

The Twenty-First Century Courtroom

Mary Vasaly

For those who have suffered through the perils and pitfalls of electronic discovery, the dawning of the technology era may not feel much like progress. But to dwell on the drawbacks of e-discovery would ignore the truly ground-breaking advances that technology has brought to most other aspects of trial practice. This issue of *TortSource* addresses several of these useful technological breakthroughs. Gregory Cesarano explains how lawyers can take advantage of courtrooms that offer state-of-the-art technology to communicate more effectively with jurors. Lisa Horvath Shub advises us on how to employ the Internet and other technology to prepare witnesses to testify. And Chris Kenney explores the advantages interim commentary can provide for litigators to involve jurors in the heart of the trial process.

Sometimes, however, adapting to technological change can be challenging. We

all can use expert advice from time to time, particularly when it comes to e-filing. Fortunately, Lauren Godfrey helps ease the transition to this required procedure with "Ten Tips for e-Filing Court Documents." To help us anticipate changes yet to come, Hervey Levin offers insights about legislative issues and procedures the 111th Congress will face, and Robert Peck highlights a case currently before the Supreme Court that involves preemption of state tort laws by federal regulation.

In the midst of all of this transition, however, one thing remains constant: the generosity of TIPS members. Don't miss Laura Farber's description of the myriad pro bono contributions our Section's members have made during the last year. This issue also provides mentoring guidance from Barbara O'Donnell in "When I Was a New Lawyer," a preview of our spring meeting in Colorado Springs, and a recap of all the fun we had on Hilton Head Island last October. Please enjoy our high-tech issue! ❖

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Courtroom Technology: The Promise of the Future Begins Now

Gregory M. Cesarano

Walking into a twenty-first century courtroom may, to the inexperienced lawyer, feel like stepping into a technological labyrinth. The use of electronic equipment in courtrooms is becoming more widespread as new courthouses open and older structures are updated. Because the equipment is equally available to all parties free of charge, the trial lawyer's major investment becomes time spent learning how to effectively employ the technology. Another outcome of such technology is that the digital divide is narrowing between parties who cannot afford to provide their own equipment and those who can. While the past may have presented classic underdog scenarios, where jurors psychologically favored the less wealthy party, it is now possible for everyone to take advantage of technology.

The availability of these new electronic tools makes it essential for trial lawyers to learn how to operate and take full advantage of them. Lawyers today must not only

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Illustration by Andrew O. Alcalá

Preparing Your Witness in the Electronic Age

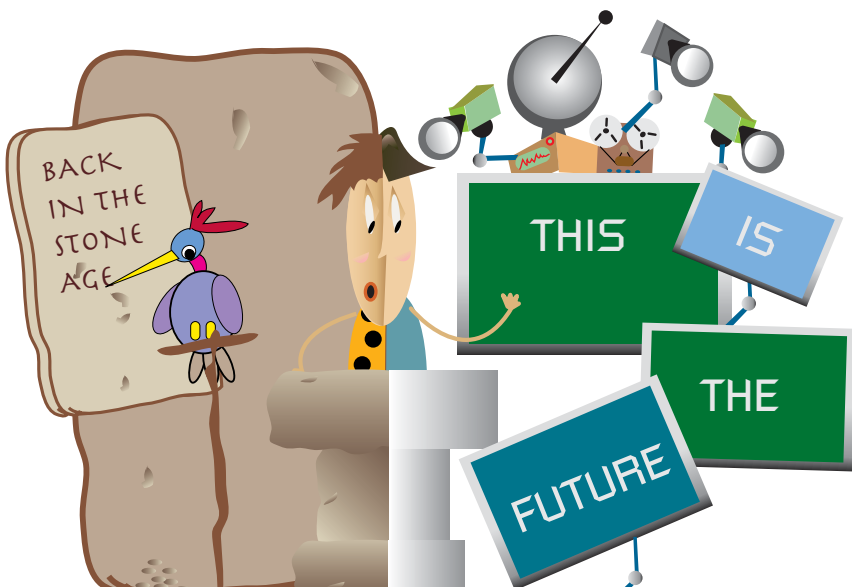
Lisa Horvath Shub

Presenting a witness to testify can be a nail-biting experience for both lawyer and witness. Despite hours of preparation exploring the facts, ensuring that the witness is familiar with all the relevant documents, and warning your witness about the tricks opposing counsel may play, the witness, having his or her own strengths, weaknesses, thoughts, and opinions, has to answer the questions. When the witness takes the stand, your assistance to him or her is limited to objecting or attempting to halt improper questions and taking your witness on direct to ensure that the facts are presented more accurately if you believe one of the answers has left a misleading impression.

But the facts are the facts. If you have not done homework newly necessitated by the electronic age before you present your witness, some facts about your witness that you did not know may surface because he or she neglected to tell you about them. Your witness may not have a thorough understanding of how electronic information

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Meeting Round-Up

Fall Meeting on Hilton Head Island

Emily Gifford

Nothing could be finer than a TIPS meeting in South Carolina! This year's Fall Leadership Meeting, October 2–5, 2008, was held at the Westin Spa and Resort on Hilton Head Island, South Carolina, and the Palmetto State came through with smiling faces and beautiful places.

The Westin Resort provided a perfect location for the Section's fall gathering, as it provided sun, sand, golf, spa services, and great restaurants on the island. For those who were willing to travel, Savannah and Charleston offered nearby opportunities to experience some good old fashioned Southern hospitality.

