DEFENSE NEWS

Fighting for Justice and Balance in Civil Courts

WDTL
WASHINGTON DEFENSE TRIAL LAWYERS
Fighting for Justice and Balance in Civil Courts

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IN THIS ISSUE

Trial Techniques and Tactics
Closing Argument - Why the Last Should Be First

By Bruce A. Rubin[1]

Lawyers who draft the final argument early in the hectic 30 days before trial–so as to better shape what witnesses they need and what evidence to elicit–swear by the advantages of doing so. Only in the movies and on television do we find lawyers who see the light after midnight and after all the evidence is in, and devise the compelling final ode to deliver to the jury the next morning. But the advantages of early preparation of final argument multiply the sooner it is prepared.

Waiting until that final 30 days is too late. The notion that a lawyer cannot plan final argument before knowing which claims go to trial, who the witnesses will be, or what discovery will show is backwards. Final argument, if begun early enough, will and should shape what comes before it is eventually delivered. In short, Michael Tiger had it right when he said:

> ". . . you begin work on the closing argument the day you take the case. When I start work on a case, I use the potential closing argument to find holes in the evidence and gaps in legal theory. We work on these, and of course the potential closing changes with each passing day as we learn more."

Tigar, *Persuasion, The Litigator's Art*, pp. 152-153 (1999).

And, despite his abundance of wisdom on how to structure final argument, Judge Anderson had it wrong when he wrote:

> "Some advocacy teachers suggest that a good lawyer will mull over the rudimentary beginnings of a closing argument the day the client walks in for the initial interview. This strikes me as unrealistic. Certainly, you need to begin planning your theory of winning the case at an early date, but no lawyer can seriously plan for summation until it is known which causes of action are in and which are out, who the witnesses will be, what evidence will be developed during discovery, and the like. Suffice it to say that at some point prior to trial, the good lawyer will at least sketch out, in outline form, what needs to go into the summation."

Anderson, *The Lost Art, An Advocate's Guide to Effective Closing Argument*, p. 6 (2002).

Continued on Page 2

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Techniques *From Page 1*

So did Judge Stern, who wrote:

> "Preparation for summation can begin no earlier and should begin no later than with the first witness in the case".

Stern, *Trying Cases To Win - Summation*, p. 53 (1995).

So, this article is not about how to prepare or deliver a persuasive closing argument; instead, this explains why you become a better trial lawyer the sooner in the life of a case that you prepare your final argument.

How soon? Try it way too early by conventional standards. Like after you have been retained and spoken with your client and perhaps had a quick look at the file. That will be primitive compared with the final product, but why not start searching for the themes that will "hit home" then, instead of just wading into the universe of information that unfocused, wide–net discovery can result in? Your client will be grateful–and less concerned about your fees–the sooner you are able to truly focus on what matters. And what matters generally depends on what packs the most punch for your side of the dispute–which is why you put it in the last statement you make to the jury.

I tried a case a few years ago that displays the advantages of preparing final argument early on. I represented a funeral home, sued by family members of the deceased who accused the funeral director of forcing them to help prepare the corpse for burial.

Possibly grisly stuff: dressing the body, combing the hair, lifting the body into the casket, combined with plaintiffs swearing they abhorred it, but felt compelled to do so when the young, inexperienced funeral director "asked" them if they wished to help.

The funeral director did ask them, and I knew (because I own a television and read newspapers) that abuses in the funeral service industry are regularly reported and often sensational.

So: bad facts, bad law. The stuff for which the theory of outrageous conduct was invented. What to say to the jury at the end of the trial, and how should that shape the discovery, motions, and trial that would precede it?

I began by asking the funeral director, "Why?" I quickly realized that the defense had to emphasize that many cultures and religions embrace interaction with the "loved one's remains" (not the "corpse") in the mourning and burial process. The funeral director explained how Buddhist customs can involve placing objects in the mouth of the loved one; how Samoan culture involves rubbing cheeks of the deceased; how the members of the Church of Latter Day Saints use "dressing committees" to dress the body, how Asian and other cultures often interact with the body as part of the mourning and funeral process. Suddenly, I was way past just saying "a lot of people will give the deceased a final kiss or place a memento in the casket." Suddenly, I knew the theme of the case and of the final argument, before taking a single deposition.

Continued on Next Page

Techniques *From Page 2*

The funeral director had to ask the family members if they wished to get involved. That was the theme. How else could he know? How else could he assure he didn't deny the family of a ritual important to them, but which they might later regret not participating in'?

Here's how this shaped the case after I drafted final argument. In discovery, plaintiffs were asked not only about their own religious beliefs and customs, but what they knew about others' beliefs and customs–to help show at trial that the funeral director needed to ask similar questions. I also learned from this line of inquiry that one plaintiff–the daughter–had cuddled in bed with her deceased mother for 20 minutes while waiting for the hearse to come to remove the body from the family home. I do not think I would have asked this without already working on final argument and this evidence helped remove the notion that plaintiffs wanted no direct contact with the body.

When I retained an expert (a college instructor who trains funeral directors), he focused on the theme of "having to ask" about rituals and identified even more of them than the funeral director had told me about.

At trial, one of our prospective jurors was a Buddhist minister–not a common occupation in the jurisdiction, but a golden opportunity to argue my theme, without ever seeming to do so, merely by asking him to describe in detail those Buddhist burial ceremonies that involve family members touching the remains of the loved one. The jury rejected the claims of two plaintiffs and awarded the third (the widower) $5,000. This result was based on a theme–supported by evidence–that would not have been as well presented by just wading through motions, discovery, and trial preparation without a final argument shaping the case.

