NYSBA FALL 2006 | NO. 53

Trial Lawyers Section Digest

A publication of the Trial Lawyers Section
of the New York State Bar Association

Message from the Chair

Our recently completed Summer Meeting at the Otesaga Hotel in Cooperstown (August 21-24, 2006) was a definite success. Our CLE Chair, Peter Kopff, put together a terrific program. The program was both educational and entertaining. In short, Peter produced Brian Cashman–like results—without the aid of an unlimited budget!

Professor David Siegel delivered a lecture on recent developments in the CPLR. Professor Siegel imparted many pieces of useful information—information useful to both the new trial attorney or the hardened veteran.

Our past Chair Ed Cosgrove spoke with his usual passion on the subject of attorney advertising. Ed's unique perspective on this issue was both provocative and compelling.

Malpractice defense attorney John Lyddane discussed the topic of mentoring. Most attendees agreed that John took a rather difficult topic and brought it to life.

Malpractice defense attorney David Brown kept our attention with a potpourri of practical maxims for the trial attorney. Even if a trial lawyer would incorporate just one of Dave's suggestions, it might make the difference in a close case.

Finally, plaintiff's attorney Marvin Salenger was at the top of his game with a Socratic-like dissertation on the art of jury selection. Marvin's ability to interact with individual members of the audience is a special gift.

During our meeting, we had 2 afternoons of golf at the scenic, challenging Leatherstocking Golf Course which is located right on the grounds of the Otesaga Hotel. Our Golf Chair Bill Bave did an outstanding job in organizing these 2 golf outings, policing the handicaps and insuring perfect weather.

During our Executive Committee Meeting, we attempted to begin the process of getting better linkage between our Section and the Young Lawyers Section. If we keep this issue on the "front burner," there may be a lot of potential benefit to both Sections.

Prior to one of the CLE sessions, NYSBA President Mark Alcott addressed the attendees regarding his agenda. Mark gave us the sense that he will be very open and accessible during his term of office.

At the barbecue held on August 22, we honored Professor Travis Lewin (Syracuse Law School) for the outstanding work he has done with the NYSBA Trial Moot Court Competition. Next year's competition will be held in February 2007. Fordham Law School will be the sponsoring law school. Executive Committee Member Elliott Winograd will work with Professor Lewin and Judge Tim Franczyk (Buffalo) in organizing this competition.

Finally, on August 23, we honored all our past Chairs who were in attendance at our closing dinner. The past chairs in attendance at the closing dinner included:

Inside

Cross-Examination of the Infant Witness: A Review of Lessons Learned from the Triangle Shirt Waist Fire Case and Related Trial Experiences 3
(Harold Lee Schwab)

How Alternative Dispute Resolution Can Help You .. 10
(Irwin Kahn)

Jim Hartman
Harold Schwab
Gerald McDonald
Dick O'Keeffe
Bill Bave
Dick Long
Sy Boyers
Ed Cosgrove

There is a striking similarity in all of our past Chairs listed here as well as those who could not attend the closing dinner—each has his or her own unique personality. This common denominator in our past Chairs is their devotion to the system of trial by jury. Let us hope that we can latch on to some of the dedication of our past Chairs as we move forward in these difficult times.

Stephen O'Leary, Jr.

SCENES FROM THE

TRIAL LAWYERS SECTION

SUMMER MEETING

AUGUST 21, -24, 2006
THE OTESAGA
COOPERSTOWN, NY

Richard "Dick" O'Keeffe

Front: Meeting Program Chair Peter Kopff and Distinguished Professor of Law David D. Siegel
Back: John L.A. Lyddane, Section Chair Stephen O'Leary, Jr.

Hon. Seymour Boyers and wife Joan

Mark Moretti, Thomas Valet, Richard Long

Former Section Chairs
William Bave Jr., Harold Schwab, Edward Cosgrove, James Hartman, Richard O'Keeffe, Richard Long, Seymour Boyers, Gerald McDonald

Cross-Examination of the Infant Witness: A Review of Lessons Learned From the Triangle Shirt Waist Fire Case and Related Trial Experiences

By Harold Lee Schwab

There is a hierarchy of risk in cross-examination depending upon who is the witness. Questioning an economist about his assumptions/projections will make almost any trial attorney look good. With proper preparation the cross of a technical expert can be challenging but rewarding. Cross-examination of a perjured witness when counsel is armed with a prior inconsistent statement or admission should always be successful. The cross of clergy and surviving spouses must be approached with caution and concern. Potential disaster looms large when cross-examining a catastrophically injured witness. But of all the categories of witnesses, children present the greatest challenge due to jurors' innate sympathies. Because of their tender years children are probably the most difficult to directly impeach. The need for delicacy, sensitivity, and possibly even a change in personality of defense counsel, is self-evident if the jury is not to be offended by the attorney's conduct. Aggressive cross-examination is unacceptable. However, a mere fatherly or motherly approach by the examiner will not suffice if nine-year-old Stephanie, who recounts events occurring six years earlier, is to be impeached. What to do? How to do it? For purposes of this analysis let us assume that there is no independent evidence available with which to confront the child. Impeachment must be predicated upon cross of the witness's story and nothing else. An impossible task? Possibly, but not necessarily. What follows may be of interest to trial counsel faced with the dilemma of cross-examining an infant witness.

