

# TORT TRIAL AND INSURANCE PRACTICE

AMERICAN BAR ASSOCIATION YOUNG LAWYERS DIVISION



## Committee Newsletter | Winter 2016

### TABLE OF CONTENTS

---

<b>The Importance of Physical Evidence in Tort Claims.....</b>	<b>2</b>
<i>By: Domenick G. Lazzara</i>	
The importance of identifying, preserving, and inspecting physical evidence in tort claims.	
<b>The Use of Electronic Media in Opening Statements.....</b>	<b>4</b>
<i>By: L. Robert Shreve</i>	
Providing an overview of electronic mediums available for use in opening statements.	
<b>News and Announcements.....</b>	<b>7</b>
Winter 2015 News and Announcements from the ABA YLD TIPS Division.	
<b>2016 ABA Midyear Meeting.....</b>	<b>7</b>
Join us this year in San Diego, California for the 2016 ABA Midyear Meeting.	
<b>2016 YLD Spring Conference.....</b>	<b>7</b>
Join us this year for the 2016 YLD Spring Conference in St. Louis, Missouri.	
<b>Update from the Social Media Team.....</b>	<b>7</b>
The Social Media Team is pleased to announce the new Social Media Policy.	
<b>Update from the Disaster Legal Services Team.....</b>	<b>7</b>
The DLS team is currently implementing DLS in four new states.	
<b>Update from the Disaster Legal Services Team.....</b>	<b>8</b>
The National Conferences Team is putting together a social media photo scavenger hunt.	

## ARTICLES

### THE IMPORTANCE OF PHYSICAL EVIDENCE IN TORT CLAIMS

By: Domenick G. Lazzara\*

#### Introduction

Last year, I found myself three months out from trial in a general negligence maritime claim. The firm I was with at the time represented two clients against a large and well known cruise line for injuries sustained when the grab bar in their handicap accessible stateroom came detached from the wall. This sudden and unexpected event brought about permanent injuries and a lawsuit approximately one year after the incident. The crux of our lawsuit was the cruise line's negligence in failing to maintain grab bars ship wide, and especially, in its handicap accessible staterooms.

Three months from trial – while discussing the case with my managing partner – a lightbulb went off over both of our heads. We did not possess the grab bar. While we had requested hundreds of documents, a myriad of depositions, and countless interrogatories and admissions, we had not requested the *actual* grab bar. Luckily for us, we were only three months out from trial and still within the discovery cut-off. The next three months would be a race to compel the grab bar's production, track down an "exemplar" bar from manufactures in California and Italy, and deliver the grab bars to our expert for analysis and testing. It was a stressful process; one which would have been a lot less stressful had the grab bar been requested when the lawsuit was filed. Consequently, I learned a valuable lesson: the importance of physical evidence in tort claims.

#### Step One: Identify the Physical Evidence Early On

The first step in assessing the importance of physical evidence in tort claims is identifying what that physical evidence is. Examples of physical evidence include clothing and footwear, the (defective) product that may have caused the injury, and the automobile in an automobile accident. In my case, this should have been the easy part: a shower grab bar. However, as the case unfolded and trial neared, we went down a long and intricate rabbit hole to identify the grab bar and its manufacturer. Identifying the grab bar took us to corporate representative depositions for the cruise line and the alleged manufacturer in California, international phone calls to Italy, hearings in Brevard County, and countless hours of internet research before we finally identified the correct grab bar and its manufacturer. I use this to illustrate why it is important to identify the physical evidence early in your case.

Identifying the physical evidence begins with client intake. Take the time to ask your client what caused his or her injury, and just as important, what *could* have caused or contributed to his or her injury, including what he or she was wearing and carrying at the time of the incident. In a premise liability action – for example – where a person slips and falls on a foreign substance left

on the ground, the banana peel is just as important as the shoes your client was wearing at the time of the incident.

### **Step Two: Preserve the Physical Evidence**

Spoliation of evidence is a powerful weapon in any tort claim. American Bar Association Rule 3.4 states:

A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act...

American Bar Association, Center for Professional Responsibility. (2016). Model Rules of Professional Conduct 3.4; see also 18 U.S.C. §1519.

In the case of physical evidence, spoliation occurs when that evidence is required for discovery but is subsequently destroyed or altered significantly. Depending on your jurisdiction, you may be entitled to an inference against the offending party. C.f. Fed.R.Civ.P. 37 (Failure to preserve electronically stored information may lead to, *inter alia*, the presumption that the lost information was unfavorable to the party). In Florida for example, "the spoliation can actually benefit that party through the imposition of sanctions, evidentiary presumptions, or even a separate cause of action for spoliation of evidence against the spoliator." *Spoliated Evidence: Better than the Real Thing?* James T. Sparkman and John W. Reis, The Fla. Bar Journal, July/August, 1997.

