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INDUSTRY UPDATE: TRIAL CONSULTANTS PRACTICING MORE PRIOR TO ADR

On a recent case a lively discussion ended abruptly when a member of the trial team innocently asked, “*What is our plan for mediation anyway?*” Upturned mouths went straight and the silence became awkward as they realized that for all of their hard work they had not focused their efforts specifically on mediation.

Of course, many times the lack of a mediation, or any ADR strategy, is driven by cynicism over how “far apart” the parties are, poor communication within the litigation team, or concerns that the mediator is not seeing the case as hoped. Regardless, the idea that one walks into ADR without a clear strategy can put an advocate in a position of competitive disadvantage.

The American Society of Trial Consultants (ASTC) just celebrated its 25th anniversary. Each year, the conference provides an excellent opportunity for examination of litigation trends. One of the clear trends this year was that trial consultants are being engaged earlier in the litigation timeline, with a key focus being on clients’ needs prior to ADR. As such, an overview of some of the tools that can help one gain a competitive advantage in ADR seems warranted.

Mediation and arbitration, by design, require information to be delivered with powerful advocacy in a short amount of time. The trier of fact must ask, “*What would a jury do with this case?*”

The persuasive process starts months or, in some cases, years before ADR when trial consultants meet with members of the trial team for a **Strategy Session**. In this session consultants facilitate a discussion of the strengths and weaknesses of the case. Themes can be established and the case story is fashioned into bullet points or captions, which can then be formulated into a two to

five-minute summary. Through this process, the need to find support for each point of the story with demonstrative exhibits and witness testimony is highlighted.

Demonstrative Exhibits are sometimes one of the last things considered for use in ADR. Attorneys often assume that a mediator or arbitrator will not need or want visuals used during the sessions. Obviously, mediators and arbitrators are people too, and the fact is that most people are visual learners. Good graphics reduce complexity, help deliver themes, and ensure effective communication in a short period of time. Just last week an attorney called to share with us how the arbitrator repeatedly referenced their timeline and explanation boards (the other side had no visuals), even asking to keep them while he made his decision. These visuals were critical in leading the arbitrator to view the case in their terms.¹

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Another issue often overlooked is **Witness Preparation for Deposition**. Digital video has revolutionized the way depositions are seen. Now, the mediator can assess witness credibility by the appearance and tone of the witness. Unlike a jury who will likely get the benefit of viewing the witness in person, a mediator will probably only have one chance to view your witness and make his or her assessment.

Finally, we have seen a significant increase in the use of **Mock Trials** prior to mediation to provide insight into liability, causation, damages, as well as the impact of demonstratives, witness testimony, jury instructions, and a verdict form. Walking into mediation with the trial team and the client on “the same page” is quite possibly the greatest benefit of pre-mediation mock jury research.

From the deliberations of the mock juries, a **Highlights Video** can easily be produced. This 10 to 20 minute video can show what

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FUNDAMENTALS OF OPENING STATEMENT PREPARATION: SPEECH 101

Whatever else your opening statement might be, it is fundamentally “a speech.” This is in no way meant to minimize the importance of an opening or make light of the pressure or anxiety felt when faced with the daunting task of writing one. It simply means that when preparing an opening, do not forget that it is a speech for which certain fundamentals cannot be ignored. Jurors are unforgiving when it comes to their criticism of poor opening “speeches.” If you want to make sure that you do not begin trial with jurors saying “*I couldn’t follow the defendant’s case.*” “*She rambled and seemed unprepared.*” “*Was he just trying to confuse us?*”, then take note of the following public speaking principles to your “speech” preparation.

1. Create Your Outline: This is an obvious step, but one often overlooked as many people use a “novel-writing” technique where they write a manuscript of their case. The problem with doing this is that a “speech” is not read, and without a structure to make sure that it is not redundant or confusing, the audience—your jury—will not be able to follow it. Instead, use the 10-point story (produced as part of your trial preparation) to create the organizational structure of your opening.