One approach might be to have the child repeat what she said on direct. The goal would be for Stephanie, when repeating her story, to either omit a salient fact or at least partly change her version of the events. Even if the cross examiner is successful, the jury will empathize with the child and appropriate allowances will be made for mistakes, given the tender years of the witness. Worse still, simple repetition may violate one of the cardinal rules of cross-examination: never give a witness the opportunity to repeat his/her direct testimony. Repetition carries the inherent risk of solidifying as true in the mind of the jury those very facts which the examiner contests. As history has taught, even the big lie can be believed. Indeed, isn't one of the very reasons for the use of leading questions on cross-examination to prevent repetition?

I personally witnessed such a cross-examination debacle in 1969 while on trial in my first federal court case. During a recess I went across the hall to watch a portion of the well publicized trial of *United States vs. DeSapio* before Judge Harold R. Tyler Jr., in the Southern District, New York. Carmine DeSapio was the last leader of Tammany Hall, the infamous Democrats' committee which controlled New York City politics for generations. He was charged with having conspired with Henry Fried, the owner of a construction company, to bribe James Marcus, a New York City Commissioner, to withhold permits sought by Consolidated Edison until Con Edison agreed to award the construction contracts to Fried. The accused was represented by Maurice Edelbaum, a well known member of the New York criminal trial bar. A key factual issue was whether Fried, at the time of the well attended opening of his multi-million-dollar horse farm in upstate New York, had a personal conversation with DeSapio. A defense witness testified that he had assisted Fried, who was walking with a cane and suffering from gout, onto a school bus touring the property from 1:30 to 5:30 p.m. The thrust of this alibi defense was that Fried could not have had any conspiracy conversation with DeSapio at the horse farm. The prosecution in rebuttal called various witnesses, including in particular Sister Ann James, a student nurse at the Carmelite Sisters Home for the Aged and Infirm. She wore a nun's habit in court. Sister Ann James testified that she had seen "Mr. Fried" walking around the swimming pool without difficulty and that he was not on the bus in which she rode. Unbelievably, counsel for DeSapio in his cross-examination asked the Sister to repeat her story. Imagine—a nun unrelated to either prosecution or defense, repeating her testimony as to what she had observed that particular day! Counsel could no longer credibly argue that Sister Ann was mistaken. What she said was indeed gospel and what she saw and did not see was a fact. She convinced me and apparently the jury. Due at least in part to this failed cross-examination, DeSapio was convicted.

Although not heralded in the legal annals, this is a classic example of what not to do in cross-examination. I had hoped to listen and learn how to do it. Instead, the lesson learned was how not to do it. Although the cross-examination was of an adult, the same rule would appear to apply to children. By way of postscript, the government conclusively established in its post-trial motion that Sister Ann James was mistaken and that she had been referring to one Richard Fried, and not to Henry Fried!! Ironically, repetition had proven facts that were not correct. However, because of other compelling evidence the Second Circuit denied the motion for a new trial (435 F.2d 272).

Almost a century ago, Max Steuer was confronted with a comparable situation when faced with the apparently impossible task of defending Mssrs. Harris and Blanck, the owners of The Triangle Shirt Waist Factory, against charges of manslaughter. The company occupied the top three floors of a ten-story building at 23 Washington Place in New York City. The owners, dubbed "the shirt waist kings," operated the largest manufacturing business of ladies' blouses at the time. They employed approximately 400 young girls and women, mostly recent immigrants who spoke little English, to operate the sewing machines. On March 25, 1911, a fire began in discarded rags between the cutting tables and it quickly engulfed the upper floors. Panic set in for many. Those fortunate were able to escape down a narrow fire escape, an elevator before it stopped, the staircase before it became impassible, or from the roof to the adjacent New York University Law School building. However, 146 employees, mostly women, died because of burns, smoke inhalation, or jumping from upper floors to the street below. This was the greatest loss of life in New York City (exceeded as we know today only by September 11), and the public demanded justice. Although the Building Department came under attack, the owners were viewed as the primary culprits. Within weeks of the tragedy they were indicted for manslaughter.

