

In-House Counsel Committee Newsletter

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February 2003

FROM THE OUTGOING CHAIR

Peter Wright
*Retiring Chair, In-House Counsel
Committee*
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It has been my pleasure and honor to serve as the Committee's chair over the past two years. I very much appreciate the commitment of time and talent made by the vice-chairs who have served on the Committee. I especially would like to recognize the Committee's long time editor of this newsletter, Jim Arnold, who through his extraordinary effort over the last few years has established the Committee's newsletter as a very valuable source of information and insight for the Committee's membership about matters of importance to in-house counsel. Finally, I would like to thank the members of the Committee for their the work, ideas and interest that have made the Committee's newsletter and programs so successful and the time that I have spent with the Committee so enjoyable and fulfilling.

The Committee has had a busy and productive year so far and already has in the works plans and programs for 2003. In this column I would like to let you know some of what we have done and what we will be doing. Following my message is a message from the new chair, Alexandra Dunn. I am continuing

my involvement in the Committee leadership as the Programs vice-chair for 2002-2003.

2002 Keystone Conference

As the Committee's Technology vice-chair and a member of the 31st Annual Conference on Environmental Law (2002 Keystone Conference) Planning Committee, Alexandra Dunn, oversaw the very successful panel presentation entitled "Environmental Incident Management: Real World Advice for Real World Crises." The panel used a hypothetical fact pattern to discuss the emergency response roles of in-house counsel, outside counsel, state and federal personnel, and communications experts in emergency response planning, prevention, crisis communication, and post-incident litigation. The panelists addressed release reporting, maintenance of legal privilege, state and federal investigations and inspections, media communications, crisis management, community relations, and the often all-consuming post-incident litigation. The panel included moderator Walter L. Sutton, University of Texas at Dallas, and panelists Mark Tucker, Dow Chemical, Midland, Michigan; Erin Donovan, DecisionQuest, Washington, D.C.; John P. Manard, Phelps Dunbar, New Orleans; and Greg Cooke, the administrator of USEPA Region 6.

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Committee Newsletter
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Jim Moore, Editor**

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There will be a true focus on in-house counsel and corporate environmental stewardship at Keystone 2003. Alexandra has kept our committee active as a Co-chair of the Planning Committee Keystone 2003. It is not too soon to mark your calendar for March 13-16, 2003!

2002 Section Fall Meeting

The 10th Section Fall Meeting was held in October 2002 in Portland, Oregon. Our Committee co-sponsored a panel discussion with the Ethics Committee (chaired by in-house counsel Susan Ponce). The panel discussed the role of in-house and outside counsel in meeting the conflicting obligations regarding the disclosure of sensitive corporate information related to the environment, health and safety. The myriad of disclosure requirements that corporations face with respect to environmental, health and safety matters were addressed. Finally, the panel reviewed the challenges of complying with the law, fulfilling one’s legal ethical obligations, meeting the public’s expectations, protecting corporate intellectual property and keeping one’s job.

The moderator for the panel was Professor Carl Pierce of University of Tennessee. The panelists were Susan Ponce, assistant general counsel at Halliburton; Michael Levy, Partner, Swidler Berlin Shereff Friedman LLP; and Dale Jensen, national partner-in-charge, Environmental Dispute Analysis & Advisory Services, PricewaterhouseCoopers LLP.

Future Programs

We are thinking about programs in 2003 that will address the new responsibilities that are being imposed upon in-house counsel – and particularly those of us who work for publicly traded companies – and how those obligations arise in the context of the environmental, energy and natural resource practice areas.

Brown Bags

The Committee presented a very successful "Quick" Teleconference Brown Bag program on Sept. 12, 2002 in conjunction with the Superfund and Hazardous Waste Committee and the Environmental Transactions, Audits, and Brownfields Committee. The teleconference program, entitled "Preventing RCRA Headaches: Practical Tips For Maximizing Compliance and Minimizing Exposure," was well-received. More than 100 people participated in the audience throughout the United States. Speakers included moderator Sara Beth Watson, of Steptoe & Johnson, LLP, in Washington, D.C. and speaker Kenneth M. Kastner, of Hogan & Hartson, LLP, also in Washington, D.C.

The Committee is exploring partnering with other Section committees on brown bags in 2003. Don't hesitate to contact me or any of the vice-chairs with your teleconference program ideas.

FROM THE NEW CHAIR

Alexandra Dunn
Chair, In-House Counsel Committee
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I am pleased to be serving the membership as Committee chair for 2002-2003. I am joined in the leadership by eight talented and dedicated vice-chairs. Their names, and focus areas, are included later in this newsletter for your reference. We look forward to hearing from you about new areas of interest and topics for discussion, panels, or presentations. In addition, we hope that some of you will join us as newsletter article contributors.

You may notice that the Committee is no longer named Corporate Counsel. In October 2002, the Section's leadership approved our

proposed name change to In-House Counsel. This does not mean those of you not presently in-house cannot continue your Committee membership. However, we felt the In-House Counsel name was more representative of the majority of Committee members, and would help us better focus the Committee's future growth.

The Committee will focus on several key issues throughout 2002-2003, including emerging environmental issues and trends, corporate environmental leadership and stewardship, environmental enforcement developments, maximizing relationships with outside counsel, law department structure and communication, and environmental reporting and record keeping. We hope to hear from you on these and other issues related to your practice.

The Committee has been actively sponsoring panels at recent Section meetings. Peter described our work at Keystone 2002 and the 10th Section Fall Meeting, above. We go into 2003 supporting a plenary session at Keystone 2003 focusing on corporate CEOs and how environmental decisions are incorporated into various company plans and decisions. A breakout session panel will focus on key developments in globalization. Keystone 2003 has one of the most robust agendas ever for in-house counsel, and we hope to see you at this wonderful conference in a spectacular location.

We also are trying to reach out to our Committee members, in a more direct and personal fashion. In this regard, you should have received recently a letter from one of our vice-chairs or from me, soliciting your input, and ideas, and reviewing how to access the Committee list serve. As you know, list serves are a powerful tool for bouncing questions off one another. Right now, our Committee list serve is rather underutilized. Please see Jim Arnold's article below to find out how to

maximize the list serve to your advantage.

Finally, as Raissa Kirk's article below describes, we have kicked off an exciting public service project with a group called Earth Force. We hope you can become a part of this new outreach opportunity.

Again, we thank you for your interest, we encourage your involvement, and we look forward to your input. We hope you enjoy this issue of the newsletter!

NEW PUBLIC SERVICE PROJECT

Raissa Kirk
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We are pleased to invite all committee members to join us in a new and exciting community service project. The Section leadership approved this project at its October meeting and we are now ready to go forward with an organization called Earth Force whose purpose is to help young people discover and implement lasting solutions to environmental problems in their communities. The program described below is an innovative blend of civic and environmental education. We are seeking support for the project initially in the following cities: Lansing, Michigan; Detroit; Indianapolis; Fort Wayne, Indiana; Spring Hill, Tennessee; Shreveport, Louisiana; Baltimore; Houston; Austin, Texas; Philadelphia; Erie, Pennsylvania; Pittsburgh; Tampa/St. Pete, Florida; Charleston, South Carolina; Portland, Oregon; and Lordstown, Ohio. Our Committee is enthusiastic about this effort and hope that you will join us in our work with Earth Force.

