



1982

From the Student Bar Association

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Recommended Citation

(1982) "From the Student Bar Association," *University of Baltimore Law Forum*: Vol. 12: No. 2, Article 13.
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FROM THE STUDENT BAR ASSOCIATION

Litigation Tips & Techniques

by Asst. Prof. Frank D. Giorno

Successful litigation requires functioning adequately at three developmental levels. The first stage is the process of allocation wherein the advocate seeks to identify and develop the elements of his case. The second stage involves the mechanical preparation wherein the advocate seeks to organize and assemble the evidentiary and theoretical approaches to the proof required to put forth a convincing presentation. The advocate also formulates barriers and formulates attack plans regarding the opponent's case. The third stage encompasses the physical presentation of the case upon the merits.

Before the trial attorney can successfully begin elementary preparation she must ascertain what elements are allocated to her side of a given controversy; that is, what elements are the responsibility of a given party in order to carry forth the burden of production (going forward) and persuasion. For example, in a contract dispute based upon the denial of coverage under a policy of life insurance the plaintiff beneficiary of the face amount of the policy would have to prove among other things, the death of the insured. If the plaintiff tries to assert that he is entitled to double indemnity under an accidental death provision of that same policy, then that plaintiff would have to prove, as an additional element: the *manner* of death. The distinction between *cause* of death and *manner* of death is important, the former referring to the physiological ending of life and the latter referring to the way in which the physiological end was brought about. For example, the cause of death could be massive hemorrhage and/or heart failure caused by the penetration of a .38 caliber bullet into the

chest cavity entering the heart; but the manner of death could be accident, suicide or homicide. If the defendant insurance carrier contests the payment of the face amount of the policy and the accidental death benefit because it believed the insured died by his own hand, then the insurer would have to plead, as an affirmative defense, death by suicide. The defense would have to prove the manner of death bearing upon both claims; that is, the first area of coverage where only the face amount of the policy is claimed and the second area of coverage where the plaintiff claims double indemnity due to accidental death. These are examples of elements of a claim or defense being allocated to one side or the other, depending upon the theory and nature of the claim or defense. In order to make suicide a viable defense in our example, we will have to assume that the insurance policy has been in force less than two years. Most insurance contracts contain an incontestability clause which would preclude the defense of suicide if the policy had been in effect more than two years from the date of issuance.

The goal of litigation for the plaintiff is to discharge successfully his burden of proof. The goal of the defense is to prevent that discharge; or in the case of an affirmative defense, to carry forth the primary duty of proving all those elements allocated to it by contract or by substantive law.

Continuing with our insurance contract model, we next look to the second phase of litigation, that of mechanical preparation. One helpful suggestion in the way of organization, which is the key to any successful case presentation, is to formulate,

prepare and utilize a trial brief, which can be arranged along the lines of a simple outline or schematic form as follows:

- I. Elements of Charge or Civil Action (Plaintiff's Elements)
 - A. Insurance Contract Dispute
 1. Policy Issuance (Date, Policy No., etc.)
 2. Identify Insured
 3. Identify Beneficiary
 4. Terms of Contract (Amounts payable upon death and or accidental death)
 5. Insured's date of death
 6. Policy in full force and effect at the time of decedent's death
 7. Conditions and terms of policy complied with by Plaintiff, etc.
- II. Law (Elemental Allocation in A Given Case)
 - A. Case Precedent
 - B. Contract and Insurance Law Doctrines
 - C. Statutory Provisions
- III. Facts
 - A. Plaintiff's Testimonial Presentation (Dates, Places, etc.)
 - B. Statements of Defendant's Representative to Plaintiff
 - C. Statements of Other Witnesses
 - D. Presentation of the Contract of Insurance of the Insured
 - E. Other Factual Data
- IV. Witnesses
 - A. Testimony—W₁
(with appropriate reference to evidentiary presentation)
 - B. Testimony—W₂
(second witness, etc.)

IV. Witnesses (*Continued*)

- C. Documentary Evidence (witnesses—testimonial sponsors for documents)
 - 1. Documentary Considerations
 - a. Best Evidence Rule
 - b. Authentication
 - c. Hearsay
- D. Real or Demonstrative Evidence—Testimonial Sponsors

- 1. Exhibits—Real Evidence Considerations
- 2. Charts, Diagrams—Other Descriptive Evidence, etc.

- V. Evidentiary Considerations
 - A. Hearsay
 - B. Real Evidence—Chain-of-Custody
 - C. Reports (Autopsy, etc.)
 - D. Expert Testimony
 - E. Writings, etc.