The trial of *People v. Harris and Blanck* before Judge Thomas Crain began in December 1911 with Assistant District Attorney Charles Bostwick heading the prosecution. The defendants were represented by Max D. Steuer, reputedly a leading member of the New York Trial Bar. The prosecution focused its case on the death of Margaret Schwartz, a ninth floor victim. It was alleged that she could not escape because the exit door was locked in violation of the New York Labor Code. A key prosecution witness was Kate Alterman, who had been with Margaret when the two of them came out of the dressing room and found the ninth floor ablaze. Her principal testimony on direct examination follows:

> Q Margaret Schwartz was with you at this time?
>
> A At this time, yes, sir.
>
> Q Then where did you go?
>
> A Then I went to the toilet room, Margaret disappeared from me, and I wanted to go up Greene street side, but the whole door was in flames, so I went in hid myself in the toilet rooms and bent my face over the sink, and then ran to the Washington side elevator, but there was, a big crowd and, I couldn't pass through there. I noticed some one, a whole crowd around the door and I saw Bernstein, the manager's brother trying to open the door, and there was Margaret near him. Bernstein tried the door, he couldn't open it and then Margaret began to open the door. I take her on one side I pushed her on the side and I said, "Wait, I will open that door." I tried, pulled the handle in and out, all ways—and I couldn't open it. She pushed me on the other side, got hold of the handle and then she tried. And then I saw her bending down on her knees, and her hair was loose, and the trail of her dress was a little far from her, and then a big smoke came and I couldn't see I just know it was Margaret, and I said, "Margaret," and she didn't reply. I left Margaret, I turned my head on the side, and I noticed the trail of her dress and the ends of her hair begin to burn. Then I ran in, in small dressing room that was on the Washington side, there was a big crowd and I went out from there, stood in the center of the room, between the machines and between the examining tables. I noticed afterwards on the other side, near the Washington side windows, Bernstein, the manager's brother throwing around like a wildcat at the window, and he was chasing his head out of the window, and pull himself back. He wanted to jump, I suppose, but he was afraid. And then I saw the flames cover him. I noticed on the Greene street side someone else fell down on the floor and, the flames cover him. And then I stood in the center of the room, and I just turned my coat on the left side with the fur to my face, the lining on the outside, got hold of a bunch of dresses that was lying on the examining table not burned yet, covered my head and tried to run through the flames on the Greene street side. The whole door was a red curtain of fire. A young lady came and she began to pull me in the back of my dress and she wouldn't let me in. I kicked her with my foot and I don't know what became of her. I ran out through the Greene street side door, right through the flames on to the roof.
>
> Q When you were standing toward the middle of the floor had you a pocketbook with you?
>
> A Yes, sir, my pocketbook began to burn already, but I pressed it to my heart to extinguish the fire.
>
> Q And you put the fire out on your pocketbook?

A Yes, sir.

How does one cross-examine a Kate Alterman given the enormity of the tragedy? Steuer initially established that the witness came from Philadelphia to the trial, had been in New York for over two weeks waiting to testify, and had actually gone to the building with Bostwick and another member of the District Attorney's office. The inference of witness coaching was thereby made but more was required. Steuer asked Alterman to repeat her story not one time, which might enhance credibility, but rather three times, which established that the witness's version was essentially memorized from a script.

After more preliminaries, Steuer asked on cross:

Q Now tell us what you did when you heard the cry of fire.

A I went out from the dressing room, went to the Waverly side windows to look for fire escapes, I didn't find any and Margaret Schwartz was with me, afterwards she disappeared. I turned away to get to Greene Street side, but she disappeared, she disappeared from me. I went to the toilet rooms, I went out from the toilet rooms, bent my face over the sink, and then went to the Washington side to the door, trying to open the door, but there I saw Bernstein, the manager's brother, trying to open the door; but he couldn't. He left; and Margaret was there too, and she tried to open the door and she could not. I pushed her on a side. I tried to open the door, and I couldn't and then she pushed me on the side and she said, "I will open the door," and she tried to open the door. And then a big smoke came and Margaret Schwartz I saw bending down on her knees, her hair was loose and her dress was on the floor and a little far from her. And then she screamed at the top of her voice, "Open the door! Fire! I am lost, there is fire!" and I went away from Margaret. I left, stood in the middle of the room, went in the middle of the room, between the machines and examining tables, and then I went in I saw Bernstein, the manager's brother, throwing around the windows, putting his head from the window—he wanted to jump, I suppose but he was afraid—he drawed himself back, and then I saw the flames cover him. And some other man on the Greene Street side, the flames covered him, too. And then I turned my coat on the wrong side and put it on my head with the fur to my face, the lining on the outside, and I got hold of a bunch of dresses and covered up the top of my head. I just got ready to go and somebody came and began to chase me back, pulling my dress back, and I kicked her with the foot and she disappeared. I tried to make my escape. I had a pocketbook with me, and that pocketbook began to burn, I pressed it to my heart to extinguish the fire, and I made my escape right through the flames—the whole door was a flame right to the roof.

Q It looked like a wall of flame?

A Like a red curtain.

Q Now, there was something that you left out, I think, Miss Alterman. When Bernstein was jumping around, do you remember what that was like? Like a wildcat, wasn't it?

