



Juvenile Regional Services: Rebuilding a Broken System in New Orleans

BY HECTOR LINARES



Hector Linares

Reforming a broken system is never a quick and easy process, but a new nonprofit in New Orleans has taken great strides in fixing what the *New York Times* called in 1997 the “most troubled” juvenile public defender’s office in the country.¹

In early 2007, a group of attorneys and youth advocates wishing to capitalize on reform opportunities created by the city’s post-Katrina rebuilding efforts formed a new organization called Juvenile Regional Services, Inc. (JRS). After much planning, hard work, and political wrangling, JRS was able to enter into a contract with the Orleans Public Defenders Office to become the exclusive provider of juvenile public defender services in Orleans Parish and the first stand-alone juvenile public defender’s office in the country.

The founders of JRS formed the organization with the lofty goal of transforming New Orleans’s juvenile public defender system from a broken institution into a model office that provides not only constitutionally adequate representation but also holistic and zealous representation of youth, implementing national standards of best practices

for juvenile defense.

Before JRS came on the scene, a youth arrested and charged with a crime in New Orleans was subjected to a system that embodied some of the worst stereotypes of how bad public defender offices operate. High rates of plea bargaining, stipulations waiving important procedural protections, little face-to-face time with overworked attorneys, no investigation of even serious cases, and a generally low level of advocacy on all levels were all too common.² Regardless of the outcome of an individual case, the experience was often traumatic and disempowering for the youth being funneled through this broken system.

The structure and policies of JRS allowed the organization to correct some of the most serious problems almost immediately. JRS quickly implemented a system of vertical representation in which one attorney follows a child from arrest through trial and into any post-disposition advocacy until the case is closed. This system, including assigning the same attorney to clients with multiple cases, allows attorneys at JRS to develop close relationships with clients and their families, something often crucial in providing effective advocacy.

JRS also focuses on the dispositional phase of proceedings as much as on the trial phase because,

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Technology for Litigators: Making Your Tech Dollars Work Harder

BY CATHERINE SANDERS
REACH



Catherine Sanders Reach

The modern law office survives and thrives in large part thanks to enabling technologies that make work more efficient and less time-consuming, and that, in the best of situations, help lawyers become more responsive, capable attorneys. But what technologies can aid in those endeavors? Solo and small-firm practitioners are often faced with questions of how best to spend their technology dollars. A combination of hardware, software, and best practices can

create an environment of organization and productivity, helping lawyers concentrate on the practice of law. Following are technologies that are essential to a litigation practice to help communicate with clients, get work done, and practice competently.

Hardware

Today’s laptops have the speed and computing power to rival any desktop. For a litigator, a laptop is essential. Traveling to client sites, courts, depositions, and other venues with the ability to access documents, client information, and communications is a necessity. A laptop can supply all of these and more. For litigators who make use of technology in the courtroom (by, for example, displaying evidence, charts, timelines, and persuasive arguments), a high-powered laptop can help win the day. Laptops can mimic a desktop environment with the right peripherals, so no one has to synchronize between a desktop and a laptop. So, what types of laptops are available?

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A Pipeline of Programs, Benefits

BY PAUL L. McDONALD, TIMOTHY L. BERTSCHY, AND RAYMOND B. KIM
COCHAIRS OF THE MINORITY TRIAL LAWYER COMMITTEE



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The Minority Trial Lawyer Committee recently cosponsored the Committee on Corporate Counsel CLE Seminar with the Committee on Corporate Counsel and the Woman Advocate and

Business Torts Litigation Committees. This year, the seminar featured the plenary Women of Color in the Legal Profession: Why It Means Success for Everyone. Next year, the seminar will be held at Disney World. We invite you to submit proposals for future programs to us no later than May 15.

Our committee has made significant progress on other fronts. We have hosted panel discussions addressing corporate efforts to increase the number of diverse partners by considering diversity performance when hiring—and firing—firms. Among these was the panel Spreading the Wealth: Are Client Diversity Expectations Changing the Legal Marketplace? at the 2007 ABA Section of Litigation Annual Conference. We also hosted the panel the “Separate and Unequal” Partnership Tier: Overcoming Barriers for Diverse Partners at the 2007 Minority Corporate Counsel Association Diversity Conference. That panel addressed the barriers that continue to impede the success of diverse partners within their firms.

