

Trial Practice

Neal Ellis

It has probably not escaped your attention that our Section has a new name. As the Tort Trial and Insurance Practice Section, we recognize and emphasize the important role that trial practice and trial lawyers play in our Section. Trial lawyers for plaintiffs, the defense, and insurance companies have always had a home in TIPS, and the welcome mat is out for all lawyers who find that their practices frequently lead to the courtroom. Our Section sponsors a wide variety of programs for trial lawyers including the TIPS National Trial Academy held each year at the National Judicial College in Reno, Nevada.

This issue of *TortSource* is devoted to trial practice. Future issues of *TortSource* will feature regular columns dedicated to the art of trial practice.

In this issue you will learn how to make your direct examinations of witnesses more effective. John Buckley, chair-elect of our Trial Techniques Committee, tells us how to

convey our story and persuade the jury in the direct case. Trial consultant Kelly Naylor explains how trial preparation research including focus groups can enhance our chances at trial. In the past widely publicized studies were used to support the proposition that the most important parts of the trial were opening and closing. David Davis explores the theories of primacy and recency and concludes that trial lawyers should pay more attention to story telling through presentation and structuring the evidence. Don Beskind reviews David Ball's best-selling *Theater Tips and Strategies for Jury Trials*. West Group has created an innovative software tool for trial lawyers called Westlaw Litigator. See what Kassi Erickson Grove has to say about this exciting new product.

We are pleased to bring you this issue of *TortSource* devoted to the art of trying cases. Look for more coverage of trial practice issues in coming issues.

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The Myth of Primacy and Recency at Trial: Tell Stories Instead

David Davis

For many years trial consultants and lawyers have touted that trials should be structured to take into account primacy and recency effects. In its simplest form (and there really isn't much else to it), primacy and recency theory posits that people best remember information from the beginning and end of communications and forget what went on in the middle. This idea has been used to argue that openings and closings are the most important parts of the trial; that the beginning and end of witness testimony must have impact; that lawyers should cover important points at the beginning and end of a trial day; and so on.

Although these ideas may make intuitive sense, there is no real empirical evidence to support primacy and recency effects as fact. The concepts were developed in 1957 by A.S. Luchins and included in a book, *The Order of Presentation in Persuasion*. Luchins based his conclusions on a series of experiments in which subjects read lists of words and then immediately repeated the words they remembered. The enormous amount of follow-up work and experiments generally share two features: They (1) use word lists and (2) measure the subject's recall shortly
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Illustration by Andrew O. Alcalá

Tips for Effective Direct Examination

John Buckley

You can see it on the jurors' faces—"Another boring direct examination?" You don't ever have to see that look again.

The key to effective direct examination is to keep in mind the ultimate goal of direct examination and, ultimately, of your entire case presentation: Tell a persuasive story. It is actually simple to turn the witness' testimony into a portion of the story. Think hard about what role the witness plays in your overall case. She's not there simply to present evidence or prove an element of your prima facie case. She is there to tell a part of your story and to persuade the jury that her part (1) is true and (2) fits into the overall story (3) in a manner that compels the jurors to your conclusion. Position your witnesses in the context of your overall story, and let your direct examination explain how each fits into the big picture.

The jury's attention is critical. In order to persuade a jury, you must get their attention and keep it. There are several ways to do this, but using action is one of the best. Have the

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Illustration by Andrew O. Alcalá

Meeting Round-Up

A Grand Time in Texas

Toya Cook Haley

The stars were big and bright as TIPS members enjoyed the Spring Leadership Meeting, May 1-4, in Austin, Texas. The capital city was abuzz with the Texas state legislative session where tort reform was high on the list of priorities; live music, which filled the air; and street festivals highlighting the artistic and cultural diversity of Austin. The tremendous success of the meeting was due to the leadership of the host committee co-chaired by Robert and Cindy Bass, and the TIPS staff who showcased the best that Austin has to offer in hotel accommodations, dining, live music venues, and cultural activities. TIPS members were treated to meetings and accommodations in two of the regal jewels of the state: the Stephen F. Austin Hotel and the Driskill Hotel. Both hotels boast a rich history that mirrors that of Texas and both are noted as historical landmarks complete with architectural details and furnishings of the period.

The social activities began in the governor's suite of the historic Driskill Hotel and continued each evening in a different breathtaking venue within the hotel. The wel-



The Bar & Grill Singers entertain the crowd in Austin.

come reception was graciously sponsored by Austin-based Slack & Davis and set the tone for an upbeat and productive Spring Meeting. The social highlight was a Saturday night reception and dinner, sponsored by Winstead Sechrest & Minick. The dinner was held at the bigger-than-Texas Bob Bullock State of Texas Museum. TIPS members and guests were treated to a concert by the Travis County Bar Association's internationally known Bar & Grill Singers. In addition to the concert and dinner, attendees were free to roam the vast collection of Texas historical memorabilia amassed in the monolithic building.

