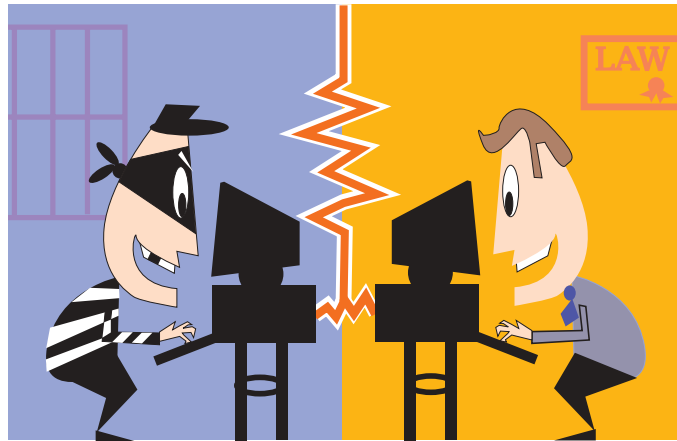
Despite some states' concerns, many have established Internet access to court records without incident, although the extent of available information varies. The question of providing electronic access to court records also raises subsidiary issues. For example, what will happen as courts move to a paperless courthouse? Courts that now restrict Internet access

to electronic records frequently justify such limitations because a person can come to the courthouse to see the records in person, if such information is truly needed. As courts move away from paper filing, such justification is no longer valid.

Courts also must decide whether compilations of information will be available. Obviously, electronic storage of data allows a person to quickly search records and compile relevant data. Traditionally, a person would need to rummage through piles of paper files to amass such a compilation. Ohio courts have ruled that compilations must be released, as its public records law “does not require members of the public to exhaust their energy and ingenuity to gather information which is already compiled and organized in a document created by public officials at public expense.” *Cincinnati Post v. Schweikert*, 527 N.E. 2d 1230, 38 Ohio St. 3d 170 (1988).

Finally, courts must decide whether they will release internal documents, such as e-mail messages and internal memoranda. Although such documents have not traditionally been considered “court records” open to the public, it is likely that the more progressive and open states will allow public access to such records.

Lucy Dalglish is executive director for the Reporters Committee for Freedom of the Press. She gratefully acknowledges the research assistance from Ashley Gauthier, McCormick Tribune Legal Fellow at the RCFP, and Phillip Taylor, McCormick Tribune Journalism Fellow at the RCFP.



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Legislative Update

Leo J. Jordan

Status Report 107th Congress

As the days move closer to November elections, legislation of major interest to TIPS members is languishing. Noting the diverse interests in our section, the present status on tort and insurance-related issues may be good or bad. Congress is still reeling from the tragic events of September 11, 2001, as well as issues associated with corporate fraud and the faltering economy. Both the Senate and the House, reacting to public pressure, enacted legislation to tighten control of the accounting industry and crack down on corporate fraud. Hearings on legislation creating the Department of Homeland Security share the spotlight with corporate concerns.

While many of us Washington watchers never did expect significant tort and insurance legislative activity from this Congress, there was and is activity. The real issue though is whether relevant legislation introduced was done so with the intent of active pursuit or merely to satisfy constituent interest. Actually, it appears to be somewhat of a mixed bag.

I will summarize what I sense are the key pieces of legislation of importance to TIPS.

Class Actions

From the viewpoint of the business community, there is nothing more important than enacting legislation to move most major class action legislation from state to federal courts. Proponents argue that they are already 50 percent completed toward their goal. This is because the House of Representatives has already passed the Class Action Fairness Act of 2002. Opponents have argued that 50 percent is a failing grade because the House-passed bill may never see the light of day in the Senate. However, a small glimmer of light surfaced on July 31, 2002, when the full Senate Judiciary Committee held a hearing on S. 1712. What is surprising is that there was far more interest in the hearing than many committee members and lobbyists anticipated. The hearing offered a balanced presentation of witnesses for and against the legislation. As one who was able to get into the hearing room, I offer these observations.

a) Committee members acknowledged problems with class action litigation at the state court level.

b) The principal proponents of the legislation are the United States Chamber of Commerce and its business-related supporters. Principal opponents are the American Trial Lawyers Association and its consumer-related supporters.

c) There was a sense that while some federal corrective measures were necessary, the current legislation is overbroad, leaving too many cases falling into federal courts.