We are working to create an online clearinghouse where corporations can post their respective requests for proposal guidelines and diversity performance expectations of outside counsel. This initiative should enable our members to better target and tailor their business development efforts. We are also exploring opportunities for our members to network, and discuss litigation issues, with in-house counsel at regional CLE programs hosted by corporate law departments.

As part of our commitment to “pipeline programs,” we are working with the National Association of Urban Debate Leagues (www.naudl.org) and Associated Leaders of the Urban Debate (www.debateleaders.org) to support high school debate programs that promote interest in the legal profession among minority students. These programs also better prepare students for eventual application to law schools by developing rigorous reading comprehension, critical thinking, research, and advocacy skills. We plan to promote opportunities for our members to participate in local Urban Debate Leagues during the 2008–2009 academic year.

We have added new resources to our website, including the Discussion Board—a forum for our members to debate hot topics, to discuss litigation practice tips and strategies, to share professional experiences, and to facilitate business development and business referrals.

As a final note, the newsletter editorial board has published yet another excellent issue. The participation of our members is, as always, appreciated and acted upon promptly. To those who have yet to express an interest in participating in projects, or who have yet to use resources such as our discussion board, we encourage you to do so. We can do great things—together. ■

Tribal Courts: Making the Unfamiliar Familiar

BY MAYLINN SMITH



Maylinn Smith

Does the thought of appearing before a tribal court judge make you apprehensive? Do you worry about minimal competency when practicing in an unfamiliar setting? Are you concerned that your client may be treated unfairly? Do you wonder how best to ensure that you and your client have a positive experience when appearing in tribal court?¹

With minor modification, basic advocacy steps for appearing before any tribunal apply equally well to the tribal adjudicatory process. Simply put, know the court rules. Know the applicable law. Arrive prepared and on time for court. Be able to guide the court through the application of the relevant facts to the appropriate legal principles. Do not mislead the tribunal, and always show respect.² If you follow these guidelines, practicing in tribal courts can be a positive and rewarding experience for both you and your client.

Knowledge often helps mitigate concerns about unfamiliar justice systems. Although encouraged, the random observation of tribal court hearings may not be a convenient option for gathering the broadest information possible about tribal court operations. This article, therefore, helps familiarize attorneys with some very generalized points about the tribal court experience by providing information about the creation of tribal courts. It highlights areas where tribal courts may use dispute resolution approaches not exercised in non-tribal systems and considers how tribal customs and traditions can impact the adjudicatory process. This article includes specific suggestions for effectively representing a client in tribal courts and provides references to additional resource information to assist professionals practicing in tribal courts.

Creation and Forms of Tribal Courts

Historically, tribes resolved societal problems through methods based exclusively on

customs and traditions.³ As part of the European colonization process, many aspects of the adversarial adjudication process were either adopted by⁴ or imposed upon⁵ tribal governments. Although the U.S. Supreme Court acknowledges that “[t]ribal courts play a vital role in tribal self-government and the Federal Government has consistently encouraged their development,”⁶ neither federal court decisions⁷ nor federal governmental policies ensure that practice in tribal court will be straightforward. The most effective way of resolving disputes that occur within Indian country⁸ depends on a wide variety of factors. Knowledge of the types of systems available is the starting point.

Today, approximately 275 tribal governments have established formal tribally operated justice systems.¹⁰ More than 285 federally recognized tribes¹¹ operate some other type of justice system. A relatively small number of tribal governments still use Courts of Indian Offenses¹² (CFR courts) to adjudicate matters occurring within Indian country. The continued operation of CFR courts within Indian country probably reflects tribal constitutional and financial constraints¹³ more than a tribal preference for this form of adjudication. Tribes under Public Law 280¹⁴ jurisdiction may rely on state courts to handle civil and criminal adjudicatory matters, although regulatory jurisdiction often remains with the tribal government.¹⁵

Understanding the varying types of systems available for dispute resolution is the first step in effectively representing a client. Because each tribe is “distinct and separate,”¹⁶ tribal justice systems reflect the same level of diversity found in tribal governments.¹⁷ Similarities between tribal judicial systems exist, particularly among the Indian Reorganization Act (IRA) tribes.¹⁸ However, even among IRA tribes, subtle and significant differences still exist. Frequently, these differences relate to operational structure, process requirements, and dispute resolution methods; all of which can influence tribal court practice techniques.

