



# The Commercial Law Connection



The National Bar Association  
Commercial Law Section

VOLUME 3, ISSUE 1

Winter 2006

CONNECTING PEOPLE, IDEAS AND OPPORTUNITIES

## Karol Corbin Walker's Chair Message

**M**ark your calendars! The 19th Annual Corporate Counsel Conference will take place at the Renaissance Ross Bridge Golf Resort and Spa, Birmingham, Alabama from February 23 through 25, 2006. Commercial Law Section members have yet another opportunity to foster and strengthen relationships with their colleagues and corporate representatives. This Conference promises to be one of our best ever.



Karol Corbin Walker, Chair

We are enthusiastic about this year's Conference. It will feature an Attorney Roundtable, which will run concurrently with the Corporate Counsel Roundtable. Both of these programs will begin at noon on Thursday, February 23, 2006. Following the roundtable sessions, all participants are invited to attend a Family Work Life Balance Program. The Conference will also include a Thursday Welcome Reception, Friday Buffet Breakfast and Luncheon, One-on-One Corporate Interviews, 7 CLE Seminars with comprehensive materials, Saturday Buffet Breakfast and Saturday night social/networking event.

Many corporate counsel, including General Counsel, will participate as panelist on the CLE Substantive Seminars, Corporate Roundtable, Attorney Roundtable and Family Work Life Balance Program. We are delighted that Geoffrey J. Kelly, Senior Vice President and General Counsel of The Coca-Cola Company, will deliver our General Counsel Keynote Address at our Friday, February 24, 2006 Luncheon.

We continue to enhance the value of the Conference. This year we have obtained commitments from several corporations that have not traditionally participated in our Conference. The outstanding program agenda and other activities will serve you and your practice tremendously. Space is limited. So, please register now online at [www.nbacls.com](http://www.nbacls.com).

I look forward to seeing you in Birmingham. Have a safe trip.

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## Corporate Investigations: Responding to an Allegation of Corporate Financial Misconduct -- An Effective Response Team

By Gary Arrick, Contributor Tamika Tremaglio

In the event your company receives an allegation of employee wrongdoing or other financial misconduct, how the company directors and management team respond may have immediate and long-term implications for the company. The company's next steps are crucial in mitigating implications resulting from alleged misconduct, including negotiations with regulators and negative public perception.

The completeness and effectiveness of an investigation depends on the response team's ability to triage issues as they are identified. It is critically important to engage a diversified team of professionals with the breadth of experience and skills required to adequately assess allegations, evaluate response options, conduct the investigation and present the findings.

### *The Decision to Engage*

The current regulatory environment, along with heightened public scrutiny, requires immediate consideration of allegations brought to the attention of a company's management or Board of Directors. Generally, if the allegations of financial misconduct received involve individuals below senior management, the individual receiving the report, such as a compliance officer, may determine an appropriate course of action and level of investigation necessary. For matters involving allegations that may have a financial impact on the company, the audit committee will have previously set guidance on how to handle such allegations. Appropriate members of the audit committee and the company's general counsel may also be notified, depending on the nature and seriousness of the allegations. In the event a report of alleged financial misconduct is received involving members of senior

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## The National Bar Association mourned the passing of Clyde E. Bailey, Sr.

The National Bar Association mourned the passing of Clyde E. Bailey, Sr., who died on Monday, December 12, 2005. Among his many accomplishments, Clyde, a distinguished patent attorney at the Eastman Kodak Company, was the 61st president of the NBA.

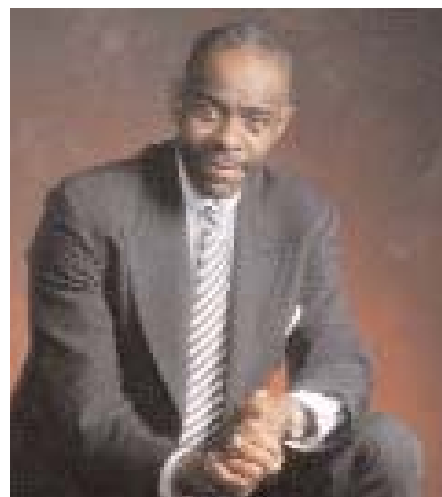
As a patent attorney for Kodak, he prosecuted over 500 patent applications worldwide. Prior to his tenure at Kodak, Clyde's practice included intellectual property, space commercialization and employment law matters at NASA. He also served as a congressional staff attorney to Congressman Louis Stokes. Before practicing law, Clyde was a senior engineer and physicist for Xerox Corporation.

As NBA president, Clyde: (i) lead the development of an NBA Judicial Grading Process for evaluating judicial candidates; (ii) launched the first NBA diversity pledge to encourage corporate law departments and majority law firms

to embrace diversity; and (iii) founded the National American Drug Policy Coalition, a coalition of African-American professional organizations concerned with drug abuse laws.

Clyde believed that global networking within black communities could improve life in our communities around the world. He traveled extensively throughout Africa, working tirelessly to build relationships between black lawyers worldwide.

Clyde received numerous awards for his outstanding contributions to the NBA and the community, including: four (4) NBA Presidential Awards; the NBA Commercial Law Section's Corporate Counsel Award (2003); the Congressional Black Caucus Chair Award (2003); and the Rochester Black Bar Association's Life Time Achievement Award (2004). In April 2004, LexNoir Foundation created a scholarship fund in his name for black



law students pursuing a career in international law. The fund will award its first scholarships in June 2006.

Sadly, our community lost a great man, true friend and mentor. Expressions of sympathy may be directed to: Clyde E. Bailey Memorial Fund for Services to Our Communities, National Bar Association, 1225 11th Street, N.W., Washington, D.C. 20001.

## The National Bar Association Awarded Its 2005 Section of the Year Award to the Commercial Law Section

On Monday, August 1, 2005, during the opening plenary session at the National Bar Association's 80th Annual Meeting in Orlando, Florida, the NBA recognized the Commercial Law Section ("NBACLS") as "the NBA's Section of the Year." Section Chair Karol Corbin Walker accepted the award on behalf of the NBACLS.

The NBACLS has received this coveted honor on three prior occasions — 2001, 2002, and 2003 — under the leadership of former section Chair John Lewis (currently an attorney with Coca-Cola). This year the NBACLS received the honor under current Chair Walker. Without question, the NBACLS's juggernaut as Section of the Year is a result of the exceptional benefits it offers to its members through its incredible lineup of business and industry leaders who meet with and retain NBACLS members to represent major U.S. corporations. Those same prominent corporate representatives serve as panelists and keynote speakers. The section also boasts of phenomenal programming, both CLE and otherwise. Many NBA members will tell you that, without question, the NBACLS leads by example. The NBACLS's mantra of "connecting people, ideas, and opportunities" is real because the NBACLS has for years connected its section members' wealth of talent with corporate clients that recognize diversity is a best practice.



Karol Corbin Walker accepted the NBA's award to the NBACLS.

If you have not attended the NBACLS's Annual Corporate Counsel Conference, you have missed professional and personal networking opportunities. This year's conference will be held on February 23 - 25, 2006 in Birmingham, Alabama. If you would like to learn more about the NBACLS's Conference, please visit [www.nbacls.com](http://www.nbacls.com).



## The Coca-Cola Company NBACL's Corporation of the Year Award

In June 2005, the National Bar Association's Commercial Law Section ("NBACL's") announced that The Coca-Cola Company's Legal Division was selected to receive its 2005 Corporate Award. This Award was presented on August 2, 2005 in Orlando, Florida, at the National Bar Association's ("NBA") Annual Meeting.

Each year, the Corporate Award is presented to a corporate law department for demonstrated strategic and underwriting support of the NBACL's and for demonstrated leadership in diversity initiatives, including the utilization of minority outside counsel. Past recipients of the NBACL's Corporate Award include the law departments of General Motors, International Paper, Eastman Kodak, and Bank of America.

In acknowledging the Corporate Award, Geoffrey J. Kelly, General Counsel, and Senior Vice President, remarked that ... "we are thrilled and delighted for the honor . . . Our Company has been greatly enriched by a long and fruitful relationship with the National Bar Association and the Commercial Law Section. We look forward to a long and mutually beneficial partnership."

