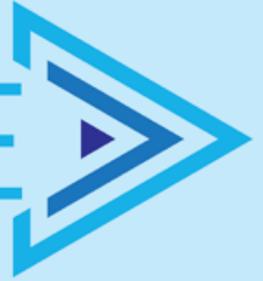


TORTSOURCE

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Cannabis: Legal and Business Issues Abound in a Growing Industry

By Michael W. Drumke

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Around the globe, cannabis is poised to move from a nascent industry to multi-billion-dollar-a-year business over the next 10 years, according to research cited in *Forbes Magazine*. <https://www.forbes.com/sites/thomaspellechia/2018/03/01/double-digit-billions-puts-north-america-in-the-worldwide-cannabis-market-lead/#2cd572a36510>. Spending on legal cannabis worldwide is expected to hit \$57 billion by 2027. The adult-use (recreational) market will cover 67 percent of the spending; medical marijuana will take up the remaining 33 percent.

Already, recreational marijuana is legal in nine states and medical marijuana is legal in 30 states. Cannabis initiatives were on the ballot in four more states this November. The number of Americans that support legalization continues to climb, with a 2017 Gallup poll showing that 64 percent of Americans favor legalization.

This year, under the direction of TIPS Chair Roy Cohen, the Section has launched a new Cannabis Law and Policy Task Force. The reason for doing so is simple: The cannabis industry will touch on a myriad of legal issues including federal, state, and local regulation; insurance; banking and finance; product liability; intellectual property; employment; real estate zoning and land use; public nuisance; and water rights—just to name a few.

In addition to navigating the legal terrain for clients in a new and growing industry, lawyers face the additional challenge of ethically providing legal advice at a time when the substance at issue is still listed on Schedule 1 of the Controlled Substances Act and, hence, is illegal under federal law.

In the coming months, the TIPS Cannabis Law and Policy Task Force will be examining the emerging business and legal issues for lawyers and clients involved in the cannabis industry. The initial members of the task force have experience in the field, but as with every TIPS task force and committee, we welcome all interested TIPS members to join us as we begin to develop our programs and plan our publications. Please feel free to contact the task force cochairs, Michael Drumke (mdrumke@smbtrials.com) and Daniel Gourash (dfgourash@sseg-law.com) for more information on the task force's activities and how to get involved. And, add to your knowledge of this hot topic by reading the feature articles on cannabis by Lisa Dickinson and Lisa Pittman in this edition of *TortSource*.

Litigation in the Weeds

By Lisa Jill Dickinson

Lisa Jill Dickinson is the principal at Dickinson Law Firm, PLLC, practicing in Spokane, Washington, and Northern Idaho, where she focuses on litigation of business disputes and acts as local counsel to other firms in those states. In addition to her private practice, she is a pro tem administrative law judge for the state of Washington. She serves on the TIPS Cannabis Law and Policy Task Force and is a past chair of the TIPS Standing Committee on Ethics and Professionalism. She may be reached at lisa@dickinsonlawfirm.com.

Litigation in the weeds . . . should you practice in this emerging area of marijuana law, or do you already inadvertently deal with ancillary issues?

In States Where Marijuana Is “Legal,” What’s the Risk?

As marijuana businesses become legal in more states each year, an emerging new area of litigation has arisen. The intricacies of litigating or drafting deals where the subject matter is federally illegal but the business itself may be allowed by state law are treacherous at best. Further, what is the risk to a firm that practices in multiple states when the laws may disallow the business in one state but allow it in another? Is it ok to advise on a commercial lease or insurance for a marijuana grower or retail operation or not? Is it ok to advise on how to obtain a marijuana license or federal trademark?

The answers are that we don’t know yet, and it depends. Until more of these cases are heard, case law is sparse at best. One case that may serve as a cautionary tale is the story of attorney Jessica McElfresh out of San Diego who was charged with violating civil RICO law and a felony when assisting a marijuana business client. Prosecutors alleged that the business owner and others had conspired to illegally manufacture and distribute hash oil across the country. The issues at stake involved seizure of her attorney-client communications with the client. She has since pled to an infraction, but the felony charges were dropped with the stipulation that she not break any laws for a year. During her case, recreational marijuana sales became legal, but prosecutors did not dismiss the charges against McElfresh.

Some state bar associations have acted progressively to protect their attorneys. Colorado and Washington were among the first states to specifically allow attorneys to advise and assist marijuana clients with their legal matters. Washington first allowed practice in this area through a comment to its RPC 1.8; however, the state’s position was based on the issuance of the “Cole Memorandum,” which was a guidance to federal prosecutors to stand down on enforcement. Since then, the federal government has revoked the Cole Memorandum, so rules based on that guidance need to be changed. Washington is in the process of amending its rules since the revocation. Practitioners in other states have proceeded by petitioning their supreme courts with rule changes (rather than a comment to the existing rules) to allow attorneys to advise and consult with marijuana businesses. And finally, some states specifically disallow the practice of attorneys giving advice to marijuana businesses. In short, a review of your state’s ethics rules is the first thing to do when determining whether to advise a client or not about issues involving marijuana.

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Beware of Pitfalls and Unforeseen Issues

So, once you determine that you want to represent a client on a cannabis-related issue, what next? Many issues facing marijuana businesses are like those confronting any other business. However, beware of pitfalls for the nonexperienced attorney in this area. Generally, leases may contain clauses permitting the eviction of a tenant for any illegal business. Obviously, careful drafting can circumvent this problem, but counsel must look for those issues when a client seeks advice after signing a lease. Insurance is also an issue. Questions have arisen over whether or not cannabis plants can be insured against loss. What else is covered? What are the other coverage issues that may arise? Furthermore, do you want an arbitration clause in your operating agreement, even if you aren't sure what arbitrators will hear a dispute on this type of issue? Is it better to just go to court in a dispute? Will you need to know how to appear before an administrative tribunal if your client has a license violation or revocation hearing? What will happen in a state trademark dispute (as most companies have not been able to obtain a federal trademark)? What about ancillary businesses—landlords, packaging and machinery manufacturers, retail “swag” or merchandise stores, advertising agencies, accountants, and doctors or naturopaths who prescribe medical marijuana? Another issue that has newly arisen: Employees of marijuana businesses are having difficulty getting loans because certain banks and credit unions will not accept their W2 from a marijuana business as proof of legal income.