A Like a wildcat.

After more preliminaries, Steuer asked a second time:

Q Now could you tell us again what you did after that time?

A After going out from the dressing room?

Q Yes.

A I went out to the Waverly side windows to look for fire escapes. Margaret Schwartz was with me, and then Margaret disappeared. I called her to Greene street, she disappeared and I went into the toilet room, went out, bent my face over the sink, and then I wanted to go to the Washington side, to the elevator. I saw, there a big crowd, I couldn't push through. I saw around the Washington side door a whole lot of people standing, I pushed through and there I saw Bernstein, the manager's brother, trying to open the door; he could not and he left. Margaret Schwartz was there, she tried to open the door and she could not. I pushed Margaret on the side, and tried to open the door, I could not. And then Margaret pushed me on the side; and she tried to open the door. But smoke came and Margaret bent on her knees; her trail was a little far from her and her hair was loose, and I saw the ends of her dress and the ends of her hair begin to burn. I went into the small dressing room, there was a big crowd, and I tried—I stood there and I went out right away, pushed

through and went out and then I stood in the center of the room between the examining tables and the machines. Then I noticed the Washington side windows—Bernstein, the manager's brother, trying to jump from the window, he stuck his head out—he wanted to jump, I suppose, but he was afraid. Then he would draw himself back, then I saw the flames cover him. He jumped like a wildcat on the walls. And then I stood, took my coat, turning the fur to my head, the lining to the outside got a hold of a bunch of dresses that was lying on the table and covered my head, and I just wanted to go and some lady came she began to pull the back of my dress; I kicked her with the foot and I don't where she got to. And then I had a purse with me and that purse began to burn, I pressed it to my heart to extinguish the fire. The whole door was a flame, it was a red curtain of fire, and I went right on the roof.

Q You never spoke to anybody about what you were going to tell us when you came here, did you?

A No, sir.

Q You have got father and a mother and four sisters?

A Five sisters. I have a father, I have no mother—I have a stepmother.

Q And you never spoke to anybody else about it?

A No, sir.

Q They never asked you about it?

A They asked me and I told her once, and then they stopped me; they didn't want me to talk anymore about it.

Q You told them once and then they stopped you and you never talked about it again?

A I never did.

Q And you didn't study the words in which you would tell it?

A No, sir.

Steuer asked a third time:

Q Do you remember that you got out to the center of the floor—do you remember?

A I remember I got through the Greene Street side door.

Q You remember that you did get to the center of the floor, don't you?

A Between the machines and the examining tables, in the center.

Q Now tell us from there what you did; start at that point now instead of at the beginning.

A In the beginning I saw Bernstein on the Washington side, Bernstein's brother, throw around like a wildcat; he wanted to jump, I suppose, but he was afraid. And then he drawed himself back and the flames covered him up. And I took my coat, turned it on the wrong side with the fur to my face end the lining on the outside, got hold of a bunch of dresses from the examining table, covered up my head, and I wanted to run. And then a lady came and she began to pull my dress back, she wanted to pull me back, and I kicked her with my foot—I don't know where she got to. And I ran out through the Greene street side door, which was in flames; it was a red curtain of fire on that door to the roof.

Q You never studied those words did you?

A No, sir.

On redirect examination the witness endeavored to explain that she used the same language when repeating her story "Because he asked me the very same story over and over." The remarkable similarity of the versions strongly suggested, however, that Kate Alterman had been coached if not in fact programmed. Surely, "red curtain of fire" and "like a wildcat" were not words of her own choosing. Max Steuer had successfully impeached through continued repetition a most sympathetic witness who had survived a major tragedy. At the very least, her credibility after cross-examination was suspect. The defense subsequently called approximately 50 witnesses to testify and it therefore cannot be said that the cross-examination of Kate Alterman was the *sine qua non* of the jury verdict for the defendants, returned after only two hours of deliberation. However, it certainly assisted in the result since Kate Alterman was indeed a critical prosecution witness.

Many years ago I decided to use the Max Steuer approach in a Bronx trial before Justice Matthew Coppola. The case involved a child who had obtained a carpenter's stud gun from the superintendent's office of the defendant. As one might expect, the five-year-old infant, while

playing with the gun pulled the trigger and blinded himself in one eye. The principal negligence issue was whether the stud gun had been left out for children from the building to play with or whether it had been put away in a reasonably safe place. At the time of trial the infant, then 11 years of age, described on direct examination the salient events of the accident as if they had just occurred the day before and as if he was an adult with total recall. This presented an opportunity to emulate the cross-examination of Kate Alterman.