Indeed, the NBACL's has benefited greatly from the leadership and hard work of members of The Coca-Cola Company's Legal Department. The following are just a few examples. John Lewis, Jr., Litigation and Employment Law Counsel for The Coca-Cola Company, is the immediate past Chair of the NBACL's and served in that position for three years. For each of those years, the NBACL's was named the NBA's Section of the Year. Before becoming the NBACL's Chair, Mr. Lewis was the Section's Assistant Treasurer for one year and was the section's Treasurer for five years.



Angela Cox, John Lewis and Ben Garren accepted the award from Karol Corbin Walker.

Schuylla Goodson Bell, the current Division Operations Counsel for The Coca-Cola Company's Southern Africa Division based in Johannesburg, South Africa, is the immediate past First Vice Chair of the NBACL's. Ms. Goodson Bell served on the NBACL's Executive Committee for 2001 to 2005.

Currently, Cheryl F. Turner, Counsel for The Coca-Cola Company in the Retail & Distribution Group, is a Corporate Liaison of the NBACL's.

We look forward to deepening and continuing the NBACL's important relationship with The Coca-Cola Company. We also encourage all companies to continue to expand their diversity initiatives and their utilization of minority outside counsel as The Coca-Cola Company has done. The NBACL's welcomes partnerships with all corporations as part of our ongoing commitment to excellence and inclusivity.

### At the NBACL's reception at the NBA Annual Meeting, the NBACL's acknowledged the contributions of its members and friends.





## Greetings NBACLS members. Welcome to Birmingham, Alabama, "The Magic City!"

It is that time of year again. It is time to register early for the NBA Commercial Law Section's Annual Corporate Counsel Conference in Birmingham, Alabama at the Renaissance Ross Bridge Golf Resort & Spa. Come learn, network, and relax at this beautiful resort, which opened in August 2005.

Founded in 1871 at the crossing of two railroad lines, Birmingham is one of the south's best kept secrets. Voted one of "America's most livable cities" in 2004, it has the largest concentration of business, legal, financial and medical services in the state. Join us for re-connecting with old friends, establishing new relationships, and enjoying some of this city's significant history.

Here are just a few of the cultural amenities, shopping districts and award winning restaurants you can look forward to:

### SIGHTS TO SEE:

1. **The Birmingham Civil Rights Institute.** Located in the historic Civil Rights District and surrounded by the 16th Street Baptist Church and Kelly Ingram Park, this is a "living institute" with permanent exhibitions of the Civil Rights Movement. 520 Sixteenth Street North. 205-328-9696. Tues.-Sat. 10-5; Sun. 1-5.
2. **Kelley Ingram Park.** During the Civil Rights Movement, the country and the world witnessed several events that occurred in this park, including police dogs and fire hoses turned on children and marchers who gathered in this park for civil rights demonstrations in the 1960's. Sixth Avenue North between 16th Street and 17th Street.
3. **Sixteenth Street Baptist Church.** This church, which is part of the historic Civil Rights District, is the site of the infamous 1963 bombing that killed four little girls. 1520 Sixth Avenue North, 205-251-9402. Tours by Appointment. Worship services Sundays at 11:00 a.m.
4. **The Alabama Jazz Hall of Fame.** The Alabama Jazz Hall of Fame makes its home in the historic Carver Theatre for the Performing arts. The museum honors great jazz artists with ties to the state of Alabama. Exhibits convey the accomplishments of the likes of Nat King Cole, Duke Ellington, Lionel Hampton and Erskine Hawkins and the music that made them famous.
5. **Mercedes-Benz International Visitors Center.** In 1995 Mercedes Benz chose a site just east of Birmingham to build its first assembly plant outside Germany. The plant produces the popular M-Class All Activity Vehicle. A \$600 million expansion is currently underway.

### SHOPPING:

**The Summit.** This is a 165 acre outdoor mixed use development with shopping and dining. It is anchored, among others, by Saks Fifth Avenue, Parisian, Barnes and Noble and Old Navy. Dining includes the Cheese Cake Factory, Flemings Prime Steakhouse & Wine Bar, and Tavern on the Summit. It is located at the intersection of Highway 280 and I-459.

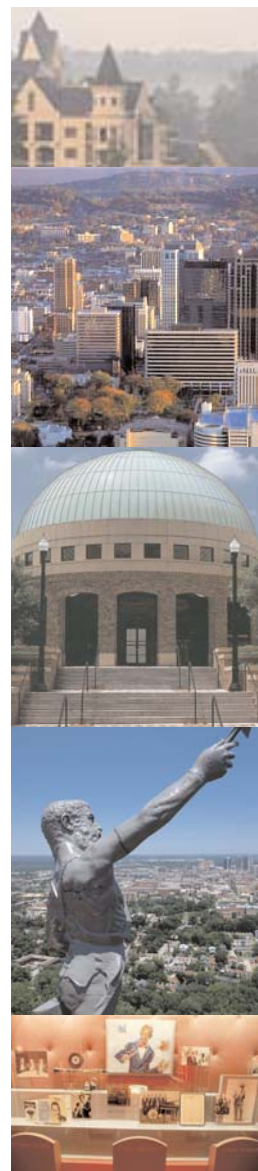
**The Riverchase Galleria.** The Galleria is a 200+ shopping mall housed beneath the world's longest skylight. Stores

include Parisian, Macy's, Banana Republic, The Disney Store and Godiva Chocolatier. In addition, the area behind The Galleria known as Patton Creek has become a mini Summit and includes an eclectic mix of national retailers, local stores, boutiques and restaurants. Both The Galleria and the Patton Creek shopping area are located off Highway 150 in close proximity to Ross Bridge Resort.

**Watermark Place.** Birmingham's own Outlet shopping. Watermark has over 300 outlet stores including Nine West, Polo Ralph Lauren, Tommy Hilfiger and Gap. Watermark is located next to Visionland Theme Park, 4500 Katie's Way, Bessemer, Alabama. [www.watermarkoutlets.com](http://www.watermarkoutlets.com)

### DINING:

1. **Highlands Bar & Grill.** Named by Gourmet Magazine as the fifth best restaurant in the nation and recognized by the New York Times and Bon Appetit. Country French with a rich southern tradition. Chef and Owner, Frank Stitt. Reservations recommended. 205-939-1400. 2011 11th Avenue South. (Southside).
2. **Bottega Italian Restaurant.** Italian and Mediterranean Cuisine. Owned by Frank Stitt, Chef and Owner of Highlands Bar & Grill. Reservations recommended. 205-939-1000. 2240 Highland Avenue South. (Southside).
3. **Bottega Café.** Casual trattoria. Owned by Frank Stitt. Woodburning oven baked pizzas and pastas, roasted and grilled meats and fish, antipasta, and salads. 205-933-2001. 2242 Highland Avenue South. (Southside).
4. **Ocean.** Fresh seafood in a comfortable, contemporary, upscale atmosphere. Reservations recommended. 205-933-0999. 1218 20th Street South. (Southside).
5. **Hot & Hot Fish Club.** Continental/Seafood. Reservations recommended. 205-933-5474. 2180 11th Court South. (Southside).
6. **Dreamland Bar-B-Que.** If you have ever watched an Alabama football game on ESPN, the ESPN crew gives this place free advertising. Dreamland now serves chicken and sides such as beans and cole slaw, but the original Dreamland in Tuscaloosa only served ribs and white bread. 205-933-2133. 1427 6th Avenue South (Southside near UAB).



**For more information about Birmingham, go to [www.birminghamal.com](http://www.birminghamal.com)**



## Historic Celebration

The Magic City Bar Association's Celebration of the 40th Anniversary of the Voting Rights Act was held on Friday, December 2, 2005, at the Civil Rights Institute in Birmingham, Alabama. The attendees included all of Alabama's African-American Circuit Court judges, an African-American federal court judge, African-American state legislators, and African-American city council and school board members. The Voting Rights Act was enacted in 1965 and gave citizens of all races the equal right to vote for political candidates. The Act was enacted after "Bloody Sunday," which was the day on which the world watched Alabama state troopers and sheriff's deputies beat peaceful protesters participating in a voting rights march on the Edmund Pettis Bridge in Selma, Alabama. Chief U.S. District Court Judge U.W. Clemon, the first African-American federal judge in Alabama, called the Voting Rights Act the most important law passed in the 20th Century.