When counseling a marijuana client, many potentially unforeseen issues arise each day. The best thing one can do is to stay up to date on national trends and case law as well as trends in the industry. The laws also are generally state-specific, as is their enforcement. Each state will deal differently with this emerging area of law.

One example: When one state's legislature made medical marijuana “legal,” the local U.S. attorney decided to “raid” businesses that sold medical marijuana in that jurisdiction and shut them down for being federally illegal. In addition, letters were sent to landlords stating that they could be charged in a conspiracy if they rented to medical marijuana businesses and that they must evict those entrepreneurs. What if your client was stuck in a commercial lease with no escape clause? Would they be liable for the entire lease term? Such a scenario also could occur if the federal government changes its enforcement policies and decides to get in a fight with a state. To date, there has been no test case on this issue, but we all are aware of federal preemption.

Litigation of Marijuana-Related Issues

As this article is written, very few cases have litigated marijuana issues. Most of the cannabis cases I have dealt with are partnership disputes. Because some of these businesses were formed without the advice of an attorney, especially in “first to file” or “lottery” states, their records can be murky at best.

Basically, dissenting members tend to have to sue when a disagreement or deadlock arises. The pitfalls of initiating legal action are that when you point the finger at your partner for breaches of fiduciary duty, you risk having the regulatory agencies investigate your allegations and cancel your license. If that occurs, it's all for naught, as there will be no business to save. When you finally “pull the trigger” and file suit against a partner/member, the suing partner must be aware that the business's license may be revoked, or that he or she would be forced to file declarations admitting to things such as basic violations of federal law and other unpleasant facts. It is sometimes difficult to obtain a protective order just for embarrassing disclosures. One of my first cases resulted in “Exhibit A”: a picture of \$400,000 on the conference room table. Because banks and credit unions did not accept marijuana businesses, all businesses dealt in cash. The judge refused to issue a protective order in the matter. And when do you

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counsel your client to plead the fifth? Most civil lawyers are not well versed in criminal law. As these are issues to consider before filing suit, many disputes avoid litigation and are settled before an action is filed.

How Do I Prepare to Practice in This Area?

So, should your firm leap into representing marijuana clients or assisting ancillary ones? To avoid doing so puts you behind the ball as other attorneys and firms potentially will swoop up the emerging businesses. Is it worth the gamble? From an ethics perspective, the decision is somewhat murky. You should first seek out an opinion from your state bar. The states that have firm rules for the protection of attorneys counseling clients in this area seem to be the safest. Avoid states or districts where you have outspoken law enforcement or prosecutors who oppose these types of businesses. Keep copious notes and records. One of the first things you must do when rendering advice to a marijuana client is to inform them that you are counseling them under state law, and that what they are doing remains federally illegal. Keep up to date on the law and ethics rules, along with federal policy and trends. Many attorneys and firms are experiencing no problems as they delve into the representation of marijuana clients. But the reason could be that, thus far, no one has chosen to enforce ethical rules or laws against them. In short, some level of danger still exists, along with a stigma of practicing in this emerging area.

At this point, cannabis is one area of the law for which it's still the wild, wild west. I appreciate TIPS and Chair Roy Cohen for forming a task force on cannabis to examine these challenging issues, and to stay apprised of the trends in this fast-growing legal arena.

The Hemp Revolution Will Not be Televised . . . Yet

By Lisa L. Pittman

Lisa L. Pittman is special counsel at Tannenbaum, Trost & Burk, LLC, in Denver, Colorado, where she represents a wide range of clients engaged in the legal cannabis and hemp industry across the United States and globally by applying knowledge gained from litigating a range of commercial disputes over 17 years in Texas and Colorado. She is a vice-chair of TIPS's Business Litigation, Corporate Counsel and In-House Professionals, and Products Liability Committees, and is a member of the Cannabis Law and Policy Task Force's Steering Committee. She may be reached at lisa@ttb.legal.

While cannabis legalization is sweeping the nation and the spotlight, either through medical programs in 33 states and the District of Columbia, adult use programs in 10 states and the District of Columbia, or decriminalization measures undertaken in many metropolitan cities, hemp is the emerging giant of this new industry, which all burgeons from the same cannabis plant. In contrast to cannabis, which is tightly regulated from a law enforcement perspective because of its status on Schedule 1 of the U.S. Controlled Substances Act (CSA), hemp, which derives from the nonflowering portions of the cannabis plant containing low tetrahydrocannabinol (< 0.3% THC, the compound in the plant causing euphoria), is subject to much less regulation. Currently, enormous market potential and public awareness of the benefits of cannabidiol (CBD, the compound in the plant possessing a plethora of therapeutic benefits) are increasing exponentially, particularly among those discovering its capabilities to reduce inflammation, pain, and anxiety. *See, e.g., Alex Williams, Why Is CBD Everywhere?, New York Times, Oct. 27, 2018.*

Despite the increasing popularity of CBD, hemp, and hemp-derived CBDs, legal status currently is extremely limited, due to their inclusion in the definition of “marihuana” under the CSA. Technically, neither cannabis nor hemp-derived CBD extracts are legal to ship across state lines or are permitted in some states, and, as noted, their possession and use are in violation of federal law. So, why do we see hemp-derived and infused CBD products, from creams to tinctures to edibles and beverages, in mainstream commercial outlets and online?