The meeting started off with the Diversity in the Profession Reception, during which the Honorable Matthew J. Perry Jr. was honored with the Liberty Achievement Award. Inaugurated at the 2008 ABA Annual Meeting in New York City last August, the award raises awareness about the importance of diversifying the legal profession by honoring lawyers and judges who actively promote diversity within the legal community. As a senior U.S. district court judge in South Carolina, Judge Perry has played a pivotal role in the integration of institutions and facilities in the state of South Carolina.

The Leadership Academy welcomed its third class, which quickly went to work and heard from several distinguished speakers, including South Carolina Supreme Court Chief Justice Jean Hoefer Toal. The Academy continues to be an acclaimed TIPS innovation, and members of this year's Academy come from three different continents.

The Young Lawyers Division, in conjunction with the Leadership Academy and the Young Lawyers' Task Force, hosted both formal and informal happy hours, and each was a great success. Those who did not stay up too late in the hospitality suite enjoyed participating in the Fun Run on Saturday morning.

The TIPS Law in Public Service Committee sponsored a public service project in conjunction with the Children's Center on Hilton Head Island. A dramatic reading of

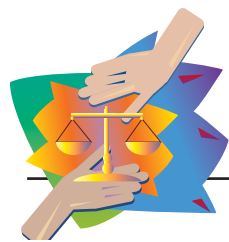
Goldilocks and the Three Bears, as well as a coloring activity, brightened the day of many children at the Children's Center, which assists children of low-income families in Hilton Head.

Saturday night's reception was hosted beachside by the Section, and many danced late into the night to live music on the Westin's oceanfront terrace. South Carolina attorney Kenneth M. Suggs received the Pursuit of Justice Award, which recognizes lawyers and judges who have shown outstanding merit and excelled at ensuring access to justice.

Even with all the sun and fun, much business was accomplished, and everyone is planning and working hard for the upcoming ABA Midyear Meeting in Boston. Mark your calendars for February 11–17, and bring your sweetheart with you to celebrate Valentine's Day in New England.

Many thanks to TIPS Chair Tim Bouch, the event leaders, and the TIPS staff who produced a wonderful meeting to begin the new fiscal year. See you soon in Beantown! ❖

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Pro Bono

Laura Farber

TIPS Lawyers Make Major Pro Bono Contributions

In Spring 2008, the TIPS Law and Public Service Committee created a survey and sent it to the entire TIPS membership. Sixty-six people responded and provided information confirming that our Section's members are amazing: They not only are busy practicing lawyers and active in bar associations but are also providing pro bono and reduced fee services, as well as working to improve the legal system to make this world a better place.

Ninety-four percent of the Section's members perform pro bono services anywhere from 10 to 500 hours a year, with an average of 60 hours per lawyer. TIPS members have offered assistance to abused and neglected children, HIV/AIDS victims, nonprofit boards, victims of elder abuse, low income tenants, active duty military personnel and their families, homeless youth, immigrants, victims of foreclosure schemes, domestic violence victims, death row inmates, and students with copyright claims. Other areas of services provided include family law, transactional work, legal clinics, veteran benefits, housing subsidy terminations, and guardian ad litem work representing children.

Fifty-seven percent of TIPS members have provided legal services at no fee or substantially reduced fees to individuals or groups to protect civil rights and civil liberties, and to charitable, religious, environmental, and educational causes where the payment of a standard legal fee would significantly deplete the economic resources of the individual or the entity. Those services include representing victims of fraud who are members of an African-American church, assisting a nonprofit to protect civil rights of the disabled,

representing children with diabetes, assisting animal rescue shelters, and assisting victims of warrantless searches and racial profiling.

Twenty-four percent of the Section's members have provided reduced fee legal services to people of limited means (individuals who do not qualify for legal aid, but cannot afford the full rates of lawyers). Our members have contributed between 15 and 1,000 hours per year to this group with an average of 45 hours per lawyer. These types of services include domestic relations cases; representation on employment-related administrative hearing claims; drafting wills, powers of attorney, and advanced health-care directives; estate planning; assisting clients with review of contracts; and assisting lower income families in presenting personal injury claims.

Seventy percent of TIPS members participate in activities to improve the law, the legal system, or the legal profession. The hours contributed range from five to 1,000 a year with an average of 50 hours per lawyer. These services include managing pro bono projects, legislative drafting, working on state access to justice programs, providing assistance with pro bono hotlines, drafting uniform laws, bar association activities, writing articles, volunteering with local teen courts, and providing testimony in state legislatures.

Most of our members find public service opportunities through bar associations, referrals, pro bono programs, law schools, legal services providers, and generally by word of mouth. Members choose to get involved with pro bono or public service projects based on personal interest, schedule, values, and client's income; whether the case or project is a "one time commitment;" the short-term and long-term effect of the commitment; the area of required legal expertise; and whether help can be provided without a steep learning curve.

We are so proud of the work our Section's members are doing and want to give the membership an opportunity to learn about the major impact that TIPS members have in their communities and around the world. We appreciate the TIPS members who took the time to complete the TIPS survey. Thank you for your contributions to the betterment of our society! ❖

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Interim Commentary: Another Tool for the Modern Trial

Christopher A. Kenney

Trial lawyers know the importance of engaging jurors as participants in a trial rather than relegating them to the role of passive observers. Unfortunately, in conventional jury trials counsel are permitted to address the jury only during opening statements and closing arguments. The bulk of the trial is spent examining witnesses, which traditionally casts jurors to the sidelines as unengaged spectators. With the advent of interim commentary, however, attorneys now are often permitted to directly address the jury at key points throughout the trial.