Birmingham City Council President Carole Smitherman is welcomed by retired Alabama Supreme Court Justice Ralph Cook.



## The Corporate Counsel Roundtable "Diversity Efforts - Is it just lip service?"

The Corporate Counsel Roundtable, which will be held on Thursday, February 23, 2006, from 12:00 noon to 2:30 p.m., will address issues facing in-house corporate counsel with regards to diversity efforts. The Roundtable will focus on the advances that have been made, the steps that corporate law departments have taken and will continue to take, and the changes that outside firms have made in response to corporations' call for greater diversity at outside firms. The Roundtable will encourage candid discussion among participants in an effort to exchange ideas and encourage continued development within the legal profession.

## The Attorney Roundtable "Diversity as a Tool for Maximizing Personal Success - Fact or Fiction?"

The Attorney Roundtable will highlight methods for utilizing diversity as a tool within a comprehensive business plan to achieve personal success. The panel and participants will also discuss the extent to which current corporate diversity initiatives have impacted the client development landscape. The Attorney Roundtable will further emphasize best practices for utilizing the Corporate Counsel Conference as a vehicle for building mutually beneficial personal and professional relationships. The Attorney Roundtable will be held at the same time as the Corporate Counsel Roundtable on Thursday, February 23, 2006, from 12:00 noon to 2:30 p.m. and serves as the first Conference networking opportunity for outside counsel.



Carter-White & Shaw, LLC contributed to the NBACLS's activities. Ron Jordan presents NBACLS Chair, Karol Corbin Walker, with a check from Carter-White & Shaw, LLC.



## 2006 REGISTRATION AND PROGRAM FORMALITIES

### CALENDAR FORMAT

Please note that this year's Conference runs from **Thursday, February 23, 2006, through Saturday, February 25, 2006.**

### SUBSTANTIVE CLE PROGRAMMING

4 hours of substantive law CLE have been incorporated into the Conference program. Substantive CLE training will include not less than 1 hour of ethics credit.

### HOTEL POLICY

Hotel rooms may only be reserved at the conference rate for registered conference attendees. Reservations made by non-registered parties are subject to cancellation.

### AIRLINE POLICY

American, Continental, Northwest and United Express Airlines are the official airlines for the NBA Corporate Counsel Conference. To obtain airline discounts for the meeting, please call: **American Airlines** reservations at **1-800-433-1790** everyday 5:00 a.m. - midnight (CT), and refer to **Authorization Number A2226AP** Code. American also offers an Avis Car Rental discount, **Authorization Number B136000**; **Continental Airlines** reservations at **1-800-468-7022** everyday 7:00 a.m. - 10:00 p.m. (CT) and refer to **Authorization Number U83LK8**; **Northwest Airlines** reservations at **1-800-328-1111** Monday - Friday 7:00 a.m. - 7:30 p.m. (CT) and refer to **Authorization Number NM89W**; or **United Express Airlines** reservations at **1-800-241-6522** Monday - Friday 8:00 a.m. - 10:00 p.m. and Saturday - Sunday 8:00 a.m. - 8:00 p.m. (ET) and refer to **Authorization Number 539TB**.

A Budget Car Rental discount is also available. For reservations call **1-800-772-3773** and refer to **Authorization Number UU76402**.

### CANCELLATION POLICY

All cancellations and requests for refunds shall be submitted in writing to the Chair not later than **February 2, 2006**. Refunds are subject to a \$125 administrative fee. A registration may be transferred to another attorney within the same firm upon written request submitted to the Chair, Karol Corbin Walker prior to **February 13, 2006**.

### ONLINE REGISTRATION

You may now register for the conference online, at [www.nbacls.com](http://www.nbacls.com).

### CREDIT CARD REGISTRATIONS

You may register for the Conference by credit card using VISA, MasterCard or American Express. To register by credit card, you can do so online at [www.nbacls.com](http://www.nbacls.com) or you can fax your registration form to (973) 491-3458 and note your credit card number, expiration date, billing address and provide the cardholder's signature where indicated on the registration form. Registration is not complete until payment by credit card has been approved. For purposes of the registration deadline, a declined credit card authorization operates as an incomplete registration.

### SPA/GOLF ACTIVITIES

To further enhance the recreational component of the Conference, spa and golf breakouts have been arranged. The applicable fees for these events **must** be included in the registration. We cannot guarantee that on-site registration for these activities will be avail-

able. Any event is subject to cancellation in the event of insufficient interest.

### GUEST REGISTRATION

The Guest registration fee is \$125.00 and must be included with the participant's conference registration. This fee includes the Thursday Welcome Reception, Friday Post-Interview Networking Reception and Saturday Evening Dinner Event. **No attorney may attend the meeting as the guest of another attorney. Each attorney must pay a separate registration fee.**

### RESUME/QUESTIONNAIRE FORMAT

Please strictly adhere to the published deadlines for submission of documentation. The Chair, Karol Corbin Walker, must receive typed Resumes/Questionnaires at the address noted in this brochure not later than **January 19, 2006**. Any documentation received after that date will not be included in the printed materials forwarded to corporations. **NO EXCEPTIONS!!!**

### REGISTRATION/CONFERENCE QUESTIONS

For registration and conference related questions please contact:

Kimberly R. Phillips  
Gardere Wynne Sewell LLP  
1000 Louisiana, Ste. 3400  
Houston, Texas 77002  
(713) 276-5576 (direct dial)  
(713) 276-6576 (direct fax)  
[kphillips@gardere.com](mailto:kphillips@gardere.com)

National Bar Association  
Commercial Law Section

19th Annual Corporate  
Counsel Conference  
*"Raising the Bar:  
Advancing Justice and Equality"*  
February 23-25, 2006

Renaissance Ross Bridge  
Golf Resort and Spa  
Birmingham, Alabama  
[www.nbacls.com](http://www.nbacls.com)

**SAVE THE DATE**

Go to  
**[www.nbacls.com](http://www.nbacls.com)**  
for information about the  
conference agenda



The NBA Commercial Law Section would like to thank our Corporate Counsel Conference sponsors for their support.

(As of January 16, 2006)

#### PLATINUM

The Coca-Cola Company  
Wal-Mart Stores, Inc.  
Huron Consulting Group

#### SILVER

Davis Wright Tremaine, LLP  
Foley & Lardner LLP  
Greenberg Traurig, LLP  
Holland & Knight, LLP  
Mercedes Benz USA, Inc.  
Pfizer Inc.  
Thelen Reid & Priest LLP

#### BRONZE

Akin Gump Strauss Hauer & Feld, LLP  
Alston & Bird LLP  
Ballard Spahr Andrews & Ingersoll, LLP  
Baxter Healthcare Corporation  
Blank Rome, LLP  
Bowman and Brooke LLP  
CYOC Foundation  
Dickstein Shapiro Morin & Oshinsky LLP  
ExxonMobil Corporation  
Gardere Wynne Sewell LLP  
Gonzalez Saggio & Harlan, LLP  
Gust Roesenfeld PLC  
Haskell Slaughter Young & Rediker, LLC  
Ice Miller LLP  
Kenyon & Kenyon LLP  
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Manatt Phelps & Phillips LLP  
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Shipman & Goodwin, LLP  
Southern Company  
Sprint  
Starbucks Coffee Company  
Sterne, Kessler, Goldstein, Fox, PLLC  
Thomas Kennedy Sampson & Patterson  
Thompson & Knight LLP  
Wachtell, Lipton, Rosen & Katz

#### BENEFACTOR

Law Offices of Alozie N. Etufugh

## Hurricane Katrina: the Mississippi Attorney General Challenges the Effectiveness of the Flood Exclusion in Homeowners Insurance Policies

By Donald O. Johnson

Hurricane Katrina ravaged the Gulf Coast of Louisiana and Mississippi in late August 2005, causing more than 1,000 deaths and more than \$200 billion in property damage. Hurricane force winds blew off roofs, blew out windows, and knocked down walls. Heavy rain saturated building contents, and floods inundated whole communities, including portions of New Orleans, Louisiana. The catastrophic scale of the property damage and many property owners' lack of flood insurance have caused some property insurance policyholders or their representatives to question the effect of the Flood Exclusion contained in most standard commercial property and homeowners insurance policies.