A Short History of Hemp

Before 1937, industrial hemp was legal and was used most often for clothing, paper, rope, and lamp oil. But in 1937, Congress passed the Marihuana Tax Act, which made all species of the *Cannabis sativa* L. plant illegal, including hemp. While the purported purpose was to eliminate the use of cannabis as a drug, some theorists posit that the real intent of the Act was to eliminate the competition hemp posed to paper and steel manufacturers by referring to cannabis as “marijuana” as a scare tactic in relation to its use as a drug. Fast forward to 2014, and under the Agricultural Improvement Act, known as the “Farm Bill,” hemp finally was permitted to be grown again, but only if in conjunction with a state’s industrial hemp program, or with a license by a public university for a research pilot program. However, to the misconception of many, in neither of these instances were hemp or the products made from hemp allowed to cross those states’ lines.

In just a few short years, licensed (and unlicensed) hemp producers began to multiply in states such

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as Colorado, Oregon, Kentucky, and South Carolina. Extracts derived from hemp plants can be infused into a variety of products to produce therapeutic effects sometimes rivaling or surpassing pharmaceutical counterparts, with none of the side effects of pharmaceutical drugs. As the public experiments and becomes more aware, businesses have been aggressively pursuing market share by peddling their own versions of hemp and CBD products for humans and pets across all types of marketing platforms . . . yet, all the while, the products are still federally illegal. The FDA sends out warning letters to companies making unsubstantiated claims about what CBD can treat or cure. Product seizures are made, usually by local law enforcement, but hemp-derived CBD is a low enforcement priority of the Drug Enforcement Authority (DEA), whose resources to thwart state-compliant hemp are limited by the Farm Bill, and currently are more focused on the opioid epidemic, the movement of cannabis across state lines, and cartel activity.

Industrial hemp plants can be used to produce thousands of products, including textiles, paper, paints, clothing, plastics, cosmetics, foodstuffs, insulation, animal feed, fiberglass, replacement for wood products, bio-fuel, and detergents. Over 30 countries around the world have some sort of industrial hemp industry in place, and in fact, the United States has been importing some of these materials because the CSA forbids their growth and production domestically. For example, both BMW and Mercedes use hemp fiber for their seats made in the United States.

Hemp Distinguished from Marijuana

After several lawsuits challenging the status of the hemp plant within the definition of “marihuana” under the CSA, the DEA issued a “Clarification of the New Drug Code (7350) for Marihuana Extract” in May. The DEA clarified that certain materials or products are excluded from the definition of marijuana, to wit: exempt plant materials such as stalks, fibers, oil and cake from seeds, and sterilized seed may be sold and otherwise distributed throughout the United States—and even may be imported into the United States and exported—as long as the laws of the country from which the products are imported or exported are in favor of such commerce. These plant materials and products made from them are arguably okay for interstate sale under current law. The DEA’s 2016 Statement of Principles on Industrial Hemp indicates that industrial hemp products may be sold in and among states with agricultural pilot programs but also directs that industrial hemp plants and seeds may not be transported across state lines. As a result, it appears that hemp-based products may be sold between states, as long as both states have enacted laws allowing the sale of hemp, but the interstate transportation of the actual hemp plants and their seeds is federally illegal, regardless of the hemp laws of the states. Confused yet?

Other Conundrums Related to Hemp

Adding to the confusion, state law enforcement agents intervene and frequently are unclear about the legality of the substance they may discover in a customer’s or distributor’s vehicle or even on the shelves of a health food store. Many clients I advise are navigating these ever-shifting and difficult-to-interpret conflicting state and federal laws because raw or finished hemp products are very lucrative. Moreover, they may be sourced from one state, but manufactured in another, and perhaps sold out of a third—just like many other businesses. And their labeling must comply with FDA requirements as much as possible.

The interstate prohibitions present the conundrums, along with the overarching federal illegality of most cannabis and hemp products on the market. For example, cannabis and hemp social media channels have been taken down by Facebook and YouTube because of the products’ federal illegality,

even if the channels are doing nothing more than providing information or education. In January, the IRS amended its rules to disallow recognition of nonprofit status for cannabis advocacy groups. And, under IRC 280(e), cannabis businesses cannot take ordinary business deductions, although the application of the provision to legal state hemp businesses is more complicated. FDIC-insured banks will not touch a cannabis- or hemp-related business account, even in states where hemp is legal; a business must find a state-chartered bank or credit union to service its accounts, and its employees are subject to bank account closures if their paychecks reflect a cannabis or hemp entity. Yet, despite these obstacles, farmers, investors, manufacturers, wholesalers, retailers, and the public are willing to risk pushing the envelopes for acceptance of hemp-derived CBD products. While the hemp revolution has been bubbling under the radar thus far, it is becoming more ubiquitous, and the push for its legalization separate from cannabis is emerging on a bipartisan basis.

2018 Farm Bill Stalls

The times are changing. On June 13, the Senate Agriculture Committee passed the Agriculture Improvement Act of 2018, known as the “2018 Farm Bill.” The Hemp Farming Act, introduced by Senate Majority Leader Mitch McConnell and included in the Senate’s updated version of the 2018 Farm Bill, would remove industrial hemp from the CSA and legalize growing industrial hemp as an agricultural crop nationwide, subject to state approvals. The bill also would specifically authorize hemp CBD extractions to cross state lines, allow hemp farmers to get crop insurance and access to federal water rights, and even protect from prosecution those hemp farmers who grow plants with slightly elevated THC content. This legislation would be a gamechanger for the industry, but no resolution on the proposed legislation was reached before Congress recessed at the end of September, mostly due to conflict over a provision in the House version of the bill pertaining to food stamps—the hemp aspect was not controversial. Thus, technically the 2014 Farm Bill expired, but some of its provisions continue to govern due to appropriations made under other programs. The hemp industry is proceeding under the assumption that the murky waters of the 2014 Farm Bill continue to apply and eagerly await action on the 2018 Farm Bill when Congress reconvenes. Congress is expected to make the 2018 Farm Bill a priority, while momentum continues to mount regarding the legitimacy and eventual legality of hemp-derived CBD products.