Another example–suppose you are retained by inside directors to defend a claim they have breached obligations to minority shareholders by approving of a self-dealing transaction. Are your clients going to say that the deal was fully disclosed and completely fair? Or are they going to say that the deal had no adverse impact on the price of the stock instead? Or are they going to say the self-dealing was only in the most technical sense, and the deal was "necessary" to achieve corporate goals? You should be able to figure out what might sell and what might not fairly quickly, because you will have access to the information about the transaction and the corpo-

Continued on Page 4

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rate minutes. (One thing is certain: if you take all these positions, you'll lose). When you prepare your answer, you can emphasize the arguments that you plan to stress to the jury at trial. This does not mean you abandon secondary arguments at the start of the litigation process. But for example, the court often will summarize the pleadings to the jury at the start of the trial, and almost always will do so in the final instructions. So if you plan on stressing , for example, that the deal had no impact on the price of the stock, then you can go on in great detail about that in your answer. It's the difference between a general denial, and an answer that states "Defendants deny that the transaction harmed plaintiffs in any way, because the transaction did not reduce the trading price of their stock and in fact was followed by a stabilization of the price of the stock when compared to other companies in the semiconductor industry".

(Plaintiff's counsel can get the same benefits from an early drafting of the final argument. The complaint "shapes the case", so a careful plaintiffs lawyer will shape it the way he or she wants to tell the jury about it. For example, in an employment discrimination case, is the plaintiff a leader sticking up for her rights as a minority? Or is she a meek victim who just wants to be treated fairly? Is the employer a reactionary retaliator, a thoughtless bureaucracy, or just statistically out of balance? Is there real noneconomic harm that will resound to the jury, or just joblessness and no evidence of a need for medical or psychological care? It usually is not too hard to recognize where your case fits in the spectrum and what to emphasize in the final argument, so why not start building on that with the complaint? The worst that can happen is that the lawyer may need to amend if the evidence begins to paint a different theme and the procedural rules require the court to liberally allow amended pleadings.)

Damages is an issue in every civil jury trial. How do you plan to deal with it?

A trial lawyer ought to decide early on whether damages are easy or hard to grasp, whether they can be calculated through a formula or are left to the jury as the conscience of the community. Will the plaintiff need a chart in final argu-

Continued on Next Page

ment to "blackboard" the relief sought? Who will provide the testimony for each item on the chart? How can each lawyer discover the evidence each witness will need? Can you neutralize opposing witnesses in discovery as to items in the formula? Are there ways to present evidence of damages in similar situations?

None of these are questions a good lawyer overlooks before trial, but many are questions where the earlier they get asked the more convincing the case becomes. And, a good way to ask them early is by preparing final argument early.

Pleadings by the defendant also can be more wisely designed by thinking about final argument. Many times, of course, the first appearance is a motion instead of an answer. Instead of focusing on "which allegations are insufficient as a matter of law and cannot be corrected by an amendment"–often a good starting point for deciding whether to file a motion,–why not ask this: which of the allegations in the complaint will best allow me, the defense attorney, to exploit the themes that I want to stress in final argument? That focus will eliminate the expense and delay of a motion that doesn't help you at the trial even if it is granted. For example, if the complaint alleges multiple claims for relief, including one for fraud, and you know that there is a document that disclosed to the plaintiff the information that the plaintiff claims was concealed, why fool around with a FRCP 9(b) motion to require pleading with particularity? You may want that fraud claim to be present at trial, because you want to have your document enlarged and in the jury's face as you deliver your final argument. In the funeral home case, I welcomed the intentional tort theories because, frankly, the funeral director intended all that he did. That "sold" better than a defense based on the notion that although the funeral director asked, the plaintiffs cold have answered "no thank you."

Pleadings by the defendant also can be more wisely designed by thinking about final argument. Many times, of course, the first appearance is a motion instead of an answer.

Partial summary judgment motions also benefit from thinking about what you want to stress to the fact finder in final argument. Lawyers have implicitly recognize this for a long time. That's why a plaintiffs personal injury lawyer is not often going to seek partial summary judgment on liability (and why defense attorneys in those same cases will always consider the advantages of admitting liability). Suppose one of the plaintiff's multiple claims is for defamation, but the defendant is loaded with evidence that the alleged defamatory remark is true. How wise is it to seek summary judgment on the grounds that there is no evidence of the element of publication, or that the statement is a nondefamatory opinion, or some other technicality? Might it be better to stress to the jury that in fact, plaintiff is dishonest: "here is a certified copy of her criminal conviction; here were three witnesses who saw plaintiff take company inventory and load it into her trunk; here is the witness who gave plaintiff a truckload of bark dust for her yard in exchange for that inventory?" Showing this will affect plaintiff's credibility on all the claims, not just the one for defamation.

As the case winds through discovery and motion practice, of course, facts gain and lose significance, witnesses surface, things evolve, you don't win every motion, you learn more through discovery. So, you review your final argument to see whether it needs fine tuning, major surgery, or burial.

But in doing so, you force yourself to ask the ultimate questions: what are my most convincing, most powerful arguments, and how do I prove them? What arguments might be possible, but carry so much baggage they are not convincing enough to describe in a persuasive way to the jury? Doing this type of fine tuning throughout the case is how you avoid the panic of assembling all your information 60 days or 30 days before trial and finally asking, "what is this case really about?"