What is Earth Force?

Earth Force is a national non-profit

organization created in 1994 by The Pew Charitable Trusts in recognition of two emerging national trends: young people's desire to act on behalf of the environment and their desire to help their communities through voluntary service. Earth Force serves 35,000 youth a year through eleven offices across the country. A visit to one of their Web sites – <http://www.earthforce.org> or <http://www.green.org> will illustrate exactly how young people and adult volunteers can improve their communities by participating in Earth Force programs.

The GREEN Program

The Global Rivers Environmental Education Network (GREEN), founded in 1984 by Dr. William Stapp of the University of Michigan, became an Earth Force program in 1999. This award-winning program matches middle and high school science students with private sector sponsors to study and improve water quality in their community. The program is implemented from start to finish during a school year. GREEN builds essential academic skills including critical thinking, teamwork, problem solving, and decision making; teaches students how to assess watershed health with the proper tools; and encourages youth to undertake projects to improve environmental quality based on their findings. The students and their teacher begin by doing a watershed assessment that includes physical, chemical and biological monitoring. Using this data and other resources, they identify a problem they would like to address. Students research the problem in a balanced fashion, review applicable legal or community considerations and decide on their preferred solution. They then design and implement their action plan to address the problem. They then reflect on what they learned.

The In-House Counsel Committee's Project

The In-House Counsel Committee would like to implement the GREEN program at two to three sites across the country, with the private sector sponsors and mentors drawn from our Committee's membership. We will lay the foundation now to have the program ready to proceed in the 2003-2004 school year. If the initial projects are successful, and the membership interest is sustained, we could explore future GREEN projects.

Corporate, Law Firm and Organization Roles

Earth Force matches the private sector sponsors such as law firms, corporations, and associations with a school class in their area. Earth Force also identifies and involves a local watershed group in the project. Sponsors from the private sector fund the students' water monitoring and testing equipment, which are kits pre-assembled by Earth Force. The cost of sponsoring the necessary training, manuals, kits and support for a GREEN school is \$5,000. We hope to pool sponsors within a geographic area to reach the \$5,000 level to move forward. Professionals from the private sector sponsor also act as mentors to the students in the program and as resources for their teachers, by assisting in monitoring events, attending a class session and being available by phone to give advice to the group. This is often an excellent opportunity to meet other corporate leaders and gain public recognition for your organization. There is no steadfast time commitment. Mentors can provide just a few hours of their time or more routine support to their host schools. General Motors has been a GREEN sponsor for over 10 years.

How Do I Get Involved?

Contact Vince Meldrum, vice-president for Programs at Earth Force (703/519-6864 or

vmeldrum@earthforce.org). He will provide any further information you need and make arrangements for your sponsorship. Please also contact our Committee Public Service vice-chair, Raissa Kirk, at rkirk@crowncentral.com or 410/659-4835, or our committee chair, Alexandra Dunn, at 202/533-1803 or adunn@amsa-cleanwater.org.

We are pleased to be kicking off this project and hope you can become involved!



**IN-HOUSE COUNSEL
COMMITTEE NEWSLETTER**

LIKE TO WRITE?

We hope you enjoy this issue of the In-House Counsel Committee Newsletter. The Committee welcomes the participation of members who are interested in preparing this Newsletter.

If you would like to lend a hand by writing, editing, identifying authors, or identifying issues, please contact the Newsletter editor Jim Moore at 801/584-5700 or jim_moore@huntsman.com.

COMMITTEE WEB PAGE AND LIST SERVE

Jim Arnold
Technology Vice-Chair
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I am pleased to serve as the Committee's Technology vice-chair. The Section, led by the In-House Counsel Committee, is working hard to use new technology to enhance the value of the information you receive for your in-house practice. You can receive In-House Counsel Committee news through two sources, in addition to this newsletter. First, you can look up your committee's Web page at <http://www.abanet.org/environ/committees/counsel/home.html>.

Second, the In-House Counsel Committee maintains its own list serve. As a member of the Committee, you are automatically added to the list serve unless you have requested no e-mail communications from the ABA or there is no valid e-mail address on your ABA member record. If you have not been receiving e-mail messages from the committee list serve (titled ENVIRON-INHSECOUNSEL), please send me an e-mail and request to be subscribed. Also, be sure to also notify ABA of any changes to your personal information. This can be done online at www.abanet.org/members/join/coa2.html.

If you are a member of the list serve, you can post a message by addressing your e-mail to ENVIRON-INHSECOUNSEL@mail.abanet.org. Or, Alexandra Dunn or I would be glad to post a question to the list for you, if you do not want to identify yourself on the list as the one posting the question. Please send your question to either one of us by e-mail.

To unsubscribe to the committee list serve, you can send an e-mail message to listserv@mail.abanet.org and state "SIGNOFF ENVIRON-INHSECOUNSEL" in

the body of the e-mail. Or you can send your request to me.

The list serve has produced interesting discussions that have provided valuable information and insight into the topics addressed. Your Committee is working on ways to use it more to provide a forum for common questions.

MEMBERSHIP OUTREACH

Karin Stamy
Membership Vice-Chair
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I am pleased to be working on several new membership outreach initiatives as I continue my service to the Committee as Membership vice-chair. By now you should have received a letter from me, Alexandra Dunn, or one of the Committee's vice-chairs about our membership initiative. The membership of the Committee has been divided on a regional basis for the purpose of the Committee's membership outreach initiative. A notice about the initiative has also been sent out on the list serve. The centerpiece of the communication component of the outreach initiative will be an electronic survey that will provide information to the Committee's leadership about your interests and preferences as they relate to the Committee's activities. The information that you take the time to provide to the Committee will be used to help the Committee better serve your interests and needs. Our goal is to constantly improve the value and benefit you receive from being a member of the Committee. Our regional and topical assignments are listed below. Bottom line, we hope to make the ABA a more tangible and useful element of your work. Feel free to contact me any time with ideas or suggestions.