In order to preserve your client's spoliation claim you should first put the parties on notice by requesting they preserve the physical evidence. It is a two-way street. Either party can put the other party on notice by sending an evidence preservation letter after the claim is initiated; the sooner, the better. At the same time, once you have met with the client and identified the physical evidence, you should immediately take the requisite steps to identify that evidence and preserve it from day one.

### **Step Three: Request and Inspect the Physical Evidence**

Once you have identified the physical evidence and taken the necessary steps to ensure the evidence is preserved, you should arrange for an inspection of the physical evidence. Usually, this requires placing the evidence in the hands of your expert. This can be arranged with opposing counsel informally or formally. Giving your expert time to inspect the physical evidence – and if necessary, prepare a report about your expert's inspection – will give you one more weapon to use during settlement negotiations, and eventually, trial. Lastly, taking these steps early on will ensure that the *actual* evidence will be available at trial.

## Conclusion

Failing to timely evaluate the import of physical evidence in tort claims could prove detrimental to your client's case. As such, physical evidence should be identified at the outset of any tort claim. After identification, steps should be taken to preserve and request that physical evidence for inspection and presentation at trial. The failure to preserve such evidence may lead to an adverse inference; yet another reason to appreciate physical evidence from the outset of any tort claim.

*\*Domenick is a trial attorney with the Law Offices of H.S. Stephen Lee, PA in Tampa, Florida. His practice concentrates on civil litigation, specifically personal injury. One of his proudest accomplishments has been the proliferation of his legal blog, The Portrait of the Lawyer as a Young Man. Read more at: <https://domlawfl.wordpress.com/>.*

## THE USE OF ELECTRONIC MEDIA IN OPENING STATEMENTS

By: L. Robert Shreve\*

*We are moving from a world where computing power was scarce to a place where it now is almost limitless, and where the true scarce commodity is increasingly human attention.*

- Satya Nadella<sup>i</sup>

In the generations of our parents and grandparents, television viewers watched intently as the likes of Perry Mason and Matlock stood in courtrooms with the undivided attention of jurors. Indeed, this depiction of the suited advocate speaking to a reverent body of his client's peers—with each of them hanging on his every word—has long pervaded our culture, appearing in books, television, and film.

Whether once accurate or not, this portrayal of trial lawyers and jurors is now incompatible with the realities of today's courtroom presentations. Indeed, the somewhat disturbing truth in our modern society is that our individual attention spans are so short, that maintaining the constant focus of all jurors during even a brief oral presentation is nearly impossible. In the spring of 2015, Microsoft Canada released a report that has noteworthy implications for those whose careers depend on the complete attention of a dozen persons sitting in a box.<sup>ii</sup> Unsurprisingly, the study found that “[o]verall, digital lifestyles deplete the ability to remain focused on a single task, particularly in non-digital environments...”<sup>iii</sup>

The decrease in our ability to focus is hardly a novel revelation. However the Microsoft study found that people now generally lose concentration after a mere eight seconds, rendering our attention span slightly less than that of a goldfish (nine seconds).<sup>iv</sup> That said, the report was not

without hope for those of us seeking to persuade the decision makers, noting that “[c]onnected consumers are becoming better at doing more with less via shorter bursts of high attention and more efficient encoding to memory.”<sup>v</sup> While the study of Canadian residents was produced for the marketing field, the lessons learned are instructive for trial attorneys who are equally dependent on the powers of persuasion.

As trial attorneys, we must recognize the changing needs of jurors who simply do not have the requisite attention span to absorb and process information presented in the traditional oratory format used by our predecessors. We must harness technology and electronic media such that jurors will process and comprehend the facts supporting our client’s position in the same manner in which they obtain and process information in their daily lives. Simply put, we have a responsibility to our clients to evolve with changing times.

While multimedia is a useful tool throughout trial, below are some examples of using multimedia in opening statements. You should be entirely comfortable with the below techniques before using them to aid in the presentation of your case to the jury. Presenting an opening statement using digital media at the expense of cohesion and accessibility is not advised. As with all technology you intend to use at trial, it is important to contact the court well in advance to determine their technological capabilities, so as to ensure that you have the proper hardware and software on the date of trial.

**(1) Powerpoint and other presentation software.** The use of Powerpoint and similar programs is now commonplace in a variety of fields. Utilizing slides to highlight major points in your opening statement can serve as a means of introducing themes within the case to the jury while aiding the attorney in his or her presentation of a clear and cohesive storyline. Be careful to avoid lengthy recitations of facts and arguments. Reading Powerpoint slides should not be a chore, but rather a reinforcement of important points spoken to the jury.