Tribes establish formal courts in several different ways. Some tribes create a

separate judicial branch under the tribe’s constitutional structure.¹⁹ Other tribes statutorily create a separate judicial system.²⁰ Many tribes, particularly IRA tribes, simply operate their tribal courts as a tribal department created by the tribal governing body.²¹ As a component of due process, tribes may either provide a forum for appeals internally²² or allow appeal to some other entity.²³

In addition to formally established courts, an appreciable number of tribes continue to use traditional dispute resolution methods for addressing societal conflicts.²⁴ Traditional dispute resolution techniques may be the exclusive remedy for handling conflict within tribal communities²⁵ or may supplement and complement an existing tribal court based on federal and state adversarial systems.²⁶

Judges, Rules, and Attorney Admission Requirements

The qualifications for tribal judges vary from tribe to tribe. Depending on the tribal requirements, tribal judges may have law degrees or formal training;²⁷ may have no formal law training; or may be tribal members, nonmember Indians, or non-Indians. Some tribes require that a tribal judge be fluent in the tribal language and have successfully completed some type of competency examination.²⁸ Tribal judges may be appointed by the tribal councils or elected. The length of time for which a tribal judge may serve is governed by the tribal constitution or code, and varies widely among tribes. Qualifications for tribal judges and procedures for removal of a judge, at both the lower and the appellate levels, are usually set forth in the tribal constitution or tribal code as well.

Knowing a tribal judge’s legal training, gained both formally and from experience, can influence the degree of specificity needed to present legal matters effectively in a tribal forum. This knowledge also can provide insight into the general operations and level of formality in a particular tribal court system. Use of plain language is the best strategy for handling any legal controversy. Pleadings, motions, briefs, and

arguments that are clear, concise, and compelling and that correctly state the applicable laws are appreciated by any court. Clarity in the legal presentation is certainly helpful when appearing before a judge not trained in the law and for whom English may be a second language.

Diversity among tribal courts not only means variation in court structures but also in tribal procedures and protocol. Knowing tribal court rules is as essential as knowing the local rules of any other court system.²⁹ Tribal court rules may be informal or published and very explicit. When in doubt about the appropriate tribal processes for a particular situation, ask for information. Most tribal justice systems will readily provide answers to questions regarding tribal protocol and procedure when requested with respect.

Many tribes have their own tribal bar examinations.

Proper admission is a component of practice in tribal courts. Many tribes have their own tribal bar examinations.³⁰ Other tribes may admit practitioners licensed before the state courts in the state where the tribe is located or before a specific federal court. Many tribes allow non-law trained advocates to represent clients in tribal court if specific criteria are met, or allow family members to act as spokespersons for parties appearing in tribal court.³¹ The tribal admission process may require annual bar fees, a one-time admission fee, or no fee at all.³²

Law Applicable to Tribal Court Cases

Perhaps the most challenging aspect of practicing in tribal courts is determining applicable laws. Applicable law can easily become a multifaceted ingredient in the tribal adjudicatory process. In addition to tribal codes and applicable treaties,³³ certain federal³⁴ and state laws³⁵ may apply to matters under a tribe's jurisdiction. The tribal code may address the hierarchy of applicable law, but frequently there will be little guidance for selecting applicable or

persuasive law. When looking for persuasive law, do not ignore decisions from other tribal courts.³⁶ Tribal courts often follow the reasoning of other similarly situated tribal courts when ruling on matters of first impression, prior to considering either state court or nonbinding federal court decisions.