- VI. Opposition Case
 - A. Elements of the Opposition's Case
 - B. Evidentiary Considerations
 - C. Testimony of Adverse Witnesses
 - D. Cross-examination—Impeachment Considerations
 - E. Rebuttal of Opponent's Evidence, etc.

VII. Opening Statement

LAW & ELEMENTS OF CIVIL CLAIM	FACTS	WITNESSES	EVIDENCE	OPPOSITION
Insurance Contract Dispute 1. Policy Issuance (Date, Policy No., etc.) 2. Identify Insured 3. Identify Beneficiary 4. Terms of Contract (Amounts payable upon death and/or accidental death). 5. Insured's date of death 6. Policy in full force & effect at time of decedent's death 7. Conditions and terms of policy complied with by Plaintiff, etc. 8. Case Precedent 9. Contract and Insurance Law Doctrine 10. Statutory Provisions	1. Plaintiff's testimonial presentation 2. Statement of Def's. Reps. to plaintiff 3. Statements of other wit. 4. Other Factual Data	1. T ₁ -W ₁ 2. T ₂ -W ₂ 3. T ₃ -W ₃	1. Physical a. Exhibits (Real Evidence) 2. Documents a. Authentication b. Best Evidence Rule c. Hearsay 3. Demonstrative Evidence 4. Hearsay 5. Chain-of-Custody (Real; Demonstrative Evidence, etc.) 6. Expert Testimony a. Reports, (Autopsy) etc.	1. Elements of Opponent's case 2. Evidentiary Considerations 3. Testimony of Opp. Witnesses 4. Cross-Examination-Impeachment Consideration 5. Rebuttal of opponent's Evidence
W—Designates Witness T—Designates Testimony				

The use of the trial brief can result in a well organized case presentation. After reviewing all parts of the brief, the main elements of opening statement will be evident to you.

The third phase is dealing with the physical preparation of the case. The following is helpful in anticipating the presentation of the case upon the merits.

a. *OPENING STATEMENT:*

This is an area that is not to be overlooked for it may actually set the tone and the mood for the entire trial. Many attorneys feel that a case is won or lost upon opening statement. It is important to only state the factual elements of the case and to steer clear of argument at this point. Never *over-state* what you intend to prove;

that may come back to haunt you later. Opening statement is the time to introduce yourself, your co-counsel and the parties. It is also the time when you are making a first impression upon the trier of fact. Be a story teller, but stick to the facts. Be interesting but not maudlin. Remember, if you are prohibited from mentioning certain evidence by way of a pretrial

motion *in limine*, for example, do not comment about those items on opening statement.

b. **KNOWLEDGE:**

A clear and thorough understanding of the evidentiary rules and items to be offered in the case is *essential*. Thorough research and a good grip upon items of evidence you are going to offer and those to be offered against you is critical in order to make your presentation a fluid one.

c. **PREPARATION AND EXECUTION**

Prepare witnesses; know the facts thoroughly and set out with a specific goal in mind. Direct your attention to those targets, utilizing prior statements, reports, depositions, etc.

d. **MAINTAIN A SINCERE
DEMEANOR:**

A trier of fact will see insecurity quickly. You must project a belief in the case that you are presenting if you want the trier of fact to do the same.

e. **PHYSICAL EXECUTION:**

Keep your voice up and vary the tone of your voice through modulation. The volume and tone of your voice will inspire confidence and set a mood. It is not necessary to be constantly abrasive or obnoxious. Be yourself and let your own personality work for you. Stand while examining a witness, unless instructed by the court to do otherwise. Physical gestures, when appropriate, can be very effective and helpful if not overdone. Maintain a proper body position while arguing. Speak in PLAIN English using simple sentences, and above all do not lose the jury with aimless rhetoric.

f. **LISTEN:**

Being alert to the testimony in court can be of vital importance. Don't be so prepared that you forget to *hear* what the opposing witnesses are saying. A witness might state something on direct that could be "pure gold" to your case if effectively pursued on your cross-examination or in rebuttal.

g. **OBJECTIONS:**

Make sure objections are made in a timely fashion and that there is a basis for them. In Maryland State Court

you need only give a reason for objections when asked by the trial judge, but it is imperative that you are ready with an explanation for your objection, if asked. *Md. Rules of Procedure 522.*

h. **EXPERTS:**

Do not forget to *qualify* the expert as an expert by eliciting the credentials of your expert on the witness stand when beginning your direct examination, and conclude by requesting that he or she be so designated by the trial judge. Always be sure to end your direct examination of the expert by asking for a conclusive opinion that is definite. It is not proper and it will do you no good to elicit testimony from an expert that is conjectural and/or speculative. Remember the expert must give his opinion with "reasonable certainty" based upon "probability."