Interim commentary (also referred to as interim statements, interim arguments, or supplementary opening statements) is a hybrid of traditional opening statements and closing arguments that is being allowed by some more innovative judges in the interest of enhancing juror understanding of the facts and law before them. Interim commentary may be provided before or after testimony and usually comprises either preview or summation of testimony. In some variations of the technique, counsel also is provided with time at the beginning or end of a week of trial to summarize the past week's evidence or preview upcoming testimony. The length of time available for interim commentary during trial is commonly fixed by the judge before trial, often with the agreement of counsel or based on standard limits, for example, 15 minutes for each side. Sometimes available time is linked to a total "bank" of time allotted for opening statements and closing arguments.

Early Use of Interim Commentary

One of the first major trials to use interim commentary was the 62-day defamation trial of *Westmoreland v. CBS, Inc.*, 596 F. Supp. 1170 (S.D.N.Y. Sept. 24, 1984) (No. 82 CIV. 7913 (PNL)), in the mid-1980s. District Judge Pierre Leval of the Southern District of New York gave each counsel two hours for interim commentary that they could use at their discretion. Counsel for each side gave approximately 40 interim summations, each running between one and ten minutes, and averaging about two and a half minutes. Counsel used the commentary to explain the significance, strength, or weakness of evidence; to point out contradictions or inconsistencies in testimony; to introduce new themes; to respond to opposing arguments; and to challenge opposing counsel's ability to prove his contentions. In *Energy Transportation Systems, Inc. v. Burlington Northern*, No. 13-84-897-4 (E.D. Tex. 1989), a lengthy antitrust trial in the Eastern District of Texas taking place a few years later, Judge Robert M. Parker gave each side six hours for interim summaries. The plaintiff's attorney used the time to outline and preview the purposes of a particular witness's testimony and to show how the evidence presented fit with the judge's preliminary instructions. The defendant's attorney used the time to identify points that would be covered in cross-examination. Both sides used interim commentary to explain evidence that was unfavorable to their clients and, using daily transcripts, reminded jurors of the significance of testimony and highlighted discrepancies between prior and subsequent testimony.

Studies Confirm Benefits and Recommend Wider Use

The Jury Reform Commission of the Tennessee Bar Association recently studied the use of interim commentary. The study found the technique was infrequently used when allowed but that a majority of jurors found it helpful when used. Attorneys generally supported the practice. Consequently, Rule 44A of the

Tennessee Rules of Civil Procedure was added to provide trial judges with discretion to allow interim commentary during trial. Over the past decade, special commissions in other jurisdictions, including Massachusetts, Hawaii, and the Ninth Circuit, have similarly looked at the use of interim commentary as a potential reform to the jury system and endorsed it as an advocacy tool.

Most recently, the Seventh Circuit Bar Association American Jury Project Commission published the results of a study that tested the use of interim commentary as one of four innovative trial techniques determined to have potential benefits for jury trials. This study looked at 54 jury trials conducted between October 2005 and April 2008 and reviewed a survey of 434 jurors, 86 lawyers, and 22 federal trial

judges involved in the trials. Over 85 percent of the judges who allowed interim commentary during the study responded that they would permit its future use and believed that it increased juror understanding. Attorneys responded that interim commentary allowed them to better explain, emphasize, and organize the evidence they presented to the jury. Over 90 percent of the jurors thought interim commentary was helpful when used to introduce or summarize evidence. The commission suggested that attorneys have flexibility as to when and how to use interim commentary in order to receive the maximum benefits and advantages from the technique. For example, counsel should be allowed to comment on both direct and cross-examination, for either preview or summation purposes.

To curtail abuse while preserving the benefits of interim commentary, commissions studying its use have recommended that it be subjected to similar procedural safeguards as opening and closing statements. For example, advance notice of interim commentary should not be required, as doing so would dilute efficiency gains and fail to eliminate the inherent spontaneity involved with interim statements. The

Seventh Circuit commission also suggested that attorneys should not be allowed to respond directly to opposing counsel's commentary and instead should be limited to the traditional array of objections that apply in the context of opening statements and closing arguments. However, commissions in other jurisdictions have suggested that counsel be permitted to respond to commentary as a matter of right. The overall time limits set by the trial judge for each party's commentary is one of the strongest means of curbing abuse by forcing counsel to use the time sparingly to avoid prolonging the trial. A judge can weigh the expected length of the trial, the complexity of the case, and the nature of the evidence to be presented to determine appropriate limits.

Interim commentary can aid the jury by explaining and providing a context for testimony, making the jury aware of what the attorneys are trying to emphasize through the testimony presented, and letting the jury know what to expect next. It can also improve a juror's recollection of the evidence presented and keep jurors focused during trial. Interim commentary streamlines the presentation of evidence and increases the efficiency of trial by allowing counsel to organize, clarify, emphasize, contextualize, and explain the evidence they are presenting to the jury. It is especially useful in the context of long, multiweek trials, where the presentation of testimony is broken up over a number of days and interrupted by weekends. This can effectively reorient the jury before resuming testimony following a break in a trial. As more jurisdictions trend toward endorsing the use of interim commentary, trial lawyers must learn to take advantage of this technique effectively. It adds an important weapon to the trial advocate's arsenal. ♦