Accessing information about tribal laws can be challenging at times. Tribal codes may be available through the tribal court, the tribal executive office, the tribal legislative office, or the tribal legal department. Tribal community colleges may also be a good source for locating applicable tribal law. As tribal technological capabilities improve, more and more tribes are providing electronic access to their codes and decisions.³⁷

Accessing tribal codes is only part of the process of determining applicable tribal laws. Financial constraints affect the ability of tribes to codify ordinances regularly. As a result, a search of tribal law may require a search of tribal ordinances and resolutions to ensure all applicable law is located. Generally, tribal courts can provide information about where tribal legislation can be found.

Litigation within tribal civil adjudicatory systems is particularly challenging because of the complicated and confusing parameters of tribal jurisdiction. The various laws that generally apply depend on the nature of the controversy, the status of the parties, and the status of the land where the incident in controversy occurred. Irrespective of the jurisdictional complexities associated with practice in tribal court, the application of tribal custom and tradition seems to strike the greatest fear in the average practitioner, the non-tribal member litigants, and, apparently, the federal courts to some degree.³⁸

Tribal Customs and the Adjudicatory Process

Although not triggered in every situation, tribal customs and traditions often are an element of tribal proceedings, both subtly and overtly.³⁹ Despite the fact that the concept of custom and tradition is readily accepted in legal matters outside the arena of Indian law,⁴⁰ concerns over the use of these principles are frequently expressed when a nonmember or non-Indian is a party to the tribal court action. Characterizing

tribal customs and traditions as indefinable certainly creates a perception of uncertainty and unfairness in the tribal adjudicatory process.⁴¹ This view can prove accurate if the attorney does not conduct the appropriate research and investigation prior to a tribal court appearance. Being properly prepared can eliminate concerns about customs and traditions being applied to the case in controversy.

It is true that information about tribal customs and traditions is generally not codified or even recorded. Tribal knowledge about societal conflict and common responses to such conflict usually pass from generation to generation in an oral format.⁴² Normal research techniques will likely be unproductive in uncovering information about tribal customs and traditions. Similar to the development of common law in the federal and state adjudicatory systems, determining the applicability of tribal customs and traditions requires accurate sources and special pleadings.⁴³ One method for handling the application of custom and tradition in a pending legal matter is to request that notice be given if tribal custom and tradition will be used in connection with any aspect of a disputed matter. Additional information regarding the scope of this legal authority can be explored as part of the discovery or briefing process.

General information about tribal customs and traditions can be obtained by meeting with tribal elders or tribal cultural committees. The materials and personnel at tribal community colleges can be excellent resources for obtaining information about tribes. Prior tribal court case law may also address the applicability of custom and tradition and can be cited for its precedential value as well.⁴⁴ The more inquiries you make, the more stories you hear. The more stories you hear, the more information you acquire. This information often will provide insight into tribal customs and traditions.

Tribal Court Dispute Resolution

Similar to other community-based dispute resolution systems, where parties will normally have continued contact or interactions beyond the legal controversy, many tribal courts emphasize "horizontal justice"⁴⁵ or restorative justice. Parties get to

tell their story, and pro se litigants remain the norm in most tribal court systems. This combination may result in less formal proceedings than those in state or federal courts and in the allowance of a more narrative type of testimony. Patience and discretion in making objections are recommended in the tribal court setting. Sometimes an apologetic objection is more effective than an indignant one.

Many formal tribal courts are courts of record. Although recorded, tribal court proceedings are not routinely transcribed. Obtaining a transcript often requires recourse to an external transcription service or the services of a court reporter at the time of trial.

For tribes that have maintained a high level of tribal language fluency, an interpreter may be necessary to ensure that all aspects of the proceedings are understood. Court proceedings may be conducted exclusively in the tribal language or in both English and the tribal language. In addition, witnesses and other parties may be primarily tribal language speakers, making interpretation necessary to represent a client effectively. Few tribal courts provide independent interpretation service,⁴⁶ although they may be able to direct you to someone who could serve as an interpreter.