i. **CROSS-EXAMINATION:**

This must be approached with the idea of making a point. Don't wander aimlessly through this critical part of the trial. *Do not* attempt to cross-examine an opposing witness just for the sake of having him or her repeat the story presented on direct. This will only serve to reinforce the original testimony and allow the jury to hear it twice thereby reaffirming it in their minds. Don't rehash the witness's testimony unless you are going to make a specific point or impeach the story the witness is telling.

j. **CLOSING ARGUMENT:**

This is the time to discharge the burden of persuasion by focusing on the factual basis of your case. Organize your argument around your entire case presentation which has, in fact, already been structured toward this goal. Tie your major points together by expounding upon the facts, the law, the inferences in your favor and the evidence. Most importantly, gear your argument to the common sense and experience of the jury. Use an organized, well-based structure. Be clear, and persuasive while giving a good overview of the case. Choose your words carefully and utilize a persuasive yet non-abrasive tone, with good voice modulation and inflection and good physical presentation. Do not forget to handle or

comment upon any rebuttal evidence that has come in against your client.

Obviously the suggestions contained within this article are not meant to be exhaustive, but they will provide a basis for continuing thought on the techniques to be learned and mastered for good, solid case presentation. Experience in the art of trial advocacy has no substitute, but two of the most important elements of successful litigation are thorough preparation and alertness during the trial. Concentrate on the proceedings not upon your own personal role and the performance will take care of itself and help eliminate a lot of miscues that nervousness and hesitation can bring on. Anxiety begets anxiety. So, focus on the task and if you are properly prepared self-assurance will follow.

Use every trial as a "teaching tool" for the next one, for every proceeding has something to contribute to an advocate's overall development. Emulate the great ones—but do it in your own style.

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BALSA Presents *State v. Diamond*, A Mock Trial

by Victoria R. Robinson

A mock trial, held November 20, 1981, was sponsored by the University of Baltimore's Chapter of the Black American Law Students Association (BALSA).

BALSA is a national organization with chapters in virtually every law school in the nation. Its aims are to maximize the number of Blacks entering and completing law school as well as to competently advocate the interests of all segments of the Black community. One aim is to sponsor community outreach programs to interest and educate minority youth in various careers available in the legal profession. The mock trial is just one of several such community programs planned by UofB BALSA.

State v. Diamond

Facts: The Grand Jury charged John Diamond with first degree murder in the shooting death of Trudi Doyle, at the Truck Stop Cafe on Highway 33, just outside of Nita City.

Mr. Diamond, a police officer with the Nita City Police Department, and Ms. Doyle, a waitress in the Truck Stop Cafe, had been living together immediately prior to her death.

On the morning of December 1, Mr. Diamond went to the Truck Stop Cafe to meet Ms. Doyle when she got off work at 6:00 a.m. He had just resigned from the police force and had left a California forwarding address at the station. Mr. Diamond entered the cafe and sat in a booth. Ms. Doyle was sitting on the other side of the cafe conversing with the other waitresses and did not acknowledge Mr. Diamond's presence. When Ms. Doyle got up and went to the vestibule in the front of the cafe, Mr. Diamond followed her, and they talked for a few minutes. A shot rang out, followed by a second shot. Ms. Doyle fell to the floor, dying shortly thereafter. Mr. Diamond remained at

the scene and was arrested when the police arrived.

Verdict: In an eight to four decision Mr. Diamond was found guilty.

In a real first degree murder trial, the jury must return a unanimous verdict. However, since the hour was growing late, the jury could only muster up a verdict of guilty by a majority vote. The jury was comprised of a random selection of 12 young people who had come to view a realistic, if somewhat abbreviated, mock trial.

The split among the jurors is quite understandable in light of the excellent performances by Gorham Scott (John Diamond), Mary West Miller (witness for the defense) and Zerita Skates (witness for the prosecution), all members of the Arena Players of Baltimore.

Although a murder trial was selected for its sensational appeal, the proceeding was quite authentic, complete with bench conferences and discussions on the finer points of law. Judge William Murphy, Jr. of the Baltimore Supreme Bench presided. The defendant was represented by Harvey Greenberg, a former assistant State's Attorney for Baltimore City. The prosecutors were James Randolph Spencer and Roger Adelman, both assistant U.S. Attorneys.



International Law Society

by Alegra Saragosey

The University of Baltimore International Law Society (ILS) was established in 1976 with the accreditation of the American Society of International Law (ASIL) in Washington, D.C. The purpose of the Society is to increase an interest in, and understanding of, the many and varied aspects of comparative and international law and organization; and to acquaint those students intending to pursue careers in international law with the opportunities available to them.