Standard commercial property and homeowners insurance policies cover property damage caused by wind and caused by rain that enters a building because wind or another insurance-covered peril has exposed the property to the rain. Such policies, however, usually contain a Flood Exclusion. A typical Flood Exclusion in a commercial property policy or homeowners policy states:

This policy does not insure against loss caused by, resulting from, contributed to or aggravated by any of the following:

- a. flood, surface water, waves, tidal water or tidal wave overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not.

Property insurers include the Flood Exclusion in standard commercial property and homeowners insurance policies to avoid exposing themselves to catastrophic losses. Floods can result in extraordinarily large losses because a flood can severely damage many properties in a given area. Thus, an insurer that insures against flood damage assumes the risk that it may have to pay a large number of flood claims at the same time, the cost of which could be extremely high.

Because of a lack of insurers that were willing to insure against flood damage at a price that most property owners could afford to pay, the federal government created the National Flood Insurance Plan in 1969. Under the National Flood Insurance Program, the Federal Insurance Administration, which is part of the Federal Emergency Management Agency (FEMA), and insurance companies that participate in the Federal Insurance Administration's Write Your Own program sell flood insurance to the public. The participating insurance companies collect the premiums, issue the policies (called the Standard Flood Insurance Policy), and handle the claims. FEMA, in turn, covers the losses and allows the participating insurers to keep part of the premiums as payment for the administrative services that the insurers render.

FEMA also creates flood insurance rate maps, which identify areas that are particularly susceptible to flooding. FEMA calls these areas special flood hazard areas. Owners of property in these areas pay higher premiums for flood insurance than do owners of property located outside of them. Federal law requires owners of property in special flood hazard areas to purchase flood insurance if they have mortgages on the property from lenders that federal agencies regulate or insure.

Hurricane Katrina severely damaged property in special flood hazard areas and

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## Hurricane Katrina News from a Few of Our Section Members from New Orleans

### After The Storm

By Dana Douglas

My firm, Liskow & Lewis, PLC, reopened its New Orleans office on November 7, 2005. In the immediate aftermath of Hurricane Katrina, the attorneys in my New Orleans office relocated to our firm's existing Lafayette office, our recently established office in Houston, and new quarters in Baton Rouge, Louisiana at the One American Place building. Our administrative headquarters was temporarily moved from New Orleans to Lafayette. Thus, our firm was able to continue to represent our clients' interests throughout the state and region without interruption during the evacuation of New Orleans.



Ironically, in addition to forcing us out of our New Orleans office temporarily, Hurricane Katrina generated a number of legal matters for our firm related to issues surrounding the hurricane. Our clients recognized our capabilities and experience with disaster-related issues and

retained us to handle matters such as class actions concerning responsibility for storm damage and claims related to commercial, residential and mineral leases, force majeure, oil spills, pipeline issues, builder's risk policies, business interruption policies and other insurance issues. Other Katrina-related representations include the representation of clients in suits claiming that oilfield canals have destroyed marsh leading to the damage from Hurricane Katrina and a client whose barge allegedly broke a levee that has been blamed for significant flooding in parts of the New Orleans metropolitan area.

We at Liskow & Lewis are deeply saddened by the devastation caused by Hurricanes Katrina and Rita and send our thoughts and condolences to those who have suffered losses. All of us look forward to a return to the great city of New Orleans and participation in the rebuilding of the Gulf South!

*Dana Douglas, Esq., is an Associate at Liskow & Lewis, PLC. Her primary practice areas are commercial litigation including intellectual property and oil and gas litigation.*

### Planning, Action and Agility, Makes Montgomery, Barnett, Brown, Reed, Hammond and Mintx, L.L.P. Katrina Survivors

By Terrel J. Broussard

For over a century my firm, Montgomery, Barnett, Brown, Read, Hammond & Mintz, L.L.P., has taken pride in the creative talents of its attorneys. We are a full service law firm, and our principal office locations are New Orleans, Louisiana and Gulfport, Mississippi. The cata-



strophic effects of Hurricane Katrina tested the resolve and the capability of our firm. Because of our advance planning, our quick action, and our agility, we survived the worst natural disaster to strike the United States in the last 100 years.

Several years ago, my firm devised a disaster plan that included data support duplication and retrieval, relocation of offices and equipment, and the designation of specific tasks to key members of the firm. The capstone of the plan was business interruption insurance. However, in order to minimize the effects of any interruption of business by any natural or man made disaster, the firm contracted with Agility Recovery Solutions to provide equipment and logistics support. The contract included computer, telephone and office equipment. The firm's plan also contemplated the possibility of providing housing for firm personnel who may be displaced by a catastrophic event.

On the close of business on Friday, August 26, 2005, there was the presumption that Hurricane Katrina, which was in the Gulf of Mexico, would make landfall in Florida or some place east of New Orleans. The reality was that Katrina, a strong Category 4 storm at that time, was heading directly for New Orleans. Jefferson Parish, Louisiana ordered a mandatory evacuation of its population on Saturday, August 27, 2005. A mandatory evacuation was issued for Orleans Parish for Sunday, August 28. The firm's information technology section and the firm's managers implemented the disaster plan by placing duplicate copies of the firm's data in the possession of key personnel. The data had also been backed-up electronically in other places, which would provide the firm access to its data. A decision was made to maintain the firm's main file server operational during the duration of the natural disaster so that email could serve as the principal mode of communication for the firm during the disaster. The firm's personnel evacuated to various parts of the country. With a vengeance, the hurricane slammed in to New Orleans bringing with it 140 miles an hour winds and a tidal surge of 20 feet that devastated most of the area. Additionally, major levee breaches caused the flooding of eighty-percent of the City of New Orleans.

The firm's advance planning to mitigate the adverse effects of catastrophic events on sustained business operations was tested by Hurricane Katrina, and the firm passed the test. The firm was able to set up temporary offices in Baton Rouge, Louisiana within a week after the storm devastated the New Orleans area. The agility of the firm is clearly a result of proper planning. Hurricane Katrina struck the New Orleans Area and the Gulf Coast on August 29th. By August 31st, the firm's office manager had leased office space. On September 2nd, the firm's computer services provider began installing forty desk top computers complete with workstations, chairs and office supplies. They also provided file servers on which the firm's back-up data was restored. Because conventional phone service for our new office space was impossible to attain in Baton Rouge, a satellite phone service with a New Jersey phone number was installed. We could now communicate telephonically with the rest of the world. By September 3rd, housing had been secured for most of firm's personnel. By September 5th, the firm was operational. On that day, attorneys and staff began filling up the acquired space; clients were serviced. We had survived.

The firm's offices on the 32nd and 33rd floors of the Entergy Center in down town New Orleans sustained minimal damage externally. However, sewer, water and electrical difficulties pre-

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## Katrina Stores... *continued from page 8*

vented the firm's return to the offices until mid-November. To accommodate expansion opportunities in the surrounding parishes, the firm has opened offices in Baton Rouge, and Mandeville, Louisiana.

Currently, our offices in New Orleans are open. There is no doubt that our practice was interrupted and continues to perceive some present effects of the horrific storm. The firm's philosophy of planning, action and agility is the direct cause of the firm's survival of this catastrophic event. We have viewed this crisis as an event that only hinders, and disrupts our business operations. We are determined that it will not deter our resolve to be part of the rebuilding of our great city.

*Terrel J. Broussard, Esq. is a Partner at Montgomery, Barnett, Brown, Read, Hammond & Mintz, L.L.P., which is a full service law firm with a local, regional, national, and international practice.*

## Our Practice Continues Despite the Devastation and Destruction of Hurricane Katrina

By Troy Bell

On Sunday, August 29, 2005, like many other residents of New Orleans, I gathered a few belongings and evacuated from the city expecting to return no later than the Wednesday after Hurricane Katrina's landfall and expecting to continue business and life as usual. However, instead of my usual practice of evacuating for a few days, I now have the persistent status of an evacuee, which includes being separated from family, friends and colleagues.

