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The Newsletter of the Technology and Construction Bar Association

in association with informa law & finance

From the Chairman

Since the last TECBAR Review we have had the sad news that HH John Toulmin CMG QC has passed away. He was appointed a Companion of the Order of St Michael and St George for services to the European legal profession and was a past Treasurer of the Middle Temple, an honorary member of this association, and a former judge of the TCC. A Memorial Service, to which all are welcome, will be held on Monday, 5 November at 5.45 pm in Temple Church with a reception following in Middle Temple Hall.

The autumn is promising to be a busy period. I am particularly delighted that our speaker for the 2012 TECBAR Annual Lecture will be Peter Rees QC, the Legal Director of Royal Dutch Shell plc, a former chairman of TeCSA and a prominent solicitor advocate. It will be held on Thursday, 1st November 2012 at the Royal College of Surgeons, Lincoln's Inn Fields. His talk is entitled "*And What About The Client?*'". The lecture will commence at 5.30 pm and will be followed by a short Q&A session and drinks and canapés. All members of TECBAR, TeCSA and the SCL are invited. There is no charge for attendance.

If you have not yet booked into the "*Unlocking Disputes: Challenges in Construction Litigation & Arbitration*" international construction conference which TECBAR, TeCSA and the SCL, with the support of the TCC, are hosting, please consider doing so. It will take place on 24 September 2012 and will conclude with a drinks reception at the Rolls Building, and dinner at the Royal Courts of Justice. For further details please look at the TECBAR website (www.tecbar.org) under Events.

One of our major projects for the next 12 months is revamping the TECBAR website both in terms of improving its general appearance and utility and so as to update the ADR section. If you have any particular ideas or thoughts please let us know by emailing Thomas Crangle (TCrangle@4pumpcourt.com) or Charles Pimlott (Pimlott@crownofficechambers.com).

I wish you all a happy and/or profitable long vacation.

Chantal-Aimée Doerries QC, Chairman

From the Editor

Expert evidence features, in one form or another, in most construction and engineering cases. In this summer issue of the Review, Andrew Bartlett QC considers the obtaining of and deployment of expert evidence. His article will be of great interest to lawyers and experts alike, and benefits from the perspective of Andrew's experience as both advocate and tribunal.

Thomas Crangle contributes the second article, a case note on the recent decision of Akenhead J in *Walter Lilly v Mackay*. Tom's article summarises the valuable guidance given by Akenhead J in respect of extensions of time, loss and expense and global claims, all topics close to the heart of the construction lawyer.

Correspondence and contributions in response to either of these articles (or otherwise) for future publication would be very welcome indeed.

Mark Chennells, Editor

List of Contents

Dealing with Experts	2
Walter Lilly: new guidance on the correct approach to "global" claims	5

Dealing with Experts

A talk given by Andrew Bartlett QC, Crown Office Chambers

A cautionary tale

***SPE International Ltd v Professional Preparation Contractors (UK) Ltd* [2002] EWHC 881 (Ch)**

I start with a cautionary tale about expert evidence of quantum. The case of *SPE International* was concerned with the quantum of damages in a dispute over mobile shot-blasting machines. The claimant, SPE, relied on expert evidence pursuant to the Civil Procedure Rules, CPR Part 35.

The evidence did not go down well with the High Court Judge who heard the claim (Rimer J). I set out some short extracts from his judgment. I will refer to the unfortunate expert as Mr X. The Judge said:

> *"[Counsel] levelled a merciless attack on Mr X's qualities as an expert. For the most part I regarded them [sic] as well-founded. With respect to Mr X, I doubt if there has often been an expert less expert than he.*
>
> *Mr X's main difficulty is that he has no relevant expertise. He is an ex-RAF officer, who no doubt has a specialised knowledge and experience of many fields of human endeavour, but they do not include the field of shot-blasting. The only experience he does have of that field is confined to work he has done for SPE since late 2000 as a management consultant. … Despite this shortcoming, he nevertheless purported to express views as to the practice in the industry, which I do not regard him as qualified to express. Nor does he have any accountancy qualifications or experience such as to qualify him to express views on the approach to the calculation of SPE's loss in this case.*
>
> *Although Mr X's report is described as prepared by him, it in fact purports to be the report of an organisation called "DMC", which is a consultant agency run by Mr and Mrs X. It appears that his wife … was originally going to be the author of the report, and be the SPE expert, but she was called back into reserve service by the RAF, which posed a difficulty. The result was that … it was decided that Mr X should instead be the expert and he was later told of this.*
>
> *Mr X made no note of the instructions he was given because he said there was no need – he said he had a fairly good memory. .. Mr X's ignorance in what was required of him was compounded by the fact that, until he gave evidence, he had never heard of, let alone read, Part 35 of the CPR. … He … performed his task with manifest incompetence.*
>
> *As for Mr X's report itself, much of its work had in fact been done not by him, but by his wife. He cannot be said to be independent of SPE, since he has been and is remunerated generously for his past and continuing role as a consultant to SPE. … His evidence itself displayed a lack of independence, and betrayed that he really regarded his primary role as being to present and defend SPE's case.*
>
> *I hold that this evidence is inadmissible. That leaves SPE in some difficulty in the proof of damages."*

In that case pretty well everything that could possibly go wrong with expert evidence did go wrong. We all want to be in the opposite situation, where as far as possible, everything goes right with our expert evidence. This article says something about six areas which need to be handled correctly in order to maximise the chances.

1. Identifying the vital issues – which disciplines (project management? programming? valuation?)

Maximising returns through relevance not comprehensiveness

A mistake commonly made is to think that it will be necessary to have a broader range of expert evidence than will actually be needed for a claim or a defence as the case may be. It quite often happens that commercial parties actually have the same view of all the matters that are on the penumbra of the dispute, and that the real argument lies in a relatively narrow area.

Clients should not allow their lawyers to go instructing experts without first finding out what are the real points in dispute. Thought should be given to whether an expert is needed at all, and if so in which discipline or disciplines. If the claim is for delay, disruption and loss and expense, is the real dispute over, say, the effect of an event on the programme, so that the help of a programmer is needed, or is it really a valuation matter for which a quantity surveyor is needed, or is it over, say, the duration of an event, in which case it may be a witness of fact that is needed rather than an expert?

It may be necessary to have all of these categories, but it should not be assumed. It should be checked before the costs are incurred. The key point is to make sure that the expert evidence that is obtained is relevant to what really matters, and that money is not spent getting expert evidence on inessentials or things that will not actually be in dispute. It sounds such a simple point. But it is amazing how much money is spent getting experts to write long reports of which only a small fraction ultimately turns out to be relevant.

2. Horses for courses – mediation, adjudication, arbitration, litigation

The awkward tension between knowledge and expertise

At the outset, when trying to choose the right horse, it is important to think about the nature of the course on which your horse is most likely to need to run. The skills and resources required depend on the nature of the process in which an expert is going to be engaged.

If you are unexpectedly on the receiving end of a notice of adjudication, it is no good choosing a top expert who will produce a splendid report, with every 'i' dotted and every 't' crossed, two months after the adjudication has finished. You need someone who is a quick thinker, a quick worker, who can clear their desk, drop everything else, and turn out a report in a matter of days, to meet the short time limits of adjudication proceedings. The report will be rough and ready and may not be very good, but it will be a whole lot more useful than a report that is not ready in time, and will give the adjudicator something to work with.

Since the time scales of arbitration and litigation are less abbreviated, in those contexts a higher quality job will be more appropriate.

What if you are heading into a mediation? You may not want an independently minded expert acting as if under court rules. You may want someone who will not act as an expert in the accepted sense but as an adviser - someone who has expert knowledge which will enable them to help you present your case as convincingly as possible to the other party.

And when you are selecting which horse to run, do give deliberate consideration to the awkward tension between knowledge and expertise. What I mean is this: it very often happens, when a problem has been brewing up for a while, you have been receiving regular help from someone working in some kind of consultant capacity. That person knows about the problem because they have been living with it, thinking about it, advising on it. They are the person with the knowledge. Some clients too readily assume that that person should be their expert. But that person may not have the right mix of expertise to produce robust expert evidence to put before a Judge or an arbitrator.

If you think you are going to be heading into arbitration or litigation, you need to take stock of whether you can make do with your existing consultant who already knows about the problem or whether you actually need to engage someone new, who knows nothing about your individual business or about the problem, and will have to start from square one, but who has the expertise needed to produce a good expert report and stand up in court or arbitration and be cross-examined.