ILS coordinates UB's participation in three of the major events of the ASIL: Washington Law Week, the Philip C. Jessup International Law Moot Court Competition, and the Annual Meeting of the ASIL. In addition, the ILS presents guest speakers in the field of international law.

This past fall, speakers included the Regional Counsel of the U.S. Customs Service, Mary Grumbine, and the Executive Secretary of the ASIL, Richard Nelson. Currently, we are planning for the appearances of Jack Simmons, the attorney for the International Trade Commission (ITC) who will speak on the functions of this leading U.S. trade body and the role of its attorneys; and Howard Pollock, the 1st Congressman for the State of Alaska and Official Delegate

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This year's Jessup Moot Court Competition is well underway with UB's team having submitted their Memorials (briefs) and preparing now for their regional rounds of oral argument to be held at Catholic University, March 12-14. At the regionals, UB's team will argue against teams from Washington & Lee University, the University of Virginia, William & Mary College, and George Washington University. Entering the competition are 124 U.S. law schools in addition to some 65 law schools in 22 countries throughout the world making this year's competition a truly international event! The semi-final and final rounds of the competition will highlight the activities of the Annual Meeting of the ASIL during the week of April 18-24. The agenda of the Annual Meeting will be announced at the next meeting of the ILS (t.b.a.); but for those of you who like to plan ahead. . . a tremendous open party, funded by all member societies including UB, has been planned for the evening of April 21 in Washington, in celebration of this year's Jessup Competition. This party is also open to all UB students and faculty.

As a student society, UB's ILS also participates in the activities of the Association of Student International Law Societies (ASILS). The ASILS publishes a yearly journal of original student works, and for the first time ever, we are very pleased to announce a publication by Kevin Nachtrab, one of our own law students, who is also a member of this year's Jessup team. Kevin's timely article on the Paris Convention for the Protection of Industrial Property was approved by the Executive Secretary of ASIL and will appear in the journal's next edi-

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Also a first, the University of Baltimore has been chosen as one of five schools in the D.C. area to participate on the nominating committee for the ASILS Executive Board. The decision to include UB on the committee was based on a recommendation from the ASIL Executive Secretary and on our active role in ASIL and ASIL's activities. Interested students should watch for the notice in the Advance Sheet concerning nominations as we have been encouraged to submit resumes from our own members.

A number of U.S. schools have contacted the ILS with information concerning summer legal studies abroad. Some of the programs include studies in Mexico City, Guadalajara, Salzburg, Budapest, Vienna, Paris, Oxford, London and Russia. Students interested in information on any of these programs should pick up applications outside of the ILS office at 205 EMR where all program information is posted.

This year's ILS officers are Alegra Saragosey, President; Cindy Miraglia, Vice-President; Marcy Sherry, Secretary; and Barbara Radcliff, Treasurer. For more information on the ILS and its activities, please feel free to contact any of these officers or Professor Goodenough or leave a note at our office at 205 EMR. As a student society we encourage and welcome all suggestions from UB students and faculty concerning our activities and proposed events.

That "Circus Sideshow" in Annapolis

by Stanley D. Janor

Another glib social pseudo-sage once opined that "No one's life, liberty, or property is safe while the legislature is in session." While this may be overstating the case somewhat, the General Assembly or whatever of every state probably wields the most substantive power over the daily lives of its constituency of any of the levels of government, especially today with the move toward the "New Federalism."

Nearly forty percent of the federal budget, and presumably governmental activity, is devoted to defense and foreign affairs—matters from which the states are constitutionally barred. While the remaining sixty percent is purportedly spent on carrying out economic and social policies, most of these are in long-term and broad-brush modes, which only touch us as far as setting a minimal structure and atmosphere in which there is a wide range of operation, contrary to the constant decrying of the "get the federal government off our backs" crowd.

The powers of local governments barely warrant mentioning, as municipalities are literally incorporated, non-sovereign entities. Besides being bogged-down in such mundane matters as where to dump the garbage they collect, their existence, let alone their ability to govern, is limited by—you guessed it—the state legislature. Only in the case of large cities with politically-innovative leadership (Daley in Chicago and Schaefer in Baltimore being the most recent examples) can local governments have any real say in their destiny, and then only if they have a highly-disciplined as well as numerically large legislative delegation.