Epidiolex Rescheduled after FDA Approval

Finally, in a landmark move, the DEA rescheduled Epidiolex, a cannabis-derived CBD drug for the treatment of seizures that is manufactured by a pharmaceutical company based in the United Kingdom. Epidiolex recently was approved by the FDA, but no doctor could prescribe it because of its Schedule 1 status, which designates the drug as having “no currently accepted medical use.” Despite many case studies, particularly in Israel, demonstrating that cannabis possesses powerful curative properties for certain ailments, research in the United States has been prohibited because of the drug’s Schedule 1 status, leading to circular reasoning by the DEA in maintaining cannabis as a Schedule 1 drug alongside heroin and LSD. But in late September, the DEA rescheduled CBD drugs approved by the FDA to Schedule 5 under circumstances that applied only to Epidiolex. That does nothing to help all the manufacturers whose products have not undergone FDA approval, but it signals one of the first recognitions by the U.S. government that the cannabis plant possesses medicinal properties, and more are expected to come.

Adding to the complicated question of which laws govern hemp products intended for human consumption, the application for and approval of Epidiolex resulted in the consideration of CBD by federal agencies as a definitive “drug,” rather than the botanical dietary or health supplement category

CBD inhabited before this approval. This categorization means that efforts now must be made on labeling not to make claims or to even state that the product contains “CBD.” Instead, “hemp oil” or “hemp extract” are used on labels in an attempt not to frustrate the FDA’s new authority to regulate CBD. Manufacturers are struggling to achieve the fine balance of ensuring that the consumer will realize a product contains hemp-derived CBD without raising red flags to the FDA, DEA, and other federal agencies and their state counterparts.

Hemp Movement on the Rise

From both an agricultural and medicinal standpoint, the hemp movement—largely unbeleaguered by the crushing compliance and taxing obligations of cannabis businesses—is on an exponential rise in the United States and internationally. A leading trade industry publication states that CBD was at least a \$350 million industry last year, and some estimates suggest that by 2020, annual sales of CBD products could top \$1 billion. Jenel Stelton Holtmeier, *Chart: Opportunity in CBD-only stores limited, but strong growth expected for other channels*, Hemp Industry Daily, Oct. 18, 2018. The magnitude and swiftness of these transactions, coupled with the uncertain nature of the laws, results in many situations and business lawsuits of all kinds between farmers, buyers, sellers, and brokers, as well as intellectual property battles and regulatory issues, along with the interplay of federal law and cross-state and cross-border investment.

Stay tuned; the evolution of law is taking place before our very eyes, in an area unthinkable only five years ago. Eventually, you will see an ad for a CBD product on television (or in a pop-up to your YouTube video). CBD products already may be available in your local convenience store or health food store. Walmart is selling CBD products in Canada, and they were briefly on the shelves of 7-Eleven and Target stores in the United States. CBD products definitely are available online, even from Amazon—but after reading this article, you may notice that your search term for CBD will yield results for “hemp” products as manufacturers forego or dance around the CBD moniker until the laws catch up to the market demand.

DID YOU KNOW?

TIPS Women Trial Lawyers Committee: Developing and Connecting Talented and Accomplished Women

By Christine S. Davis

Christine S. Davis is the executive editor of TortSource and is an attorney in the Washington, D.C., office of Bradley Arant Boult Cummings, LLP, where her practice focuses on providing counsel to policyholders seeking insurance recovery. She is editor in chief of the Tort Trial & Insurance Practice Law Journal and a member of TIPS's Women Trial Lawyers Committee and Scope and Correlation Committee. She may be reached at cdavis@bradley.com.

The Tort Trial & Insurance Practice Section is pleased to announce the formation of a new general committee, the Women Trial Lawyers Committee, which officially became a TIPS general committee at the end of the 2018 ABA Annual Meeting in Chicago.

The origins of this committee date back to 2016, when TIPS formed a Women Trial Lawyers' Task Force with the goal of getting together women lawyers, particularly those who try cases and those who hire trial lawyers, to share experiences and information relating to their legal practice area.

During the past two years, the task force demonstrated just what the women of TIPS can do. We held interactive, roundtable discussions on topics of interest to our members at each TIPS quarterly meeting. We sponsored highly successful networking receptions at TIPS meetings. The committee also put together CLE presentations at those TIPS meetings, focusing on pertinent and substantive issues facing women trial lawyers, such as women as first chairs at trial, implicit bias in the workplace, and men as allies and champions. Notably, the programs hosted well-respected panelists, including general counsel and chief executive officers of Fortune 500 companies, highly respected trial attorneys, a best-selling author, and professors and a dean from nationally recognized law schools.

Last spring, the Women Trial Lawyers Task Force sponsored a Women's Networking Luncheon that was open to all attendees at the 2018 Section Conference. Our keynote speaker was the Hon. Virginia Phillips, chief judge of the U.S. District Court for the Central District of California. Judge Phillips gave an inspirational speech to a sold-out crowd of both women and men.

In addition to convening TIPS women to support a common cause, the Section recognizes that its members include many women trial lawyers who are involved in women lawyers' groups both nationally and locally, which provides an added value to the Women Trial Lawyers Committee.