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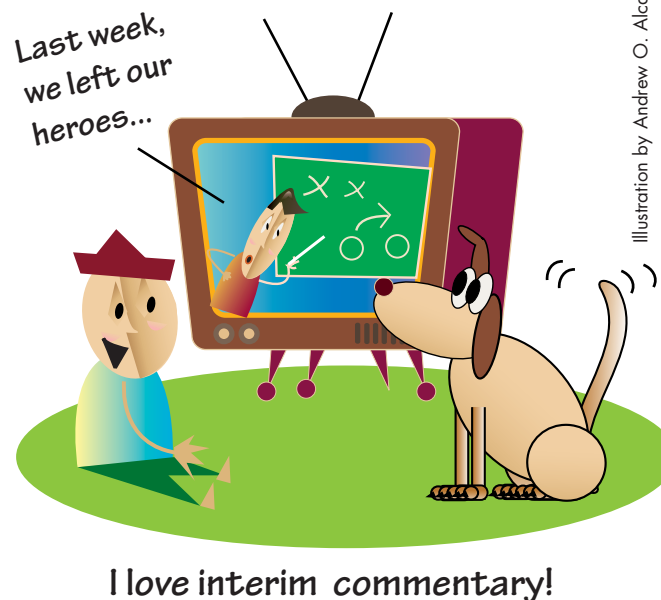


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Preparing Your Witness in the Electronic Age

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can play a role in the facts of his or her case. Or your witness may wrongly perceive what facts will be deemed relevant. Nonetheless, you can minimize surprises if you impress upon the witness the diligence that is likely to be marshaled to unearth information about him or her, the wealth of information that can be discovered, and how it may be used.

Mining the Internet

A Google search is always a good place to begin. The most obvious search term is your witness's name, coupled with his or her city and state to narrow the search. However, you may also get some hits if you include search terms as "lawsuit" or "verdict" to provide some background regarding the witness's litigation history. Including search terms that describe a witness's profession or a known interest may also yield results.

Internet social networking sites and personal blogs can be illuminating resources. Some firms have assistants and librarians regularly search such sites and blog postings as part of their duties. The amount of personal information posted on the Net is staggering to most lawyers, at least to those over 30. Posting personal information has become commonplace, and more than several anecdotes have been published describing witnesses (and jurors for that matter) who have posted information related to their litigation. Ask your witness if he or she has a MySpace or Facebook page. Ask if he or she has a blog. If so, review them diligently. Advise your witness that even if material has been removed, someone may have copied and forwarded it to friends, so that it may never really be "off" the Net. Make sure your witness understands that if he or she doesn't help you find any such information, the other side will find it. It is far better to find out what is out there than to have your witness blindsided on the stand.

Skating through cross-examination without a question about his or her blog or Net postings doesn't mean your witness is out of the woods. Although consulting

outside sources will be against the court's instructions, jurors oftentimes take it upon themselves to see what they can find out about a witness. If your opposing counsel did not find information, your witness should understand that a juror still might do so. The juror may use that knowledge privately in his or her decision making. Indeed, in some jurisdictions, courts allow jurors to pose questions to witnesses. If the witness has a Web site, tell him or her to expect questions related to those postings.

Does your corporate representative witness know what is on its company Web site? Has he or she explored how the company's products or services are advertised online? Online promotional materials commonly vary from the hard copy. If your witness knows what promotional claims are made, he or she will be better positioned to investigate the basis for those claims and provide the testimony necessary to support those statements if opposing counsel attempts to attack them.

For experts, in addition to testifying histories and articles authored, credentialing information—or lack thereof—can often be found electronically through professional certification Web sites. Nothing is more disheartening than discovering that an expert in whom you have invested much time and energy has let their board certifications lapse, especially if they have represented otherwise. Check out your witness's CV, and use the online certification Web sites to verify well before your expert takes the stand.

Numerous more specific Web sites, including state and county court sites, state department of public safety sites, Lexis-Nexis, and Westlaw provide access to public records. Even if your witness tells you nothing is floating around cyberspace, "trust but verify." It is worth your time to check the sources that might exist, just to make sure.

E-mail, Metadata, and Beyond

While most of us now know that "deleting" your e-mail does not necessarily delete a file altogether, witnesses may not be as knowledgeable. Conversely, they may know e-mails can be found

but think that opposing counsel will not expend the effort to retrieve that information. Enlightening your witnesses to the realities of electronic discovery—and a party's obligation to produce documents, even if in electronic form—may cause them to be more candid. It may also lead them to word their e-mails more appropriately in the future. Question your witness about e-mail communications. Make sure you and the witness are aware of any applicable document retention policies and practices. Encourage them to search their memories, and of course, work with you to collect any such documents you are obligated to produce during discovery. Pretending e-mails do not exist will not make them go away. Knowing what is there will help your witness be prepared to answer any questions.

If your witness transmitted documents electronically to the opposing party, did the documents contain metadata that may indicate changes in position and thinking? If you have a document intensive case, is that information that you need to review? Perhaps. But it is likely worth your time to find out if the parties ever communicated in this way. Opposing counsel may have questions related to the dealings of the parties that are not readily apparent in the final correspondence. Ask the questions. Ascertain whether it is worth the time and expense to explore further.

The amount of information available through electronic media gets larger every day. Explore with your witnesses, and without them, what may be out there. Then use that information to counsel your witnesses before they raise their right hands to testify. Minimizing surprises will make your witnesses more comfortable and hopefully ensure that they are able to more calmly—and therefore more persuasively—tell their side of the story. ♦

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Legislative Update

Hervey P. Levin

Change Has Come . . .

Although conventional wisdom believes Barak Obama and the Democratic majorities in Congress will work smoothly together under the impetus of the challenges we face, there is a reason for the separation of powers between the executive and legislative branches, as well as between the House of Representatives and the Senate. Precedent exists for a new Democrat president squandering his goodwill and influence in Congress—one remembers Jimmy Carter—and there is always the reluctance of members of the House to utter the word “Senate.” They always refer to the “other house.” With that in mind, and assuming the best, what has change wrought?