What exhibits are worth the trouble? (One judge I know tells counsel in complex business cases to "pick your best 100 exhibits", but a jury isn't likely to read anything close to that number.) If you start with the question "what handful of exhibits are so important that I want to enlarge them for the jury to see in final argument?" follow that with "what other exhibits must I get admitted to establish the prima facie case?" and then presume that all other exhibits probably are not worth the trouble and complication, you will be miles ahead. To be sure, you will be tempted to add more exhibits, but when that temptation arises, remember that most jurors' chief complaint about trials is the repetition of information.

Continued on Page 7

Impact on Citizen Participation After Jury Service

By Professor John Gastil, Associate Professor, University of Washington

In 2004-2005, colleagues and I conducted a pair of studies on jury service. The principal study was a survey of over six thousand jurors who served in King County or the Seattle Municipal court. Among other things, we found that jury service can have a significant impact on people's broader civic participation. Whether it has such an effect depends on the person and the jury experience, with the clearest effect being for those persons who come into jury service with lower levels of civic engagement, have an involving experience deliberating on a jury, and have a positive subjective assessment of their time spent in the courtroom. Put another way, our research suggests that for over two hundred years, the jury system has been quietly replenishing the reservoir of civic spirit and political engagement in the United States.

The text below comes from an Executive Summary of our results that we shared with the jurors who participated in our study. All of our published research can be accessed at our website, www.jurydemocracy.org. If you have comments or reflections you wish to share at any time, contact John Gastil at jurydem@u.washington.edu.

Population and Survey Demographics

The King County residents in this survey were contacted either by mail from a random sample of the county voting list or in person immediately prior to jury service at the Seattle Municipal Courthouse, the King County Courthouse in downtown Seattle, or the Kent Regional Justice Center. Courthouse response rates among jurors were outstanding, with over 70% of eligible jurors participating for a total of 6,605 responses. The mail survey response rate (21%) was significantly lower, yielding 270 total responses; such high non-response is common for surveys of that variety. Follow-up surveys were sent to a subset of those who took the first survey, and response rates were high (60-70%), with 3,480 persons taking the survey after jury service. The courthouse survey method reflected the study's principal interest in the experience of those citizens who report for jury duty when summoned. It was our expectation that the courthouse population would differ from a general survey population, let alone the county population.

Table 1 shows that, above all else, those reporting for jury service had many more years of formal education than the county as a whole. Nearly every prospective juror 25 and older was a high school graduate compared to 91% county-wide, and roughly two-thirds were college graduates, compared to just 43% county-wide. In addition, 86% of King County jurors identified themselves as White, compared to 74% of the county-wide population. The most under-represented ethnic group among prospective jurors, particularly in Seattle, was Hispanic residents, making up just 2% of the jury pools despite representing 7% of the county population and 14% of the Seattle population.

Continued on Page 8

Table 1. Comparison of Demographics from U.S. Census and Survey Respondents for King County and Seattle

	King County			Seattle	
Statistic	**Census**	**Court**	**Mail**	**Census**	**Court**
Median Age (yrs)	46	48	53	46	50
In labor force	71%	75%	61%	67%	76%
HS Grad (25 & up)	91%	99%	99%	84%	99%
BA/BS (25 & up)	43%	63%	69%	27%	72%
Female	51%	54%	52%	51%	52%
White	74%	86%	89%	76%	82%
Black	6%	3%	3%	12%	5%
Asian	13%	7%	4%	4%	10%
Hispanic	7%	2%	2%	14%	2%
Pacific	1%	2%	3%	<1%	1%

Techniques *From Page 5*

Who do you call to the stand and what do you ask them? Again, by keying your witness selection and witness outlines to your final argument, you can figure out what will best convey your themes, and what you do not need to mention at all. Cases are won on direct examination in real life, and cross examination in Hollywood. Having your final argument ready enables you to ask fewer questions, but make every one tell. Specifically, when it comes to cross, ask first: do I need to cross this witness to say what I want to say in final argument? If the answer is no, it is probably time for the next witness. And if a cross is necessary to support statements in your final argument, that should be all that a cross does.

Will you still be awake deep into the night on the evening before final argument? Probably. But at least you will not be starting to understand what the case is all about. Instead, you will be reviewing a final argument that has taken shape for many months, one you can fine tune at the end of each day of trial, and you will be confident that you have focused throughout the case on the way to present your best possible arguments to the judge and jury.

1 Bruce Rubin is an IADC member who served on the 2006 Trial Academy Faculty. He leads the Business Governance Team at Miller Nash, LLP, which has offices in Portland, Seattle, Vancouver (Washington) and Central Oregon. Reprinted with permission from the International Association of Defense Counsel (IADC) Newsletter No. 2, February, 2007.

Participation *From Page 6*

Public Participation and Attitudes

Public Participation in King County before the 2004 Presidential Election

Those participating in this survey were more educated than the general King County population, and they also were more active in civic affairs. Voter turnout in King County was very high in 2004 among all registered voters, but those showing up for jury duty voted at even higher rates in the primary (63% vs. 46%) and general election (94% vs. 83%) than did the general population.

We view the juror and mail survey samples as a generally representative cross-section of the engaged public. Those who volunteer for surveys, let alone answer a jury summons, are not only more likely to vote, but also more likely to engage in other civic activities. What we can ask is how this subgroup participates in public life and whether that varies across the different parts of the county.

Survey respondents were very interested in politics and public affairs, with 49% following such subjects "most of the time" and 86% at least "some of the time." The county region with the most uninterested persons (19%) was South County (Seatac, Renton, Kent, Auburn), and Seattle had the fewest such persons (11%). The main public affairs information source survey participants used was "printed and online newspapers/magazines," with 60% reading such sources nearly every day. South County residents were least likely to listen to radio, and both South County and Cascades (Duvall to Fall City) residents were least likely to read print news sources.

