



NEWSLETTER OF

**TRIAL
TECHNIQUES
COMMITTEE**

SPRING 1994

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**Tort and Insurance Practice Section
American Bar Association**

CHAIR'S COLUMN

by: Elliott C. Winograd
Mineola, New York



a pleasure to serve as Chair of nittee. I welcome and encourage cipation. Our Committee offers a id unique opportunity for all law- enhance the quality of the legal n and improve our self-image, as arn and benefit from one another. 'sletter and other American Bar on publications provide a forum to ctioners from across the coun- are their thoughts on successful riques as well as air their views rs which relate to our particular and concerns. I encourage your n of articles for upcoming edi- ur newsletters. u have utilized a creative ap- an old and recurring problem or memorandum involving a difficult question or a sticky evidentiary ase share it with us. We are d to learning from each other, and your experience and insight to h this goal.

The ABA and the TIPS TASK FORCE on the SOLO and the SMALL FIRM PRACTITIONER have evinced much concern at the participation of single practitioners and members of small firms. Therefore, the Trial Techniques Committee is proud to be co-sponsoring six programs at the Annual Meeting which we believe will be entertaining and are designed to meet the special concerns of our members. On Monday, August 8, 1994, our program will address the heart of the issues confronting all sole practitioners and small firms, "MAKING A PERSONAL INJURY PRACTICE PROFITABLE." The panel will examine certain underlying economic factors in accepting and/or rejecting representations, analyzing liability and damages, protecting and keeping your clients even when you turn down their cases, successful and professional marketing to attract new clients and the management of both your cases and your law firm including the file and utilization of computers from the perspective of both the plaintiff's lawyer as well as that of defense counsel.

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the recent United States Court decision in the *Daubert* case, "THE EXPERT WITNESS-A COMPLETE USER'S GUIDE." Our panel of four experienced trial counsel will dissect the questions surrounding the initial investigation, the discoverability of expert information, the taking and defending of expert depositions, and the use of expert testimony at trial.

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I look forward to seeing all of you in New Orleans in August. I am certain that it will be exciting and worthwhile.

EDITOR'S NOTE

By: Wendy Fleishman
New York, New York



The "Spring, 1994" edition of our newsletter begins with an article written by James P. Connors, a partner in the New York firm, and an experienced trial lawyer who specializes in the defense of medical

malpractice cases. This article cuts to the heart of the Clinton Health Plan and analyzes its potential impact upon medical malpractice litigation throughout the U.S. The second article, written by Neil Shayne, Managing Partner of a boutique trial firm in Nassau County, New York, and former Chair of the Trial Techniques Committee, brings to this audience practical experience and suggestions regarding the ethical dilemma posed by discussing the applicable law regarding a case with one's client--before hearing the client's version of the facts. Our last article, written by Kathleen Chancler, a prominent Philadelphia trial attorney, examines and analyzes the thorny ethical and legal responsibilities of attorneys regarding an ex parte contact with former employees of an opposing party.

We are striving to make this newsletter an important and useful resource for both plaintiff and defense lawyers. We encourage your comments and your contributions. If you have an article that you would like to publish, please call me at (212) 735-2303 or write to me c/o Skadden, Arps, Slate, Meagher & Flom, 919 Third Avenue, New York, New York 10022. I look forward to hearing from you.

DISCLAIMER: Before citing any case or legislative enactment that is mentioned in this newsletter, be sure to make certain that the decision has not been overruled or modified, or that the statute has not been amended, subsequent to the time these summaries were prepared.

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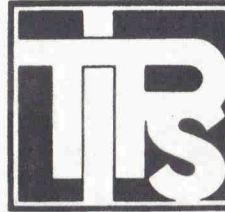
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SUMMER 1994

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CHAIR'S COLUMN

By: Elliott C. Winograd
Mineola, New York



It has been a pleasure to serve as Chair of this Committee. Our Committee offers a special and unique opportunity for all lawyers to enhance the quality of the legal profession and improve our self-image, as well as learn and benefit from one another. This newsletter and other American Bar Association publications provide a forum to enable practitioners from across the country to share their thoughts on successful trial techniques as well as air their views on matters which relate to our particular interests and concerns. I encourage your submission of articles for upcoming editions of our newsletters.

If you have utilized a creative approach to an old and recurring problem or written a memorandum involving a difficult discovery question or a sticky evidentiary issue, please share it with us. We are committed to learning from each other, and rely upon your experience and insight to accomplish this goal.

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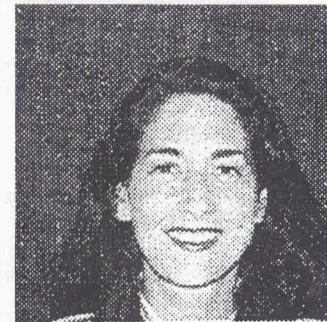
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EDITOR'S NOTE

By: Wendy Fleishman
New York, New York
and
Peter C. Richter
Portland, Oregon



The "Summer, 1994" edition of our newsletter begins with a reprint of a chapter entitled "An Integrated Philosophy of Advocacy" (reprinted with permission) from Bill Barton's book, *Recovering for Psychological Injury* (2d Ed.). William A. Barton is a Newport, Oregon lawyer who has tried over 500 jury trials as part of a practice specializing in claims of victims of sexual molestation. We believe that this chapter is a good outline of how to develop a theme for your case which applies to lawyers who represent both plaintiffs and defendants.