Throughout the meeting, the Section focused on outreach to women and minority lawyers, the plaintiffs' bar, and corporate counsel. The Task Force on Plaintiff's Involvement and the Task Force on Outreach to Women and Minority Lawyers co-sponsored a highly publicized and well-attended reception recognizing Broadus Spivey, a legendary plaintiff's attorney from Austin, as a recipient of the Pursuit of Justice Award. The award is in recognition of Spivey's lifelong devotion to the legal profession and significant contributions to the pursuit of justice. In addition to TIPS members and friends, a host of friends and colleagues representing the local and statewide judiciary, the Travis County Bar, Austin Black Lawyers, and the Mexican American bar associations of Austin were in attendance. In an ongoing effort to further develop networking and Section mentoring opportunities for our members who are in-house corporate counsel and those who are new to Section

leadership, a networking reception was held on Saturday evening with current and future leaders of the Section.

All in all, we had a grand time in Texas. ♦

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Book Review

Reviewed by Donald H. Beskind

I admit to being one of David Ball's most ardent admirers. Ball, for those who do not know of him, is a jury consultant who came to that work from the theatre, having been a director, playwright, and producer; and from academia, where he taught drama at Carnegie Mellon and chaired the Drama Department at Duke University. It was at Duke where our paths crossed. I use him often as a consultant in my cases, and I read everything he writes.

Theater Tips is the second edition of Ball's first book on trials. A sort of transitional piece for him as he moved from theatre to courtroom, the first edition took his ideas about telling fictional stories to audiences and applied them to telling real stories to jurors. He took stagecraft concepts like visceral communication, point of view, forwards, backwards, and climax into

the courtroom. He used the dramatist's eye to suggest techniques for cross examination (e.g., putting the key phrase at the end of the question to reduce the time the witness has to think). Techniques I learned from Ball's first edition are so much a part of what I do in a courtroom that I often forget how recently I learned them. One chapter, now even better in the second edition, "The Leading Character: You," is so helpful on the topic of how a lawyer should appear and behave in a courtroom, that I reread it before every case I try.

The second edition is made up of about half the best material from the first edition, thoughtfully revised, and about half new material. The revisions and additional material draw on Ball's years of jury consulting experience since the first edition. The chapter on

witness preparation, "Your Cast Rehearsals," is the most comprehensive and useful 11 pages available on the subject, covering not only how to make the witness a better witness but

also how the attorney can become a better witness coach. From witness prep through closing argument, Ball's book shows how to take the tested techniques of theatre and apply them to each segment of a trial.

To me, the major improvement in the second edition is not in the first half of the book on "Methods," but in the other half called "Applications," where Ball brings his experience to bear on issues all

trial lawyers face. "Working with Co-counsel," "The Awkwardness of Voir Dire," "Reading the Jurors," "Paralegals in Court," and "The Care and Feeding of Experts" are just some of the topics. These are not common topics in trial practice books. In fact, though an avid reader of trial practice books, I have not seen anything else-

where like his two sections on effective courtroom collaboration with co-counsel and paralegals.

Ball may spin his applications section off as its own book some day, since theater strategies are only part of the content. Until he does, however, the reader gets two books for the price of one and, since the book is in paperback, it is an unbelievable bargain. This book belongs on every litigator's shelf. ♦

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Theater Tips and Strategies for Jury Trials (2nd Edition)

By David Ball (National Institute for Trial Advocacy)



In Motion

David Casey, Jr., a senior partner with the San Diego law offices of Casey Gerry Reed & Schenk, was honored with the Author E. Hughes Career Achievement Award from the University of San Diego. ♦

Visit the TIPS website for current and past issues of *TortSource* in pdf format www.abanet.org/tips/tortsource.html.