Seattle residents were the least likely to access TV news daily (only 48% doing so nearly every day), and South County residents relied most heavily on TV news (58% nearly every day). National studies have shown that reliance on TV news is often associated with less engagement in public affairs, and this is consistent with our findings.

Along with the Issaquah/Sammamish region, Seattleites were most likely to talk about politics. The most frequent mode of talk was actually listening: trying to get information about candidates or issues, with 40% of Seattle and Issaquah/Sammamish residents engaging in such exchanges at least monthly. By contrast, only 21% of these same residents engaged in "persuasive" talk–conversations aimed at changing someone else's mind–at least monthly. The least talkative region was South County, with 17% and 31%, respectively, listening and persuading each month.

Continued on Page 10

President's Column: R-67, So Where Do We Go from Here?

By WDTL President, Rick Roberts, Law Office of Sharon J. Bitcon

In what could have otherwise could have been a dull off-year-year election, the controversy over Referendum 67 was interesting for both its controversial ads by both camps and the money each side raised. Now that the dust has settled and R-67 has passed, the controversy will continue over its application and effect for years to come.

If you have not been active in any of the WDTL committees or practice sections, now may be a time to consider joining one of several to stay informed. I have asked the Chairs of the Insurance and In-House Counsel sections to hold meetings to discuss the issues that may arise in those practice areas. Consideration is being given to forming another group to discuss the defense of bad-faith claims. If you are interested in being in on the discussion, please contact Executive Director Kristin Lewis at (206) 749-0319 or Kristin@wdtl.org. Also watch for the WDTL Insurance Law Seminar on April 4, 2008.

An issue that may arise is whether the bill was intended to be retroactive. The answer should be "no"; the bill would have to been explicitly retroactive and it was not. It should only affect claims that arise after its effectiveness date; 30 days after the election or December 6, 2007. Denial of a claim, unreasonable or not, after that date may be subject to the law even if the event that prompted the claim happened before that date.

The next issue may be the scope; that is, can an actionable bad faith claim arise in third-party case? The answer should be a resounding "no" because the bill was amended to expressly remove third party claim and the final version affects only a "first party" claim between an insured and their insurance company. Nevertheless, there will be those who try….

While the full impact of the approval of R-67 may not be felt for some time, there is one effect that may be more immediate. Our colleagues in WSTLA may be commended for their organized and successful campaign. With this success, they are prepared to tackle other issues, most notably the expansion of claimants in a wrongful death action. In a recent meeting of the WSBA Legislative Committee, a representative from WSTLA announced it was their intent to pursue this issue, in effect overturning *Philippides v. Bernard*, 151 Wn.2d 376 (2004), which required parents of deceased adult children be financially dependent on them in order make a claim. If you or someone in your firm has had a case that has dealt with this issue and is willing to testify before the Legislature, please contact our Legislative Chair, Greg Clark at (206) 447-4400.

The upcoming legislative session is typically described as the "short" session; the budget is not a stake and legislators avoid controversial issues prior to an election year. This year may be the exception. We are grateful to all of our members who volunteer their time and energy that keeps WDTL as the vital and active voice for the civil defense bar.

Participation *From Page 8*

Seattle residents were also the most likely King County residents to join political groups and attend political functions. When it came to volunteering in political campaigns, contacting public officials, and talking about local community affairs, Seattleites were matched by residents of the Issaquah/Sammamish and Cascades regions. For instance, 35% of residents in these regions contacted a public official at least once in the past six months, and roughly half of these residents talked about local issues with fellow residents at least monthly.

Participation in group life showed a different pattern. Seattleites were frequent joiners in cultural groups, but they were the least likely to regularly participate in religious groups. The Eastside was the most active in cultural, neighborhood, and charitable groups. For example, 54% of these Eastsiders occasionally participate in charitable group activities, and 42% of them participate in neighborhood groups. Unfortunately for nonpartisan groups (the League of Women Voters and the like), 90% of residents across the county never participate in these groups.

Civic Attitudes During the 2004 Presidential Election

Comparing responses from before the 2004 election with those recorded afterward, attitudes in King County did not change dramatically. The clearest changes were an increased confidence in fellow citizens and declining confidence in courts. Counting only those who completed both the initial and final surveys, the proportion of King County respondents who believed "few Americans consider voting in elections to be an

Continued on Next Page

important civic duty" dropped from 36% to 22%. For this same group, the proportion having "high" or "very high" confidence in state and local judges dropped from 55% to 48%, as did confidence in the U.S. Supreme Court (from 62% to 56%).

These changes were relatively consistent across the county's regions, but there were differences among the counties in people's basic attitudes. Clearest among these were a greater sense of political self-confidence in Seattle, particularly compared to the South County and Cascades regions of the county. For instance, 53% of Seattleites said they were "better informed about politics and government that most people," but only 38% felt that way in South County and Cascades. Based on the civic knowledge test included in the survey, Seattleites are, indeed, a bit better informed. Notably, such confidence in one's political knowledge and abilities is important in and of itself (that is, aside from the reality of the situation), and it may partly account for why Seattleites are more politically active than their counterparts.

The King County Jury Experience

Many of the questions in our survey specifically examined the jury service experience. Our study was designed to focus on this often-underappreciated aspect of public life.

Though many prospective jurors were dismissed during voir dire, those dismissed did not differ in dramatic ways from those who ultimately served as jurors. The largest difference may have been education level, with 36% of sworn jurors not possessing a college degree compared to just 24% of those seated in the jury box before being dismissed.