It is often said that the good thing about practicing in tribal court is that everyone knows everyone, and the bad thing about practicing in tribal court is that everyone knows everyone. This concept makes aspects of practicing in tribal courts challenging, as well as rewarding. Jury pools must be larger to find jurors who are not excluded for cause; obtaining information can be more difficult because of cultural considerations and distrust of outsiders; and determining the viability of a matter is less certain. The rewards of practicing in tribal court include a less formal and more holistic approach to resolving conflicts, a more individualized decision-making process, and a greater emphasis on substance over form.

Currently, many attorneys actively avoid appearing in tribal court instead of embracing the experience as an opportunity to expand their advocacy skills. As a result, tribal courts are often underutilized and their jurisdiction challenged. This approach may not be the most cost-effective nor in

the best interest of the client. Just like state and federal courts, tribal courts have many competent, intelligent judges, whose sense of fairness, compassion, high ethical standards, and holistic approach for resolving matters help ensure justice is achieved for everyone involved. By developing an adequate understanding of, and respect for, tribal justice systems, an attorney may competently represent a client in any forum with jurisdiction. The information and guidelines provided in connection with this article should help increase basic understanding, but the actual advocacy remains the responsibility of the individual attorney. ■

Maylenn Smith is director of the Indian Law Clinic at the University of Montana, School of Law.

Endnotes

1. In *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997), the U.S. Supreme Court found that “requiring [the defendants] to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to ‘the political integrity, the economic security, or the health or welfare of the [Three Affiliated Tribes],’” citing *Montana v. U.S.*, 450 U.S., 544, 566 (1981).

2. Judge Elbridge Coochise once stated that “[l]awyers appear in tribal court knowing little about Indian people or tribal law. . . . They cite laws that have no effect in Indian country, and engage in procedural fencing based on rules of evidence that we don’t always use.” Lisa Wiehl, *The Law, Indian Courts Struggling to Keep Their Identity*, N.Y. TIMES (Nov. 4, 1988) [available at <http://query.nytimes.com/gst/fullpage.html?res=940DE4DC1039F937A35752C1A96E948260&sec=&spon=&pagewanted=all>]. An informal survey of various sitting tribal judges revealed these common themes regarding what they want to see from practitioners appearing before them.

3. See generally RENNARD STRICKLAND, *FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT*. (U. Okla. Press 1975).

4. Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL’Y 18, 23–27 (1997).

5. In 1883, the Bureau of Indian Affairs began operating Courts of Indian Offenses. See VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE*, 82–89 (U. Tex. Press 1983).

6. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14–15 (1987).

7. David Getches, *Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color-Blind Justice, and Mainstream Values*, 86 MINN. L. REV. 267 (2001).

8. Although tribal members generally identify with a particular tribe or tribes, federal law commonly uses the term “Indian or Alaska Native” when delineating powers, policies, programs, and procedures relating to indigenous peoples of North America. For purposes of being consistent with most federal legislation, the term “Indian” will be used in this article as opposed to either “American Indian” or “Native American.”

9. 18 U.S.C. § 1151 (2007).

10. See www.tribalresourcecenter.org/tribalcourts/history.asp (last accessed on February 5, 2008).

11. As of March 22, 2007, 561 tribal entities were recognized by the federal government and eligible for funding and services from the Bureau of Indian Affairs. See 72 Fed. Reg. 13648 (Mar. 22, 2007).

12. Currently, 42 tribes have Courts of Indian Offenses. See 25 C.F.R. § 11.100(a) (2005). CFR courts are federal courts of limited jurisdiction operating within Indian country.

13. Some tribal constitutions do not contain language that allows for the creation of a tribal court. Many tribes, however, simply do not have sufficient resources to fund the operation of a tribal court.

14. See Pub. L. No 83-280, 67 Stat. 588 (1953), 9 (codified as amended at 18 U.S.C.A. §§ 1161–62, 25 U.S.C.A. §§ 1321–1322, 28 U.S.C.A. § 1360).

15. An excellent discussion of Public Law 280 can be found in Carol E. Goldberg’s article, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975).

16. *Cherokee Nation v. Georgia*, 30 U.S. 1, 55 (1831).