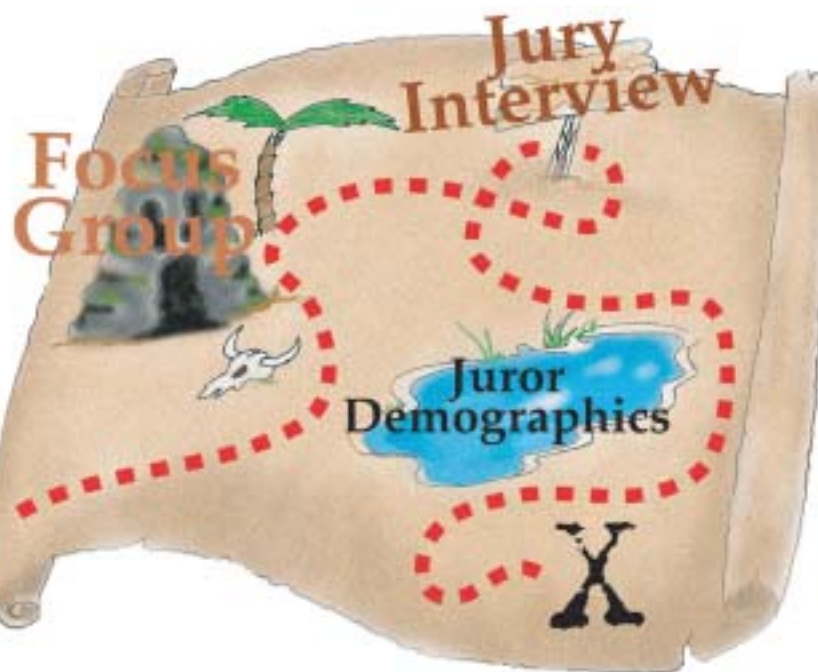
To Reach the Destination, Use a Map: Pretrial Research Is Trial Preparation

Kelly E. Naylor

How are journeys successfully completed? To achieve any goal, it is necessary to have a plan or a map to guide the process. Conducting pretrial research, including case analysis, holding focus groups, and/or assessing trial simulation are crucial tools to map a concerted and strategic trial plan. The major tools to prevail at trial, including juror selection and courtroom presentation development, are substantially strengthened by pretrial preparation of the case using social science research methods.

Building methodologically sound pretrial research activities into case development allows the trial team to meet the following goals:

- Overall case evaluation that is increased in objectivity. This process answers questions like, “What are the serious case problems perceived by potential jurors?” and “What is the crucial information that jurors need to decide this case, and what facts distract them from seeing our position clearly?”
- Identification of attitudes and belief systems that will likely impact the verdict-related reasoning of jurors
- Gaining a deeper understanding of facts and opinions that support each side of the case
- Demarcation of life experiences that relate to key case facts, and how those experiences and consequent attitudes influence views of the case story
- Discovery and development of trial strategies that can address case weaknesses and underscore case strength
- Developing and testing arguments, exhibits, and evidence presentations before trial, and obtaining ways to strengthen those strategies
- Setting a schedule for trial preparation that typically moves deadlines earlier in the process, allowing more time and targeted energy to prepare the case—resulting in higher confidence and flexibility in court, rather than consistently being distracted by crisis management
- Repeated opportunities to refocus on the broader and overarching issues of a case that are highly relevant to jury decision making and yet can get lost in the detail shuffle
- Discovery and development of potent case-related themes and effective ways to communicate case themes to a jury, including use of language, visual presentation, and key documents
- Identification, development, and testing of jury selection strategies
- Polishing the case narrative or story, and better understanding juror’s likely expectations of how the trial story should unfold and why, including attributed motives and the moral lesson of the trial story,
- Identification of the major questions that if left unanswered will distract jury-eligible focus group participants from the central issues of the case
- Testing the utility of jury instructions and verdict forms
- Showing major reactions of jurors to damages requests and the bases on which focus group jurors use reach liability and damages-related decisions, including issues for which jurors are likely to reduce damages calculations
- Finding the likely processes of jury deliberations
- Eliciting venue, juror demographic, and case fact-related factors that may influence jurors’ views of the case
- Providing a comprehensive story narrative for presenting case facts
- Increasing trial team confidence in the trial presentation or settlement strategies



Following the Map: Pretrial Research Preparation Drives Trial Readiness

Trial management and preparation oversight can be enhanced by pretrial research, which forces the scheduling of time to discuss, plan, evaluate, and reevaluate trial strategies. Investing time and money in focus group research requires that attention be paid to the case. For pretrial preparation, if garbage goes in, garbage comes out. It is essential to think about any case to be tested with a critical eye, and to sharply curtail the amount of information to be presented for evaluation to a mock jury panel. Thus, much of the fat is cut away, and broad conceptual frameworks for presenting the case are constructed.

Early pretrial focus groups can assist in discovery by providing direction about what jurors want to know about a particular case and from a particular witness. In addition, focus groups can be used to design and test exhibits. Trial simulations further provide opportunity for practicing portions of the trial presentation and testing the effectiveness of opening statements, evidence presentation, witness credibility, and closing arguments. In addition, the process of completing pretrial research can inform settlement negotiations.