Filibusters

Because Senate filibusters could not be quashed and presidential vetoes could not be overridden without Republican votes, Democrats were frustrated despite their control of Congress since 2006. However, the extraordinary turnout in the primaries was a harbinger of a Democrat groundswell in November that enlarged the Democrat majorities in Congress and installed a Democrat president. Thus, a key to moving legislation through the newly formed 111th Congress will be the ability of Senate Democrats to invoke cloture and end filibusters. To assist an understanding of cloture, the essence of a cloture motion and the ways it changes debate in the Senate is summarized below.

To “invoke cloture,” or end a filibuster:

- At least 16 senators sign a petition, read by the clerk.
- The petition is ignored for one full day, during which the Senate is sitting.
- On the second calendar day that the Senate is sitting, after one hour a “quorum call” summons the senators to the Senate.
- The president of the Senate, the president pro tempore, presents the petition.
- The Senate votes. Three-fifths of the whole number of senators (60, assuming no vacancies) is the required majority. If there are vacancies, the motion requires three-fifths of the whole number of senators in office. *However, when cloture is invoked on a question of changing the rules of the Senate, two-thirds of the senators voting—not necessarily two-thirds of all senators—is the requisite majority.*

If cloture is invoked, the following restrictions apply:

- There can be a maximum of 30 hours of debate, with senators limited to one hour.
- No amendments can be offered unless they were filed on the day between the presentation of the petition and the actual cloture vote.
- All amendments must be relevant to the debate.
- Certain debates on procedure are not permissible.
- The presiding officer gains additional power in controlling the debate.
- No other matters may be considered until the question upon which cloture was invoked is disposed of.

See Cloture, <http://en.wikipedia.org/wiki/Cloture>.

A Message to the POTUS (Elect)

The cover of a message to President-Elect Barak Obama from the ABA reads: “A justice system that allows citizens to resolve disputes peacefully and protects individual rights and property is a pillar of America’s success as a nation. This requires a justice system that vindicates the rights and claims of all Americans—rich and poor, corporations and individuals, and advocates of every political point of view.” Addressing tort law, the message said: “With few exceptions, the ABA has long and consistently opposed the enactment of federal legislation that would attempt to create a national body of tort law that would apply in the justice systems of the 50 states and territories. The courts and legislatures of the states and territories are the appropriate bodies to modify tort laws.”

Catastrophic Risk and Flood Insurance

The Disaster Insurance Coverage Task Force, created by TIPS following the post-Katrina emergence of coverage litigation and the withdrawal of many carriers from coastal areas, presented the TIPS Council with seven comprehensive and integrated recommen-

dations during the fall meeting. The Council approved the recommendations for presentation to the House of Delegates during the ABA Midyear Meeting in February.

Gazing into My Crystal Ball

Conventional wisdom presupposes that passing legislation in election years is difficult, especially presidential election years. However, nothing moves legislation like a crisis, and the combination of a subprime mortgage crisis and the credit default swap crisis created the worst financial predicament since the Great Depression, helping to propel Barak Obama into the White House and to change the fundamental paradigm of federal legislation, with enlarged Democratic majorities. (Not to mention the future of the U.S. Supreme Court.)

The impetus of the national and global economic crises also compelled the adoption of the “bailout bill,” HR 1424, as stock markets plummeted around the world and wealth disappeared overnight. The law created a vast new set of powers for the federal government, caused the federal government to invest in various sectors of the banking and insurance industry, and left the question of reregulation/deregulation hanging for the new administration. Will the disappearance of the icons of Wall Street hasten or impede a transfer of regulation of the insurance industry to the federal government? It can and will be argued strenuously both ways. What may be most compelling is the prescient plea to Congress of Eric Dinallo, New York Superintendent of Insurance, on behalf of the National Association of Insurance Commissioners on April 16, 2008, when he succinctly invoked the “R” and “O” words: “We would reject those reforms that are merely a veiled attempt at undermining state authority and substituting self-regulation or no regulation for effective oversight.” See http://www.house.gov/apps/list/hearing/financialsvcs_dem/dinallo041608.pdf.

While the effort to enact tort reform in almost every piece of legislation and regulation may abate for at least two years, there will continue to be full employment for the lobbyists of the insurance industry as efforts to “restructure” the financial services markets and the economy dominate the agenda. There will also be a compelling effort to enact health care reform and a Patient’s Bill of Rights to cap the legacy of Sen. Ted Kennedy. ❖

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Federal Preemption of State Tort Laws by Regulation

Robert Peck

In November 3, 2008, pharmaceutical giant Wyeth told the U.S. Supreme Court that it was impossible for it to comply with Food and Drug Administration (FDA) approvals and regulations while providing a strengthened warning of risks associated with its anti-nausea drug, Phenergen. The issue arose in *Wyeth v. Levine*, No. 06-1249, which was widely expected to provide a landmark ruling on the issue of preemption of state tort laws by federal regulations. The case originated when Diana Levine, a Vermont guitarist, went to her physician complaining of a migraine headache. Phenergen is often prescribed in precisely those circumstances. The doctor administered it by a delivery technique known as an “IV push.” Wyeth knew that the IV push technique created a risk of inadvertent arterial injection resulting in gangrene. Use of an “IV drip,” on the other hand, carried no risk of gangrene. Levine suffered an arterial injection, developed gangrene, and was forced to undergo amputation of one of her arms. Even though the FDA had approved Wyeth’s labeling for Phenergen that warned against use of the IV push without prohibiting it, a Vermont jury found Wyeth liable and awarded Levine more than \$6 million in damages. The Vermont Supreme Court affirmed.