Name/Position	Contact Information	Assignments/ Plans	State Assignments
Alexandra Dunn Chair	Association of Metropolitan Sewerage Agencies 1816 Jefferson Pl., NW Washington, DC 20036 202/533-1803; f 20/ 833-4657 adunn@amsa-cleanwater.org	Reports, conference calls, Web page and newsletter column, support of vice- chairs and ideas, liaison to Section.	District of Columbia, Massachusetts, Maine, New York, Rhode Island
Jim Arnold Technology	The Arnold Law Practice 225 Bush St., 16th Floor San Francisco, CA 94104 415/439-8831; f 925/284-2473 JArnold102@aol.com	Edit Web page, foster use of new technology	Alaska, Hawaii, Idaho, New Mexico, Oregon, South Dakota, Wyoming
Jim Moore Newsletter	Huntsman Corporation 500 Huntsman Way Salt Lake City, UT 84108 801/584-5700; f 801/584-5781 jim_moore@huntsman.com	Edit newsletter	Colorado, Nevada, Oklahoma, Utah, Washington
Karin Stamy Membership	Norfolk Southern Corporation Three Commercial Place Norfolk, VA 23510 757/629-2752; f 757/629-2607 klstamy@nscorp.com	Membership outreach	Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, West Virginia
Peter C. Wright Programs	The Dow Chemical Company 2040 Dow Center Midland, MI 48674 989/636-6148; f 989/638-9997 Pcwright@dow.com	Coordinate program ideas with Section	Illinois, Michigan, Minnesota
Raissa Kirk Public Service	Crown Central Petroleum Corporation 1 North Charles St. Baltimore, MD 21201 410/659-4835; f 410/659-4763 rkirk@crowncentral.com	Coordinate public service outreach	Delaware, Maryland, New Jersey, Pennsylvania,
Joan Heinz Additional	Eli Lilly & Company Lilly Corporate Center Drop Code 1094 Indianapolis, IN 46285 317/276-1675; f 317/433-6610 heinz_joan_m@lilly.com	Provide ideas and guidance to the Committee	Iowa, Indiana, Kansas, Missouri, Nebraska, Ohio, Wisconsin
Judy Wenker Additional	Major & Fox 1802 McKee St. San Diego, CA 92110 619/234-1000 jwenker@majorfox.com (Formerly with Texaco)	Provide ideas and input to the Committee	Arizona, California
Kim Lesniak Additional	El Paso Corporation PO Box 2511 1001 Louisiana St. Houston, TX 77252-2511 713/420-4855; f 713/420-7011 kim.lesniak@elpaso.com	Continue to provide the Committee with good ideas	Arkansas, Texas

EDITOR'S NOTE

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This edition of the In-House Counsel Committee Newsletter includes the first of two installments of an article by Rachel Jakubovitz, of Willis North America, entitled "Mold: Are You Covered?" We think you will find the article very enlightening and timely. The first installment discusses various kinds of mold of concern to indoor air environments, the science relating to mold pollution, apparent or potential health effects, and mold litigation. The second installment will discuss insurance issues related to mold pollution and its effects.

Residential mold issues are becoming a greater concern of in-house counsel who manage environmental, health, safety, and insurance matters for their companies. For instance, on Feb. 14, 2002, it was reported that nineteen former day care workers and nine additional family members filed a toxic mold suit against the Paragon Casino Resort and other defendants alleging they were injured due to exposure to mold in the walls of an on-site day care center. Plaintiffs allege that mold caused skin rashes, memory loss, nausea and hair loss. Mold was discovered in the sheet rock in the Louisiana casino's hotel and in the walls of the day care center called Kids Quest. ASSOCIATED PRESS, Feb. 14, 2002. In another case, on March 16, 2002, it was reported that a Louisiana district court found the owners and property management firm of the 44-story Plaza Tower office building in contempt of court after mold contamination and water damage was remediated contrary to a court order. About 700 former state employees who once worked in the building had filed personal injury suits alleging that exposure to mold within the building caused their injuries. Defendants include the building

owners, property management company and an insurance company. The suits allege that the owners and maintenance firm deferred maintenance allowing water intrusion and mold growth despite persistent complaints. According to the complaint, mold growth spread from water damage caused by the roof top air conditioning system and through leaking window seals. ASSOCIATED PRESS, Mar. 16, 2002.

We hope you enjoy this issue of the In-House Counsel Committee Newsletter. Please contact me with ideas, suggestions and contributions for future editions at 801/584-5700 or Jim_Moore@huntsman.com.

MOLD: ARE YOU COVERED?

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[Note: The author gratefully acknowledges the assistance of Sandy Rodgers and Gordon Barham of Willis North America in preparing this article.]

Introduction

Mold ... everywhere we turn these days there are articles or commentaries on mold. Local and national newspapers, magazines, and television are inundating us with mold discussions – particularly focusing on the potential health hazards of mold and the escalating number of mold cases being litigated. By now, most people have heard about the infamous *Ballard* case in Texas. *Ballard v. Fire Ins. Exchange*, No. 99-05252 (Tex. Dist. Ct., 345th Dist., 2001). In June 2001, a Texas jury awarded Melinda Ballard and her family \$32 million in damages from the Farmers Insurance Company, which

issued the family's homeowners policy. This case was on the front page of the Aug. 12, 2001, New York Times Magazine and has been analyzed in major engineering, scientific, medical, legal, construction and contractor journals since.

The earliest mold cases were the "courthouse cases" in Florida involving alleged construction defects which culminated in multi-million dollar settlements. The large dollar amounts awarded in these cases piqued the interest of the plaintiff's bar. As a result, mold litigation over the past few years has grown in leaps and bounds. Seminars, newsletters, and conventions on mold are becoming more prevalent. The hot topic of mold has even produced a cottage industry of mold remediators.

Is mold the new and emerging toxic tort, to take the place of asbestos? There are factors that differentiate mold litigation from asbestos litigation such as weak medical causation evidence, lack of exposure standards, and an extremely short latency period of injury. Yet there appears to be a trend developing as the quantity and complexity of mold cases rapidly increases. Today's mold litigation is appearing as a combination of construction defect, toxic tort and/or insurance bad faith claims.

This paper will attempt to clarify the mold issue from the science and regulatory standpoint and then address the related insurance coverage issues. The insurance issues include first and third party liability policies as well as environmental impairment liability policies. See also Blundell, David F., *Note: Proliferation of Mold and Toxic Mold Litigation: What is Safe Exposure to Airborne Fungi Spores Indoors?* 8 ENVTL. LAW. 389-405 (Feb. 2002).

Science

A growing body of scientific evidence indicates

that the air within residential and commercial buildings can be seriously polluted. Coupled with the fact that people spend approximately 90 percent of their time indoors, the risks to health may be greater due to exposure to air pollution indoors than outdoors. *The Inside Story: A Guide to Indoor Air Quality*, U.S. Environmental Protection Agency, Office of Radiation and Indoor Air (6604J), EPA Document # 402-K-93-007 (April 1995). The recent concerns raised over the health problems attributable to mold have increased this indoor pollution risk.

What is Mold?

Molds are microscopic fungi that live on plant or animal matter. Select species of mold have always impacted human health to some degree. Only recently has the scientific community identified mold as one of the causes of more severe adverse health effects in humans. For persons with sensitivity to molds, symptoms such as nasal stuffiness, eye irritation, or wheezing are common. Those with heightened sensitivity to mold may have more severe reactions that include fever and shortness of breath. People with chronic illnesses, such as obstructive lung disease, may develop mold infections in their lungs. "Mycotoxins of Molds and Maladies," 108 ENVTL. HEALTH PERSP. (Jan. 2000).

Molds are omnipresent – indoors and out. More than 200,000 species of mold have been identified around the world with over 1,000 species common to North America. The most common indoor molds found in the United States are *Cladosporium*, *Penicillium* and *Aspergillus*. *Facts About Mold*, New York City Department of Health, <http://nycdoitt.ci.nyc.ny.us/html/doh/html/epi/epimold.html>. Although less common but the focus of most of the recent concern, *Stachybotrys chartarum* (*Stachy*) is also found in most buildings and homes. "Molds in the Environment," Centers for Disease Control, <http://www.cdc.gov/nceh/>

asthma_old/factsheets/molds/moldfacts.htm.