I approached the witness as would any understanding father, asked a few innocuous questions, and requested that the child repeat for the jury what happened. I was not disappointed. With the clarity of a tape recording the story was repeated verbatim. However, from this one-time repetition, it was possible that the jury did not yet appreciate the import of the cross-examination. To stop at that point would result in another "Sister Ann James" debacle. After wasting a few more innocuous questions, I asked the child to tell once again what took place. The memorized recitation was repeated word for word. Feeling reasonably certain but not 100% that the jury had the idea now that the testimony had been scripted, I asked a few more throwaway questions and requested that the child tell the jury one last time how the accident happened. For what was a fourth time (1 on direct and 3 on cross), the jury heard the exact same story.

The case changed from one of sympathy for the child who had sustained a major injury to one of highly questionable credibility regarding the details of the occurrence. Plaintiffs' counsel, Herman Glaser, referred to at that time as the "Dean" of the New York plaintiffs' bar, clearly sensed the effect of this cross-examination. The matter was settled almost immediately afterwards and even before the defense had presented its case.

Possibly the most ingenious cross-examination of young children took place in the medical malpractice case of *Levine v. Kent*, tried in Supreme Court, New York County (Index 124206/99) before Justice Martin Schoenfeld in February 2002. The twin girls, Avery and Betsy, had been born prematurely at about 26 weeks. They were in neonatal care for an extensive period, both underwent heart surgery, and one had laser eye surgery. It was claimed that they had cerebral palsy, as well as physical and developmental problems, but the defense maintained that they made a spectacular recovery, although diminutive in height, and were actually attending a mainstream public school. At the age of six, the girls were presented in court and gave brief testimony on direct examination. Query, how do you effectively cross-examine a six year old to demonstrate the extent of the recovery?

Defense counsel Peter Kopff opened up his black bag and introduced each child to five hand puppets, Chicken, Noodle, Shy Shelly, Alligator and Moose. He previously used the puppets when teaching children in Sunday School. Without objection from plaintiff's counsel and with the help of the puppets, he put the girls in a conversational mood to speak about their brothers, wearing knapsacks, going to restaurants, music, books, etc. The girls were articulate. From playing with the puppets they demonstrated good hand-eye coordination. The session for each child lasted 20 to 30 minutes, and with the aid of the puppets, the plaintiffs' claim of ongoing developmental problems was effectively destroyed. Justice Schoenfeld is reported to have said that the use of the puppets was "brilliant" and that defense counsel "got this very shy child to respond to his questions." Without doubt, the shirt-sleeved defense lawyer, sitting on the floor and conversing with the children through puppets, additionally served to establish a unique rapport with the jury, although the extent to which Chicken, Noodle, Shy Shelly, Alligator and Moose contributed to the malpractice defense verdict is uncertain.

The motivation for this article results not merely from the Triangle Shirt Waist Company cross-examination and the other cases referenced above, but also from the recent trial of *Torres v. New York City Housing Authority*, Supreme Court, Kings County (Index No. 40054/00) held in March 2006 before Justice Arthur Schack. I had planned to utilize the Triangle Shirt Waist Fire "tell it again" technique to cross-examine 9 ½ year-old Stephanie Torres, but almost unexpectedly another impeachment approach appeared possible and potentially even more devastating. The plaintiffs claimed that defendant had made repairs to the apartment stove but failed to reinstall the unit into a special floor-mounted bracket which would prevent the stove from tipping. A pot of beans boiling in water was on the stove. Query, did 3-year, 9-month old Stephanie pull the pot of beans off the stove onto herself, causing the disfiguring 3rd degree burns, or did the accident occur because the stove tipped over? The only witness to the accident was the child herself.

Stephanie testified on direct examination that she had gone into the kitchen and climbed up to get a glass of water from the sink. She then described how the accident happened:

> Q Well, when you were in the kitchen was there anything cooking on the stove?
>
> A Yes.
>
> Q What was cooking on the stove?
>
> A Beans and water.
>
> Q And do you remember where on the stove the beans and water were?
>
> A No.
>
> Q And can you tell what happened after you got your water?

A I opened the oven door and I sat on it and the beans fell.

The intention had been to cross-examine Stephanie by asking her to repeat her story three or four times in the "tell again what happened" tradition of Max Steuer. Her "one"-liner version appeared programmed and memorized. Multiple repetition would certainly prove the point. However, initially it was important to establish that there had been conversations (i.e., coaching) between mother and daughter. Whether Stephanie admitted to it or not was really irrelevant, since the suspicion of manipulation would be implanted in the mind of jury. Stephanie was therefore asked on cross the following questions and gave the following answers:

Q Now, did your mother ever speak to you, Stephanie, about how the accident happened?

A I don't know.

Q What did you say, Stephanie?

A I don't know.

It appeared certain from these two "I don't know" answers that Stephanie did not want to admit that her mother had spoken to her; that is, told her how the accident happened. What the transcript unfortunately does not reflect is the time lapse between the questions being asked on cross and Stephanie's answers. This was yet further proof of the child's desire not to tell an untruth. Accordingly, an immediate tactical decision was made to forgo asking Stephanie to repeat her story. Cross-examination would be even more effective if additional "No" and "I don't know" answers were obtained. The following took place next:

Q You don't know whether your mother ever asked you how the accident happened?