Survey respondents generally reported a positive experience at the county or municipal courthouse, but it was clear that one's reflections on the time spent at court depended most of all on whether one was put on a jury. Only 38% reported that they were "hopeful to be required to serve on a jury" when they reported to jury service, but even reluctant jurors generally had a very positive experience.

Seventy-three percent of the prospective jurors were sent to courtrooms holding criminal trials, ranging from murder to misdemeanors, with the remainder sitting in an equally diverse set of civil trials. Almost all of those who were not seated on a jury stayed at the courthouse exactly two days. The median service for empanelled jurors was four days, with 77%

Continued on Page 12

Participation *From Page 11*

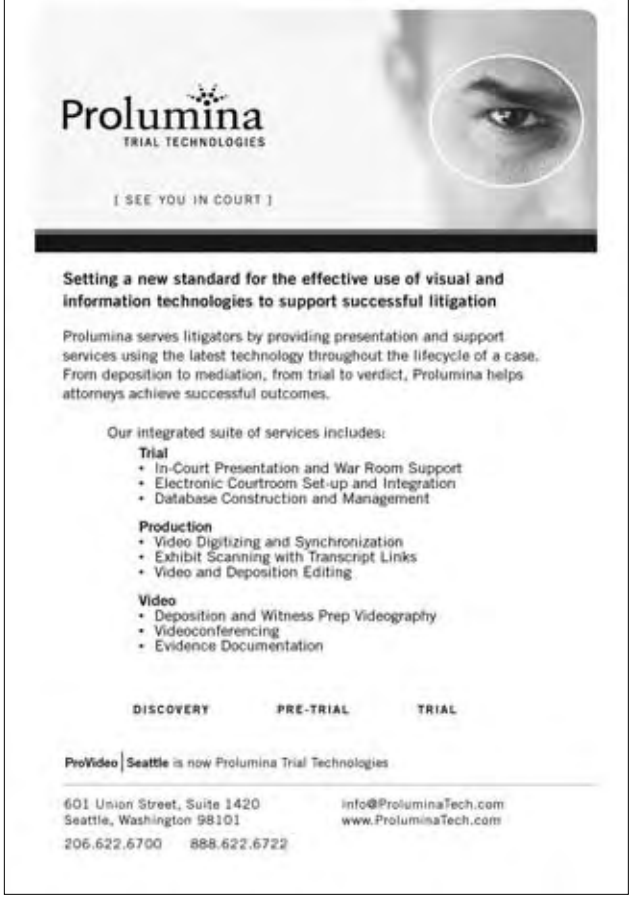
spending six or fewer days there. The median juror deliberated for four hours, with 78% deliberating for six hours or fewer.

After jury service, 24% of those who sat on a fully empanelled jury rated their overall experience as "excellent," with 37% rating it as "very good" and 23% as "good." Taken together, 84% of empanelled jurors said their experience was at least "good." By contrast, 47% of those who were dismissed without sitting on a jury rated their experience as no better than "satisfactory," with only 7% saying it was "excellent." Moreover, for 64% of the empanelled jurors, jury service "exceeded expectations," with only 5% having an experience that didn't meet their hopes for jury service. The majority of non-jurors (53%) said service was "about what I expected."

Focusing on the empanelled jurors, 62% said the treatment they received from judges was "very good" or "excellent," with only 1% rating their treatment as "less than satisfactory." Jurors perceived considerable diversity among their peers, with 71% percent said the jurors they met "came from very different backgrounds." The trial itself was "difficult to understand" for only 11% of the jurors, and 77% agreed that it was "very interesting to think about," with the same percentage believing the "jury played a very important role in resolving the case." Even higher percentages were satisfied with the quality of jury deliberation (89%) and the final verdict (84%).

After serving, 20% of empanelled jurors spoke "many times" about their experience with their family

Continued on Page 14



Welcome New Members

WDTL welcomes the following members who have recently joined our organization.

A big THANK YOU to our members who referred these individuals to WDTL.

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Patterson Buchanan Fobes Leitch Kalzer & Waechter
Referred by Bill Waechter

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Referred by Mary Levenson

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Seattle University
Referred by Shawn Lipton

Christopher A Wong
Referred by Kristin Lewis, Shawn Lipton

members, 52% discussed their service "a few times," and a total of 96% talked about service "at least once or twice." Jurors spoke of their time at the courthouse just as often with people outside their immediate family. Even 42% of non-jurors shared their thoughts about jury service with friends and others at least "a few times."

The Civic Impact of Jury Service

Jury service may be satisfying, but can it actually lift the civic spirits of those who serve? Can it change how people participate in public life? In a series of studies, including the one in which you participated, we have addressed this question by focusing on how jury service is linked to voting in the United States. Our initial study looked at a single locale, Thurston County, Washington. We collected court and voting records for a period of years and merged them by matching jurors' full names with unique matching records in the voter database. This first study found that after controlling for other trial features and past voting frequency, citizens who served on a criminal jury that reached a verdict were more likely to vote in subsequent elections than were those jurors who deadlocked, were dismissed during trial, or served as alternates. The effect was augmented by the number of charges against the defendant, with trials including more charges yielding greater increases in jurors' voting rates.