My firm, Aultman, Tyner & Ruffin, has offices in New Orleans, Louisiana, Hattiesburg, Mississippi and Gulfport, Mississippi. All three of these offices were directly impacted by Hurricane Katrina. While leaving New Orleans, one of the senior partners in our Hattiesburg office called me offering my son and me shelter in his home in Hattiesburg, Mississippi. I, however, thankfully declined his offer and drove to Dallas, Texas where my immediate family had evacuated hours earlier. My partner in the New Orleans office, Glenn Swetman ("Max") evacuated to Lake Charles, Louisiana. After we watched reports and news stores about the breaches in the levee systems surrounding New Orleans, Max and I contacted each other and attempted to locate all of our attorneys and support staff to ensure their safety.

We eventually determined that our attorneys and our support staff had spread out throughout the United States, to as far west as Colorado and to as far east as Florida. Our immediate goal was to secure a location to assure our clients, our support staff of ten, and our seven attorneys that we were continuing business as usual. Our first order of business was to locate temporary office space in either Lafayette, Lake Charles, or Baton Rouge, Louisiana. Max and I communicated primarily via emails and, when available, through our cell phones and the land line telephones of the homes to which we had evacuated. The initial stages of planning and communication were especially difficult because telephone circuits were usually inoperable. Nevertheless, we remained in contact daily.



Our contact with senior partners in our Hattiesburg office (our home office) was virtually impossible because of power outages in Mississippi; therefore, we had to act independently and quickly because many of the larger law firms from New Orleans were leasing office space in Baton Rouge, Lafayette and in Lake Charles. Max contacted a leasing agent and the search began. The leasing agent, however, was unable to locate office space in our desired location - Baton Rouge. Fortunately, we, with the help of one of our associates, were able to locate and secure office space ourselves in Baton Rouge.

When I arrived in Baton Rouge during the first week of September, we were awaiting the arrival of furniture but had access to most of our files through our remote server. We were fortunate our Information Technology Specialist also had evacuated to Baton Rouge. He worked endlessly to provide us with the same technical support that we had pre-Katrina. He leased all of the necessary equipment and supplies we needed to become operational. We later traveled to New Orleans, on a restricted business pass, to obtain computers and other necessary equipment. As a result of these efforts, our temporary office location was operational.

By the beginning of the third week following Hurricane Katrina, our associates were covering depositions throughout Louisiana, and our limited support staff located in Louisiana was busy working in our temporary office in Baton Rouge. I was preparing for a trial in central Louisiana, and Max was in New York preparing corporate and expert witnesses for upcoming trials in Texas.

Despite our successful establishment of a temporary office in Baton Rouge, we lost three associate attorneys who decided not to return to New Orleans because of the devastation and destruction caused by Hurricane Katrina. We, however, have been fortunate to hire four young attorneys who have broad experience. Their addition allowed us to ensure that we will continue to meet the needs of our clients.

We have returned to our office in New Orleans, but we will keep our temporary office in Baton Rouge open because some of our attorneys lost their homes in Hurricane Katrina. Throughout the ordeal, we continued to maintain a positive attitude about the eventual return to New Orleans, and we have become a part of its rebuilding.

*Troy Bell, Esq. is a Partner at Aultman, Tyner & Ruffin, which is a full service law firm with offices in Louisiana and Mississippi.*





## Member Spotlights



### Vicky Turner – Top Litigator Award

Congratulations to Vickie Turner for being selected by the *Daily Journal Extra* as one of the Top 75 Women Litigators in the state of California. Vickie is a partner at Wilson Petty Kosmo & Turner, where she focuses her practice in the areas of products liability, First Amendment, and complex civil litigation. She represents a broad range of clients, from Fortune 500 companies to local businesses. The *San Diego Daily*

*Transcript* has recognized her firm—a San Diego business litigation boutique—as one of the largest women-owned firms in the country, with a nationwide reputation for quality litigation.

Since entering the legal profession in the early 1980s, Vickie has become an accomplished trial lawyer and has been recognized by her peers as such. In addition to her recent recognition by the *Daily Journal Extra*, she has been recognized by *California Law Business* as one of the Twenty-Five Most Outstanding Lawyers; she has received the Outstanding Trial Lawyer Award by the San Diego Trial Lawyers Association; and she has received the International Academy of Trial Lawyers Award of Excellence in Trial Advocacy. Vickie is committed to mentoring young trial lawyers, so they can achieve the measure of success she has achieved as a trial lawyer.

Although Vickie's practice focuses on the representation of corporate clients, she is committed to providing pro bono representation to the underrepresented and underprivileged in her community. Vickie is involved in the San Diego County Volunteer Lawyer Program and has received that organization's Distinguished Service Award.

Please join us in applauding Vickie's achievements and wishing her the best as she continues to leave her mark on her community and the legal profession.

### Victor Vital – Texas Super Lawyer

In October 2005, *Law & Politics* and *Texas Monthly* named Victor Vital a Texas Super Lawyer. Mr. Vital is a partner at Haynes and Boone, LLP, where he practices in the Business Litigation Section of the firm's Dallas Office. He is a former Harris County (Houston), Texas prosecutor whose civil trial practice focuses on the representation of businesses and individuals in a variety of complex commercial matters and business disputes involving claims such as breach of contract, fraud, breach of fiduciary duty, tortious interference, misappropriation of trade secrets, defamation, business disparagement, and other business torts. His experience also includes defending businesses against complex products liability claims, including claims involving catastrophic injuries. Mr. Vital's web bio may be accessed at <http://www.haynesboone.com>.



### Beatty Receives Honors

Otto Beatty III has been selected as a "Rising Star" by the Ohio Super Lawyers, *Law & Politics*, 2005. "Rising Stars" is a comprehensive and diverse listing of outstanding, emerging attorneys in Ohio selected by their peers. The honor recognizes outstanding young Ohio lawyers who have demonstrated superior professional potential.

Beatty also received the "2005 Community Service Award" by the Columbus Bar Association (CBA). This award recognizes attorneys who substantially contribute their time and effort in service to the Central Ohio community. Beatty is one of only four individuals who was honored by the CBA at its awards ceremony on September 28.

Beatty is a lifelong resident of Columbus, Ohio, and is widely recognized as one of that community's emerging business and community leaders. Beatty is a partner with the law firm of Baker & Hostetler LLP where he focuses his practice in the areas of bankruptcy, creditors' rights, commercial finance law, and commercial litigation.

He also serves as personal counsel to several small businesses, entrepreneurs, corporate executives, and other professionals. Beatty recently was elected Vice Chair of the Bankruptcy Section of the National Bar Association.

Mr. Beatty is a graduate of The University of Michigan Law School, Morehouse College, and St. Charles Preparatory School.

### Adrian C. Hunte Founds Hunte Law Group P.C.

Adrian C. Hunte, Esq., a former federal prosecutor with the U. S. Department of Justice and general counsel to the New York State Division of Alcoholic Beverage Control, founded the Hunte Law Group P.C., following the relocation of her former partner Mary Anne Harkins. The Hunte Law Group, like its predecessor firm Harkins & Hunte, will focus on the areas of alcohol licensing, commercial and residential real estate, wills/estate planning, personal injury, commercial litigation, intellectual property and environmental law. Ms. Hunte also will continue to represent wineries, restaurants, importers and package goods stores in licensing, disciplinary matters, business acquisitions/sales and litigation in the industry. The Hunte Law Group is located at Cortlandt Town Center, 3031 East Main St., Mohegan Lake, New York 10547, and can be contacted at 914-526-1000 or [ahunte@huntelaw.com](mailto:ahunte@huntelaw.com).