Mycotoxins

While molds themselves are relatively harmless, the mycotoxins (or secondary metabolites) they produce exert toxic effects on humans. These toxic effects are referred to as mycotoxicosis, the severity of which depends on the toxicity of the mycotoxin, the extent of exposure, age and nutritional status of the individual and possible synergistic effects of other chemicals to which the individual is exposed. Peraica, M.; Radic, B.; Lucic, A.; Pavlovic, M., "Toxic Effects of Mycotoxins in Humans," *Bulletin of the World Health Organization*, Sept. 1, 1999. Unfortunately, the mycotoxins produced by structural molds – meaning molds imported into the residences, workplaces, and public buildings on the paper covering the drywall and other wood based composite materials – often represent some of the most toxic substances known. Michael R. Gray, M.D., M.P.H., C.I.M.E., "Molds, Mycotoxins, and Human Health," unpublished work from <http://www.mold-help.org>.

Cladosporium

There are some 500 species described in the genus *Cladosporium*. Several common species found in indoor air are *C(ladosporium)herbarum*, *C. sphaerospermum*, *C. cladosporioides*, and *C. macrocarpum*. *Cladosporium* is the most dominant group found in indoor surveys, in frequency and number. They have been isolated from kerosene, creosote-treated wood, face cream, dead or diseased plant tissues, air, soils, foodstuffs, paint, wood pulp, textiles, etc. Some species have been isolated from human organs. Infections of the nasal and paranasal sinuses have reportedly been caused by the inhalation of *Cladosporium* spores. "Knopfler and Robertson Micro-Organism Guide," extracted

from *MEALEY'S Emerging Toxic Torts Special Report*, Mealey Publications, Inc., King of Prussia, June 2000.

Penicillium

The genus *Penicillium* is a very large well-studied group because of their value as producers of antibiotics with over 200 species identified. *Penicillium* has been reported from dead or living vegetation, cereal grains and seeds, fruits, foodstuffs and animals. *Penicillium* has even been found growing on wet asbestos-containing insulation wraps and on water damaged sheetrock. Studies have shown that *Penicillium* is a common component of the indoor environment and can cause hypersensitivity pneumonitis. Many of the species are cellulolytic and some are mycotoxic. An interesting note is that the U.S. government spent millions of dollars during World War II studying *Penicillium* because they attacked and decayed ammunition boxes made of wood. *Penicillium* are considered allergenic; however, not much attention has been paid to them due to their relatively infrequent appearance in air of temperate climates. *Id.*

Aspergillus

Spores belonging to the genus *Aspergillus* are a common component of indoor air and have been known to cause: 1) infection in living tissues by the fungus (mycosis), 2) allergic reactions, and 3) toxicosis due to ingestion of foods containing toxins. *Aspergillus flavus* is known to produce a carcinogenic mycotoxin, *aflatoxin*. Another *Aspergillus*, *A(spergillus) niger*, is rather easy to recognize due to its black spore mass. It is worldwide in distribution and plays an important role in indoor pollution. A third *Aspergillus*, *A. versicolor*, is also common in air and has been isolated from human tissues, although its pathogenicity has not been proven. *A. versicolor* has a wide niche and can grow

on many substrates. It is probably the most frequently isolated airborne *Aspergillus* in North America. Besides air, it has been reported from soils, plant parts, paper pulps, photographic optics and other substrates. It is prudent that mycotoxin production is taken into consideration when high levels of *Aspergillus* are detected in an indoor environmental assessment. *Id.*

Stachybotrys Chartarum (Stachy)

Stachybotrys chartarum (Stachy) is a greenish-black fungus found worldwide that colonizes particularly well in high-cellulose material, such as straw, hay, paper and cellulose-containing building material. *Stachy* is generally found on materials with high cellulose content (such as gypsum board, fiberboard, lint and dust that become chronically moist or water damaged due to excessive humidity, water leaks, infiltration, condensation or flooding. *Stachy* or *S. chartarum* is normally not found on materials such as plastic, vinyl, or ceramic tiles, nor is it the green mold in bread or between shower tiles.

Stachy has been documented to produce a series of potent toxins including satratoxins and other toxins affecting the immune system. These toxins have been known to produce adverse effects on the central nervous system, eyes, skin, and upper and lower respiratory tract, and, possibly, chronic fatigue. Other adult symptoms are immune suppression, bleeding and adverse reproduction effects. *Id.*

Health Effects of *S. chartarum*

The type of mold receiving the most press today is the mycotoxin-producing *Stachy*. The information available on the health effects of *Stachy* is preliminary at this stage of the game. There are no federal or state standards for safe levels of exposure to *Stachy* or other molds. Neither the U.S.

Environmental Protection Agency nor any of the states' environmental regulators have designated *Stachy* or any other mold as a toxin, a pollutant or a hazardous waste.

The state of California passed the Toxic Mold Protection Act (see below for details), requiring the state Department of Health Services to establish a permissible exposure limit (PEL) for mold. This will be the first effort to document the potential health effects of mold in a regulatory setting.

Research to date has been focused on "guidance." Guidance documents are reviewed below from two organizations – the Center for Disease Control and the New York City Department of Health.

Center for Disease Control

The Center for Disease Control (CDC) has prepared a mold fact sheet that is basic and informative (see www.cdc.gov). The CDC's National Center for Environmental Health states that *Stachy* and other molds *may* cause health symptoms that are nonspecific. It further states that at present there is no test that proves an association between *Stachy* and particular health symptoms. CDC also indicates that mold exposure does not always present a health problem; however, some people are sensitive to molds. These people may have severe reactions such as fever, shortness of breath and/or lung disease. See www.cdc.gov/nceh.

The NYC Department of Health

In 1993 The New York City (NYC) Department of Health (DOH), the NYC Human Resources Administration (HRA) and the Mt. Sinai Occupational Health Clinic convened an expert panel on *Stachy* in indoor environments. The purpose of the panel was to develop policies for medical and environmental evaluation and intervention to

address *Stachy* contamination. The policy document was revised in November 2000 and expands the original guidelines based on a review of the literature regarding fungi and comments by experts in the field. These NYC “Guidelines on Assessment and Remediation of Fungi in Indoor Environments” offer excellent information on the health effects of *Stachy*.

The Guidelines begin by commenting that inhalation of fungal spores, fragments (parts), or metabolites (e.g., mycotoxins and volatile organic compounds) may lead to or exacerbate immunologic (allergic) reaction, cause toxic effects or cause infections. According to the Guidelines, there are only a limited number of documented cases of health problems from indoor exposure to fungi. The most common symptoms reported from exposures in indoor environments are runny nose, eye irritation, cough, congestion, aggravation of asthma, headache and fatigue.

The NYC Guidelines also find that the presence of fungi on building materials, as identified by a visual assessment or bulk/surface sampling, does not necessitate that people will be exposed or exhibit health effects. In order for humans to be exposed indoors:

- fungal spores, fragments, or metabolites must be released into the air and
- be inhaled, physically contacted (dermal exposure), or ingested.