17. See generally SHARON O’BRIEN, *AMERICAN INDIAN TRIBAL GOVERNMENTS* (U. Okla. Press 1989).

18. 25 U.S.C. § 476.

19. The Crow Tribe amended its constitution to establish three branches of government. See CONSTITUTION AND BY-LAWS OF THE CROW TRIBES OF INDIANS, Article I (2001).

20. The Sault Tribe recently established a new organizational chart, functionally creating separation of powers. See the press release (available at <http://turtletalk.wordpress.com/>

2007/12/20/sault-tribe-press-release-on-separation-of-powers/). The Cheyenne Tribe created separation of powers statutorily. *See* N. Cheyenne Tribal Ordinance 1-98(1997).

21. Nearly all IRA tribal constitutions originally contain a section stating that a tribal council would have the power “[t]o promulgate and enforce ordinances which shall be subject to review by the Secretary of the Interior, governing the conduct of members of the [name of tribe inserted here], and providing for the maintenance of law and order and the administration of justice by the establishment of an Indian Court,” and defining its powers and duties.

[emphasis added] *See, for example*, Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Part 1, Article VI.

22. An increasing number of tribes have established their own appeal courts. The Navajo Nation, the Assiniboine and Sioux Tribes of Fort Peck, the Ho-Chunk Nation, the Grand Ronde Tribes, and the Cherokee Nation are examples of tribal nations that have an appellate court. Some tribal justice systems are structured so that appeals may go to the tribal council or the recognized leader of the tribe. Several of the Pueblos use this mechanism for review of lower court decisions. For information about the Tribes and Pueblos in New Mexico, see *The New Mexico Tribal Court Handbook*, available at <http://tlj.unm.edu/handbook/> (last accessed on Feb. 5, 2008).

23. Numerous tribes make use of intertribal courts of appeal. Examples are the Southwest Intertribal Court of Appeals, Northwest Intertribal Court of Appeals, Intertribal Court of Appeals of Nevada, Intertribal Court of Southern California, and the Montana-Wyoming Intertribal Court of Appeals.

24. The Navajo Nation, the Stockbridge-Munsee Community, and the Mississippi Band of Choctaw Indians are examples of tribal nations that use Peacemaker courts. A more thorough discussion of traditional dispute resolution can be found in Justin B. Richland & Sarah Deer, *Introduction to Tribal Legal Studies*, 313–58 (Altamira Press, Tribal Legal Studies Textbook Series No. 1, Jerry Gardner, ed., 2004).

25. Tribal nations that do not have a formally established justice system or that do not use state court systems under some type of Public Law 280 arrangement may rely on traditional restorative justice principles. *See* Lisa Rieger, *Circle Peacemaking*, 14 ALASKA JUSTICE FORUM

4 (Justice Center, U. of Alaska Anchorage 2001).

26. *See* Robert Yazzie, *Life Comes from It: Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994).

27. The National Judicial College at Reno, Nevada, has developed the National Tribal Judicial Center. Many tribes use this program when training tribal judges, particularly those without law degrees.

28. *See generally* NAVAJO NATION CODE tit. 7 § 354 (2005), FORT PECK COMPREHENSIVE CODE OF JUSTICE tit. II § 301 (2004), and CROW LAW AND ORDER CODE § 3-3-303 (2005).

29. An attorney who hopes to effectively represent a client would be well advised not to tell a tribal judge that in “real courts” different procedures would apply.

30. The Mashantucket Pequot Tribal Nation, Navajo Nation, Crow Nation, Colville Tribe, Shoshone Bannock Tribes, and the Fort McDermitt Paiute-Shoshone Tribes are examples of tribes with bar examinations.

31. The Muckleshoot Tribe, Assiniboine and Sioux Tribes, Bois Forte Band of Chippewa, Red Lake Nations of Chippewa, and Lower Sioux Community are examples of tribes that allow non-law trained advocates to represent litigants in tribal court.

32. The Confederated Salish and Kootenai Tribes, Leech Lake Band of Chippewa, and Grand Portage Band of Chippewa are examples of tribes that impose some form of bar fee upon attorneys practicing in their court systems.