### Sharon Bridges Named Partner

Sharon Bridges has been named Partner at Brunini, Grantham, Grower & Hewes in Jackson, MS. She practices in the areas of product liability, asbestos, toxic torts, medical malpractice and commercial litigation. Sharon's diverse legal background has made her a highly sought after attorney. Prior to joining the Brunini firm, Sharon served as Associate General Counsel for Tulane University Medical Center and practiced with a premiere plaintiffs firm.

Sharon Bridges received a Bachelor of Science Degree in Nursing, with Honors, from Morris Brown College in Atlanta, Georgia, and a Juris Doctorate from Loyola University School of Law in New Orleans, Louisiana. Sharon currently serves as the Deputy Regional Director of Region V for the National Bar Association; an Editorial Board Member of the Commercial Law Section for the National Bar Association; Co-Chair of the Litigation Section for the American Association of Nurse Attorneys; Co-Chair of the Diversity Committee for the Hinds County Bar Association and is a member of the American Bar Association, Mississippi and Louisiana Bar Association and the Magnolia Bar Association. She has been a national speaker for the Defense Research Institute (DRI) and the American Healthcare Lawyers Association (AHLA). Sharon is active in numerous charitable organizations, as a board member and volunteer. Sharon is licensed to practice in Mississippi and Louisiana.

### Achia Swift Joins Intel

Achia, a conference regular, recently left Burnham Brown in Oakland, California where she practiced employment law. She has joined Intel's Human Resources Legal Department at the company's headquarters in Santa Clara, California. This Department oversees employee relations issues for the nearly 100,000 employees. The Department also handles litigation as well as advice and counsel matters for Intel worldwide. At Intel, Achia is responsible for the management of all U.S. agency charges and third party subpoenas. She also manages outside litigation and will handle international investigations. Recently, she was elected Co-Chair of Communications for NIA (Network of Intel African-American Employees). She will be switching sides at the interview table in February, 2006, at our next NBACLS conference.

Congratulations Achia from your NBACLS family.





## Corporate Investigations... *continued from page 1*

management, the audit committee should be notified. It will then assess the extent of investigation necessary and determine whether to engage internal or external resources to investigate.

Since the enactment of Sarbanes-Oxley and new rules of stock exchanges, the role of a public company's audit committee has expanded for oversight of management and the company's auditors in the preparation of the company's financial statements, and in the conduct of audits of the company's financial statements. Section 301, *Public Company Audit Committees*, of the Act includes provisions relevant to allegations of financial misconduct received by an audit committee:

“(4) COMPLAINTS- Each audit committee shall establish procedures for:

- (A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and
- (B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.

(5) AUTHORITY TO ENGAGE ADVISERS- Each audit committee shall have the authority to engage independent counsel and other advisers, as it determines necessary to carry out its duties.

(6) FUNDING- Each issuer shall provide for appropriate funding, as determined by the audit committee, in its capacity as a committee of the board of directors, for payment of compensation:

- (A) to the registered public accounting firm employed by the issuer for the purpose of rendering or issuing an audit report; and
- (B) to any advisers employed by the audit committee under paragraph (5).”

These provisions are directly relevant to an audit committee's responsibilities to conduct an investigation of allegations of financial misconduct.

### *The Importance of Independent Counsel*

Although it is not unusual for a preliminary investigation of the allegations to be performed by internal counsel, internal auditors, external auditors or even management to determine whether or not the allegations are valid, to protect the integrity of an investigation and its findings, it is important that it be conducted, authorized and directed by independent counsel. An investigation conducted and overseen by management is generally not perceived as independent because management has custody of the company's financial and accounting records, which could be impacted by the allegations and any findings resulting from the investigation. Additionally, members of management may be direct or indirect subjects of the allegations and should be, in any event, subject to the scrutiny of the investigation.

A heavily weighed factor in deciding whether to pursue an independent investigation is the source and nature of the allegations. Other factors to be considered include whether the SEC or other regulators will have an interest in the allegations and how the audit committee and management responded to those allegations.

In October 2001, the SEC issued a report (*SECURITIES EXCHANGE ACT OF 1934, Release No. 44969 / October 23, 2001, ACCOUNTING AND AUDITING ENFORCEMENT Release No. 1470 / October 23, 2001*) summarizing the reasons why no action was taken against a public company where the controller of one of its subsidiaries intentionally misstated public reports and then covered up the facts. This report has since become known as the Seaboard report. In this report, the SEC stated that action was not taken against the subject company “given the nature of the conduct and the company's responses.” Although the SEC clearly stated in this report that it had not committed to any position or limited its ability to evaluate each case separately, the SEC did note that “[f]irst, the paramount issue in every enforcement judgment is, and must be, what best protects investors. There is no single, or constant, answer to that question. Self-policing, self-reporting, remediation and cooperation with law enforcement authorities, among other things, are unquestionably important in promoting investors' best interests.” Further, the report set forth 13 criteria that would be considered in “determining whether, and how much, to credit self-policing, self-reporting, remediation and cooperation — from the extraordinary step of taking no enforcement action to bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents we use to announce and resolve enforcement actions.” Among these 13 criteria were the following questions:

- “Did the company commit to learn the truth, fully and expeditiously?”
- Did it do a thorough review of the nature, extent, origins and consequences of the conduct and related behavior?
- Did management, the Board or committees consisting solely of outside directors oversee the review?
- Did company employees or outside persons perform the review?
- If outside persons, had they done other work for the company?
- Where the review was conducted by outside counsel, had management previously engaged such counsel?
- Were scope limitations placed on the review? If so, what were they?”

These considerations clearly show the SEC's interest in whether the investigation was conducted in an independent manner. Although the company, its management, or internal counsel may conduct the investigation, it may not have the same credibility as an independent investigation.

In addition, the investigation should be limited in scope to address the specific allegations. It is not unusual for an investigation, even one limited in scope, to discover additional matters, unrelated to the allegations, that may require disclosure to the government or public mar-

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## MEMBER GRAPEVINE

When you or another NBA member that you know makes a notable accomplishment, such as winning a significant plaintiff or defense verdict, being elected to partnership in a law firm or to a corporate board of directors, or receiving an in-house counsel promotion or a judicial nomination, please send us the good news so that we can share it with other NBA members in this section of the NBACLS newsletter. You can contact us at [nbanews@nbacsl.com](mailto:nbanews@nbacsl.com)



## Corporate Investigations... *continued from page 11*

kets, and which would have to be considered in the assessment of whether a restatement or other corrective action is necessary.

### *An Effective Response Team*

Once the decision is made to conduct an independent investigation, the audit committee will likely engage independent counsel that has experience in conducting similar corporate investigations. Generally, the audit committee will engage counsel and require counsel to report directly to the audit committee. The audit committee will authorize counsel to inquire into certain matters. Counsel also will give advice concerning, among other things, cooperation with regulatory authorities and the protection of privileged communications. Counsel will also report to the audit committee and regulatory authorities, including the SEC, as appropriate, on the progress of the investigation and at its conclusion. Decisions concerning whether to cooperate with the SEC and other regulatory authorities, who to name as a spokesperson, what the scope of disclosure should be, and whether to assert a privilege against the disclosure of certain communications are critical questions that should be considered with a focus on the risks and potential consequences.

Each of the team members will generally be engaged directly by or at the direction of counsel. Many of the larger and better known forensic accounting firms will have most, if not all, of the professional resources, other than legal, on staff or will have established relationships to provide access to these resources as needed. Often, it is the forensic accountants that will oversee and coordinate these resources while working closely with, and reporting to, counsel. This process ensures that the entire team follows the work plan and does not stray from the agreed upon and authorized scope of the investigation. This also allows counsel to maintain control over the conduct of the investigation and the costs of professional services and gives counsel the information it needs to advise the audit committee and other parties about the progress of the investigation.

In considering the composition of the response team, the following qualifications should be reviewed for each professional, as appropriate:

- Expertise in performing similar investigations;
- Experience in reporting to executive members of management and the Board of Directors;
- Experience in the relevant industry;
- Experience in identifying key personnel for interviews and the conduct of interviews of operational, finance, accounting and information systems personnel;
- Expertise in the application of statistical sampling methods and other relevant tools for substantive tests of transactions;
- Experience in determining an appropriate manner to select and test transactions; and
- Experience in responding to inquiries from government organizations on behalf of the company.