A grant from the University of Washington made possible an extensive follow-up study. Data gathered from Colorado, Louisiana, Nebraska, North Carolina, Ohio, and Washington found the same pattern of increasing voting rates, except that this larger dataset revealed that the critical distinction was between those who deliberated (including hung juries) and those who did not. Once again, the number of charges against the defendant had an additional, significant effect on post-service voting rates. This study was also large enough to permit breaking down participants into two subgroups, and this analysis found that the increased voting effects were apparent only for previously infrequent voters (voting less than 50% of the time) who served on criminal trials. Frequent voters and all of those who served on civil juries did not have a significant increase in voting after jury service.

The National Science Foundation survey you participated in provided an additional test of this pattern of findings. The King County survey revealed that a juror's subjective experience was also a critical variable in predicting changes after jury service. Specifically, results showed that for both empanelled jurors and those reporting for service but not empanelled, the degree to which the jury service experience exceeded their expectations was positively associated with increased post-service voting rates. In other words, those who found jury service to be better than they expected became more likely to vote in the future relative to those whose expectations were barely met (or worse).

The King County surveys also measured changes in other forms of civic and political engagement. Though those who report for service and never sit on a jury do not experience profound change in their civic lives, many of those who do sit on juries experience increased interest in politics and local issues, increased public affairs media use, greater participation in political activity, and more frequent conversations on politics and community affairs.

Professor John Gastil, Associate Professor, University of Washington , has taught at the University of Washington since 1998. Gastil teaches courses on small group decision making, political deliberation, and public scholarship. From 1994-1997, Gastil conducted public opinion research at the University of New Mexico Institute for Public Policy. He received his Ph.D. in communication from the University of Wisconsin-Madison in 1994, and he received a B.A. in political science from Swarthmore College in 1989.

In 1993, Gastil wrote Democracy in Small Groups (New Society Publishers). The book has sold over 4,000 copies and become recommended reading at the United Nations Food and Agriculture Organization, NASA, and numerous non-profits in the United States and abroad.

His current research focuses on a wide range of subjects, including the civic impact of jury service, the cultural underpinnings of public opinion, and the different approaches to integrating citizen deliberation into existing institutional, political, and cultural contexts.

National Standards for Legal Nurse Consultants

By Deborah E. Swenson, MSN, ARNP, Legal Nurse Consultant

History

In July of 1989, The American Association of Legal Nurse Consultants (AALNC) was formed with one of its goals being to educate the legal profession about integrating the effectiveness of the legal nurse consultant (LNC) into their practice. Out of this formation, AALNC adopted its "Code of Ethics" and "Scope and Standards of Practice" for the LNC. These are the Codes and Standards that all LNC's, who are members of AALNC, should follow in their practice.

AALNC has over 3,600 members nationally and with over 60 members belonging to the local Puget Sound Chapter. This organization promotes the excellence in professionalism that all members should exhibit. AALNC holds the honor from the American Nurses Association (ANA) of being recognized as a "nursing specialty". Legal nurse consultants come from a variety of educational and specialty backgrounds. Some legal nurse consultants have additional training from national LNC programs both private, and through higher educational institutions.

LNC Standards

Legal nurse consultants are knowledge based professionals who apply their health science education and expertise in performing critical analysis of clinical and administrative nursing practice, healthcare facts and issues, and their outcomes who are guided by the professional and ethical standards set forth by AALNC.

The *Standards of Practice* where developed by AALNC and ANA to provide the basis for LNC practice accountability. Whether the legal nurse consultant is working on behalf of the plaintiff or defense side of a professional negligence case, the goal is defense of the Standard of Care (SOC). The legal nurse consultant acts as an advocate for patients, their future healthcare, and educates attorneys, patient's providers and the public regarding healthcare standards of practice.

The *Standards of Legal Nurse Consulting Practice* follow the steps of the nursing process which integrate actions that are logical, interdependent, and sequential. These standards are the foundation of professional performance by the legal nurse consultant. These standards consist of: assessment of comprehensive data, issue or problem identification(di agnosis), outcomes identification, planning, implementation, coordination of services related to the health case or claim, health teaching and promotion, consultation to support the contribution of others , and effect change, and evaluation of progress towards attainment of outcomes.

AALNC has set *Standards of Professional Performance* that all LNC members should abide by. These standards consist of quality of practice, education (continuing to attain knowledge and competency that reflects current nursing practice), professional practice evaluation, collegiality, collaboration, ethics, research, resource utilization and leadership.

Code of Ethics for the AALNC Legal Nurse Consultant

In the everyday clinical setting, nurses should be familiar with the ethical decision making process and carry over this process into their legal nurse consultant practice.

Legal nurse consultants must develop additional ethical perspectives that guide their decisions and actions as to remain consistent with the standards of our specialty. As such, the code of ethics developed by AALNC, are guidelines that the legal nurse consultant should follow for professional performance and behavior. In subscribing to these guidelines, the legal nurse consultant must accept responsibility, and accountability for the quality of their work and behavior.

AALNC Code of Ethics

1. The LNC does not discriminate against any person based on race, creed, color, age, sex, national origin, social status or disability and does not let personal attitudes interfere with professional performance.
2. The LNC performs as a consultant or an expert with the highest degree of integrity.
3. The LNC uses informed judgment, objectivity and individual competence as criteria when accepting assignments.
4. The LNC maintains standard of personal conduct that reflect honorable upon the profession.
5. The LNC provides professional services with objectivity.
6. The LNC protects client privacy and confidentiality.
7. The LNC is accountable for responsibilities accepted and actions performed.
8. The LNC maintains professional nursing competence.