Ideally, focus group planning and execution occur many months before trial, with trial simulations being conducted slightly closer to the trial date. Care should be taken to fully evaluate a case and, when feasible, to use a series of steps in the focus group process to inform trial presentation strategies. This procedure typically includes more than one focus group, or a mock trial with a minimum of three breakout juries to deliberate the case simultaneously. It is ill advised to base any conclusions on a single effort, and methodological considerations must be observed to obtain the most reliable data possible.

In particular, trial preparation research should be conducted in the venue of the trial, unless there is a concern about the population size. If so, another venue that approximates the trial venue closely but will not risk any contamination of the jury pool for the test case should be used. Research participants should be selected in a manner with no systematic flaws, and should be carefully screened to assure that they are jury eligible, not likely to be called soon for jury service, and not likely to have participated in any research by the opponent. Furthermore, participants in focus groups must be capable of understanding, signing, and observing a confidentiality agreement representative of the venire; and not in any way involved in the test case or likely to disclose or have a temptation to discuss the focus group.

A clear and doable plan for each focus group or trial simulation should be developed well in advance of conducting the research. Like the preparation plan for the focus group, the focus group plan should include what is to be done, for how long, and by whom, with an eye to meeting several major goals already defined. These goals often include assessing specific bad facts of the case that have been identified beforehand. These bad facts that can hurt the case can then be presented better or neutralized using any number of strategies. Other important research goals are the evaluating of the trial narrative and developing a list of unanswered questions that jurors have about the case. At trial, fleshing out the story to fit with juror expectations and answering crucial questions allow jurors to concentrate on their decision, rather than spending energy on finding their way through the trial presentation. Our job is to guide them smoothly through the trial, so that erroneous information and distractions from their tasks are minimal. Focus group results give that process life and direction.

Journey Without a Map?

Some attorneys feel that focus groups are too costly and time consuming to pursue. However, what is the worth of being well prepared for trial? Collaborating with others who have conducted focus groups is often a good place to begin. Also, a clear plan of what to test in a focus group that is coupled with the goals of trial preparation goes a long way in defining what will come out of any pretrial research and how it will be applied after the fact. There are many ways to keep the costs of pretrial research within a budget and still obtain useful information to use at trial.

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Legislative Update

Leo J. Jordan

Class Action Legislation

In my last column I stressed the major effort by the business community to reform the nation's legal system. This effort is well underway and making important headway. Class action, asbestos litigation, and medical malpractice are the primary targets. Let's review this trilogy after almost six months into the 108th Congress.

Class Action Legislation

Following a series of unsuccessful efforts to enact class action reform by moving first in the House of Representatives only to be stymied by Senate Democrats, the new Republican leadership tried a new approach. In February 2003, the Class Action Fairness Act of 2003 was introduced by Senate Finance Committee Chair Charles Grassley (R-IA). Democrat support came solely from Senator Herb Kohl (D-WI). Supporters of this legislation felt success in the Senate would be followed with relative ease in the House.

To a large extent this strategy appears to be working. Recognizing that the Republican majority in the Senate remains 51-49, the support of Senator Kohl certainly increases the possibility of Senate passage.

On April 11 of this year the Senate Judiciary Committee, aided by important amendments offered by Senator Dianne Feinstein (D-CA), passed a compromise bill that would expand federal court jurisdiction over class action legislation. The Feinstein amendments increased the minimal diversity aggregated claim requirement from \$2 million to \$5 million dollars. Feinstein amendments would also deny federal court jurisdiction if two-thirds or more of the members of all proposed plaintiff classes are citizens of the state where the action was originally filed.

Assuming voting unanimity of 51 Republican senators, aided by the affirmative support of Democrat senators Kohl and Feinstein, the new count of 53-47 gives aid and comfort to supporters of class action reform. I can almost visualize business lobbyists checking the current price of a good Southern Illinois champagne.

But as those who follow legislation know full well, the path to success is full of hills and valleys, or in other words "high and lows." The immediate highs from the Judiciary Committee action were followed by despair upon a closer reading of the bill. During the Judiciary Committee hearing Senator Arlen Specter (R-PA) offered one amendment that would exempt from federal court jurisdiction certain "case consolidations." According to *National Journal Congress Daily* (5-1-03) legal experts have described "case consolidations" as class actions filed under another name, as has been the situation in Mississippi. Senator Specter's amendment would also exempt from federal court jurisdiction "private attorney general" actions. These popular actions generally allow individual citizens to sue companies on behalf of the public.