In addition, the Guidelines caution that whether or not symptoms develop in people exposed to fungi depends on:

- the nature of the fungal material (e.g., allergenic, toxic, or infectious),
- the amount of exposure, and
- the susceptibility of exposed persons. Susceptibility varies with
 - genetic predisposition (e.g., allergic

reactions do not always occur in all individuals),

- age,
- state of health, and
- concurrent exposures.

The NYC Guidelines state that the potential health effects of *Stachy* are that it may either lead to or exacerbate either immunologic reactions or toxic effects, or both.

Immunological reactions include asthma, HP (Hypersensitivity Pneumonitis), and allergic rhinitis. Contact with fungi may also lead to dermatitis. It is thought that these conditions are caused by an immune response to fungal agents. The most common symptoms associated with allergic reactions are runny nose, eye irritation, cough, congestion, and aggravation of asthma. HP may occur after repeated exposure to an allergen and can result in permanent lung damage.

Toxic effects of fungi have a wide variety of symptoms such as fatigue, nausea, headaches, and respiratory and eye irritation. Some of the symptoms related to fungal exposure are nonspecific, such as discomfort, inability to concentrate and fatigue. See <http://www.ci.nyc.ny.us>.

In summary, the scientific analyses of the toxic effects of fungi are still in the infancy stage. The research has started, and the expert scientists are beginning to line up on either side of the issue. Has the scientific methodology been developed and proven thoroughly enough to connect mold mycotoxins to the health effects alleged in the cases filed to date? The answer to that question is open to interpretation. The science of mold-related bodily injury is still developing, and has not caught up with the claims of the plaintiffs.

With or without agreement on the scientific evidence, mold cases are becoming more

frequent and the jury awards, as well as the settlement figures, more severe. The next section addresses mold litigation in more detail.

Synopsis of Types of Mold Cases

Mold claims originated in the form of litigation brought by property owners, building owners, and/or homeowner associations, including condominium associations, and are presented as construction defect claims. Mold is often named as part of the damages resulting from the alleged construction defect where there is some form of water damage or moisture problem. This litigation is filed against general contractors, manufacturers, suppliers, installers and subcontractors. Almost any party that did any work on the project may be brought into these lawsuits. To date, the causes of action asserted include breach of contract, failure to construct an adequate building for its intended purpose, breach of express warranty, breach of implied warranty, and negligence.

Much of the mold construction defect litigation involves underlying water penetration and retention problems in buildings. Causes of these water problems include incorrect installations of EIFS (Exterior Insulation Finish Systems), such as "Dryvit" or other similar products. EIFSs are synthetic stucco or stucco systems. They are a multi-layered exterior wall system consisting of a finish coat, a base coat and insulation board, all of which are secured to wallboard or plywood. EIFSs have been used in commercial and residential construction in the United States since 1969. There are very technical installation, sealant, and flashing requirements established by the EIFS industry to assist in preventing water intrusion. See <http://www.eifsalliance.com>. EIFSs have had a history of water penetration and retention problems. See, e.g., *McMillion v. Dryvit Systems, Inc.*, No. 002802 (Va. S. Ct. Sept. 14, 2001), <http://www.valawyersweekly.com>.

<http://www.valawyersweekly.com/vasup/002802.htm>. Other alleged causes of water penetration and retention that cause mold growth include improper handling of moisture in attics and other unoccupied spaces and improper or leaky HVAC installations.

Property owners and property managers are also defendants in some cases. Allegations against these defendants may include negligent maintenance or repair, failure to warn, or failure to maintain a safe premises. [Ed. On May 21, 2002, it was reported that two skyscrapers adjacent to the WTC site, the 25-story 1907 building and the 39-story 1 Bankers Trust, might have to be demolished due to extensive mold contamination. The mold contamination arose after sprinklers went off after the buildings were damaged in the WTC collapse and rain water also entered the buildings. WCBS Radio, May 21, 2002.]

Insurance bad faith cases include the very well publicized example of the *Ballard* case noted above.

The following discusses specific cases that represent examples of each of these types of claims.

Negligent Construction – Builder Breached His Construction Contract

One of the first highly publicized mold trials was the Martin County courthouse case in Stuart, Florida. A construction company, Centex, had entered into a construction management agreement with the County to serve as the manager for the construction of a new courthouse complex. Several trade contractors were retained by Centex to perform various aspects of the construction, and the complex was certified substantially complete in September 1988. Following its occupation of the courthouse and office building in early 1989, the County made several complaints to Centex about window

and exterior wall leaks, mold growth and excessive humidity. Upon determining that the courthouse complex needed to be redesigned and reconstructed, the County relocated its employees.

In October 1992, the County brought suit, filing a construction defect action against several defendants, including Centex, the project architect, and the concrete and masonry contractor. Breach of contract and negligence were alleged regarding design and construction of the complex.

The County's cause of action for breach of contract against Centex was that Centex failed to properly supervise the construction, resulting in shoddy workmanship and extensive damage. Two types of mold, one of which was *Stachy*, were found in the building. Bodily injury allegations were made by 15 people alleging asthma-like symptoms as well as rashes as a result of the mold. Prior to trial, the County settled with the architect and the concrete and masonry contractor for \$2.75 million and dismissed negligence claims against them.

At the conclusion of the trial, the jury returned a verdict of \$11.55 million against Centex and its sureties, which the court reduced by \$2.75 million (the amount the County had received in pretrial settlements). The trial court subsequently entered an amended final judgment for \$14,211,156, comprised of \$8.8 million in damages, plus \$5,411,156 in prejudgment interest. Centex appealed the decision, and the appellate court found that the County presented sufficient evidence to meet its burden of proving that Centex's breach of contractual responsibilities was a substantial factor in causing the County's extensive damage; the reason for the evacuation and whether that reason was supported by the evidence was immaterial to the elements that the County was required to prove in its contract action. The appellate

court ruled that in a case involving the breach of a construction contract, a recognized measure of damages is the reasonable cost of performing construction and repairs in conformance with the original contract's requirements. The court concluded that the jury's verdict of \$11.55 million, as well as the imposition of prejudgment interest, should be affirmed; the reduction of the original award by the settlement amount was also found to be correct.

Negligent Repair – Landlord Has Duty to Maintain the Premises

In *Stroot v. New Haverford*, two tenants of a Maryland apartment complex alleged that the toxic mold and fungi in their apartments was due to the landlord's failure to maintain the apartments in a safe and sanitary condition. They alleged that this exposure caused their asthma, cognitive deficits, bronchitis and immune system abnormalities. After a two-week trial, the jury awarded one plaintiff \$1 million for personal injuries and \$5,000 for property damage. This award was reduced by 22 percent for contributory negligence. The other tenant was awarded \$40,000 for personal injuries, also reduced by the same 22 percent. The landlord appealed the case arguing that it had no duty to maintain the apartments, the jury verdict was excessive and the trial court should have granted the motion to reduce the jury verdict. The appellate court held that the landlord does have a duty to maintain the leased premises in a safe, sanitary condition and affirmed the trial court. The appellate court also did not find either the \$1 million verdict or the \$40,000 verdict to be unreasonable. *New Haverford Partnership v. Elizabeth Stroot and Joletta Watson*, 772 A.2d 792 (2001 Del. LEXIS 201).