Continued on Page 16

Nurse Consultants *From Page 15*

The Legal Nurse Consultant as an Expert Witness

"The practice of nursing requires decision making and skill based upon principles of the biological, physical, behavioral and social sciences as well as evidence-based research related to function such as identifying risk factors and providing specific interventions" (AALNC, 2006). The specialty of nursing is a complex, separate entity that has evolved beyond its early beginnings. We are a profession with distinct knowledge, specialization and standards of practice. As such, we are bound to uphold these standards set forth by our governing state and national bodies.

In some states physicians are still allowed to provide expert testimony to the standard of care provided by nurses. This is unfortunate. According to AALNC's *Position Statement: Providing Expert Nursing Testimony,* the Supreme Court of Illinois held that a board certified internal medicine physician was not competent to testify as to the standard of care for nurses.

It is the opinion of AALNC that the profession of nursing is autonomous from the profession of medicine and other allied health disciplines, and therefore, nurses are not qualified to provide expert testimony to physicians SOC. In addition, only registered nurses should provide expert testimony to the SOC for registered nurses. As such, the LNC / registered nurse providing expert testimony should have the same skill, knowledge, training and experience as the registered nurse she/he is providing testimony for be it a plaintiff or defense case. The LNC / registered nurse providing expert testimony should be currently active in their specialty for which they are providing testimony.

The attorney should take careful consideration in choosing their registered nurse expert witness by knowing the qualifications of the registered nurse. Any registered nurse who is willing to provide expert testimony should be confident in providing the attorney with a history of their skills, training and work experience.

Those legal nurse consultants / expert witnesses who are members of AALNC are bound by the *Standards of Practice* and *Code of Ethics* as set forth by this governing body. As such, if the attorney should have any concerns with the conduct of a LNC who belongs to this organization, their concerns should be reported to the local and national governing body. The websites below can provide you with AALNC member names, specialties and contact information for various legal nurse consultants.

The American Association of Legal Nurse Consultants: www.aalnc.org

Puget Sound Chapter AALNC: www.aalncseattle.org

Annual Awards at Judicial Reception

Judge Mary Yu, Ret. Judge Terry Lukens & Judge Andrea Darvas

Linda Gallagher, King County Prosecutor's Office and WDTL Board of Trustees Member & Rick Roberts, Law Offices of Sharon Bitcon & WDTL President

Bob Israel, Lane Powell & WDTL Past President, Jeff Tilden, Gordon Tilden Thomas & Cordell & WDTL Past President & Judge Dean Lum, King County Superior Court

Washington Defense Trial Lawyers Present Annual Awards at Judicial Reception

Washington Defense Trial Lawyers presented their annual awards at the Judicial Reception, on October 30, 2007 at the law firm of Kirkpatrick, Lockhart & Gates in Seattle. This well-attended reception drew over 180 participants, including over 30 judges from federal, state and local courts. During the reception, the Washington Defense Trial Lawyers presented awards for the Outstanding Defense Trial Lawyer, Outstanding Litigation Associate, and the Outstanding Plaintiff's Trial Lawyer. Nominations for these awards were received from members of the Washington Defense Trial Lawyers, and winners were chosen by vote by the board of directors. The winners are:

Jeffrey Tilden of Gordon Tilden Thomas & Cordell LLP won the Outstanding Defense Trial Lawyer of the year award, which is given to someone who has promoted collegiality, professional decorum, and the utmost ethical standards while practicing supreme advocacy for his or her clients.

Continued on Page 18

Judicial Reception *From Page 17*

Jeff universally recognized as one of the outstanding trial attorneys in the State of Washington. He continues to try many cases, preferring TDR (traditional dispute resolution - trial) to ADR. He personally has tried over 60 cases, and is a member of all the prestigious trial lawyer organizations: American College, American Board of Trial Advocates and the Washington Defense Trial Lawyers of which he is a past president (1993-94).

One of his most notable cases was the prosecution of claims on behalf of Colonel Margarethe Cammermeyer. Our honoree's representation of Colonel Cammermeyer was successful at the District Court level with Judge Zilly ruling that her discharge was based solely on prejudice of Cammermeyer's sexual orientation and violated her equal protection rights under the Fifth Amendment of the U.S. Constitution and ordered her reinstated.

Ted Buck, Stafford Frey Cooper & WDTL President Elect presents Kelby Fletcher his award

Kelby Fletcher, of Peterson Young Putra was awarded the Outstanding Plaintiff's Trial Lawyer which is awarded to a plaintiff's attorney who has demonstrated professional decorum, and the utmost ethical standards while practicing supreme advocacy for his or her clients. With over 25 years of experience in counsel, negotiation and litigation in state and federal courts, he has a well-developed understanding of problem solving in the ever-evolving law concerning employment relationships. Kelby also co-authored the WDTL-WSTLA Join Statement of Professionalism in 1993. He has been described as brilliant, low-key, easy going, thoughtful and unusually collegial and cooperative in the litigation process.

Jake Winfrey of Helsell Fetterman, received the Outstanding Litigation Associate Award, which is given to an attorney who has practiced seven years or less that promotes the highest professional and ethical standards for a Washington civil defense attorney. Factors for this award included: excellent writing skills, superior legal and factual analysis, oral skills, dependability and pro bono and community service.

Our honoree was nominated by three different individuals, which alone speaks to the outstanding work he has done. Practicing primarily in medical malpractice defense, Jake is described as highly intelligent, ethical and fundamentally decent. One nominator noted that his style is so appealing that opposing counsel prefer working with him, an admission that cannot be easy to make. An excellent writer, persuasive advocate, and increasingly experience trial attorney, Jake is said to make all those that work around him look good by association. Nominators have even received compliments from judges for the outstanding work Jake has done in several courtrooms.