The 10-point story is generally written in chronological order, but it can be “topical” where various topics or issues relating to the case are discussed as distinct categories (i.e., product liability case with points: product history, product development/manufacturing, product safety requirements, correct product usage, etc.). A few additional points to your outline might be needed; for example, “Refutation of plaintiff’s main points” or “Forewarning of the defendant’s tactics.”

The outline should follow a couple of basic rules: 1) The points should be distinct; they build on each other, but they do not cover the same material. 2) They should be ordered in a sequence that makes sense; hence, the 10-point story framework. And

3) they should all relate to the main point you are making. Although the verdict questions are not being argued, essentially the answers to those questions are the points being made. Do not make the mistake of leading your jury down the wrong path by setting them up to answer a question that will not appear on the verdict form.

2. Compile and Refine the Information: After the main points have been decided and ordered, ask yourself, “*What is the most persuasive evidence and/or testimony that goes with each of these main points?*”

The opening statement does not include *everything* in your arsenal. Instead, it is comprised of those items that will make the most impact in a succinct and comprehensible manner. Belaboring each point by mentioning every last bit of information risks boring your jury and making them think you are not using your time valuably. You might think it is your role to put all the evidence in front of the jury. Keep in mind, the opening is a speech: a compelling, clear, and cogent telling of your case. It is one of the major components that will intrigue and engage your jury.

3. Think Transitions: Transitions are not merely the sentences that move you from one point to another. A good transition will do a few key things, the first being the one that most people think about: moving your speech smoothly along so that it has flow and integrity. However, a transition should also repeat key points and signal what is next. A certain amount of repetition in your speech is smart—it is a basic tool that aids with memory. If you build in repetition at the appropriate time you are subtly reminding the jury of the conclusions you want them to draw. Second, you should inform your jury of what is coming next. People absorb information better when they understand what is happening; it is less cognitively taxing to be informed of what is going on as opposed to having to figure it out. Hence, transitions guide the jury by providing previews of what is to come.

Both of these things can be done quite simply. For example: *“Now that we have just heard how the product was manufactured in a completely safe and reasonable manner [the repetition], let’s turn to the company’s instructions to end-users on how to safely use the product [the preview of what’s to come].”*

It can also be done by simply telling your jury right after the introduction (or “Silver Bullet”) that you will be covering X number of points. And then, as you transition from point one to two to three, you remind them of what number they are on: *“First, I explained how the product was manufactured according to all governmental regulations; second, you saw some video deposition testimony from Mr. Smith who explained the proper way to use the product; and now I will turn to...”*

4. Focus on Language and Style:

You’ve written your outline, you’ve placed the evidence and testimony into the proper place, you’ve thought about how you will provide internal summaries and previews during the speech. Now it’s time to add you. No good speech instructor will ever tell you that you *must* use certain language to be successful. Each one of us has a certain style that fits with who we are and you should never try to become someone else. I might describe the color of the woman’s skirt as vermilion or maybe chartreuse, but if you feel more comfortable saying red or green, then do it. The point is, any good speech needs some additional elements to make it soar and some of those things are actually quite easy to add.

From a structure standpoint, a speech has internal consistency (and just sounds better) if you build in parallel structure or repetitive language, either for a particular section or for the beginning/ending of each main point. For example, use a question/answer structure: *“How do we know the product wasn’t defective? Three independent experts came to that conclusion. How do we know the product wasn’t used correctly? Two people saw the plaintiff on the day of the*

accident.” Or, try beginning (or ending) a series of sentences with the same phrase: *“You will not hear from anyone who will say the product was defective; you will not hear from anyone who will say the product was used correctly; you will not hear...”*

Other stylistic techniques include: alliteration (repetition of the same consonant sound, e.g., *“clear, cogent and compelling”*); antithesis (connecting two contrasting ideas to highlight the difference, e.g., *“Ask not what your country can do for you, but what you can do for your country.”*); metaphors or similes (implying two unlike things are the same, e.g., *“This product is as dangerous as a loaded gun.”*); and personification (placing human qualities on objects or ideas, e.g., *“The Widget Company has a heart as big as Texas.”*).