What do the experts make of the Specter amendments? The initial reactions from some business interests view the amendment as "gutting" the bill. As the bill heads for the Senate floor the actual impact of these amendments remains unclear. Surely proponents will attempt to clarify Senator Specter's intent; however, an element of uncertainty has interrupted the momentum. Senator Specter has expressed his willingness to discuss his amendments.

In the end though, assuming the Specter amendments are resolved to the proponents' satisfaction, will the Senate pass this bill? Senate vote counters say the proponents are three to five votes short of 60 votes needed to make the bill filibuster-proof. This strategy also assumes the Democrats are willing to use up cherished political capital on a measure important to the business community but one not yet meriting high public interest.

Asbestos

The second part of our trilogy reviews an ongoing effort to bring closure to the hundreds of thousand of claims arising from exposure to asbestos. According to a Rand Institute for Civil Justice study in 2000, more than 600,000 persons have sought recovery for damages. The *CQ Today* (4-24-2003) reported that Rand estimates the total cost of all past and future claims at between \$200 billion and \$265 billion.

According to the latest *Congressional Quarterly* reports, Senator Hatch is pressing industry officials, labor unions, and insurers to agree on a proposal to establish a multi-billion dollar trust fund to pay asbestos claims. Under the Hatch proposal, a special tribunal would be established that would hear and issue awards to persons who meet defined medical criteria. (The ABA House of Delegates, under the leadership of President-Elect Dennis Archer, adopted recommended medical criteria in February of this year, and they have been presented to Senator Hatch.)

The major hurdles to legislative consensus are the amount of money required for the trust fund and how the funding will be apportioned among industry and insurers. At this time corporate interests appear to be supporting a fund in the amount of \$90 billion, payable in the amount of \$5 billion per year, and split 50/50 between industry and their insurers. According to *CQ* labor unions feel the figure is too low and seem to prefer an approach based upon medical criteria utilizing individual payments. An increase in the trust fund level to \$105 to 108 billion has been rumored.

As the affected industries, their insurers, and labor unions move toward an ultimate solution, the role of attorneys representing asbestos claimants bears some comment. According to the *New York Times* (4-26-2003) plaintiffs' lawyers have not aggressively opposed the trust fund proposal. The *Times* article points to the public pressures faced by plaintiffs' lawyers. With the administration, House, and Senate in Republican hands, as well as an increasingly conservative judiciary, it may be that plaintiffs' lawyers are weighing their political capital. Do they use it up on class action legislation, on asbestos tribunals, or later on medical malpractice legislation?

Some of the larger firms with thousands of asbestos-related cases appear satisfied if their clients receive fair treatment from the legislation and their firm receives adequate fee compensation, although admittedly at a significantly lower rate. Other plaintiff law firms do not see it this way and continue to oppose the trust fund approach. However, our view at the moment is that the momentum is centering on a trust fund solution using approved medical standards. While it is too early to predict success, some Washington insurance experts are cautiously optimistic this effort has a reasonable chance of success.

Medical Malpractice

In my last column I listed medical malpractice reform as a major priority of the Bush administration and the House and Senate Republicans. I cited a report by *Kaisernetwork.org* suggesting that medical malpractice reform efforts would start this time in the Senate. If the Senate could cap recoveries for pain and suffering and establish punitive damage limits, supporters would find a much easier time in the House.

At this point in the 108th Congress, this plan has not materialized. Democrats oppose limits on the ability of injured persons to seek full recovery for injuries suffered by medical negligence. While many Republicans support the anticipated reforms, supporters appear to have suffered from other priorities. The priorities of the business community—including insurers—are centered first on class action reform and second on relief from asbestos liability. In the meantime, efforts to enact medical malpractice reform legislation continue at the state level. This state-centered effort might well tend to lessen the need for federal reform movements.

Still, some federal effort continues. Washington experts have learned that an attempt will be made to include medical malpractice reform in the House version of expected Medicare legislation. Despite likely success in the House, passage in the Senate remains problematic. ❖

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

Law Student Writing Competition Announces Winners

The winners of the Tort Trial and Insurance Practice Section's 2003 Law Student Writing Competition have been announced.

First Place: **Dorothy Puzio**, University of Connecticut School of Law, for "Health Insurance Coverage for Emerging Medical Technologies: A New Approach"

Second Place: **Elena Tsaneva**, Brooklyn Law School, for "Cybermedicine and the Changing Face of Health Care—Evolving legal Issues"

Third Place: **Angela Worthy**, University of Baltimore Law School, for "Uncovering Mold: An Insurance Dilemma" ❖



Copies of the 2002 Annual Meeting Programs are available. Call 800.776.5454 or go online: www.abanet.org/tips/2002annualcass.pdf.