At the end of the hearing, Chair Patrick J. Leahy, D-VT, suggested no intent to move S. 1712 beyond the July 31 hearing. The usual procedure is for the committee to mark up the bill for committee vote. It may be the Chair, who was obviously not enthusiastic about the bill, would prefer to have the parties work toward a more acceptable compromise before again taking up the bill.

We should keep in mind the ABA Task Force on Federal Class Action Legislation, which is struggling to seek common ground. Members of Congress have expressed interest in the progress of the Task Force. The Task Force expects to report its findings to the House of Delegates no later than February 2002. An interim report was presented to the House of Delegates at the August meeting in Washington. Copies are available on the ABA website (abanet.org).

Terrorism Insurance Act

The House and Senate passed legislation to create a safety net for insurers that offers terrorism coverage on commercial property. There are significant differences in these bills. The House version contains strong tort reform measures, including a ban on punitive damages and a cap on attorney fees in terrorism-related lawsuits. However, for reasons apparently unrelated to the legislation, the Senate had difficulty appointing members to a joint conference committee to iron out these differences. The logjam has been broken, and Senate conferees will join the House to resolve the differences in the legislation. News reports reveal that there has been little behind-the-scenes effort to resolve House and Senate differences. Representative Jim Saxton, R-NJ, optimistically predicts a bill should be passed by late September.

Medical Professional Liability—H.R. 4600

Members of Congress are hearing from doctors in various states that health care premiums have increased to a point where they have become unaffordable. This is especially true with respect to high-risk medical specialties. Some doctors have abandoned their specialty, others have retired, and others have sought relief in other states.

In response to these events, H.R. 4600 was introduced in April 2002 and referred to House Judiciary and Commerce Committees. The legislation contains several important tort reform measures, including a cap on general damage awards, as has been enacted for some time in California. Supporters and opponents argue whether damage caps will result in lower premiums on medical professional liability policies. The most recent House action includes a request to GAO to examine the financial returns of the insurance industry. This report is expected in early September 2002. While medical professional liability might well pass the House before year's end, its future in the Senate is decidedly less favorable. However, in a surprise move just prior to the August recess, Senator Mitch McConnell, R-KY, offered an amendment to S. 812, a bill designed to provide greater access to affordable prescription drugs. The McConnell amendment related to medical malpractice costs. Under the amendment, limits would be placed on punitive damages, joint and several liability would be abolished, a limit would be placed on attorney fees, and recovery from collateral sources would be precluded. The amendment did not include a cap on noneconomic damages. The McConnell Amendment failed in a 57 to 42 vote. Moreover, following a vote on the McConnell Amendment, the Senate on July 31 killed legislation to provide prescription drug benefits to the elderly under Medicare.

Automobile Liability

Legislation has been introduced in the House (H.R. 1475) and Senate (S. 837) to enact a car insurance accident reparation system. These bills would preempt state insurance car insurance laws and create a system where consumers would choose between two types of insurance protection. The first type (personal protection) permits injured persons to recover economic losses directly from their own insurer on a no-fault basis. The second type of coverage (tort maintenance) would allow injured persons to obtain coverage for both economic and noneconomic loss from their own insurance company—after proving fault against a motorist who had personal protection coverage. While hearings have been held in earlier years on these measures—commonly called “choice no-fault”—no action is anticipated in either the House or Senate in the foreseeable future.