The Women Trial Lawyers Committee conducts in-person meetings at each TIPS quarterly meeting, as well as periodic calls throughout the year. Meetings and calls involve interactive sessions, as well as educational opportunities on a wide variety of subjects affecting women trial lawyers.

We have been delighted by the excitement and support received from TIPS for women trial lawyers, both in TIPS as well as in other Sections of the ABA, and we strive to continue this important work as a general committee by matching women trial lawyers with opportunities for skills building, court appointments, substantive programs, and networking events. We encourage the participation

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of all TIPS women who are interested in joining us in this important work. If you would like to become involved, visit the Women Trial Lawyers Committee's webpage on the TIPS website at www.americanbar.org/groups/tort_trial_insurance_practice.html, or contact the author directly at cdavis@bradley.com.

DID YOU KNOW?

“When I Was a New Lawyer”: Jennifer Kilpatrick

TortSource Interview with TIPS Leader Jennifer Kilpatrick

Jennifer Kilpatrick is of counsel with Riley Safer Holmes & Cancila LLP in Chicago, Illinois, where her practice focuses on toxic tort litigation. She is a member of the TIPS Council, chair of the Women Trial Lawyers Committee, and past chair of the CLE Board and the Toxic Tort and Environmental Law Committee. She may be reached at jkilpatrick@rshc-law.com.

TS: What inspired you to become a lawyer? And what did you do prior to becoming a lawyer?

Kilpatrick: I was inspired to become a lawyer because I enjoyed reading and writing when I was growing up and I loved public speaking (and still do). Before becoming a lawyer, I was a full-time student. I went straight from college to law school and began practicing law with a law firm in New Orleans immediately after law school graduation.

TS: How did you become involved with the ABA?

Kilpatrick: I became involved with the ABA in 1999 when I was working at my first job out of law school. My boss worked on some cases with Mike Drumke, and I ended up working with him on some of those cases. He encouraged me to get involved, and after I attended my first meeting I was hooked.

TS: What is the benefit of a new lawyer becoming active with the ABA?

Kilpatrick: The ABA offers a wealth of resources and opportunities for new lawyers. Through my involvement with the ABA, I've spoken on and moderated CLE panels, published articles in my field, gained leadership experience, developed new clients, and met colleagues and lifelong friends. I've even secured two jobs from my ABA contacts!

TS: What early career practices led to your success?

Kilpatrick: When I first started my legal career, I tried to ask as many questions as I could and engaged experienced attorneys in conversation about the issues in our cases. While I did a lot of research and writing and took a lot of depositions, I gained a greater depth of knowledge and fresh perspectives on my cases by discussing the issues with attorneys who had been practicing longer than I had. That also ended up helping me in an unexpected way: once I'd had those discussions, the more experienced lawyers were more interested in working with me because they knew how involved I was in the workup of the cases.

TS: What challenges you the most?

Kilpatrick: The most challenging aspect of the practice of law is that you're never really done. My litigation practice has kept me on my toes for the past 18 years. Even when a case is resolved, I still

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think about what went well and how I can improve in the future. And as a single mom, juggling the demands of a law practice with raising my son is a daily challenge, but it's one I'm happy to meet.

TS: What gives you the most satisfaction:

Kilpatrick: I'm most satisfied when I get to work on challenging cases and can collaborate with other smart lawyers who are willing to use their knowledge, skills, and creativity to get the best results.

Jennifer Kilpatrick's Advice for New Lawyers:

- Don't be so intimidated by experienced lawyers that you're afraid to ask them questions. They were new lawyers once, too. Asking thoughtful questions can help you build relationships with more experienced members of the bar.
- Always be prepared, and start preparing earlier than you think you need to. If you have last-minute emergencies arise (whether work or personal), you'll be glad you already started.
- Get involved in bar associations, and get to know your colleagues. They can be a wonderful resource for practice-related tips, business referrals, and a boost for your spirits on the tough days.
- Sometimes the practice of law can be extremely challenging, especially when you're a new lawyer. Don't lose faith in yourself. You're smarter than you think.

LEGISLATIVE UPDATE

A New Model for ABA Membership: Embracing Change

By Troy S. Weston

Troy S. Weston is an associate with Eldridge & Blakney, P.C., in Knoxville, Tennessee. He is the diversity vice-chair of TIPS's Medicine and Law Committee, a member of the Section Conference Special Standing Committee, and the Young Lawyers Division's liaison to TIPS's Long Range Planning Committee. He may be reached at tweston@eblaw.us.

You may not have realized it, but when you renewed your ABA dues this year, it's a safe assumption that you probably did not pay precisely what your peers paid. This hypothesis rings true because the ABA currently offers 157 different membership packages that vary based on how long you have been practicing, how much you earn a year, whether you are in the public or private sector, and the subgroups within the ABA to which you belong. Even the most reluctant skeptic is led to one conclusion: The ABA has embraced the Byzantine, and Byzantine anything has gone the way of American-style venting for men's suits.

Modernity, however, has caught up to the 140-year-old ABA. Reports of stagnant membership numbers and revenue shortfalls have become ubiquitous in the last several years, and while austerity measures have been implemented, Association leaders acknowledged that structural challenges embedded in the mechanism for ABA membership had to be addressed. In its 2018 report to the ABA House of Delegates, the Standing Committee on Membership (SCOM) found that "[t]he cost of ABA membership is in many ways out of synch with the market and over-complicated." Report to the House of Delegates, A.B.A. Standing Comm. on Membership, Res. 177, Aug. 2018, https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2018_am_177%20REV.authcheckdam.pdf.