There are many schools of thought as to the appropriate composition of an investigations team and when the various professionals should be brought into the investigative process. These decisions are generally left to the discretion of counsel and the team's composition will in large part depend on the nature of the allegations to be investigated.

Experience has shown that effective investigative teams generally include the following core specialists, exclusive of any legal, regulatory or industry specialists that may be considered as additional team members:

### *Forensic Accountants*

Forensic accountants are an integral part of any team reviewing allegations of financial misconduct or other allegations having a financial impact to the company, as well as those allegations that include a significant data and document production component. The significance of the forensic accountant's role may vary depending on the nature of the allegations. Inevitably, the role of the forensic accountant naturally expands during the course of the investigation due to the direct or indirect impact of the issues on the company's accounting records, financial reporting and other public financial disclosures. The forensic accountant generally works closely with independent counsel throughout the course of the investigation from the planning phase through delivery of the investigation's results and identification of remediation opportunities.

Forensic accountants specializing in corporate investigations are experienced in areas likely affected by any investigation of financial misconduct, including:

- Nuances of financial reporting;
- Application of generally accepted accounting principles or other relevant industry reporting guidance;
- Accounting and disclosure requirements;
- Understanding infrastructure of information and accounting systems; and
- Gathering, assembling and interpreting the company's current and historical financial records and data.

Other areas not typically associated with the forensic accountant but that have become part of many internal investigations include the review of electronic documents and hard copy paper files. The acquisition and search of electronic documents has become a key component of all internal investigations and is one of the first areas considered during the planning phase of the investigation. A search of these documents generally is based on the application of limiting criteria, such as time constraints, custodial relationships, and key words, and yields a significant amount of output that requires manual review. The review is typically conducted by counsel, the forensic accountants, or members of both groups. After these documents have been identified, collected, filtered and duplicates removed, documents relevant to the allegations are typically reviewed by the forensic accountant for accounting and financial disclosure implications. Often, it is also necessary to perform a search of the paper files of certain employees. However, the decision to search an employee's office files should not be made hastily as there are potential legal ramifications that need to be considered.

The forensic accountant should be actively involved in the planning phase of the investigation, the extent of which will be dependent on the nature of the allegations. Input will be required in the following key areas:

- Understanding the allegations;
- Gathering and assessment of relevant information;
- Developing an investigative protocol;
- Performing a detailed review of the allegations;
- Coordinating with other members of the investigative team;
- Defining the scope of the investigation;
- Performing substantive testing of accounts and transactions;
- Defining statistical sampling techniques;
- Evaluating recommendations for enhancements to internal controls or other remediation steps; and
- Advising on potential implications of the investigative process.

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## Corporate Investigations... *continued from page 12*

The use of electronic discovery and traditional investigative specialists has become fairly standard in most investigations. These professionals often provide valuable information that may enhance the team's understanding of certain areas, identify additional areas for review, or change the scope of the investigation.

### *Electronic Discovery and Computer Forensics Specialists*

Electronic discovery has become an essential part of any investigation, whether or not the allegations may have a financial impact. Corporate communications have evolved to become instantaneous and easily stored via email and other electronic media. Email may have schedules or other documents attached that otherwise could not be correlated to specific individuals. A byproduct of the electronic revolution is the potential relevance of computer files on shared drives, networks and PC hard drives. Almost all electronic data created, modified or viewed on a computer remains in some form on that computer's hard drive or other shared media and can be recoverable through forensic examination.

Once allegations of misconduct have been raised, it is imperative that the company take the necessary steps to identify and preserve relevant electronic data, including backup media, that may contain electronic files from the period defined in the scope of the investigation. Sources of these files may include corporate servers, individual computers, personal digital assistants, portable flash drives, personal email accounts, home computers, backup disks and voicemail files. Electronic discovery and computer forensics professionals are specialists in the retrieval and examination of this information. Depending on the nature of the investigation, it may be necessary to attempt to restore deleted files and password protected or encrypted files.

Many organizations have policies that call for the auto deletion of email after a certain number of days, but in practice the purge may not actually occur. A decentralized organization may have policies from its corporate office or business units governing practices regarding the backup of data on a periodic basis, the rotation of backup media and off-site storage and related retention requirements. However, for any number of reasons, practices at locations throughout an organization may not be executed in accordance with stated policy. One reason may be that the organization evolved from a number of acquisitions, with many of its locations running on legacy systems that may not conform with the corporate information systems and related governing policies. Similarly, a company may be so decentralized that policy compliance has not been audited at any point and no one is aware of the lack of compliance.

Electronic discovery and computer forensics professionals should be included during the initial planning stages of an investigation to address technology factors that should be assessed to effectively and completely identify, preserve, collect and analyze potentially relevant data.

### *Traditional Investigative Professionals*

Depending on the nature of the allegations under review and the individuals involved, there may be a need for traditional investigative research to augment the paper trail. A search of the public record may provide ownership information as well as information about individual and corporate affiliations that often prove useful to counsel and the forensic accountants in completing a puzzle, identifying individuals for interviews, and identifying relevant transactions that may not have otherwise been reviewed. Other services, such as physical security, cross-border resources, and governmental agency network relationships may also prove useful.

Information from the public record can provide valuable insight into the backgrounds of individuals and businesses. The user of this information should, however, be cautious when considering information obtained from the public record since it may contain errors and omissions. Where appropriate, the information should be confirmed with official sources. Knowledgeable and experienced professionals working in this area are generally sensitive to these issues.

### *Other Team Members*

The investigative team may also include other non-core individuals, who may not be considered independent of the company, but can play a crucial role in the investigation:

- **Internal counsel** may act as a company liaison and has often proven to be an effective catalyst in obtaining responses from other individuals in the company.
- **Accounting and finance liaison** generally will work closely with the investigative team as the central collection and distribution point for information and document requests.
- **Compliance officer** may be involved depending on the nature of the allegations to assess issues that may impact reporting to regulatory agencies.
- **Information systems personnel** are often consulted during the planning phase of the investigation to assist in identifying and acquiring electronic transaction data from company ledgers as well as from email, network servers and other electronic media.
- **Public relations personnel** may be involved to assist the company in public disclosures regarding the allegations and the investigation and to help respond to inquiries from the public.
- **Human resources personnel** may be involved if there is a need to obtain organizational information or to deal with other HR issues, such as access to employee offices and files.
- **Corporate security** may be involved if they were involved in receiving the allegations, or if there are access issues, threats of physical harm to employees, or issues regarding the safeguarding of other company assets.

Ultimately, the composition of the investigative team can take many forms and will greatly depend on the nature of the allegations and the experience of counsel. The key is to make sure the necessary professionals are included in the planning phase and proper consideration is given to implications of various decisions throughout the course of the investigation.



**Gary M. Arrick**, Director of Huron Consulting Group's New York office, specializes in corporate investigations. **Tamika Tremaglio, J.D., M.B.A.** is Managing Director of Huron Consulting Group's Washington, D.C. office. Their email addresses are: [garrick@huronconsultinggroup.com](mailto:garrick@huronconsultinggroup.com), and [ttremaglio@huronconsultinggroup.com](mailto:ttremaglio@huronconsultinggroup.com)

**Hurricane Katrina...** *continued from page 7*

property outside of them. An example of the latter is the property damage that the hurricane caused in the lower Ninth Ward in New Orleans. FEMA's flood insurance rate maps did not classify that area as a special flood hazard area. However, when the levees that separated the waters of Lake Pontchartrain from the city of New Orleans broke during Hurricane Katrina, lake water flooded the Ninth Ward. Unfortunately, many property owners in the Ninth Ward, like many other Louisiana and Mississippi property owners whose property was not located in a special flood hazard area, had not purchased flood insurance policies.

Property owners who did not have flood insurance cannot recover for their flood-related damage from FEMA under the National Flood Insurance Program. The only relief that FEMA may provide to such property owners is disaster assistance loans, which the recipients would have to repay. The only property insurance that these property owners usually have (if they have any) is standard commercial property or homeowners insurance, which, as previously noted, likely contains a Flood Exclusion. Insurance carriers that sold those policies generally agree that they are responsible for paying for the wind- and rain-related damage that Hurricane Katrina caused, but, based on the Flood Exclusion, they typically deny claims for flood-related damage.