The second article, written by Karen Ohnemus Lisko, Ph.D., is entitled, "How can female attorneys be most effective in the courtroom?" Dr. Lisko is Research Administrator for Tsongas Associates, a national trial consulting firm based in Portland, Oregon. Her expertise is in the area

of communications, and we believe that this article will be useful for all courtroom communicators, without reference to gender.

Our next article, written by Robert Klein, Esquire, focuses on selection of a jury in a legal malpractice case from the defense perspective. We believe that this how-to article is both useful and entertaining.

Our last article, written by a preeminent plaintiffs' attorney, Roberta D. Pichini, Esquire, tells the true tale of a negligence jury trial in Philadelphia, in which the jury awarded a woman plaintiff almost \$6,000,000 as a result of a slip and fall on slippery ice. The jury found that the plaintiff's multiple sclerosis was triggered by the traumatic fall.

We are striving to make this newsletter an important and useful resource for both plaintiff and defense lawyers. We encourage your comments and your contributions. If you have an article that you would like to publish, please call Wendy Fleishman at (212) 735-2303 or write to me c/o Skadden, Arps, Slate, Meagher & Flom, 919 Third Avenue, New York, New York 10022. We look forward to hearing from you.



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**Tort and Insurance Practice Section
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CHAIR'S COLUMN

By Elliott C. Winograd
Mineola, New York



I am very proud of the marvelous work of our Committee, but there is so much to do to meet the needs of our legal community. The ABA and our Committee is dedicated to the goals of recruiting more members, and increasing membership involvement as well as encouraging professionalism among our ranks.

The ABA and the TIPS TASK FORCE, on the SOLO PRACTITIONER have evinced much concern at the participation of single practitioners and members of small firms. Therefore, the Trial Techniques Committee is proud to be co-sponsoring six programs at the Annual Meeting which we believe will be entertaining and are designed to meet the special concerns of our members. On Monday, August 8, 1994, our program will address the heart of the issues confronting all sole practitioners and small firms, "MAKING A PERSONAL INJURY PRACTICE PROFITABLE." The panel will examine certain underlying economic factors in accepting and/or rejecting representations, analyzing liability and damages, protecting and keeping your clients even when you turn down their cases, successful and professional marketing to attract new clients and the management of both your cases and your law firm including the file and utilization of computers from the perspective of both the plaintiff's lawyer as well as that of defense counsel.

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I look forward to seeing all of you at the TIPS Spring Meeting in San Antonio and, of course, in New Orleans in August.

EDITOR'S NOTE

By Wendy Fleishman
New York, New York



The "Winter, 1994" edition of our newsletter begins with an article, written by Sheila Birnbaum, the partner in charge of a national products liability practice of a major law firm, analysing the recent United States Supreme Court decision in *Daubert* and its progeny. The second article, written by Louis W. Fryman, Managing Partner of a large Philadelphia law firm, brings to this audience, practical experience and suggestions currently being

implemented in Pennsylvania State Courts to confront and solve the problem of an overburdened and backlogged civil court docket. Our last article, "Enduring and Prevailing in the Consolidated Mass Tort Trial", is written by Robert Gordon, an attorney who regularly represents plaintiffs and writes from the plaintiffs' perspective. This article will be of use to any litigator faced with the prospect of prosecuting or defending a mass tort action or multiple party lawsuit.

This is my first of three editions as editor of the Newsletter, and I would like to express my gratitude to Chair Elliott C. Winograd and Chair-Elect Robert Stutman for providing me with the opportunity to help in this manner. If any Committee member would like to contribute an article to the newsletter, please telephone me at 212-735-2303 or write to me c/o Skadden, Arps, Slate, Meagher & Flom, 919 Third Avenue, New York, New York 10022. I look forward to hearing from you.

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DAUBERT'S PROGENY IMPOSE STRICT STANDARDS FOR EXPERT SCIENTIFIC EVIDENCE

by Sheila L. Birnbaum & J. Russell Jackson



It is often said that the law is never settled products liability, as there is no one court that can render a final decision on the law of fifty states. Accordingly, the anticipation was almost palpable when the United States Supreme Court agreed to enter the *Bendectin* fracas on the issue of the admissibility of expert testimony.

When the Court rendered its decision last June in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the plaintiffs' and defense bars breathed a collective sigh of relief, as the decision contained something for everyone.³ Although the Court repudiated the *Frye*⁴ test, which had required that admissible expert testimony be based on techniques that are "generally accepted" as reliable in the relevant scientific community, the Court also stressed that trial judges are charged with "the task of ensuring that expert's testimony both rests on a reliable foundation and is relevant to the task at hand." Expert testimony, to be admissible, must be about "scientific knowledge" that "will assist the trier of fact to understand or determine a fact in issue."

In holding that courts must analyze an expert's reasoning and methodology in order to determine whether the expert testifying to "scientific knowledge," the *Daubert* Court refused to articulate a test to replace the *Frye* test. It did, however, observe that scientific knowledge typically has certain