The U.S. Supreme Court justices demonstrated a remarkable degree of consensus during oral argument. They appeared to be in general agreement that preemption would not lie and void the jury’s verdict if Wyeth had either withheld information on the degree of risk or failed to advise the FDA on the need to strengthen the warning on the basis of subsequent clinical studies. On the other hand, if the FDA had approved the label with full knowledge of the degree of risk based on the most up-to-date studies available, the lawsuit would be preempted. One issue upon which the justices seemed to be divided was the question of who bore the burden of proof on the issue of whether Wyeth had kept the FDA fully informed. A decision is expected in the case before the term ends in June 2009.

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Courtroom Technology

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prepare themselves intellectually but also technologically. As technology pervades our lives outside of the courtroom, jurors will come to expect the same inside the courtroom. Society's expectations of better and faster do not end at the courthouse steps. An attorney who does not take full advantage of all that courtrooms have to offer, when pitted against an opponent who does, can be at a disadvantage—both in the eyes of jurors and in clarity of the courtroom presentation. Keeping pace with technological innovations is also important because ever-improving computer programs and equipment enable issues to be presented much more clearly than before.

Using Technology in the Courtroom

A wide variety of trial presentation software programs are available to easily transform mundane witness testimony into a multimedia presentation. Gone are the days of impeaching witnesses with paper transcripts of former testimony. A much more powerful presentation can be made when the trial attorney shows a video of the deposition testimony on a flat panel screen in the courtroom, with the transcript scrolling along the bottom, or side by side on a split screen, with the video on one side and transcript of the testimony on the other. As a witness testifies about a document, various trial support applications allow that document to be presented onscreen. The attorney can highlight and enlarge portions of the document as the witness is speaking. Of course, having courtrooms that are equipped for these features is key. As new courthouses are constructed, the technology level advances.

Many of us are accustomed to using laptops in courtrooms. The presence of computers allows for instant legal research and finding documents. But this is only the tip of the iceberg. Perhaps one of the greatest examples of how advanced courtrooms have become is in the New York Supreme Court, which operates several technologically advanced courtrooms, which they refer to as Courtroom 2000. These courtrooms feature real-time court reporting facilities and real-time streaming, which allow simultaneous transcription of testimony. This electronic transcription is instantaneously delivered not only to counsel table but also to a secure server to be transmitted to other attorneys, paralegals, support staff, experts, and others located outside the courtroom in the attorney's office, or even out of state. This capability is invaluable to facilitate the preparation of cross-examination and later case presentation. In addition to delivering a transcription of the testimony, Courtroom 2000 can also provide video streaming of a witness as he or she testifies, along with the evidence that is being shown. Evidence may be presented to the judge and jury either as digitized on a CD-ROM or by way of a wireless communicator. An "interactive whiteboard" and touch screen monitor at the witness stand can be used by the examining attorney and witness, respectively, to highlight or mark, with a John Madden-style electronic light pen, pieces of evidence to assist their explanations to the jury. Flat screen monitors are strategically placed around the courtroom so the judge, the jurors, the attorneys, and the public can easily view the proceedings.

Similarly, the newly opened federal courthouse in Miami, Florida, is fully equipped with state-of-the-art technology. First, an electronic filing system has replaced paper filing. A typical courtroom in the building houses two 42-inch plasma monitors, multiple 17-inch monitors in the jury box, a 96-inch projection screen, a Crestron central control system with touch screen technology, DVD, CD, cassette, and VCR players, an ELMO visual presenter, and video/teleconference capabilities.

Although the attorneys primarily have control over these electronic systems, the judge has at least two very important mechanisms. During sidebar conferences, the judge can flip a switch to introduce "white noise" through the speakers to cancel out the voices, while the court reporter listens via headphones connected to the microphones. Also, the judge has the capability to override all video screens and monitors with a "kill switch" that will immediately turn all screens dark. As David

Cohen, senior law clerk to Judge Kathleen O'Malley in the Northern District of Ohio quipped, "If the juror's screens go dark without your foreknowledge, you should hope the problem is a power failure and not improper presentation of objectionable evidence."

These technological advancements not only assist the trial lawyer in case presentation, they also can facilitate meaningful communication for persons with hearing impairments. The real-time streaming of testimony and evidence, as well as infrared headset amplifiers for jurors, can be of great benefit for those with diminished hearing.

The Need to Understand the New Technology

Because of these courtroom enhancements, lawyers need to have more than a rudimentary understanding of technology. Some courthouses around the country offer courtroom orientation and training to prepare attorneys to use the equipment. This training is essential for the trial lawyer who will be presenting a case in an advanced courtroom.

But do all of these innovations really make an attorney's job easier? On balance, yes. By using all that technology has to offer, both pretrial and trial work is certainly more organized. Trial preparation and presentation is more efficient if one has been properly trained. Complex litigation and document-intensive cases especially can benefit from the electronic courtroom, as can product liability personal injury cases that use video presentations and animations to explain engineering principles. Less complex cases, however, could also benefit from the monitors and real-time streaming.