The opening statement does not include everything in your arsenal.

5. Create Visuals: We’ve written about the importance of using visuals many times, but it cannot be overemphasized: effective visuals

are an absolute necessity when giving an opening “speech.” Unlike the last section where there is some leeway in exactly what kind of language or what kind of “style” is best for you, when it comes to visuals no one can use the excuse *“I just don’t use visuals.”* It is a given that your jury will be comprised of visual learners. It is also a given that comprehension and retention are better when people are presented information both orally and visually. You will have leeway in the exact type or style of the visuals you choose (perhaps you like boards better than PowerPoint), but using visuals is critical.

Visuals help with a number of things: 1) focus structure and transitions; 2) clarify key concepts; 3) keep track of who’s who; 4) explain complex concepts or processes; and 5) summarize and preview testimony.

These fundamentals encompass a few of the basics on how to *prepare* an effective speech. In a later addition of *The Advantage* we will address how to *deliver* an effective speech.

(Industry Update continued)

aspects of the evidence were considered significant, how certain witness testimony was perceived, which arguments were the most influential, and how damage awards were calculated. The video should include both strong and weak elements of each party's case, thereby increasing the validity and ultimate power of the video to influence a mediator's opinion. Of course, the decision to disclose any form of jury research results to the mediator is dependant on your mediation strategy and warrants thoughtful consideration.

One should be aware that the use of jury research in mediation also highlights the importance of understanding the **indicators of quality in jury research.**² Without the mediator understanding the

difference between how the cases were presented, how jurors were obtained, or which methodology was used, a "dinner party focus group" could be considered on the same plane as sound research.

In a nutshell, effective preparation for ADR is not unlike effective preparation for trial. Increases in the use of trial consultants pre-ADR is an indicator that attorneys around the country are realizing the importance and making a greater effort to utilize the many tools at their disposal, which is, in turn, giving them a competitive advantage.

¹ Examples can be found at http://www.tsongas.com/services/graphics_samples.cfm

² A more complete explanation can be found in *The Advantage*, December 2005, Vol. 2, Issue 3, p. 2

CHRIS DOMINIC ELECTED AS ASTC PRESIDENT



Tsongas Litigation Consulting, Inc. is pleased to announce that Chris Dominic, President of Tsongas and Senior Consultant, has been elected to serve as President of the American Society of Trial Consultants (ASTC) effective July 2007. Serving first as President-elect, his terms began July 1, 2006. Before being elected president, Dominic served as a Director of ASTC's Board.

Dominic has been with Tsongas since 1997, first as a Consultant and currently as both Senior Consultant and President of the firm. Frequently presenting seminars around the country on issues ranging from effective courtroom communication to litigation graphics, Dominic has become well known and respected by attorneys and other trial consultants alike. Dominic's postgraduate education included studies and teaching in persuasion, public speaking, debate, and business/professional communication. He has a master's degree in speech communication from San Diego State University.

With previous experience as a management consultant, Dominic possesses a business perspective that is unique from most former ASTC Presidents. Dominic has said, *"The work I have done consulting with large organizations, as well as my current role at Tsongas, will directly translate into the approach I will take in the leadership role with ASTC. It is essential that we continue to move forward in the development of our relatively young profession."*

As ASTC celebrates its silver anniversary, Dominic says he has *"great respect for what has been accomplished in the last 25 years,"* and acknowledges that the organization *"has a strong foundation to build upon."* Dominic hopes to build on this foundation by focusing on the continued development of the organization's standards and guidelines, and by doing more to *"educate those outside the organization about what ASTC stands for and what we do."* He also says that the organization must *"respond effectively to challenges to our profession and its development."*

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