In the *Phipps* case in New York City, approximately 500 New York City apartment residents settled their lawsuits with building owners for \$1.17 million. Phipps Plaza South

and Phipps Housing Services, Inc. owned the apartment building in question. Plaza South operated, maintained, managed and controlled the common areas and the building structures and was responsible for the maintenance. The plaintiffs alleged that mold and fungi contamination caused them personal injury and property damage. Some of the causes of action included negligence, carelessness, and recklessness against Phipps. Damage claims included personal injury, loss of consortium, pain and suffering and asthma. The \$1.17 million settlement resolved the claims of all 493 plaintiffs.

Insurance Bad Faith – Carrier Handled Claim Improperly

In the *Ballard* suit in Texas, the plaintiff alleged the defendant insurance company delayed in paying a claim for a plumbing leak. This delay, according to the plaintiff, allowed toxic mold to spread and caused her husband and child to get sick. Melinda Ballard had a homeowner's policy from Fire Insurance Company, a subsidiary of Farmers Insurance Group. She had water leaks in the bathroom and near the refrigerator in the kitchen. She alleged the insurance adjuster delayed in responding to the claim, failed to repair the leaks appropriately, undervalued the claim, and because of that she and her family were exposed to mold and became ill. Causes of action included negligence and breach of contract. A jury awarded Ballard \$32 million after finding that the carrier acted in an unfair, deceptive and fraudulent way when evaluating the mold property damage claim. It is important to note that *Ballard* was a case against the Farmers Insurance Company for improper claims handling – not a claim against the homebuilder. *Mary Ballard, et al. v. Fire Insurance Exchange, et al.*, No. 99-05252, Tex. Dist., Travis Co.).

Failed HVAC System Allegations

A California Superior Court judge brought suit alleging that a faulty heating, ventilation and air conditioning (HVAC) system caused hazardous microbial contaminants to colonize in her courtroom, which caused her to suffer bodily injury. The judge's causes of action included dangerous condition of public property, fraudulent concealment, battery, intentional and negligent infliction of emotional distress, negligence by construction defendants, and nuisance. The plaintiff sought unspecified damages. *Elisabeth B. Krantv. County of Tulare, et al.*, NO. 00-0190367 (Tulare Co., Cal. Super. Ct.), Mealeys Emerging Toxic Torts (June 2000).

EIFS Manufacturer Ordered to Pay \$2.5 Million for Products Defect

In the first verdict against a maker of Exterior Insulation Finish Systems (EIFS), also known as synthetic stucco, a Virginia State Court judge ordered Dryvit Systems to pay \$2.5 million for construction defects and mold at a condominium community. The condominium association alleged that the structural defects in the condominiums were due to interior and exterior wood decay, which was a direct result of allowing foreseeable water intrusion to drain through the EIFS-clad walls. The water intrusion allegedly caused mold and mildew that contributed to the property damage. In a pretrial ruling, the judge determined that regardless of the builder that installed the EIFS, the damages would have occurred because the EIFS itself was defective. *Board of Directors of the Bay Point Condominium Association Inc., et al. v. RML Corp., et al.*, No. CL99-475 (Va Cir. Norfolk Co.) MEALEYS LITIG. REP.: Mold (Feb. 2002).

Repercussions – Regulations and Legislation

Texas Department of Insurance Response

Shortly after the \$32 million jury verdict in the *Ballard* case, Farmers Insurance announced that it would no longer write new homeowners policies in Texas. This decision was based largely on the escalating mold claims received on the “HO-B” policy used in Texas. Two other large homeowners insurance companies in Texas followed: Allstate Insurance Company and Progressive Insurance Company. Carriers stated they could not afford to take on potential mold exposure because the liability is undefined and potentially unlimited.

The Texas Department of Insurance held public hearings to promote a compromise solution. On March 8, 2002, the Texas Insurance Commissioner authorized State Farm to sell Texans a “national” homeowner’s policy in lieu of the HO-B. The substitute State Farm policy provides limited mold coverage from “sudden and accidental” discharges of water from plumbing, air conditioning systems and appliances. Unlike the HO-B policies, the substitute policy does not cover damage from slow leaks or damage to slab foundations resulting from plumbing leaks. The substitute State Farm policies offer the option of buying (for an additional premium) full mold remediation coverage with limits of \$15,000, \$25,000, \$50,000 or full policy limits. Other insurance companies may use the State Farm substitute policy in Texas if they meet certain requirements. These include satisfying the Commissioner that the rates charged for these policies will be commensurate with any changes in coverage. THE DALLAS MORNING NEWS July 31, 2001, Aug. 02, 2001; MEALEYS LITIG. REP.: Mold Vol 1., Issue #10 (Oct. 2001).

The Toxic Mold Protection Act

The first comprehensive legislation on mold in the United States was passed in California and became effective Jan. 1, 2002. The “Toxic Mold Protection Act,” California SB 732 (Health and Safety Code §§ 26100-26156; Stats. 2001, Ch. 584), addresses indoor environmental quality related to mold in commercial and residential properties.

Some of the key points in the Act are as follows:

- 1) The Act requires the California Department of Health Services (DHS) to convene a task force to advise the DHS on the development of:
 - permissible exposure limits to mold;
 - standards for assessment of mold in indoor environments;
 - alternative standards for hospitals, child care facilities, and nursing homes; and
 - standards for identification and remediation of mold.

The Act requires these items to be completed in a report by July 1, 2003 and revised every 5 years thereafter.

- 2) The Act also requires *any person that sells, transfers, or rents residential, commercial, or industrial real property or a public entity that owns, leases, or operates a building who knows, or in specified instances should know, that mold is present in levels excess of the permissible standards, would be required to provide written disclosure to potential buyers, renters, landlords, or occupants.*

The required report should clarify a number of the outstanding mold issues, at least for the State of California. It will specify the liability for property owners/operators due to the

disclosure requirement in part 2 of the Act mentioned above. The “knew or should have known” language of the Act could result in complex litigation as the courts develop case law around the knowledge people subject to the disclosure requirements have about mold. This presents a window of opportunity for insureds to take a proactive position and ensure that their insurance program provides the appropriate coverage.

[Ed. On Jan. 11, 2002, it was reported that California has “zero funding” to implement the state’s new Toxic Mold Protection Act. Funding to implement Department of Health Services’ studies may be delayed for a year. Costs of implementing the research demanded by the law are estimated at \$700,000 annually. KNIGHT RIDDER TRIBUNE BUSINESS NEWS Jan. 11, 2002. On May 14, 2002, it was reported that “mold claims have proliferated in the past year in Florida” and as a result 83 insurers have, so far, asked the Florida Department of Insurance for permission to exclude mold claims from homeowners policies and 69 insurers have asked to exclude mold claims from commercial policies. SOUTH FLORIDA SUN-SENTINEL May 14, 2002.]