As one who has had close and long-term dealings with the Maryland General Assembly, going there first in the role of Legislative Aide as a

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As one who has had close and long-term dealings with the Maryland General Assembly, going there first in the role of Legislative Aide as a

somewhat naive twenty-year-old undergrad in 1974, I can personally attest to the notion that the state legislature represents both the worst and the best that our distinctively American form of democracy can offer. The bills introduced and the interests they serve are often extremely parochial, purely personal, against the interests of the general public, or just downright petty and supercilious. The lobbying for these interests is intense and has all the trappings of a melodramatic seduction: much plying with haute cuisine and top-shelf booze; secret rendezvous at dark, out-of-the-way places; and frenzied assignational couplings of disparate partners which usually cease once rumor of their taking place becomes public. Attempts at real and substantial reforms of any number of areas in the law are often killed in committee or amended to death on the floor because of their political volatility. And, only the teen-age pages who clean out the chamber desks ever know how many pieces of good legislation simply go into limbo having never been put up for a vote before midnight on the nineteenth day because of filibusters or a logjam of other, less worthy bills which were railroaded through on the 11:58 hysteria express. (Maryland has not yet succumbed to the legally doubtful maneuver of pulling the plug or hanging a shroud over the clocks to send the sessions into overtime if the powers-that-be deem that there is important business still to be considered.)

As Tolkien might be wont to say at this point however, "Out of the midst of this evil darkness comes help beyond hope." In recent years, the Maryland legislature has worked hard to put its houses in order, prompted, no doubt, by the state's reputation in the 70's as a seat of political corruption rivalling the New Jersey of previous decades or New York of the Boss Tweed era. The hacks and machine men still linger in the halls of the nation's oldest capitol building, but their numbers and influence have been greatly reduced. The overwhelming majority of those who now serve,

particularly in the leadership positions, are honest, intelligent, educated, high-minded and public-spirited men and women—many of them, in fact, far superior to those recently elected "New Right" automatons now toiling in those old swamplands along the Potomac in the indentured servitude of the California Croesus and his gilded country club WASP nobility. While the process is still highly politicized, people such as Harry Hughes, Sam Bogley, Jim Clark, Ben Cardin, Rosalie Abrams, Don Robertson, and even that consummate master of legislative legerdemain, softshoes Harry McGuirk, have shown the wisdom to rise above politics in seeking solutions in the setting of crucial and complex policies concerning taxation, prisons, energy, and transportation, as well as the usual, recurring problems like the state budget.

Through certain institutional reforms, the General Assembly has become a more deliberative body as well. No longer do the country gentlemen troop in from the outlands with mud on their boots the first week of January and rush home at the end of the session, never to return until the following year. The standing committees, where most of the real work of any legislative body is done, now meet year-round to both explore and filter possible subjects for legislation. Special committees are now routinely appointed to scrutinize certain topics which require both a broader and more intense look—tax and spending limitation, transportation, and code reform being the most notable examples. All of these committees now actively seek and welcome public input, even when the issues are likely to provoke emotional and protracted testimony in marathon sessions before packed hearing rooms. Even such merely physical changes as the construction of the new legislative services buildings have helped to increase the efficiency and effectiveness of the General Assembly. Just ask anyone who worked in Annapolis when delegation and committee rooms were tucked into various and sundry cubbyholes and garrets around State Circle.

In those days, *literally* more business was conducted and decisions made in Fran O'Brien's, Sam Lorea's, the Barrister, the Dockside (these were the old-time Annapolis bars which existed when such preppy hangouts as Riordan's and McGarvey's were only tinklings in someone's piggy bank) or Chick'n Ruth's Delly than ever was done in the officially designated meeting places. No one could stand to stay in those cramped quarters very long without seeking solid and/or liquid nourishment.

The net result of these changes is that the General Assembly has become a much more open, responsible, and responsive body than it was just a decade ago. Not as open as some groups, say Common Cause, would like perhaps, but enough so that the movers and shakers must now at least broker their power rather than just wield it omnipotently and arcane-ly over legislators and citizens alike and "in the darkness blind them." Contrary to the *Sunpapers*, which is in a neck-and-neck race with Channels 2, 11, and 13 for the Puff and Fluff News Award and, (in its feeble attempts to sell papers) likes to focus on the "party" and "carnival" atmosphere of the session, there is serious work that goes on in Annapolis. Lawyers should be particularly interested in this year's session as it is likely to produce significant changes in the criminal law along with the more usual juggling of administrative regulations and other legal and quasi-legal rules.

The state legislature probably is still the most readily available forum in which to watch "democracy in action" and maintain a proper sense of scale without being bored to death in the process. I would also willingly wager that before we all depart for our greater reward, not a few among us will be some of those chosen to push the buttons and see those little green and red lights glow next to our names up on those electronic scoreboards which seem so incongruous, yet so integral, to those antique marble walls.