A No.

Q Did your mother ever ask you whether you sat on the oven door, Stephanie?

A I don't know.

Q You don't know? Did you ever tell your mother that you did not sit on the oven door, Stephanie?

A No.

Q No? Are you, sure of that, Stephanie?

A Yes.

Q Huh?

A Yes.

Q Okay. And Stephanie, you're recalling now what took place how many years ago?

A I don't know.

Although it seemed that the jury must already realize that Stephanie's story of the accident was memorized, a tactical decision was made at this point to press the matter further. Why not ask the child whether she had any conversations with her lawyer? Her answer, whether it be "yes" or "no," could only help the defense. At the very least it would emphasize, as in the questions about the mother, the potential involvement of another key person in the preparation of Stephanie for trial. In this case, however, the answer was even better than a simple "No" or "Yes."

Q Did you ever speak to Ms. Ball about how the accident happened, Stephanie?

(Pause.)

THE COURT: Do you know, Stephanie?

A (Shakes head.)

THE COURT: You have to say something.

A No.

Q Do you want to answer that question, Stephanie, or do you not want to answer that question?

A I don't know.

Q You don't know?

THE COURT: Okay.

Q When you climbed down from the sink, Stephanie, were you near the stove?

A Yes?

Mr. Schwab: I have no further questions.

It was additionally clear that Stephanie did not want to admit speaking to her attorney. Court personnel noted that Stephanie made the worst child witness seen in their many years of experience. There was no need to ask Stephanie to repeat her story in the Max Steuer tradition. Her essential disavowal of any conversations with her mother and attorney was even more effective than repetition, since it was tantamount to an admission that she had been programmed. The jury subsequently returned a unanimous verdict for the defense. Implicit in the verdict was the rejection of Stephanie's testimony.

Cross-examination is indeed an art and not a science. For every general rule on cross-examination there is usually either a corollary or an exception dependent upon a fact-specific situation. This article is certainly not intend-

ed to be either authoritative or definitive, given these verities about which every trial attorney is well aware. However, some of the approaches worthy of consideration in the cross-examination of infants, particularly when independent impeachment proofs do not exist, appear to be:

1. Ask the child whether he/she has had conversations about the accident with his/her parents. Did mother or father tell how the accident happened? Whatever the answer, it should direct the attention of the jury to the possibility of coaching and programming.
2. Ask the child whether she had conversations with his/her lawyer about how the accident happened.
3. Inquire whether the child was taken back to the scene of the accident.
4. Bring out the fact that the child is describing today what occurred many years ago.
5. Do not ask the child to repeat his/her story only one time since that single response will only serve to reinforce that version.
6. Consider asking the witness to repeat his/her story three or even more times to prove that it has been programmed and memorized.
7. Always remain flexible and be prepared to alter your planned cross-examination when an unexpected response or new situation develops.
8. Be ever cautious not to alienate the jury.
9. Be inventive—in the right case with the right issues, it might even be worthwhile to buy a puppet of your own.

It may be that the approach to be used in the cross-examination of infants will depend upon the particular testimony and issues involved as well as the personality of counsel and even that of the child. Nevertheless, the purpose of this article is to present for discussion and consideration possible approaches to cross-examination by referencing salient aspects of the Triangle Shirt Waist fire case and others personally known to this writer. There are lessons to be learned from almost every trial. It is hoped that in addition to being of general interest this article has served a useful purpose for those readers who are trial attorneys.

Harold Lee Schwab is a partner in the firm of Lester Schwab Katz & Dwyer, LLP and a former Chair of the Trial Lawyers Section.

How Alternative Dispute Resolution Can Help You

By Irwin Kahn

As practicing attorneys we all know that most of our civil cases are ultimately settled before coming to trial.

Because of the multitude of matters waiting to be aired before our Courts a great deal of time usually elapses between the date of occurrence to the date of trial. As well as being time consuming, the litigation process can also be quite costly. Therefore it is common for both sides of a matter to attempt to negotiate a settlement on behalf of their clients. Unfortunately, it is not uncommon for both sides to reach an impasse in negotiations. When an impasse occurs, rather than wait for trial, more and more litigants are turning to Alternative Dispute Resolution to dispose of cases.

Alternative Dispute Resolution offers litigants the promise of a means to move their cases faster than the Court system can offer and at a cost advantage as well.

If opting to submit a matter to Arbitration, which in effect is a mini-trial before a trained Neutral, cases are disposed of fairly, quickly, cost effectively, and the outcome is binding. Attorneys have put their case on a fast track, have cut expenses and have benefited their clients at the same time.