**(2) Video testimony.** Playing videotaped deposition testimony is standard practice for many trials, particularly when involving witnesses who cannot be present at court because they reside outside of the jurisdiction, are deceased, or for a myriad of other reasons. However, playing short clips of video deposition testimony in opening statements can also prove an effective technique for communicating the themes of a case. Such clips can provide an important “first impression” for witnesses who will later be heard in the course of the trial proceedings. Some programs even allow for the deposition text to be presented in combination with the video to further emphasize important testimony. The practitioner should recognize that opposing counsel may object to the use of video clips in opening statements, and should be prepared for such arguments in advance of the opening statement.<sup>vi</sup>

**(3) Audio and Video Recordings.** With the advent of smartphones and other forms of technology, it seems that the microphone and camera are always recording. Moreover, many

government agencies have a regular practice of recording communications such as 911 calls. Oftentimes there is no better way to present the dialogue of an important conversation than to let the jury hear the conversation itself. For example, the author defended a wrongful death case in which the entire trial hinged on the testimony of one witness regarding her view of a fatal traffic accident. It quickly became evident to defense counsel that the best piece of evidence in the case was a recording of a 911 call in which the star witness recounted to the operator exactly what she had just witnessed moments ago. The audio recording was played in opening statements and multiple times throughout the trial, though it appeared many jurors had arrived at a decision upon first hearing the recording.

**(4) Electronic Presentation of Documents and Photographs.** If there is a particular photograph or document that is critical to your case, it may be best to display this item to the jury in your opening statement. There are a variety of programs that allow you to present these items in such a way that highlighting text, zooming in on certain portions of documents and photographs, and providing brief instructive comments are simple. This can be far more effective than simply holding up a document, or even blowing up a document for placement on an easel. The practitioner should be sure that any items presented to the jury will later be admitted as evidence in the trial.

The above are just a few of the available electronic mediums for use in opening statements, and this article is only meant to provide a brief overview of some of these options. As we become increasingly dependent on the use of technology for accessing information, attorneys must evolve in their presentation methods to ensure that their client's case is effectively argued and understood by the jury at trial.

*\*The author is an associate practicing litigation at the firm of Luther, Collier, Hodges & Cash, LLP in Mobile, Alabama.*

<sup>1</sup> Consumer Insights, Microsoft Canada, *Attention Spans*, Spring 2015, at 4, available at <http://advertising.microsoft.com/en/cl/31966/how-does-digital-affect-canadian-attention-spans>

<sup>1</sup> *Id.*

<sup>1</sup> *Id.* at 4.

<sup>1</sup> *Id.* at 6.

<sup>1</sup> *Id.* at 4.

<sup>1</sup> See, e.g., David T. Schulz, *Seeing Is Believing: Using the Video Deposition of Your Opponent at Trial*, in *From the Trenches: Strategies and Tips from 21 of the Nation's Top Trial Lawyers*, 97-107 (John Worden, ed., 2015) available at [http://www.maslon.com/webfiles/MiscArticles/David\\_Schultz\\_08\\_Seeing\\_Is\\_Believing.pdf](http://www.maslon.com/webfiles/MiscArticles/David_Schultz_08_Seeing_Is_Believing.pdf); Christina L. Dixon & Jennifer K. Hohnstein *Rock Stars, Lies, and Videotape: Using Videoed Deposition Testimony at Trial*, *Litigation News* (Fall 2008), available at [https://apps.americanbar.org/litigation/litigationnews/trial\\_skills/trialevidence\\_video.html](https://apps.americanbar.org/litigation/litigationnews/trial_skills/trialevidence_video.html).

---

## NEWS AND ANNOUNCEMENTS

### 2016 YLD Spring Conference

Please join us for YLD Events on **May 5 – 7, 2016** at 2016 ABA Spring Meeting in St. Louis to earn CLE credit, make valuable connections, and have your voice heard by participating in the YLD Assembly. You may obtain more information about the Spring Conference [here](#).

### Update from the Social Media Team

The Social Media Team is pleased to announce the new Social Media Policy! The purpose of this policy is to provide direction on appropriate and effective ways to utilize social media on behalf of the ABA YLD when delivering content, facilitating engagement, and communicating with both members and non-members. The policy includes such information as sample posts, proper use of our social media channels, and of course directions for using the online spreadsheet we set up to capture posts from across the division. The new policy can be found [here](#).

### Update from the Disaster Legal Services Team

The DLS team is currently implementing DLS in [Mississippi](#), [Texas](#), [South Carolina](#), and [California](#). Earlier this year, we implemented DLS in Texas, Wyoming, Saipan, and Kentucky. We expect this to be a busy year on the DLS front, as NASA predicts that [this year's El Nino is going to be the worst ever](#).

The DLS team encourages all young lawyers to [be prepared](#) in the event of an emergency or disaster, and to coordinate with your local or state bar association to help disaster survivors. More information about the DLS program can be found on our [website](#).

### **Update from the National Conferences Team**

In addition to the regular activities of the ABA YLD National Conferences Team during the ABA Midyear meeting, this Team is putting together a social media photo scavenger hunt. New attendees will have the opportunity to be a part of a scavenger hunt that allows them to meet seven YLD leaders, receive their business cards, and also take a selfie and post it to their social media accounts with the hashtag #YLDmidyear16. The first person to have a selfie with each YLD leader and receive their signature on a business card will receive a generous gift from the ABA YLD National Conferences Team.

---