One of the mistakes made by SPE was to stick with the consultants who were already familiar with their business, instead of selecting someone new who would be able to produce expert evidence of the necessary quality for contested proceedings. Whether to stick with your existing consultant can be a very difficult decision to take. You do not know whether the matter will get near to a contested hearing or not. You do not want to spend money on someone new if it is not really necessary. It is a judgment call, on which you have to do the best you can. But if there is a substantial risk of formal contested proceedings, you may need to play safe, and make sure you have on board an expert whose expertise matches the problem, and who will be able to produce evidence fit for a court or arbitrator.

3. Dos and don'ts of experts' meetings and agreements

Not signing up to the unproven and the unclear

In court proceedings experts are required to meet without prejudice and to produce a statement for the court of what they agree and disagree about. Sometimes this procedure is used in arbitrations as well. In this process there are two things that tend to go wrong, in case after case, if the process is not well managed.

The first is that the other side's expert proposes for agreement all sorts of things which your expert has not really looked at and thinks are probably uncontroversial. Unless your expert is very experienced, your expert is likely to sign up to them for a quiet life. Some of the points may have legal significance that your expert cannot even guess at, particularly where they relate to legal or factual arguments that the experts are not directly concerned with. You must not let your expert do this. If you see it starting to raise its head, the practical solution is to insist that your expert makes clear that he is treating the matters which he has not looked into, or which are outside his scope of expertise, as assumptions. Then, if they turn out to be important and potentially adverse, they will still have to be proved by the other side.

The second thing that frequently happens is that the words used by the experts in the agreement do not accurately convey what the experts intended to convey. It happens over and over again - in my experience, in nearly every case. Words are used loosely or inaccurately, or so as to imply something which the experts did not mean to imply. It is essential, therefore, for the lawyers to make sure they understand what the experts' views are and then to check over the wording to make sure there are no mistakes or ambiguities in the way those views are expressed, before your expert signs the document.

4. Reports – what to leave out, what to put in

Selecting what is relevant; overcoming the black box syndrome

What to leave out?

An expert's report has far more impact on the tribunal if it concentrates on what is important. Too many experts want to include all the preliminary work that they have done, even if none of it is in dispute, partly because it is already written, and partly because they want to show that they have considered every angle. Sometimes the introduction and background, for which a page or two would be quite enough, runs to 30 or 40 pages. The effect is to obscure what is important and make it hard to find. It is generally much more effective if the expert homes in selectively on what really matters, and cuts out the rest. If the expert is doubtful about omitting peripheral or background material, it can be relegated to an appendix.

What to put in?

In a talk given to TECBAR and TeCSA in 2009 Ramsey J emphasized the importance of avoiding the black box syndrome. By this he meant avoiding the situation where the report states conclusions but without laying bare the reasoning. You cannot see what is inside the black box. There may be reasons in the expert's head or in his private workings, but they are not spelled out in the report. This problem is particularly prevalent where programming analysis is carried out for delay and disruption claims. In order to assess the expert evidence the court or arbitrator needs to be able to see the full reasoning. If it cannot be assessed, it cannot be given weight.

5. Getting best value from your expert – impartiality and ammunition

How the expert can combine robust independence and active alliance

Since the new Civil Procedure Rules were introduced there has been a much more successful emphasis than before on the independence of the expert. There has been a decline in the number of hack experts who used to be available for hire to say whatever their client's needs required them to say. More experts have gained the confidence to say what they really think, rather than what will please those who are paying their bills. This has been a real advance. The robust independence of the expert is a good thing, and a necessary thing for the integrity of the processes of justice.

But this does not mean that the expert is debarred from helping you win your case by giving advice and assistance. If all your expert does is write a report and go into court to give evidence, you are only getting half the value that you ought to get. One of the most useful things your expert can do is provide counsel with the necessary ammunition for cross-examination. People acting as experts who have not previously been involved in arbitral or court proceedings may have no idea that this is required. Counsel needs Exocets to fire at the expert's opposing number. An expert who is prepared to put in some hard work helping counsel is invaluable. In practice this is likely to mean not only the provision of detailed comments on the other side's report, but also sourcing published literature which helps to make points that need to be established during cross-examination. Counsel should not be left to work out the cross-examination unaided. Make sure your expert makes his or her full contribution. This role is not in conflict with their status as independent expert. You are contesting the case on the basis of their independent opinion. By definition the ammunition to be supplied will relate to the points where they genuinely consider that they are right and the other expert is wrong.