The other option under the Alternative Dispute Resolution umbrella is Mediation. Here a trained Neutral helps the parties to negotiate and to overcome the impasse the parties may have reached on their own. The Neutral offers an impartial view of the occurrence and often can point out factors not readily seen by the involved parties. Mediation is consensual, private, quick, cost effective, and if an agreement is reached, final. It helps both sides take a more objective view of the injuries, liability, and relevant economic factors of the occurrence and often speeds a settlement. It offers the additional benefits of early Neutral evaluation, early fact and/or coverage determination, and offers the parties an opportunity to approach their case more creatively than they may have if Mediation was not a factor. In addition, if Mediation does not result in a settlement, the parties may agree to a high-low arbitration before another Neutral.

To be ready for Alternative Dispute Resolution the attorneys on both sides should evaluate beforehand the liability, damages, and the potential sustainable verdict in the venue where the action is pending. Preparing a concise memorandum setting forth liability, damages and value will be greatly beneficial in educating both your opponent and the Neutral. Reports from experts and Jury Verdict Reports of similar fact patterns should be included as part of the package submitted to the Mediator or Arbitrator. Whenever possible, your client should be present at the Alternative Dispute Resolution session, but if this is not possible you should be able to reach your client immediately should this become necessary. Good preparation leads to the likelihood of a satisfactory conclusion to the Alternative Dispute Resolution session.

Alternative Dispute Resolution is being used as a means of resolving issues in many areas and industries. With regard to the Securities Industry, the New York Stock Exchange and the National Association of Securities Dealers both have well established Arbitration and Mediation programs. The American Arbitration Association also has Mediation and Arbitration programs in the commercial and securities areas.

Both the Federal and State Courts have Alternative Dispute Resolution programs. The New York State Office of Alternative Dispute Resolution Programs is led by Daniel M. Weitz, Esq. New York County Lawyers Commercial Division has been in existence for almost ten years. Upstate also has Commercial Division Alternative Dispute Resolution programs. New York County has an early neutral evaluation program in the Matrimonial Part. In the tort area, New York County has a successful Court Annexed Mediation Program. In the Federal area, both the Eastern and Southern Districts have Alternative Dispute Resolution programs. George O'Malley, Esq. is in charge of the Southern District and Gerald P. Lepp, Esq. is in charge of the Eastern District. Both the Eastern and Southern District Bankruptcy Courts have Mediation Programs.

There are a number of Commercial providers who supply skilled Neutrals at a reasonable cost. These providers usually aid the parties in agreeing to participate, deciding on which of the Alternative Dispute Resolution modalities to utilize and scheduling the session at a convenient location before a well-qualified Neutral.

In summary, utilizing Alternative Dispute Resolution as a case management tool in your practice can potentially speed up the turnover of your caseload and enhance the chances of a satisfactory and cost effective resolution of your cases.

Irwin Kahn is a principal of the New York City law firm of Kahn & Horwitz, P.C. He is the Chairman of the Arbitration Committee of the General Practice Section of the New York State Bar Association; a past Chair of the Alternative Dispute Resolution Committee of the New York County Lawyers' Association; and a member of the New York State Bar Alternative Dispute Resolution Committee.

General Practice Session: Hot Tips January 4, 2006

This article originally appeared in the Spring 2006 issue of One on One, *the NYSBA General Practice Section Newsletter.*

Business and Commercial Litigation in Federal Courts, Second Edition

A Review

Reviewed by Mark A. Longo

When asked to review the Second Edition of *Business and Commercial Litigation in Federal Courts*, I accepted the request as a challenge of sorts. Given the vastness of the topic area covered, I thought it somewhat akin to being asked to provide my opinions about a body of written work which attempted to educate its reader about something about as expansive as a history of the western world.

At 96 chapters spanning some 9,000 pages, Robert L. Haig, the Editor-In-Chief of what can accurately be characterized as a treatise on the subject, uses a broad brush to provide both the technical and, more important, the practical applications of the law as they pertain to both the lawyer and any judge who would be wise to access this extensive resource when dealing with commercial litigation in the federal courts. In this respect, it is truly unique.

Mr. Haig hits his target of educating the lawyer by providing us with 96 chapters, l6 more than the first edition of this work published in l998. The authors of the various subjects presented include noted attorney practitioners, professors and l7 members of the federal bench.

Of those chapters, 36 of them address substantive subjects covered in the first edition, which now absorbs and expands upon Pocket Part additions since that time. As one might expect, these include traditional areas such as Contracts, Labor Law, RICO, Employment Discrimination, Professional Liability, Products Liability, Insurance, Banking and Torts of Competition.

In the procedural realm, subjects not only include Venue, Forum Selection and Transfer and Subject Matter Jurisdiction, but are joined by chapters dealing with Multi-District Litigation and a particularly effective treatment of the respective roles of Magistrate Judges and Special Masters in the litigation process.

There is even a chapter titled Litigation Avoidance and Prevention, which acknowledges at the outset that while it may be "as impossible for a lawyer to wish a client out of litigation as for a physician to wish them in health," the 35 pages that follow provide us with lessons geared toward enabling effective and profitable representation of clients in a civil and professional manner.