ERISA Shield—Patients Bill of Rights

Under ERISA laws enrollees in employer-sponsored health plans are generally unable to pursue state law remedies resulting from actions or decisions of their health plans. They may seek relief only in federal court, which limits damages to the actual cost of the plan benefit under dispute. While important legal in-roads have been made in state courts, in large measure these disputes over benefits and administration have been preempted by ERISA.

The recent history of the Patients Bill of Rights legislation is complex and confusing. In June 2001, the Senate passed broad legislation to remove the ERISA shield and permit cases of medically reviewable issues to be brought in state court. A similar bill having bipartisan support was introduced in the House. However, the House leadership supported by President Bush introduced a competing House bill. Following complex parliamentary maneuvering, the House passed legislation which would permit, among other matters, a patient to bring a cause of action against a health plan in state court—but would provide more limited right to sue.

The usual process is for the nonconcurring bills to go into a joint conference committee. However, because of major policy differences between the Senate and House bills, and the differences within the House sponsors and leadership, conference committee resolution was set aside as a futile effort. Since November of 2001, representatives of Senator Kennedy (D-MA) and President Bush have been attempting to develop a compromise proposal. These talks collapsed just before the August recess, significantly reducing the chance that Congress will broaden exemptions under ERISA. Questions have been raised as to whether the parties really want a compromise solution or would prefer to defer in favor of retaining an important election issue.

Product Liability

Those who have followed federal legislation over the last 10 to 15 years will recall repeated efforts to enact product liability legislation. Perennial legislation would preempt state laws in favor of broad federal legislation. Manufacturers and small business owners support broad federal legislation because it limits their liability. Consumer groups have consistently opposed the legislation for similar reasons.

Legislation has been introduced in the 107th Congress in much the same form as in many previous legislative sessions. In the 106th Congress, legislation limiting the liability of product sellers and small businesses passed the House in February 2000. The Senate took no action during the 106th Congress. While product liability has been introduced in the House (H.R. 1805) and Senate (S. 865), no significant activity has occurred as we near the twilight of the 107th Congress.

The Washington ABA office has again provided valuable service to TIPS in following this legislation. For this we express our sincere gratitude.

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



Something New

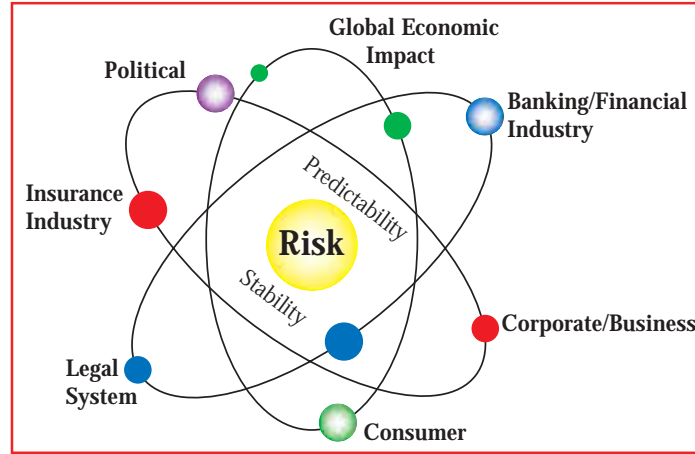
Libby Benet and Tom Baker

Vision 20/20 Institute: The Future of the Tort and Insurance Practice in the Years to Come

The TIPS Emerging Issues Committee is working together with the University of Connecticut Insurance Law Center and the Geneva Association to focus on the future of the tort liability and insurance system in the United States. TIPS members, including plaintiffs' counsel, defense counsel, corporate counsel, and insurance counsel, along with UConn's faculty and students and the Geneva Association (an academically oriented, nonprofit research organization supported by insurance companies based in the United States and Europe) are joining together to explore the future.

What will be the "emerging" issues of tomorrow in tort and insurance practice in the years to come?