6. Presenting the evidence – introduction, visuals, hot-tubbing

Seeing through the eyes of the tribunal

Finally a few words about how expert evidence is presented in court or in arbitration.

Of course we all know in theory that the evidence needs to be presented in a way that makes it easy for the tribunal to assimilate it and be persuaded by it. But I have to confess that it was only after I started sitting as an arbitrator and as a part-time Judge that this really came into sharp focus for me. (For this purpose there is no real difference between arbitration and court proceedings, so I will just refer to arbitration.)

Until I sat myself, I did not appreciate the full extent of the difference between the position of the arbitrator and the position of the lawyers. By the time a substantial claim reaches an arbitration hearing the lawyers have been living with it for months, if not years. A lot of knowledge has been assimilated in that time. The lawyers will have a clear overall picture in their heads, into which it is relatively easy to fit new facts and new arguments as they arise. The arbitrator is in quite a different position. There may have been one or two interlocutory hearings, but that will only have given the arbitrator a smattering of the knowledge which the lawyers have.

For the full hearing the arbitrator will have received and read a written opening, but a once-through reading of an opening is no substitute for the in-depth knowledge that will be needed to decide the case.

I conclude with three points about making the expert evidence easy for the tribunal to take in.

First, the introduction. There is a common practice these days of saving time by having the expert swear to the truth of the report and then going straight into cross-examination. But I urge you to think about it from the point of view of the arbitrator. The report is often long

and complex. Unless it is extremely well written, and the arbitrator has had ample time to study it, the arbitrator's grasp of it will only be partial at best, when the expert is called to give evidence. As a result, some arbitrators find it more helpful to have the expert take 15 minutes or so in chief, to explain what he or she thinks is important and the reasons for disagreeing with the other party's expert – a sort of short tutorial before the cross-examination starts. This gives the expert the opportunity to shine and gives the arbitrator a good insight into the expert's thinking. So counsel should always ask the arbitrator (or Judge) if an introduction would be helpful.

Second, visuals. It is trite that a picture is worth a thousand words. Experts could make much more use of visuals in their reports and presentations than they commonly do. There is something about the formality even of an arbitration that seems to inhibit experts from using visual means of communication. I do not mean just graphs and photographs, which are standard, but explanatory diagrams and graphics. These are so much better than long and involved verbal explanations that take much more effort to understand.

Third, a word about hot tubbing or, to give it its proper name, concurrent expert evidence. My experience is that this is good for some things and bad for others. It is good where there is a large number of items of claim which need to be commented on. It enables the arbitrator to set the views of one expert directly against the views of the other and compare the two on the spot. That can be very helpful. It is bad for the expert evidence on the general issues in a case. When I am sitting as the arbitrator I am conscious that I am going to have to decide between two opposing views, both sincerely held (usually) and both expertly argued (usually). I want to be able to see the experts tested by a proper cross-examination which proceeds step by step, establishing propositions and exposing weaknesses. Then it usually becomes apparent without too much difficulty which expert I ought to prefer. If the only live expert evidence is by hot tubbing, that opportunity to see the experts tested is lost, and it is then much harder to decide between them. So I would say a yes to hot tubbing, but only for part of the evidence.

To conclude – there are practical steps that can be taken to make sure not only that a disaster as in *SPE International* is avoided, but also that you get the very best out of your expert.

Postscript

The rejection of Mr X's expert evidence did not mean that SPE recovered nothing. The Judge held that he was entitled to assess the damages by what he called *"the exercise of a sound imagination and a broad axe"*, and he awarded SPE £40,000, which he assessed by, in effect, licking his finger and sticking it in the air. *SPE International* is a useful authority to know, if you ever do get into the situation where your quantum evidence crashes and burns.

Walter Lilly: new guidance on the correct approach to "global" claims

In *Walter Lilly v Giles Patrick Mackay* [2012] EWHC 1773 (TCC) Mr Justice Akenhead has given important new guidance on the correct approach to "global" claims.