Streamlined ABA Dues Structure

Fortunately, the ABA recognizes the need for change, and beginning with fiscal year 2020, a new membership model will be waiting for you like an enthusiastic Golden Retriever at the end of an arduous day. Working with Avenue Strategy, the ABA developed a proposal to reduce the number of membership packages from 157 to five. Presently, the highest base rate for membership is \$467. Harkening back to SCOM's comment about the cost being "out of synch with the market," many of you reading this article have experienced heartburn writing that check every year, or you have been the recipient of grousing from your managing partner or CFO when renewal time arrives. The new proposal has five categories of dues, with \$450 as the highest, which will apply only to lawyers who have been practicing for more than 20 years, are currently practicing full-time (i.e., not retired), and are in private practice at firms with more than five lawyers. The other categories still take into account your longevity in the bar and your practice setting, but they range from \$75 for attorneys with fewer than five years' experience up to \$450.

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Appealing to the Modern Lawyer

Along with the reduced categories of dues are other changes designed to make the ABA attractive to the modern lawyer. An increased amount of free CLE is coming, and it is expected that 650 on-demand CLE hours will soon be available in the ABA's CLE Marketplace. The new ABA website debuted in October, allowing users to access and purchase content with the efficiency of other successful online marketplaces like Amazon (think one-click for that treatise you have had your eye on). Further, these membership initiatives are going to focus on curating content for members based on their interests and location.

The new membership model comes with risk. For example, an attorney with 10 years' experience at a law firm with 25 lawyers currently pays base dues of \$467. Next year, that same attorney will pay \$250 while having access to more membership options. However, based on the projections, if this new membership model works according to plan, after five years, the ABA will have more than 80,000 new dues-paying members.

Change is good. Change is necessary, and change is going to propel our organization into the next 140 years. When you renew your ABA membership next year, remember that the streamlined dues structure has taken it a little easier on your wallet while, at the same time, other ABA changes are going to bring you better, more customized content.

BOOK REVIEW

Resolving Insurance Claim Disputes before Trial, Timothy H. Penn and Judith F. Goodman, Editors

Reviewed by Russell S. Buhite

Russell S. Buhite is a shareholder in the Seattle, Washington, office of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., where he focuses his practice on life, health, and disability insurance coverage litigation, as well as myriad ERISA matters. He is a former chair of TIPS's Federal Involvement in Insurance Regulation Modernization and Health Care Reform Task Force, current vice-chair of the Health and Disability Insurance Committee, and a member of the TortSource editorial board. He may be reached at russell.buhite@ogletree.com.

In this comprehensive book designed as a resource for attorneys and claims professionals alike, the authors provide valuable assistance in describing the various alternative dispute mechanisms available for all types of disputes, from automobile liability claims through life, health, disability, professional liability, and workers' compensation matters. It provides a practical guide to the alternative dispute resolution (ADR) process that considers everything from choice of the proper mediator and mediation strategies to drafting agreements.

Resolving Insurance Claim Disputes before Trial begins with a thorough discussion of arbitration and appraisal in the insurance context and follows that with an introduction to the insurance mediation and ethical issues involved in both arbitration and mediation. The compendium addresses such important topics as how to break an impasse at mediation and the duties of disclosure in both arbitration and mediation. The book also provides a helpful discussion regarding ADR options and strategy for international business transactions.

The treatise's authors next give more specific advice useful for seasoned litigators and claims personnel handling specific litigated matters. In discussing ADR in automobile liability claims, the authors offer helpful pointers on how to select the proper mediator, manage client expectations, and present the best case from the standpoints of both plaintiff and defendant. Regarding commercial general liability claims, the book describes the more detailed coverage law that often comes into play in making strategic ADR choices. The authors also offer opinions as to how to use coverage analysis in the context of the underlying facts in the most effective way to reach consensus in settlement.

Regarding life, health, and disability claim disputes, special ADR considerations discussed involve the timing of when to utilize options and whether ERISA is involved in the claim. Mediation selection tips involve the specialized experience and personalities of mediators. With construction claims, among other key pointers, the authors describe the need to aggregate parties in mediations among owner/developers, general contractors, and subcontractors along with their respective insurance representatives. As to products liability cases where the parties choose ADR, the authors offer helpful tips regarding the pros and cons of joint sessions and opening statements in mediation. The strategies involved in mediating professional liability claims are also discussed, and the description of how best to prepare clients for mediation is particularly helpful.

Finally, the authors discuss particularly unique ADR involved in property insurance claims and

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workers' compensation matters. Regarding property insurance appraisal, the authors provide useful advice about the scope of this unique mechanism, the appraisal format and procedures, forms of an award, and the award's enforcement. The chapter also describes in detail how to prosecute a property insurance arbitration from beginning to end. Considering workers' compensation cases, the authors describe varying mediation and settlement conference procedures in several different venues and the practical considerations for handling different ADR mechanisms, from client and lawyer preparation through enforcement of mediation settlement agreements.

To order *Resolving Insurance Claim Disputes before Trial*, go to <https://www.americanbar.org/products/inv/book/313723009/> or call 1-800-285-2221.

Regular price: \$149.95; TIPS Member price: 119.95.

WHAT'S NEW AT TIPS

A TIPS Year Focused on Raising the Bar

By Roy Alan Cohen

Roy Alan Cohen is chair of the Tort Trial & Insurance Practice Section, a principal of Porzio, Bromberg & Newman, P.C., and a senior trial lawyer with experience litigating and trying a wide variety of products liability, toxic tort, construction, environmental contamination, professional liability, premises liability, automotive and trucking, class action, and business litigation matters. He may be reached at racohen@pbnlaw.com.

In a speech given in June 1963 on a trip to West Germany to address the building of the Berlin Wall, President John F. Kennedy said, “Change is the law of life. And those who look only to the past or the present are certain to miss the future.” His words resonate as well today as they did long ago: as applied to our Section, TIPS will change to meet the needs of its members and the time in which we practice law.