“When I Was a Young Lawyer”

Linda A. Klein
Managing Partner, Gambrell & Stolz, L.L.P.
Chair-Elect, Tort Trial and Insurance Practice Section

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

I was very fortunate to have all four of my grandparents until my third year of law school. They were active in the community and told stories of the plight of senior citizens who were less fortunate. I went to law school fully intending to open a legal clinic to help senior citizens, but my lack of interest in Trusts & Estates changed that.

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

Washington & Lee University in Lexington, Virginia. I accepted the lowest paying job I was offered, as an insurance defense lawyer in a small but well-respected Atlanta firm, representing lawyers accused of malpractice.

Do you have any young lawyer experiences that particularly stand out in your memory? If so, what have you learned from them/how have they helped you to become so successful?

My first pro bono case: I was 23 years old and was asked to represent a widow with Alzheimer's who needed the proceeds from her husband's life insurance policy. I thought it would be easy, but there was no marriage certificate. I found out when and where the couple was married, called, and held on for an eternity until the clerk finally asked if the couple was "African American" (she used another descriptive word). When I responded yes, she told me that they didn't keep records on "African-American" marriages in 1953. I ended up having to prove a common law marriage, to deal with a distant cousin who claimed she was the widow, and to piece together family bibles, tax returns, and anniversary cards to get my client her money. I learned that this is why people need lawyers—we must be tenacious fighters for our clients.

Whom do you most admire?

Among TIPS leaders, I admire Hugh Reynolds as a model lawyer whose word is his bond, whose integrity is unmatched, and who knows that taking shortcuts is no way to represent a client. I also admire the late Neil Shayne, who was a generous mentor and who taught me never to take life too seriously.

What is your greatest source of professional pride?

My first pro bono case, described above. Besides that, accomplishments we made the year I served as president of the State Bar of Georgia (1997-1998), when we obtained the first-ever legislative appropriation for legal services to help indigent victims of domestic violence.

What got you started with ABA involvement?

I was a law student member of the ABA and stayed a member as a young lawyer (it

helped that my firm paid for my membership). I attended a program, met wonderful people who to this day are some of my closest friends, and immediately I became a member of the TIPS Trial Techniques Committee. I volunteered to do the least exciting jobs, did them diligently, and the next thing I knew I was a committee chair.

What was the worst professional advice you ever received?

Don't do anything that isn't billable. Lawyers who do that miss some of the best parts of practice, like the collegiality of the bar, pro bono work, etc. P.S. I didn't take that advice.

What was the best professional advice you ever received?

Giving back is what feels best about being a lawyer.

What personality trait has served you best over the years?

Staying focused. The best way to accomplish goals is to focus on them.

What challenges you the most?

Finding enough time to do everything I want to do.

What is the one thing you cannot stand (regarding the law/lawyers)?

Putting their egos before clients' needs.

What is your favorite type of legal work?

Anything that presents a challenge.

What would you most like to accomplish as TIPS Chair?

Lawyers must become client driven, and client focused; be partners with our clients; and help clients be successful. We can be most useful to our members by providing them the tools they need to stay competitive.

What themes will you focus on for 2003-2004?

We must work together. TIPS was founded on the concept that we may joust in the courtroom, but we will work together to promote scholarship, better lawyering skills, better legislation, professionalism, and access to justice. TIPS is a base of opportunity for young lawyers; women lawyers; minority lawyers; and plaintiff, defendant, and corporate counsel. The core values of our profession are TIPS's core values.

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

Offer affordable, hands-on programs and useful scholarship and provide opportunities to get involved and meet other lawyers, especially more experienced lawyers. ♦



Linda A. Klein, then and now



Linda A. Klein's Advice for Young Lawyers:

- If you are asked to do something that doesn't feel right, don't do it. You will never regret obeying the canons of ethics.
- Lawyers are most effective when they are whole people. Find your place in the community. Don't focus exclusively on billable hours.
- First learn to be a good lawyer, then build a practice. Take advantage of experience and mentoring.
- If you are a trial lawyer, be yourself; don't copy someone else's style.

Pretrial Research

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Many attorneys who use focus groups as a trial management tool would never go back to heading into trial "blind," stripped of focus group results that guide the trial presentation and jury selection processes, and consider focus groups essential to mapping out effective trial strategies.