The claimant contractor had been engaged to construct a residential property under a JCT standard form of contract with bespoke amendments. The project fell into significant delay and the claimant sought an extension of time and loss and expense. The case has already provoked extensive comment from an interlocutory judgment handed down on 12 March 2012 in which the Court granted the claimant's application for specific disclosure, holding that legal advice privilege does not attach to documents generated by claims consultants even where the claims consultants concerned use legally qualified personnel[1].

In his judgment, Mr Justice Akenhead undertook a comprehensive review of the authorities and provided some guidance on the following important issues:

(a) The correct approach to calculating extensions of time, including the use which can be made of prospective or retrospective expert-driven delay analysis;

(b) The correct approach to ascertaining loss and expense under standard form contracts; and

(c) The extent to which loss and expense claims can be advanced on a "global" basis.

Extensions of Time

Mr Justice Akenhead refocused attention on the role the court generally plays when considering questions of extensions of time:

> *"It is first necessary to consider what the Contract between the parties requires in relation to the fixing of an appropriate extension of time. Whilst the Architect prior to the actual Practical Completion can grant a prospective extension of time, which is effectively*

1 http://www.bailii.org/ew/cases/EWHC/TCC/2012/649.html

a best assessment of what the likely future delay will be as a result of the Relevant Events in question, a court or arbitrator has the advantage when reviewing what extensions were due of knowing what actually happened. The Court or arbitrator must decide on a balance of probabilities what delay has actually been caused by such Relevant Events as have been found to exist…. How the court or arbitrator makes that decision must be based on the evidence, both actual and expert"[2].

In undertaking that exercise the Court considered what the approach should be where a delay is caused by both the contractor and an employer default. Having considered the relevant authorities Mr Justice Akenhead approved the comments of Mr Justice Dyson in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 ConLR 32, and expressly rejected the "apportionment" approach of *City Inn Ltd v Shepherd Construction Ltd* [2010] BLR 473. In doing so, he said:

"I am clearly of the view that, where there is an extension of time clause such as that agreed upon in this case and where delay is caused by two or more effective causes, one of which entitles the Contractor to an extension of time as being a Relevant Event, the Contractor is entitled to a full extension of time. Part of the logic of this is that many of the Relevant Events would otherwise amount to acts of prevention and that it would be wrong in principle to construe [such clauses] on the basis that the Contractor should be denied a full extension of time in those circumstances. More importantly however, there is a straight contractual interpretation of [such clauses] which points very strongly in favour of the view that, provided that the Relevant Events can be shown to have delayed the Works, the Contractor is entitled to an extension of time for the whole period of delay caused by the Relevant Events in question. There is nothing in the wording of [such clauses] which expressly suggests that there is any sort of proviso to the effect that an extension should be reduced if the causation criterion is established. The fact that the Architect has to award a "fair and reasonable" extension does not imply that there should be some apportionment in the case of concurrent delays. The test is primarily a causation one. It therefore follows that, although of persuasive weight, the City Inn *case is inapplicable within this jurisdiction"*[3] (emphasis added).

He also made two further significant points concerning the assessment of extensions of time:

(a) First, that that the debate which often occurs between delay experts as to whether or not a "prospective" or "retrospective" delay analysis is the more appropriate is a sterile one because *"if each approach was done correctly, they should produce the same result"*[4].

(b) Secondly, snagging is an inevitable feature of most complex projects, such that time taken in snagging works per se is not delay caused by the contractor: such snagging could only be said to cause delay if it is excessive[5].

Loss and Expense – the correct approach under standard form contracts

In his judgment Mr Justice Akenhead considered the application of a typical standard form "loss and expense" clause. He concluded the following in relation to the JCT loss and expense clause under consideration (Clause 26):

(a) That in construing clause 26.1.3, the contractor will not lose the right to recover loss and expense where for some of the loss details are not provided *"[o]therwise, one can have the absurd position that where £10 out of a £1 million claim is not adequately detailed but the rest of the claim is, the whole claim would fail to satisfy the condition precedent…"*;

(b) Under clause 26.1.3 the contractor need only submit details which "are reasonably necessary" for ascertaining loss and expense and that allowing the Architect or Quantity Surveyor to inspect the contractor's records could constitute adequate submission of details;

(c) The requisite details *"do not necessarily include all the backup accounting information which might support such detail…"*[6];