Remediation Guidance Documents

Presently there are three major remediation guidance documents available for assessment and remediation of mold. These are not law. As guidance documents, they are not legally enforceable by any regulatory body. These three documents are distinct from the health effects guidance discussed above.

1) The United States Environmental Protection Agency (USEPA): Mold Remediation in School and Commercial Buildings (<http://www.epa.gov/iaq/molds/index>). This document presents guidelines for the remediation/cleanup of mold and moisture problems in schools and commercial buildings and can be used as

a reference for residential properties also. It has a thorough resource list, references and appendices. The information contained in this document could be very helpful, especially in choosing a remediation contractor.

2) The New York City Department of Health – Bureau of Environmental & Occupational Disease Epidemiology: Guidelines on Assessment and Remediation of Fungi in Indoor Environments, <http://www.ci.nyc.ny.us/html/epl/moldrptl.html>. This document offers detailed recommendations on a step-by-step approach to assessment and remediation of mold in various types of indoor environments and at various stages of growth. Five different levels of abatement are described. The size of the area impacted by fungal growth and whether it is a heating, ventilation and air conditioning (HVAC) system or property (wallboards) are some of the distinctions made. This document also contains a thorough list of notes and references.

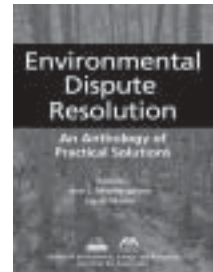
3) The American Conference of Governmental Industrial Hygienists (ACGIH): “Bioaerosols: Assessment and Control” is widely referred to as the “Bible” for industrial hygienists and establishes a standard of care for anyone involved in performing a microbial investigation or remediation.

[Ed.: This balance of this article will be published in the next In-House Counsel Committee Newsletter.]

New from ABA Publishing and The Section of Environment, Energy, and Resources

Environmental Dispute Resolution: An Anthology of Practical Solutions **Ann L. MacNaughton and Jay G. Martin, editors**

Environmental Dispute Resolution: An Anthology of Practical Solutions provides comprehensive and thoughtful treatment of the topic for the serious student and also highly practical guidance in specific substantive contexts to those who may wish to focus on one or a few of its chapters. This useful handbook provides a toolkit of diagnostics, systems, strategies, and methodologies proven effective in diverse substantive contexts. It can be read in order, or in any order, or chapters can stand alone for the reader with a particular substantive or procedural focus. The information in this book will be invaluable to anyone involved with environmental risk management, environmental management systems, environmental dispute resolution, or sustainable development system design and implementation.



Summary of Contents

- Environmental Conflict Management and Dispute Resolution: A Framework for Analysis
- Moving Beyond the Familiar Rules: The Challenges of Alternative Dispute Resolution
- Advantages of Using Mediation and Arbitration to Settle Environmental Disputes
- Mediating with an Environmental Enforcement Agency
- Effective Settlement Strategies in Public Disputes
- Public Access to EDR Processes: US and UK Trends Toward a Common Approach
- Effective Settlement Advocacy in Mass Tort Disputes
- Resolving Superfund Cost Recovery Disputes Outside the Courtroom
- Effective Settlement Advocacy in Environmental Insurance Coverage Disputes
- Is Mediation a Better Alternative for the Resolution of International Environmental Disputes?
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NEWSWORTHY NOTES

VIRGINIA MAY IMPOSE NEW REQUIREMENTS ON IN-HOUSE COUNSEL

Jim Arnold

Corporate attorneys in Virginia may have to apply for admission to the Virginia state bar. Proposed Rule 1A:5 would require all corporate counsel in Virginia to register with the state bar. With their registration, they would be allowed to practice law and appear in court, though only on behalf of their company. They would also be required to score 85 or more on the Multi-state Professional Responsibility Exam, attend a course on professionalism, pay an application fee and annual dues, and obtain 15 MCLE credits yearly. Virginia is one of only 8 states which do not require corporate attorneys to be admitted or even registered with the state bar. The proposed rule resulted from lobbying by in-house counsel who became ineligible to waive into the Virginia bar – based on their in-house practice – under an earlier rule change. LEGAL TIMES, Apr. 25, 2002.

The American Corporate Counsel Association reports that only 12 states have specific rules for corporate counsel practice (Florida, Idaho, Kansas, Kentucky, Michigan, Minnesota, Missouri, Ohio, Oklahoma, Oregon, South Carolina and Washington). Eight states allow in-house counsel to practice for their companies as an exception to the ban on unauthorized practice of law (Alabama, Connecticut, Maryland, New Jersey, North Carolina, Texas, Virginia and Washington, D.C.). The other 37 states don't have an in-house counsel rule and don't except in-house practice from their UAPL rules. <http://www.acca.com/admissionRules/chart.jsp>. Additional information about the rules of

practice for in-house counsel may be found at <http://www.crossingthebar.com/ccanalysis.pdf>.

[Note: The California Supreme Court expects to promulgate rules for multi-jurisdictional practice, including in-house counsel, by Jan. 1, 2004.]

LEGAL NEWS – DAUBERT RAISES ITS UGLY HEAD AGAIN

For our many attorney-readers, we've constantly stressed the need to pay extremely close attention to the mandates of *Daubert* and *Kumho* tire when selecting and preparing a real estate expert witness. (For more on this subject, please see my article on that subject, co-authored with Bill Mundy and Dave McLean, in the special Fall, 1999, edition of Real Estate Issues devoted to real estate law and litigation.)

Recently, the Kentucky Supreme Court hammered yet another nail in the coffin of this issue in the case of *Vance Wilhite, et. al, v. Rockwell* (2002 Ky. LEXIS 91). The facts of the case are not terribly in dispute – Rockwell polluted the Mud River in Kentucky with PCB's, which then contaminated properties owned by Mr. Wilhite and his class-action neighbors. Nor is there much dispute over the unimpaired value of the properties – about \$7.6 million.

The lower court then awarded the property owners \$7.6 million in actual damages and \$210 million in punitives (the cleanup costs) based on the expert valuation testimony of a local real estate appraiser. This appraiser had years of experience and all of the requisite education and licensing necessary to be an appraiser.

However, the *Daubert* standard sets a substantially higher bar for expert testimony,

particularly in cases where some degree of specialization is needed. As such, the court of appeals in Kentucky threw out the award, based on the expert's failure under *Daubert*, and the Supreme Court affirmed, remanding the case for a re-trial.

Reprinted with permission from Monday@Mundy, May 19, 2002. <http://www.mundyassoc.com>. John A. Kilpatrick, Ph.D. (john@mundyassoc.com), Mundy Associates LLC, Economic, Market, and Valuation Analysts.

THE NEW ROLE FOR ENVIRONMENTAL INFORMATION

Gary Guzy
Former General Counsel
USEPA

When I first was appointed to work at the U.S. Environmental Protection Agency in the beginning of 1994, its Web sites received approximately 100,000 hits per year. Seven years later, when I left the agency, EPA was receiving nearly 30 million hits per month on its Web sites. This reflects the fundamental transformation in the way in which information is shared, processed, and managed, and even more centrally, it also reflects a transformation in the role of information in environmental decision-making?. To read the rest of the article, go to http://www.environews.com/?Target=/Features/access_security.htm.