Some may argue that lawyers have made their mark without visual or audio aids for centuries, and that an attorney's quick intellect and keen mind make a great advocate. Nonetheless, the first technological innovation lawyers employed likely was a chalkboard or an easel with a paper pad. From that point forward, the ever-flowing current of technological innovation has flooded every aspect of litigation, and indeed, society. Today's trial lawyer cannot afford to be a Luddite. We must take advantage of all that courtrooms and software companies have to offer to keep the playing field level and enhance all aspects of our trial and litigation practices. ♦

Gregory M. Cesarano is a shareholder of Carlton Fields, P.A., in Miami, Florida, who focuses his practice on trials of civil lawsuits, representing product manufacturers, insurers, and other corporate defendants. He is chair-elect of the TIPS Trial Techniques Committee. Cesarano gratefully acknowledges the assistance of attorney Nicole Neustein in preparing this article. He can be reached at gcesarano@carltonfields.com.



Mark Your Calendar

Insurance Coverage Litigation Committee Meeting

February 26–28, 2009, Los Angeles, CA
(312-988-5597)

Transportation Megaconference IX

March 5–6, 2009, New Orleans, LA
(312-988-5597)

TIPS National Trial Academy

March 21–25, 2009, Reno, NV
(312-988-5708)

Emerging Issues Motor Vehicle Litigation

April 2–3, 2009, Phoenix, AZ
(312-988-5708)

Toxic Torts Committee Midyear Meeting

April 2–4, 2009, Phoenix, AZ
(312-988-5597)

TIPS Section Spring Meeting

April 23–26, 2009, Colorado Springs, CO
(312-988-5672)



“When I Was a New Lawyer”

**Barbara O’Donnell
Robinson & Cole LLP
Boston, Massachusetts**

What is your background, and what inspired you to become a lawyer?

I grew up in Northampton, Massachusetts, as the oldest of four children. My dad’s law office was within walking distance of our home. By stopping by and later working for him, I came to know many of the attorneys in our town. Also, the fathers of two of my best friends were an attorney and a judge, so the legal profession was familiar to me.

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

I attended Boston College Law School and, upon graduation, was torn between returning to my small town in western Massachusetts or joining a firm in Boston. My dilemma was resolved when I received an offer to join Sherin and Lodgen, a Boston firm that was small enough to offer great collegiality and early opportunities to gain litigation experience.

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

The firm I joined gave new associates opportunities to handle litigation matters from inception through trial, so early in my career I made the transition from handling specific assignments to relying on my own judgment about matters such as witness credibility and claim merits. Provided they have done thorough and conscientious research, associates need to trust their own instincts and be prepared to challenge the partner on a case (who likely is not as familiar with the facts) or to counsel the client against pursuing a course of action that may result in overly contentious or prolonged litigation.

I recall a dispute between owners of a small business, in which the client was motivated in part by his animosity toward the defendants, who he claimed attempted to force him out of the business. This client traveled from Australia for the defendants’ depositions, intent on contributing to the sully of their reputations. I had to strike a balance between developing relevant evidence and curtailing my client’s desire to use the depositions to settle old grievances.

Whom do you most admire?

Every day, people overcome physical disabilities and manage to enjoy active personal and professional lives. When I’m tempted to complain about the hassles of my commute or other inconveniences, I try to keep in mind the perseverance and determination others draw upon in overcoming daunting physical limitations.

What is your greatest source of professional pride?

Knowing that I have helped develop a great team of coverage attorneys at my firm.

What got you started with ABA involvement?

A few years after I started concentrating on insurance coverage disputes, the head of our litigation practice encouraged me to become involved in the ABA. Upon learning that TIPS and the Section of Litigation both had an insurance coverage litigation committee, I decided to join TIPS because I suspected that its newer committee might offer greater opportunities for active involvement. Shortly after I contacted Buck Bragg, he gave me a start at a breakout session (where I couldn’t cause much harm). The next

year, Sue Popik (then committee chair) gave me the opportunity to help organize the committee’s midyear meeting. That opened doors for me to chair the ICLC committee in 1997. My responsibilities as committee chair-elect and chair were time consuming, but the roles proved their weight in gold by allowing me to forge strong friendships with TIPS colleagues from around the country as I continued in a number of TIPS leadership positions.

What was the worst professional advice you ever received?

The assumption early in my career, which I happily discarded before long, that I needed to be a tough litigator rather than remain true to myself as someone who tries to arrive at a resolution through listening to and having a dialogue with my adversary.

What was the best professional advice you ever received?

To get involved in ABA/TIPS. My TIPS friendships and opportunities to join TIPS members at great meeting settings around the country have provided valued respites from professional demands, coupled with the ability to gain insights on professional challenges from TIPS colleagues around the country.

What personality trait has served you best over the years?

A love of laughter, resilience, and a high level of energy.

What challenges you the most?

Trying to maintain focus during the barrage of a steady stream of e-mails, coupled with interruptions—some necessary and some not—by workplace colleagues.

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

Excessive ego.

What is your favorite type of legal work?

I truly am a “coverage geek” because I continue to enjoy the challenge of analyzing the application of insurance policy provisions to myriad underlying claim scenarios, accounting for jurisdictional differences.

What are your future ambitions?

Friends sometimes comment that I should teach. As one who could have been a perpetual student, it is nice to imagine a move to academia as an instructor.

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

Work to ensure that firm leaders do not allow the focus on productivity and revenues to divert attention from the importance of encouraging young attorneys to become actively involved in community and professional organizations. TIPS has a strong history of welcoming new members. To attract them in the first place, the Section should continue spreading the word about TIPS to young lawyers through outreach to law schools, state and local bars, and existing initiatives such as the YLD liaison relationship and the Leadership Academy. ❖

Barbara O’Donnell’s Advice for New Lawyers:

- Don’t allow the time demands of the legal profession to cause you to give up interests that matter to you or to lose sight of the sustaining power of friendships.
- Learn from more experienced attorneys, but do not assume that their judgment is better than your own.
- Seek out opportunities early and throughout your career to tackle a range of legal disciplines rather than succumbing to the pressure to specialize too soon. ❖



Barbara O’Donnell then and now.