The illustration portrays the interlocking pieces of the puzzle as the committee sees it. Change in any of these sectors unbalances the system, some-



times in unpredictable ways. We would like to lift our heads up from the tasks immediately in front of us and think about ways that the system is unbalanced at the moment, and threats to the balance in the short-term future.

To that end this partnership will work in two phases. In the first phase, key leaders in these spheres of influence met as a small group to speak about issues that keep them up at night—what they see as the principal challenges of the next five to 10 years in their particular spheres. This focus group met in New York at NYU's Law School in late August.

Representation from academia, associations, and business are evenly divided. Business leaders identified and discussed important tort/liability insurance system issues. The association and academic participants spoke to those issues as well. This was not intended to be a forum to debate the pros and cons of tort reform. It was a forum to discuss the good, the bad, and the ugly of the tort liability and insurance system in a balanced format so that potential solutions can be researched and discussed.

The goal of phase one will be to spot issues for research and presentation in phase two. Phase two will culminate in a seminar—Vision 20/20—to be held in Spring 2003 at the University of Connecticut. We will keep you posted as things develop.

Libby Benet is chair of the Emerging Issues Committee and Tom Baker is director of University of Connecticut Insurance Law Center.

Randy Allment is a partner at Williams Kastner & Gibbs PLLC in Seattle.

The market boasts a jubilant, open-air celebration operating farmers' market (since 1907). The market also houses eclectic shops and fine restaurants—many with breathtaking views of ferry and freighter traffic on Elliott Bay. The Friday night TIPS Welcome Reception will be held at Seattle's most famous landmark, the Space Needle (www.spaceandneedle.com). Built in 1962 for the Seattle World's Fair, the rotating 607-foot Space Needle was once hailed as futuristic and daring. Now, this internationally recognized symbol of Seattle is a quirky reminder of the city's creative spirit. Following Saturday's jam-packed day of meetings, TIPS will join the YLD at the "Sky Bridge" of the Convention Center to mingle, party, and dance to the music of The Beatniks, MTV's coverband of the year (www.thebeatniks.com). The Beatniks perform '60s and '70s music with an energy and passion you won't find anywhere else. This is a can't-miss meeting, so mark your calendars now for your trip to the Pacific Northwest, February 3-9, 2003.

The 2003 Midyear Meeting promises business and pleasure in not just one, but two locations. Prior to the regular meeting in Seattle, this year's new twist provides TIPS and YLD members with the opportunity to attend a pre-meeting ski trip from February 3-6 at beautiful Whistler, British Columbia (www.touristswhistler.com). No guilt necessary since we have scheduled early morning ethics CLEs that will leave you with the rest of the day free to hit the slopes at Ski Magazine's top-rated North American ski resorts Whistler/Blackcomb Village North. More than 150 shops and boutiques offer Native artwork, locally made jewelry, and high-fashion apparel. Our hotel, the award-winning Fairmont Chateau Whistler, features a full-service spa for those who simply want to relax or be pampered (www.chateauwhistler.com). The Seattle end of the meeting starts on February 7. Although February in Seattle is chilly (35 lows and 45 highs), the chances of seeing blue skies and Mount Rainier are fairly good. Additionally, nationally acclaimed local chefs have placed Seattle solidly on the international cuisine map with an inspiring and adventurous cuisine that is distinctly Seattle. Seattle also delights visitors with its distinctive architecture that provides a stimulating mix of innovation and style. For example, Paul Allen's rock museum, the Experience Music Project, has a psychedelic Frank Gehry design that is relentlessly edging Seattle into the 21st century in terms of unconventional architecture (www.emplive.com). The Seattle landscape also features "Sleepless in Seattle" houseboats on Lake Union that make up the largest floating residential community in the country. For those who like to shop, you will find everything you would expect from one of America's major metropolitan cities. However, there is one shopping stop that you should not miss—the Pike Place Market. This must-do excursion is the nation's oldest continually

February 3-9, 2003

Join us for the TIPS Midyear Meeting
Randy Allment



"My Seattle and Whistler, BC"

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