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For more information, call 312/988-5724 or visit
[http://www.abanet.org/environ/
programs/keystone/](http://www.abanet.org/environ/programs/keystone/).

USING THE LIST SERVE: RECORDS RETENTION – SOME OBSERVATIONS

Our first list serve question on records retention was from an attorney in Little Rock, Arkansas, who said a long-time manufacturer had asked him about records retention in chemical-related businesses. He said that he had compiled requirements from RCRA, TSCA, and OSHA, and had considered potential liability issues under CERCLA and relevant state laws. The attorney asked for information about other statutory and regulatory schemes, and whether there are any good articles or model retention policies generally available.

Ralph Cooper, a mediator and attorney from San Antonio, Texas, had this answer:

First, with RCRA and CERCLA, I would keep all records of the disposal of any solid or hazardous waste or used oil, etc., including all off-site recycling, including any due diligence performed with disposal sites and recyclers, and all waste classification records. This information can only be exculpatory if a claim is made that your client sent CERCLA-covered materials to a disposal site. It may also be useful to keep records of sales, since a purchaser could dispose of something that was sold to them as a product and it could later be alleged that your client was the disposer of the product. Also any UST records must be maintained. Sometimes even purchase records can be helpful – I have a client that bought new oil and later sent it off for “recycle” – unopened and unused – now they are a PRP in the recycling site and we are struggling to be able to prove that it was unused new oil that was sent there.

Also, all due diligence documentation regarding purchases, leases, etc. of sites (CERCLA). TSCA – especially for manufacturers or importers of chemicals, and for those who have or have had PCBs on site. FIFRA/CERCLA with any pesticides,

herbicides, etc. applied on site or handled/sold by the client. EPCRA (SARA Title III) reports and bases for computations or exclusions from reporting. CAA – especially emergency release planning and any release/emissions records. Basis for claimed exclusion from reporting should be documented and kept. Information on permits and any modifications must be kept indefinitely (infinitely?). CWA – records on containment sizing and SPCC development generally; records related to discharge permits, spills, etc.

Finally, be careful about OSHA records. The regs are often misinterpreted. The retention period is a lot longer than people think and covers all exposure relevant records which includes monitoring and MSDSs, and can include where the employee was assigned to work or actually worked in the plant. Some records must be retained for the period of employment plus years afterward (30?) and if the plant closes, must be retained or forwarded for storage.?

Ralph E. Cooper, Ph.D., Mediator, Attorney & Counselor at Law, cooperre@FLASH.NET

Shell Bleiweiss, a Chicago attorney (and a regular contributor to this newsletter)

responded: I don't think it is as black and white as Ralph suggests that it is always better to have your records for CERCLA purposes, although it certainly can be. I advise clients that this is a difficult strategy choice that should be decided on other bases. Too many times I have seen very weak plaintiff cases brought, and through discovery of defendants' records, the case was proven or the quantity enlarged.

Shell Bleiweiss, Environmental and OSHA Law, sbleiweiss@shell-bleiweiss.com

David G. Ries, an attorney in Pittsburgh, Pennsylvania, made a suggestion for information: "A good reference for record

retention requirements for environmental areas and generally is the "Guide to Record Retention Requirements In the Code of Federal Regulations" published by CCH. The current edition has revisions as of July 1, 2001.

"It is organized by CFR chapters. Title 40 covers EPA record retention requirements. The Guide includes over 60 pages of records requirements in Title 40. There are also requirements under the Coast Guard, Transportation, Emergency Management, Mineral Resources, etc."

David G. Ries, Thorp Reed & Armstrong, LLP, dries@thorpreed.com

Fern Fleischer Daves, an attorney with the Sedgwick Detert law firm office in Newark, New Jersey suggested: You may also want to consider the Clean Water Act and the Clean Air Act, and facility permits which may have additional document retention requirements. Consent decrees and AOC's typically have document retention requirements too. Finally, there may be insurance, litigation or business reasons to retain documents longer than the statutory period. Training records may also be governed by employment laws and personnel policies.

Fern Fleischer Daves, Sedgwick, Detert, Moran & Arnold, http.Fern.Daves@sdma.com

Jim Arnold adds: The Section's *The Environmental Lawyer* has a good article on "Self-Reporting and Self-Monitoring Requirements Under Environmental Laws," by Prof. Arnold W. Reitze, Jr., and Lee D. Hoffman, of George Washington University, in Vol. 1, at pp. 681-745.

Note: All list serve comments are being reprinted with the authors' permission.

MEMBER NEWS

Stacy Watson May, has joined the CSX Transportation, Inc. Law Department in Jacksonville, Florida as Counsel. She joins long-time committee member Pamela Savage, Senior Counsel, in that office.

Judith Wenker has left her in-house position at Texaco Inc. to return to the gray mornings and sunny afternoons of San Diego, Calif. She is Of Counsel with the AV-Rated firm of Majors & Fox. The firm specializes in litigation and has handled many environmental claims and lawsuits. Judith is planning to continue the kind of practice she had as the head of Texaco's environmental practice group, namely Superfund/contaminated properties matters and air/water/waste compliance counseling. She is looking forward to being a key "meeter and greeter" of the In-House Counsel attendees at the Section's Fall Meeting in San Diego in 2006!

Jim Arnold has served in various CLE roles in the Section for some time. At the Council meeting this past Spring, Jim was asked to develop the "Quick Teleconference" program series for the Section's national telephone/Internet briefings on major recent developments. This new Section program was kicked off with the Brownfields 2002 telephone conference call shortly before the President signed the 2002 Brownfields Act in January. For example, recent topics have included updates on:

- EPA's New Source Review program modifications, led by EPA's assistant administrator for Air Programs (June)
- The World Summit on Sustainability, led by the ABA's delegation leader (Aug.)
- "Preventing RCRA Headaches" (reviewed above by Peter Wright)(Sept.)
- Preserving the identity of crops, both biotech and non-biotech (Sept.)

- Qualifying for the new EPA brownfields grants, led by the head of EPA's Office of Brownfields Cleanup and Revitalization, and the head of the EPA Office of Site Remediation Enforcement (Nov.)
- The U.S. Data Quality Act and EPA Science and Technology (Dec.)

Additional programs are being developed by the Section's 30 Substantive Law Committees. Contact Committee chairs and Program vice-chairs through the Committee page Web site if you have a topic. <http://www.abanet.org/environ/committees/>

Copies of recordings of these programs and related materials may be available from the Section. Contact Brooke Loucks at loucksb@staff.abanet.org if you are interested in purchasing any available materials.

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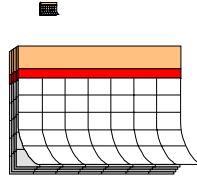
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(Co-sponsored with ALI-ABA, for information call 800/253-6397)

11th Section Fall Meeting

October 8-12, 2003
Washington, D.C.

For more information, see the Section Web site at <http://www.abanet.org/environ> or contact the Section at 312/988-5724.