Among the new chapters, which in and of themselves serve as a roadmap evidencing the evolution of practice areas over the past 8 years, are Litigation Technology, Discovery of Electronic Information, Litigation Management by Law Firms, Director and Officer Liability, Broker-Dealer Arbitration and E-Commerce.

From my own personal experience, I remember being asked several years ago to be part of a CLE panel organized by the Editor-In-Chief to address the subject of Ethical Issues in Commercial Cases, a Chapter included in Volume 3. I am impressed by the scope of the treatment given to the issue in this treatise and will consult it time-and-again for both presentation and practice guidance.

Especially pertinent to the trial practitioner are those chapters dealing not only with areas such as opening statements, presentation of a case, cross examination and final arguments, but the treatment given to the tactical aspects of a trial such as *motions in limine* and the selection of experts, including a particularly helpful subheading of how to locate and "manage" one.

What is also most appropriate to trial lawyers is the chapter on Expert Disclosure and, in an area of ever-growing acceptance in the litigation process, the pre-trial exclusion of expert testimony.

Offered across the board in virtually all of the subjects presented are checklists and suggested language for pleadings, disclosures, the questioning of witnesses and how to deal with clients in the course of representation in a way that I wish that I had seen in other resource works I have relied upon in my past years of practice.

It is axiomatic to say that there is no substitute for experience in any context, and particularly when attempting to maneuver through the complicated myriad of the federal commercial litigation process.

On the other hand, if one were to seek out a treatise that would make you feel as if "you are there," this is the one that you should invest in and rely upon. The presentations are most detailed and clear and the information provided is from sources who are experienced and have been there. It is a resource prepared by lawyers for lawyers who practice business and commercial litigation on the federal level to rely upon for ongoing reference.

Mark A. Longo is a trial lawyer with Longo & D'Apice and a member of the New York State Bar Association House of Delegates.

Save the Dates

New York State Bar Association

2007 Annual Meeting

January 22-27, 2007
New York Marriot Marquis

Trial Lawyers Section
Annual Meeting
Wednesday, January 24, 2007

(Joint meeting with the Torts, Insurance and Compensation Law Section)

Section Committees & Chairpersons

The Trial Lawyers Section encourages members to participate in its programs and to contact the Section Officers listed on the back page or the Committee Chairs for further information.

Committee on Arbitration and Alternatives to Dispute Resolution

John P. Connors, Jr.
766 Castleton Avenue
Staten Island, NY 10310
718/442-1700

Committee on Continuing Legal Education

Thomas P. Valet
113 East 37th Street
New York, NY 10016
212/684-1880

Arlene Zalayet
60 Andover Road
Roslyn Heights, NY 11577
516/528-0687

Committee on Cyberspace

Timothy P. Murphy
1500 MONY Tower I
Syracuse, NY 13221
315/471-3167

Committee on Legal Affairs

Prof. Michael J. Hutter, Jr.
80 New Scotland Avenue
Albany, NY 12208
518/445-2360

Committee on Legislation

John K. Powers
39 North Pearl Street, 2nd Floor
Albany, NY 12207
518/465-5995

Committee on Medical Malpractice

Thomas P. Valet
113 East 37th Street
New York, NY 10016
212/684-1880

Committee to Preserve and Improve the Jury System

James H. Kerr
172 Arnold Drive
Kingston, NY 12401
845/338-2637

Committee on Products Liability, Construction and Motor Vehicle Law

Howard S. Hershenhorn
80 Pine Street, 34th Floor
New York, NY 10005
212/943-1090

Committee on Trial Advocacy Competition

John P. Connors, Jr.
766 Castleton Avenue
Staten Island, NY 10310
718/442-1700

Stephen O'Leary, Jr.
88-14 Sutphin Boulevard
Jamaica, NY 11435
718/657-5757

Committee on *Trial Lawyers Section Digest*

Steven B. Prystowsky
120 Broadway
New York, NY 10271
212/964-6611

Catch Us on the Web at WWW.NYSBA.ORG/TRIAL

Publication of Articles

The *Digest* welcomes the submission of articles of timely interest to members of the Section. Articles should be submitted on a 3½" diskette (preferably in WordPerfect or Microsoft Word) along with two laser-printed originals. Please submit articles to Steven B. Prystowsky, Esq., 120 Broadway, New York, NY 10271.

Unless stated to the contrary, all published articles and materials represent the views of the author(s) only and should not be regarded as representing the views of the Section officers, Executive Committee or Section members or substantive approval of the contents therein.

TRIAL LAWYERS SECTION DIGEST

The *Digest* is published for members of the Trial Lawyers Section of the New York State Bar Association. Members of the Section receive a subscription free of charge.

ISSN 1530-3985

NEW YORK STATE BAR ASSOCIATION
TRIAL LAWYERS SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155