Finally, while pretrial research meets the requirements of going into trial with as few unanticipated variables as is possible (let's face it, one cannot account for everything that happens at trial, but why not control as much as you can?), post-trial

research with any jury should also not be overlooked as the ultimate real life test of any trial presentation. Jury interviews post-trial are the first steps in pretrial research for the next similar case to be tried, despite the fact that it may not even be in the office yet, and can guide trial practice in general. Like careful case assessment and focus group evaluation of all cases, post-trial juror interviews should not be neglected if the goal is highly developed and clearly mapped advocacy. ♦

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The Myth of Primacy and Recency at Trial

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after being exposed to the words. Even in an artificial laboratory setting, primacy and recency effects can be eliminated simply by highlighting words in the middle of the list.

How the theory actually might affect presenting a case to a jury in a courtroom is unclear. Instead the experiments seem to be a good example of the misuse of discrete scientific findings to make grossly overgeneralized points. It's like the way the Heisenberg Uncertainty Principle, suggesting that we cannot know both the location and velocity of an object, has been ripped from physics to argue that we can never know where anything is.

Are openings and closings important in a trial? Of course they are. Is this because of primacy and recency effects? Unfortunately, it is unlikely to be that simple. What we do know is that information is best remembered when it has a person's continued attention and when it remains available to the person. Far more than spending time on primary and recency effects in planning a trial, the lawyer should focus on determining what the key information is and how evidence can be presented so jurors will pay attention and so the information remains memorable.

Telling a Tale

The storytelling technique is the best way we have seen to achieve these goals and to make facts and details memorable. Storytelling makes an effective courtroom technique for several reasons. First, it draws upon one of the most familiar and accessible ways of imparting information. We are exposed to stories from our first moments of consciousness, as our parents read us stories while we lie in the crib. Books, movies, sermons, and television are just a few of the many vehicles from which we absorb stories through our lives.

All stories have a familiar structure: beginning, end, plot, setting, and motive. The most powerful stories create drama and impart a message of some sort. They also tap into



basic feelings, attitudes, and beliefs. In constructing a case presentation, the goal should not be to use concepts like primacy and recency but to construct a coherent and compelling story that is reinforced throughout the trial. Effective stories draw upon age-old themes like good versus evil or the powerless against the weak that resonate with human experience. Effective courtroom stories also involve the jurors as characters within the plot who have a role to play. Essentially, they write the last chapter with their verdict.

A trial is not structured to accommodate easily telling a story—openings and closings obviously lend themselves most naturally to the structure. But there is a way to approach presenting the story in the rest of the trial. Many lawyers lauded for their ability to spin a yarn at trial employ a technique borrowed from the movies called storyboarding. Before directors yell “Action,” they sketch out every scene along with the dialog that takes place in it. The resulting “storyboards” are like a rough comic strip of what they expect to get on film. Lawyers can do the same thing—the witnesses are the characters in the scene, and their testimony is the dialog. The storyboard should show how each witness fits within the story and the themes and parts of the overall plot the witness will cover in testimony. The sketches can be incredibly detailed—how does demonstrative evidence move the story along?—or developed on the fly as the trial develops—can breaks at the end of the day also serve as dramatic breaks?

By storyboarding your case, you can more easily determine what is extraneous to the story, what bogs it down, and what moves it along. In short, you can be the good editor that takes a run-of-the-mill detective story and helps turn it into a dramatic, suspense-filled blockbuster. (What, you thought John

Grisham did all that by himself?...) ❖

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Tips for Effective Direct Examination

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witness play an active role in the story—speak in an active voice with an active manner. Have her move if possible—bring her down to explain exhibits, to draw on a dry easel or chalkboard. TV newscasts frequently change the scene behind the commentator; follow their lead—they've been in the business of keeping people's attention for years. Create movement, present an active story, vary the scenery.

Provide the reasoning behind your story. You can do more than have the witness say simply that she went to the CEO to discuss design flaws in the punch press. The fact that she went there is relevant for a variety of reasons. Have her explain how she learned the design engineers forged the safety test results in order to meet the production deadline—this is a powerful persuasive tool. Go beyond presenting the facts to present the motivation that led to the action, the logic behind the facts. A jury that understands these things will believe and accept her testimony within the story you are trying to present.

Use the tools of persuasion, use educational tactics. People learn via three systems: aural (hearing), visual (seeing), and kinesthetic (doing or touching). Jurors are no different, except they don't get to choose how to review the evidence—you do, so present your testimony using as many modes as you can. A presentation that uses aural and visual information interchangeably is the daily double. If you can fit kinesthetic experience in as well, you hit the trifecta.