Within this context, Mississippi's Attorney General Jim Hood filed a complaint in state court on behalf of the State of Mississippi against several named insurance companies and other unnamed insurance companies that sold homeowners policies in Mississippi. See *Jim Hood v. Mississippi Farm Bureau Ins., et al.*, Civil Action No. G2005-1642 R1 (Miss. Chan. Ct. 1st Jud. Dist. filed Sep. 15, 2005). The complaint alleges that Mississippi policyholders purchased homeowners policies with the expectation that the policies would insure against all hurricane damage. The complaint seeks a declaration that policies containing the Flood Exclusion are void and unenforceable based on the allegation that they violate Mississippi public policy because the insurers interpret the Flood Exclusion to preclude coverage for damage caused by water even if hurricane winds were a proximate cause of the loss. The complaint also supports its claim for relief on allegations that the policies as written are ambiguous and violate the Mississippi Consumer Protection Act.

The insurance company defendants had the case removed to federal court in Mississippi and filed an answer, denying Attorney General Hood's allegations. See *Jim Hood v. Mississippi Farm Bureau Ins., et al.*, Case No. 3:05-CV-00572-TSL-AGN (S. D. Miss. Sep. 16, 2005). The insurers argue that the law is well settled that standard property insurance policies do not cover flood damage, emphasizing that Mississippi's Insurance Department long ago approved property insurance policies containing the Flood Exclusion, as did the insurance departments in many other states.

The insurers also asserted a counterclaim that alleges that as participants in the Federal Insurance Administration's Write Your Own program, they acted as fiscal agents of the United States government. Their counterclaim seeks a declaration that FEMA has exclusive authority under the National Flood Insurance Plan to regulate flood claims-handling practices and that any conflicting Mississippi law is preempted by federal law.

Attorney General Hood contested federal court jurisdiction and has sought to have the case remanded to state court. He contends that the complaint deals only with whether the insurers' denial of claims under standard homeowners policies containing the Flood Exclusion is proper and that, therefore, no federal question jurisdiction exists.

Given that the Flood Exclusion has been used in property insurance policies for many years, that state insurance departments, including Mississippi's Insurance Department, have approved the use of property insurance policies containing the exclusion, and that the National Flood Insurance Program has been in existence for more than 30 years, it will be difficult for Attorney General Hood to prevail. However, given the amount of money at stake, this is an issue that commercial law attorneys should monitor closely. The results of the Mississippi litigation may impact future policy language in homeowners policies and commercial property insurance policies, and, therefore, may affect the advice that commercial law attorneys on both sides of the insurance aisle give their clients in the future.

Beyond the dispute about the effectiveness of the Flood Exclusion in homeowners insurance policies, some property owners have complained that FEMA used inaccurate flood insurance rate maps that did not include flood-prone property in the special flood hazard areas. These property owners claim that FEMA is responsible for their not having flood insurance. Based on this argument, representatives of Hurricane Katrina victims who did not have flood insurance have asked the federal government to assume responsibility for uninsured property losses. Mississippi Governor Haley Barbour, for example, has asked the Congress to provide \$4 billion to help 50,000 flood victims in his state. Mississippi Commissioner of Insurance George Dale and Attorney General Hood also have asked for similar relief.

Assuming, for argument's sake, that Attorney General Hood fails in his effort to make the insurance industry finance the reconstruction of the homes in Mississippi that were not covered by flood insurance, it is crucial that other private and public sources of funds be tapped and dedicated to rebuilding the property that Hurricane Katrina indirectly damaged in Mississippi, as well as that in Louisiana and in the other states that the hurricane hit. The affected individuals need this assistance so that they can rebuild their lives and their communities. It clearly will take the financial resources of more than one industry to help them recover from the worst natural disaster to hit the United States in the last 100 years.



**Donald O. Johnson, J.D., LL.M., CPCU** is Of Counsel at McKenna Long & Aldridge L.L.P.'s Washington, D.C. office. He represents clients in insurance coverage litigation and counsels clients about insurance coverage issues. The views and opinions contained in this article are not intended to be legal advice and should not be considered as such. Further, the views and opinions

expressed in this article are solely those of the author. They do not represent the views of McKenna Long & Aldridge L.L.P. or its clients. Mr. Johnson can be contacted by telephone at (202) 496-7187 or by email at [dojohnson@mckennalong.com](mailto:dojohnson@mckennalong.com).



## COMING EVENTS

**January 18 - 22, 2006**

**NBA Judicial Council & Board of  
Governors Mid-Winter Meeting**  
Hilton Barbados, Needham's Point  
*Bridgetown, Barbados*

**February 23 - 25, 2006**

**NBA Commercial Law Section's 19th  
Annual Corporate Counsel Conference**  
Renaissance Ross Bridge Golf  
Resort and Spa  
*Birmingham, Alabama*

**March 16 - 19, 2006**

**NBA Small Firms/Solo  
Practitioners Division  
11th Annual Conference**  
*Montego Bay, Jamaica*

**March 21 - 26, 2006**

**National Black Law Students  
Association 38th Annual Convention**  
*Crystal City, Virginia*

**April 26 - 30, 2006**

**NBA Mid-Year Conference &  
Gertrude E. Rush Award Dinner**  
Memphis, Tennessee

**June 2 - 11, 2006**

**NBA International Affiliate  
Chapter Meeting**  
*Ethiopia, Africa*

**August 5 - 12, 2006**

**National Bar Association  
81st Annual Convention & Exhibits**  
*Detroit, Michigan*

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1000 Louisiana, Suite 3400  
Houston, TX 77002-5007  
Tel: 713-276-5576  
kphillips@gardere.com

### Andrea M. Buford

*Second Vice Chair*  
Buford Law Office LLC  
The Mentor Building  
6 East Monroe, Suite 1301  
Chicago, IL 60603  
Tel: 312-263-6000  
ambuford@aol.com

### Tamika Langley Tremaglio

*Treasurer*  
Huron Consulting Group  
Managing Director  
555 13th Street, N.W.  
West Tower, 4th Floor  
Washington, DC 20004  
Tel: 202-585-6820  
ttremaglio@huronconsultinggroup.com

### DeMonica D. Gladney

*Secretary*  
Exxon Mobil Corporation  
Counsel  
800 Bell Street  
CORP-EMB-3407F  
Houston, TX 77002  
Tel: 713-656-3019  
demonica.d.gladney@exxonmobil.com

### Donald O. Johnson

*Communications Liaison*  
McKenna Long & Aldridge LLP  
1900 K Street, N.W.  
Washington, DC 20006  
Tel: 202-496-7187  
dojohnson@mckennalong.com

### Blonde Grayson Hall

*Program Chair*  
Law Offices of Hall & Associates  
1700 Ben Franklin Parkway, 24th Floor  
Philadelphia, PA 19103  
Tel: 215-557-8100  
bhallasociates@aol.com

### Stewart S. Myers

*Corporate Liaison*  
Sprint  
Senior Attorney  
Law Department  
6200 Sprint Parkway Eisenhower A  
Overland Park, KS 66251  
Tel: 913-794-1474  
stewart.s.myers@sprint.com

### David B. Cade

*Corporate Liaison*  
General Motors Corporation  
Legal Staff  
M/C: 482-028-205  
400 Renaissance Center  
Detroit, MI 48265-4000  
Tel: 313-665-4743  
david.b.cade@gm.com

### Cheryl F. Turner

*Corporate Liaison*  
The Coca-Cola Company  
Counsel, Coca-Cola North America  
One Coca-Cola Plaza  
Mail Stop USA 1104B  
Atlanta, GA 30313  
Tel: 404-676-4809  
chtturner@na.ko.com

### Werten Bellamy

*Advisor*

### Darryl Simpkins

*Advisor*  
Simpkins & Simpkins  
170 Township Line Road, Building D  
P.O. Box 5783  
Hillsborough, NJ 08844  
Tel: 908-281-5466  
dsimpkins@simpkinslawfirm.com

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