You will see references to TIPS’s theme “Raising the Bar” many times during this bar year. It is a reminder of an evolution in our organization that will have an impact on image and messaging, technology and delivery of content, the redesign of our publications, an increase in the importance and focus of our committees, significant expansion of our CLE offerings, and more. Our new Networking, Strategic Communications, and Law Firm and Legal Department Management Task Forces already are actively engaged in expanding our focus. TIPS’s emerging issues initiative led to the new Cybersecurity and Data Privacy Committee, Women Trial Lawyers Committee, Cannabis Law and Policy Task Force, and Insurance Institute Task Force; each of these groups manifests strong evidence of TIPS’s cutting edge focus on addressing issues of importance to the legal industry. We continue to evaluate areas for new groups, programs, and publications that address the most immediate needs of our members.

Important Section Meetings—Mark Your Calendar

The Section Conference has become TIPS’s signature meeting for all members. If you come to one meeting a year, then this is it! From May 1–5, 2019, our New York City venue in the heart of Manhattan will make this Section Conference even more of a premier event, including a reception on Thursday evening of that week at the iconic Rainbow Room at Rockefeller Center. This meeting will include more than 50 company speakers and a host of networking opportunities, with CLE that will be better than ever. This is an event that you really should not miss, so mark the dates on your calendar now.

Beginning with the 2018 Fall Meeting, all first-time attendees were assigned a mentor from TIPS Fellows, creating a link for every new member with a senior advisor to the organization. Convened on Amelia Island, Florida, October 10–13, the Fall Meeting combined strategizing and networking for a gathering that was focused, informal, and fun. The ABA 2019 Midyear Meeting in Las Vegas and the ABA 2019 Annual Meeting in San Francisco have been scaled back to involve only the TIPS Council and certain general committees. There will be no general committee activities at these two meetings.

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TIPS Committees and Task Forces

TIPS has 35 substantive committees and task forces that are actively engaged in delivering content in various areas of interest to members. Many of these groups are industry leaders, continuing to create dialogue and produce programs and publications that are the best in the business. Our focus going forward will be on delivering value within these general committees, and those with critical mass are being encouraged to organize and present their own stand-alone substantive programs. Each of these groups also is charged with creating networking, publishing, and speaking opportunities for members. Committees can plan to fulfill these goals by creating practice area directories, publishing their newsletters, and contributing articles to *The Brief*, TIPS's signature publication, as well as to *TortSource*, *e-TIPS News*, and the *TIPS Law Journal*.

Our slate of national programs for 2018–2019 is unmatched. CLE for Aviation Litigation, Fidelity and Surety (Fall, Midwinter, and Spring), Insurance and Employee Benefits, Insurance Coverage Litigation, Transportation Megaconference/Trucking Litigation, Admiralty and Maritime Law, Motor Vehicle Products Liability, Toxic Torts and Environmental Law, Cybersecurity and Data Privacy, Cannabis Law and Policy, and Workers' Compensation are on the schedule. Each will be a cutting-edge program at which attendance will be as important for subject matter as it will be to network with leaders in those areas of practice.

There are many ways to get involved in TIPS. Please feel free to contact me, and we will find the right place for you.

WHAT'S NEW AT TIPS

TIPS Lawyer Volunteers Help Chicago Animals During ABA Annual Meeting

By **A.J. Albrecht**

A.J. Albrecht is a legislative attorney with Best Friends Animal Society, which is based in Kanab, Utah. She is the chair-elect and a current vice-chair of TIPS's Animal Law Committee. She may be reached at andreajoya@bestfriends.org.

Animal-loving lawyers found time during the ABA Annual Meeting in Chicago to participate in two TIPS Law in Public Service Committee projects that benefitted the city's dogs.

On August 2, approximately 15 conference attendees handmade over 30 dog tug toys, which were then donated to the Anti-Cruelty Society. The Anti-Cruelty Society is a founding member of the Chicago Animal Shelter Alliance (CASA), whose mission is to build a community of caring by helping pets and educating people. Many of the dogs in their care enjoy a good game of tug—thanks to CNA for their generous sponsorship of this project.

The TIPS Animal Law Committee organized an outing on August 4 to the Chicago Animal Care and Control Center to volunteer with Safe Humane Chicago. Well-known within the animal welfare movement for coining the term “court case dogs,” Safe Humane’s mission is to create safe and humane communities by inspiring positive relationships between people and animals. Their Court Case Dog Program began in 2010, working to ensure that dogs seized from owners facing criminal charges were no longer seen as simply “evidence,” languishing in cages until their inevitable euthanasia at the conclusion of their owners’ court cases. Since that time, Safe Humane has placed over 1,000 court case dogs into loving homes; their team of dedicated volunteers and dog training and behavior professionals focus on helping the dogs reach their full potential.

Today, Safe Humane has grown into an alliance of nontraditional partners that recognize the connections between animal abuse and interpersonal violence and the benefits of the human-animal bond. Safe Humane now runs many great programs in addition to the Court Case Dog Program (which continues with great success), focusing on education, advocacy, and second chances for homeless animals.

Approximately 15 TIPS members enjoyed an afternoon of learning about Safe Humane’s lifesaving work, meeting adoptable dogs, and helping to socialize them with Safe Humane’s volunteers. This was the second time the TIPS Animal Law Committee has partnered with Safe Humane for such an event, and the committee is hopeful that the partnership will continue.

Perhaps best of all, it is rumored that one or two attendees returned to the shelter after the event, and their visits may have led to an adoption or two. Paws crossed!