Good persuasive technique includes involving the jury in the story. Good direct examination includes using signposts to outline topics within the testimony, which provides a context for the examination and permits a wider understanding. Some experienced direct examiners will use this opportunity to involve the jury directly in the process. Instead of saying “Let's discuss the CEO's reasons for refusing to speak with you about the punch press design,” a creative examiner will open with “Let's see if we can get to the bottom of why the CEO wouldn't talk to you that day.” This topic heading highlights a question that remains unanswered for a period of time; creates a measure of suspense; and helps the jury to invest in finding out the answer before the witness presents it. The jury's mental investment in the puzzle—especially for those who figure out the answer before the witness tells—also leads to firmer positions in the deliberation room. Jurors who come to a conclusion by themselves, before being told the facts by a witness or lawyer in argument, are more likely to hold fast to their beliefs

during deliberations than those who simply absorbed what they were told to believe.

Use the witness as an educator, a teacher and assistant to the jury, in order to simplify your case, your story, and your witness's testimony. Jurors believe their job is to decide facts and solve or resolve a dispute. But you can enlist them to help solve a mystery and correct an injustice (the injustice being done to your client in this case). Witnesses whose testimony presents a problem for the jury to solve and an injustice for it to redress encourage the jury to play an active role; this sets them up to be persuaded to, not to parrot, your side of the case.

Sell your story and the witness's part in it. An examiner who appears bored is boring. Be interactive. Have a conversation with the witness. Be animated. Change your tone, your inflection and pacing of words. Change the structure of your examination for each witness. This atmosphere helps jurors pay attention—they will thank you for it at the end of the case. ❖

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TortSource

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U.N. Office of the High Commissioner for Human Rights for relief from the High Court's ruling, claiming that it violates his free-speech rights under the U.N. International Covenant on Civil and Political Rights.

Although Web publishers are naturally concerned about the potential financial impact of the *Gutnick* ruling, its practical consequences may be far less devastating, especially for those without substantial assets in foreign jurisdictions. Foreign judgments that violate a publisher's First Amendment protections are of doubtful enforceability in U.S. courts. For example, in *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 145 F. Supp. 2d 1168 (N.D. Cal. 2001), a federal district court declined to enforce a French court's order in a suit brought in France against Yahoo! for selling Nazi memorabilia online.

It also is debatable whether *Gutnick* is in fact a radical departure from conventional personal jurisdiction analysis. Many jurisdictions now follow the test enunciated by the court in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), which holds that personal jurisdiction is present when a defendant has sufficient minimum contacts with residents of the forum "that involve the knowing and repeated transmission of computer files over the Internet." Applying the *Zippo* analysis to the facts of *Gutnick*, a strong argument could be made that Dow Jones's provision of a subscription-only website to *Gutnick* would indeed confer personal jurisdiction upon the forum in which *Gutnick* resides and does business.

Perhaps the only point not debatable is that *Gutnick* does not settle the question of where Web publishers are properly amenable to suit. The issue no doubt will continue to be litigated in other national and international tribunals and may be the subject of international treaty negotiations. One of the High Court justices, although upholding the dismissal of Dow Jones's appeal in *Gutnick*, nevertheless recognized the problem in a concurring opinion:

The notion that those who publish defamatory material on the Internet are answerable before the courts of any nation where the damage to reputation has occurred, such as in the jurisdiction where the complaining party resides, presents difficulties: technological, legal and practical. . . They appear to warrant national legislative attention and to require international discussion in a forum as global as the Internet itself.

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ABA Annual Meeting, August 7-13 in San Francisco, CA (312.988.5672)

Medical Malpractice, Tort Reform, and HIPAA Issues for 2003, September 5-6, Dallas, TX (312.988.5708)

The Future of Class Action Litigation, October 2-3, Boston, MA (312.988.5708; online registration at abanet.org/tips)

Aviation Litigation Meeting, October 16-17, Washington, DC (312.988.5708)

TIPS Section Fall Meeting, October 22-26, Savannah, GA (312.988.5672)

Fidelity & Surety Law Committee Fall Meeting, November 5-7, Philadelphia, PA (312.988.5708)

U.S. Supreme Court Ceremony, December 13-15, Washington, DC (312.988.5708)

Life Ins. Law, Health & Disability Law Ins. Reg., Employee Benefits Financial Services Integration Committees CLE Meeting, January 15-18, Orlando, FL (312.988.5708)

Fidelity & Surety Law Committee Annual CLE Midwinter Meeting, January 26-31, New York, NY (312.988.5672)



Product Review

Kassi Erickson Grove

Westlaw Litigator

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