(d) That clauses such as clause 26.1.3 should not be construed too strictly against the contractor *"bearing in mind that all the Clause 26.2 grounds which give rise to the loss and expense entitlements are the fault and risk of the Employer."*[7];

(e) *"It is legitimate to bear in mind that the Architect and the Quantity surveyor are not strangers to the project in considering what needs to be provided to them; this is consistent with the judgement of Mr Justice Vinelott in the* Merton *case…"*[8];

(f) Ultimately the purpose of the requirement that details of loss and expense be provided is that *"The Architect or the Quantity Surveyor must be put in the position*

2 Para 362 of the judgment.

3 Para 370 of the judgment.

4 Para 380 of the judgment.

5 Para 379 of the judgment.

6 Para 465 of the judgment.

7 Para 466 of the judgment.

8 Para 467 of the judgment.

Continued on p8

in which they can be satisfied that all or some of the loss and expense claimed is likely to be or has been incurred. They do not have to be "certain"[9].

Global Claims

The defendant in *Walter Lilly* argued that the loss and expense claim was a "global" one and, as a result, could not succeed. That prompted Mr Justice Akenhead to embark on a careful consideration of the authorities surrounding "global" claims and to form the following conclusions:

1. Subject to any express contractual requirements, claims by contractors for loss and expense must be proved as a matter of fact. The contractor must establish that: (i) events occurred which entitle it to loss and expense; (ii) that those events resulted in delay and/or disruption; and (iii) that such delay and/or disruption caused it to incur loss and expense. There is no requirement in principle for the contractor to show that it is impossible to plead and prove the cause and effect in the conventional way or that that impossibility is not the contractor's fault.
2. The contractor can prove the three requirements by whatever evidence will discharge the burden of proof. A claim *"may be supported or even established by admission evidence or by detailed factual evidence which precisely links reimbursable events with individual days or weeks of delay or with individual instances of disruption and which then demonstrates with precision to the nearest penny what that delay or disruption actually cost"*.
3. Although global claims face added evidential difficulties, there is nothing in principle to make them impermissible. A contractor will generally have to establish that its loss would not have been incurred in any event. This will involve showing that its tender was adequately priced so that it would have made a net return. Although the burden of proof does not shift to the party defending the claim, that party may seek to show that the accepted tender was so low that the loss would have occurred in any event or that other events at the contractor's risk caused some or all of the loss.
4. If events other than those relied on by the contractor, or which are at the contractor's risk caused or contributed to the total loss, the contractor's claim does not necessarily fail except to the extent that those other events caused the loss. Mr Justice Akenhead gave the example of a £1m global claim where it could be proved that, except for an unpriced item of £50,000 in the accepted tender, the contractor would probably have made a net return. In those circumstances, the global claim would not fail in its entirety. The global loss would simply be reduced by £50,000.
5. The tribunal may treat a global claim with more scepticism if the more conventional approach of proving a direct linkage is available but has not been adopted. However that does not mean that the global approach should automatically be rejected.
6. Mr Justice Akenhead expressly rejected the suggestion that a global award should not be made where the contractor has himself created the impossibility of disentangling the claim. Unless the contract expressly states that a global claim cannot be made unless certain conditions are complied with, such a claim is, in principle, permissible subject to the contractor discharging the burden of proof.[10]

These principles provide valuable guidance on how courts and arbitrators should approach "global" claims which will assist parties in formulating and seeking to prove such claims.

Conclusion

In *Walter Lilly*, Mr Justice Akenhead has delivered a thorough judgment that brings welcome clarity to several of the most interesting and difficult practical issues that arise in both domestic and international construction disputes. His judgment is likely to become heavily relied upon by contractors. Although the decision does not make new law, it appears to have finally put an end to the debate over whether or not the approach to concurrent delay in *City Inn* is good law in England. The comments on global claims are also likely to bring a certain amount of relief to contractors and to make them less reticent about having their claims characterised as being "global". It seems likely that this decision will prove to be the main authority on these issues and an essential reference point for those making, or resisting, such claims.

Thomas Crangle
4 Pump Court

9 Para 370 of the Judgment.

10 Para 486 of the Judgment.

Readers are invited to submit material by email to be considered for possible publication. This may consist of correspondence, short articles or case notes, news of forthcoming cases or events, book reviews, or other matters of interest to members of TECBAR or SCL.

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