WHAT'S NEW AT TIPS

Meeting Round-Up

ABA Annual Meeting in Chicago, Illinois

Briana M. Montminy

Briana M. Montminy is a partner with Burr & Forman LLP in the firm's Nashville, Tennessee, office and is the immediate past retiring chair and a current member of the TortSource editorial board. She may be reached at bmontminy@burr.com.

TIPS members and guests convened for the ABA Annual Meeting in Chicago on August 2–5, where the Section was headquartered at the Swissôtel, overlooking the Chicago River on Upper Wacker Drive. Once again, TIPS provided CLE at no charge to all its members, offering a total of 12 free credit hours of CLE—a tremendous member benefit! CLE programs provided information on such topics as turning the tables on difficult witnesses and counsel at deposition, protecting your client's sensitive information in court filings from cyberattacks, the future of arbitration, protecting intellectual property in the legal cannabis industry, and defending negligent security claims.

When not in business meetings or attending the free CLE, TIPS members participated in a public service project cosponsored by the TIPS Law in Public Service Committee and Animal Law Committee in conjunction with Safe Humane Chicago; enjoyed shopping on Michigan Avenue; cruised along the river on one of Chicago's architectural boat tours; watched the Cubs play at Wrigley Field; spent an evening at the theatre to see the hit hip-hop musical "Hamilton"; walked, biked, or jogged the Lake Michigan shoreline; and ate at one of Chicago's famous steakhouses or pizza places.

Hall McKinley III received the Andrew C. Hecker Memorial Award, which recognizes a member of TIPS who consistently demonstrates the qualities of leadership, outreach, enthusiasm, professionalism, and pride in the Section. Yolanda Eisenstein, recipient of the Excellence in the Advancement of Animal Law award, was recognized for her work as member of TIPS's Animal Law Committee. Additionally, Northwestern Law School Professor Kathleen Dillon Narko received the Liberty Achievement Award for her leadership in promoting diversity in the legal profession.

On Saturday evening, Section members and guests gathered at the TIPS Leadership Dinner where Holly Polglase ended her year as the chair of the Section, handing the gavel to Roy Cohen, the new TIPS chair. Michael D. Green, a professor at Wake Forest University School of Law, received the Robert B. McKay Law Professor Award, which honors law professors who have shown commitment to the advancement of justice, scholarship, and the legal profession through their contributions to the fields of tort, trial practice, or insurance law. Lastly, John Tarpley, received the James K. Carroll Leadership Award for his outstanding leadership, dedicated service, and endless support to TIPS, the ABA, the Tennessee Bar Association, and other bar organizations. John is one of the founding members of the TIPS Leadership Academy, which has succeeded in bringing many younger members and new leaders to the Section.

On behalf of *TortSource*, we offer our congratulations to all the award recipients and thank them for their contributions to TIPS and the legal community.

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WHAT'S NEW AT TIPS

"My Las Vegas"

ABA/TIPS Midyear Meeting, January 24–27

By Robert Caldwell

Robert Caldwell is a shareholder with Kolesar & Leatham in Las Vegas, Nevada, practicing in the areas of business litigation and sports law. He is the chair of the TIPS General Committee Board and a former revenue officer of the Section. He may be reached at rcaldwell@klnevada.com.

Michelle Madow once wrote that “people who say New York never sleeps must never have visited Las Vegas.” If any city can boast being alive 24 hours a day, 365 days a year, it’s my adopted hometown of Las Vegas.

Las Vegas McCarran International Airport serves around 150 destinations with direct flights. Upon your arrival, the best way to get to the Strip and our meeting hotel is Uber, Lyft, or by taxi. Be advised that the days of free parking on the Las Vegas Strip have come to an end (with few exceptions), so a rental car only makes sense if you want to venture away from the Strip. If you have time to visit some nearby sights, the Grand Canyon, Hoover Dam, Valley of Fire, and Red Rock Canyon are great options.

For this meeting, TIPS’s headquarter hotel will be the legendary Caesars Palace, right in the center of the Las Vegas Strip. Try booking a room in the Augustus Tower with a view of the Bellagio fountains, or the Nobu Tower, which feels like a boutique hotel in the middle of a megaresort. Caesars has nearly everything you will need during the meeting, including restaurants, shops, and entertainment.

Culinary options in and around the hotel are plentiful. For fans of Gordon Ramsay, check out Hell’s Kitchen, which opened earlier this year. Inspired by the television show of the same name, the new restaurant is divided into red and blue sectors, each with a chef’s table. Sushi fans should head to Nobu, which boasts several vegetarian, vegan, and gluten-free options. The Bellagio is a short walk over a pedestrian bridge, where you can dine at Prime Steakhouse, Picasso (French/Spanish), or Lago (Italian).

There also are many great options for nightlife in and around the hotel. If you arrive early in the week, catch the Vegas Golden Knights’ game against the Nashville Predators on Wednesday night. The atmosphere inside the new T-Mobile Arena is already legendary among NHL ice hockey fans. At Caesars’ Colosseum, Van Morrison is scheduled to perform during our meeting on Friday and Saturday. Just in front of the hotel, Absinthe is highly recommended. Suitable only for adults, it is an incredible combination of edgy comedy, acrobatics, and dancing. If nightclubs are your thing, head to OMNIA Nightclub where the world’s top DJs perform until the early hours. If you have an equal or greater ratio of ladies to men, you can often get free “guest list” admission to OMNIA and other clubs at www.freevegasclubpasses.com.

For those of you who want to see some of the “Old Vegas” charm, head down to the Fremont Street Experience at night, where a television canopy broadcasts music and light shows on the hour. Book a

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tour of the Neon Museum, where many of the legendary Las Vegas neon signs have been restored and are on display—it's a photographer's dream. Visit the Mob Museum and learn about the city's colorful history. Whatever your pleasure, Las Vegas is waiting for you.

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