A special thanks goes to Dan Johnson of the Law Offices of Shahin Karim as the program chair of this event and to Ted Buck of Stafford Frey Cooper, and WDTL President Elect for acting as master of ceremonies.

Dennis Woods, Dirk Holt & John Zehnder, Scheer & Zehnder

WDTL

WASHINGTON DEFENSE TRIAL LAWYERS

Fighting for Justice and Balance in Civil Courts

Application for Appointment to WDTL Board

Name _____

Firm Name _____

Office Address _____

City, State, Zip _____

Home Address or Legislative District _____

Phone (_____) _____ FAX (_____) _____

E-mail _____

Please complete the following information so that we can begin to learn more about you and to aid us in our decision making process:

1. Why do you want to serve on the Washington Defense Trial Lawyers Board?

2. What type of law practice do you have?

3. How many years have you practiced law?

4. What is the main reason that you joined WDTL?

5. How long have you been a WDTL member?

6. Please check the skills you could contribute to our Board:

___ Accounting ___ Organizational planning ___ Community Service

___ Technical knowledge ___ Legislative knowledge/testifying

___ Seminar speaking/planning ___ Legal specialty ___ Records/data

___ Writing or editing legal articles ___ Knowledge of legal community

___ Public Relations ___ Amicus brief writing ___ Bar Liaison

7. On what other boards have you served? n/a

8. Can you regularly attend bimonthly Board meetings? ___ yes ___ no
   Conflicts?
   Can you attend the Annual Convention held each Summer? ___ yes ___ no

9. Are you available to attend a day and half board retreat scheduled for June 2008 for new & current Board members? ___ yes ___ no

10. Are you able to commit your efforts and time to WDTL as outlined in the job description for Board members? (please email WDTL office for job description you are interested in at info@wdtl.org)

11. At this point, which position would you be interested in serving?
(please circle)

Board Committees

A. Board Development B. Strategic Planning C. Programs

D. Publications E. Legislative F. Amicus

G. Membership H. New Member I. Finance

Regional Representative

___ Eastern WA ___ Central WA ___ North Sound ___ South Sound ___ Southwest WA

12. Please write a brief statement of your understanding of WDTL's mission:

13. Signature _____ Date: _____/_____/_____

Please complete and mail or fax to Kristin Lewis at:
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2007 - 2008

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WASHINGTON DEFENSE TRIAL LAWYERS

Application for Membership

1. The undersigned hereby makes application for membership with the Washington Defense Trial Lawyers, representing that a substantial portion of my practice is devoted to representing defendants, companies, or entities in civil litigation:

Name _____

Firm Name _____

Office Address _____

City _____ State _____ Zip _____

Home Address _____

Phone (_____) _____ WSBA Bar # _____

FAX (_____) _____

E-mail _____

2. Year of Admission to Bar _____ Legislative District _____

3. State degrees held, both academic and law, year of graduation and school:

_____

4. If you were referred to WDTL by a fellow attorney, please list name here:

_____

5. 2007-2008 Membership Dues

Attorneys	
Admitted to the Bar more than 5 years	$250.00
Admitted to the Bar less than 5 years	$200.00
Other	
Government Attorney	$125.00
Retired Member	$100.00
Paralegal	$75.00
Law Student	$10.00

6.a. YES! I would like to serve on the following WDTL Committees.

- ☐ Amicus
- ☐ Court Rules
- ☐ Community Service/Pro Bono
- ☐ Judicial Liason
- ☐ Legislative
- ☐ Membership
- ☐ Practice Development
- ☐ Programs
- ☐ Publications
- ☐ Strategic Planning
- ☐ Technology

6.b. YES! I would like to join the following sections

- ☐ Construction
- ☐ Commercial Litigation
- ☐ Employment
- ☐ Government Liability
- ☐ In-House Counsel
- ☐ Insurance
- ☐ Maritime
- ☐ Product Liability
- ☐ Professional Liability
- ☐ Workers' Compensation

7. ☐ I would like to contribute $150.00, $100.00, $50.00 (minimum $20.00) to fund WDTL's legislative advocacy and outreach program.

I understand that pursuant to Public Law 103-66, this portion of my annual WDTL dues is not deductible from federal income taxes as a business expense

8. Dues $_____ + Legislative Contribution $_____ = TOTAL:$ _____

Please make check payable to: WASHINGTON DEFENSE TRIAL LAWYERS and mail to:

MEMBER SERVICES, 4141 AGATE ROAD, BELLINGHAM, WA 98226

Or fax with credit card information to (206) 202-3776

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Credit Card Authorization Signature _____

Questions? Contact Kristin Lewis,WDTL Executive Director at (206) 749-0319 or kristin@wdtl.org

9. Dated this _____ day of _____, 20 _____

10. Signature of Applicant: _____

Proposed WDTL Events Calendar for 2008 (register online at www.wdtl.org)

January

22	Judicial Dinner – Tacoma
24-26	CLE - Snowbreak – Sun Valley (in conjunction with SLDO meeting)

February

1	CLE - Annual Update on Construction Law – Seattle

March

	CLE - Annual Update on Construction Law – Portland

April

4	CLE - Insurance Law Update – Seattle
	CLE - Judicial Reception – Spokane
	CLE - Advanced Trial Tactics – Seattle

May

	CLE - Construction Defect Academy – Seattle

July

17-20	Annual Convention - Harrison Hot Springs, B.C.

WDTL
WASHINGTON DEFENSE TRIAL LAWYERS
Fighting for Justice and Balance in Civil Courts

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