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TECH Tips

Lauren Godfrey

Ten Tips for E-Filing Court Documents

As most practitioners know, e-filing of court documents in federal district courts is here to stay. In some jurisdictions, state and appellate courts also have instituted e-filing procedures. For some practitioners, e-filing makes life easier, providing instant online access to court documents and the ability to save time and money on paper and service fees. For others, e-filing presents new challenges. Here are ten tips that any practitioner should keep in mind when e-filing documents with a court:

- Know the latest rules for e-filing in your jurisdiction. In many jurisdictions, e-filing policies and procedures are in flux as courts continue to work out wrinkles and challenges to their e-filing systems.
- Sign up for a username and password before the time when you will actually need to file. Obtaining an e-filer account could take hours or a day to receive.
- Know the file size limits in your jurisdiction for converting documents to portable document format (known as PDF and usually associated with Adobe Acrobat). Courts have explicit file size limitations, and exceeding those limits could result in the rejection of your filing.
- When converting Word or WordPerfect documents to PDF, if possible, use the “print to file” method instead of printing the document and then scanning it. Using print to file results in a smaller file size. If you must scan your document, make sure the scanner is set to no greater than 200 to 300 dpi and black and white, not grayscale or color.
- If you must provide a signature on your documents consider creating a small .jpeg file of your signature, which can be inserted into the signature line of your document.

• When using an electronic signature, the username and password of the attorney signing into the e-filing system must be that of the attorney electronically signing the document. The e-signature is authenticated when the attorney signs in with her username and password.

• When filing documents, be sure to provide a detailed description of the document so that it can be easily identified on the case docket sheet. For example, do not use a generic name like “Letter to the Court.”

• After a document has been filed, the filer should receive a confirmation of filing. In federal district court, this is called a notice of electronic filing or NEF. Print out and attach the confirmation or NEF to file copies and courtesy copies sent to the court or other attorneys.

• E-filing permits users to file documents up to midnight to meet court deadlines on any given day. However, you should get started well before midnight to ensure that you timely complete the transaction and your NEF reflects the appropriate filing date. If the intent is to file a document after midnight, then start the whole process after midnight so that the file date and transaction date reflect an after midnight filing date.

• Be aware of which types of documents cannot be e-filed in your jurisdiction. For example, it may not be appropriate to e-file initial pleadings like complaints or removal papers. Additionally, documents that must be filed under seal or that contain privacy or confidential information should not be e-filed or may need to be redacted before e-filing.

Knowing how to e-file court documents today is essential for every practitioner. Once you get accustomed to the system, you will realize that e-filing offers time and cost savings benefits to you and your clients. ❖

Lauren Godfrey is an associate in the firm of Drinker Biddle & Reath LLP in Florham Park, New Jersey. She is the chair of the TIPS Technology Committee and can be reached at lauren.godfrey@dbr.com.

Colorado Springs is a western gem, a bustling city disguised as a small mountain town, filled with little surprises at every turn. TIPS's spring meeting will be held at the Broadmoor, a five-star, century-old, European-style grand resort, 6,200 feet above sea level, nestled in the pines at the base of Cheyenne Mountain. There are many reasons never to leave the Broadmoor's lush 3,000-acre grounds: the lake and gardens just outside your room, the three championship golf courses, the spa, the movie theatre, the 18 restaurants and bars on the grounds. But there are even more reasons to explore.

Pikes Peak, at 14,110 feet, towers over Colorado Springs. April is a little early to climb it, but you can take an unforgettable cog railway journey to the summit, with its 100-mile views of the mountains and plains and its rocky alpine moonscape. This is where Katharine Lee Bates was inspired to write “America the Beautiful” in 1893. Venturing 7,000 feet below the summit, you'll find the Garden of the Gods, a magnificent park featuring huge red sandstone monoliths set among piñon pines. You can also explore the waterfalls and pine forests of North Cheyenne Canon Park, just minutes from the Broadmoor.

A number of historic towns are within a short drive. Manitou Springs, a quaint 1890's Victorian village, is a favorite shopping destination. Indulge your low-stakes gambling urge in Cripple Creek, a well-preserved old gold-mining town in the mountains. The drive there on Old Stage Road makes for an exciting, if bumpy, afternoon. You can also drive (via a more civilized highway) to the Royal Gorge, where the world's highest suspension bridge hangs 1,053 precarious feet over the Arkansas River.

Colorado Springs features a number of other world-class attractions, like the United States Air Force Academy—one of the most unique and scenic college campuses in the

Michael Beaver

“My Colorado Springs”



TIPS Spring Meeting
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country—and the U.S. Olympic Training Center, where you might see Olympic hopefuls in mid-workout. The ProRodeo Hall of Fame and Museum of the American Cowboy attracts lovers of this unique western tradition. The Colorado Springs Fine Arts Center hosts a wonderful collection of western, Native American, and Latin American art.

Dining options abound. The Blue Star features Colorado-oriented modern fare. The Famous and Mackenzie's Chop House are steakhouses in nearby downtown Colorado Springs. Vegetarian food rules at Adams Mountain Cafe. For a special Colorado experience, sample authentic game at the Craftwood Inn, or take in the corny but hilarious western stage show at the Flying W Ranch.

At 6,000 feet, springtime weather can be unpredictable. Look forward to chilly mornings followed by mild, warm and sunny days, but be prepared for some late season cold snaps, too. The old west and the new west meet in Colorado Springs. Come and explore. ❖