33. Under Article VI, Clause 2 of the U.S. Constitution, treaties are the supreme law of the land. Tribal courts frequently relied on provisions in the tribe’s treaty when rendering decisions.

34. Title 25 of the U.S. Code exclusively pertains to federal Indian laws.

35. Tribal codes may expressly incorporate state laws or allow the application of state laws in a choice-of-law provision.

36. Officially, the *Indian Law Reporter* was the primary source of published tribal court decisions. Improvement in technology has allowed tribes to make a variety of tribal information available to the public. Many tribes now post their appellate decisions online.

37. There are a number of websites with helpful information about tribes and tribal courts. Tribally specific websites often contain materials that can be very helpful when practicing in tribal courts. The following is merely a partial list of sites that contain helpful infor-

mation: <http://www.tribal-institute.org/lists/codes.htm>; www.tribalresourcecenter.org/tribalcourts/codes/default.asp; <http://thorpe.ou.edu/codes.html>; www.narf.org/nill/triballaw/onlineDocs.htm; www.naicja.org/; <http://lib.law.washington.edu/pubs/ind1981.html>; www.judicare.org/triballaw.htm

38. *See* Nevada v. Hicks, 533 U.S. 353, 384–85 (2001).

39. Matters involving family issues, probate-type issues, hunting and fishing issues, land use issues, and sentencing in criminal cases are areas commonly shaped by tribal customs and traditions.

40. Concepts such as “commercially reasonable sale” or “usual and customary practices” in the area of commercial law are essentially based on customs and traditions of the commercial community.

41. In *Burlington Northern R. Co. v. Red Wolf*, 106 F.3d 868 (9th Cir. 1997), the dissent took issue with the tribal court proceedings in part because Burlington Northern had not been given notice that the jurors would be addressed in the Crow language in a manner that the judge considered inflammatory. Others view this incident as impressing upon the potential jurors the importance of their duty.

42. Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society* (1995)(available at www.tribal-institute.org/articles/melton1.htm).

43. Tribes may require that notice be given if custom and tradition are to be applied in a particular matter, but this requirement is not the norm. The better practice is to request notice of the application of tribal custom and traditions as part of any pleading.

44. In *Lente v. Notah*, 3 Navajo Rptr. 72 (Navajo Ct. App. 1982), the Navajo Supreme Court discussed when custom should apply. The Court said that prior to “applying custom, the courts should see whether a particular custom or tradition is generally accepted and applicable to the parties before the court.”

45. *See* Laura Mirsky, *Restorative Justice Practices of Native American, First Nation and Other Indigenous People of North America: Part One* (available at www.realjustice.org/library/natjust1.html).

46. The Confederated Tribes of Siletz Indians authorize the use of qualified interpreters in judicial proceedings. *See* SILETZ TRIBAL CODE § 3.020 (2005).



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YOUNG LAWYERS

Where the Rubber Hits the Road: The Courtroom Application of the Principles of Evidence

BY AMI GADHIA



Ami Gadhia

Most young lawyers are still close enough to the law school experience to remember evidence class. We read the Rules of Evidence, scrutinized them, tore apart the case law applying the rules, and discussed hypothetical applications of the principles. However, as in many parts of our law school education, we may have learned evidence in a vacuum. What do the rules, and the pertinent case law, mean in application? At trial, what evidence will you be able to get in? And what do you do when the totally unexpected happens? Last winter, I had the opportunity to serve as second chair in a dental malpractice trial. We defended the dentist, who had performed root canal therapy on two of the plaintiff's teeth. The plaintiff alleged that complications from the root canals had caused her myriad physical symptoms. It was my first jury trial and an education in (among many other things) what happens when the tenets of evidence are applied to the exhibits you so keenly want admitted into evidence.¹

The Case

The plaintiff had come to our client, a general dentist, complaining of pain in the upper-left portion of her mouth. After proper diagnostic testing and assessment, the dentist performed root canals on two of her teeth over the course of about six months. Because a root canal is done when the roots of a patient's teeth are dead or dying, part of the root canal treatment involves removing the diseased tooth pulp tissue from the root canal and filling the empty root canal with a rubber-like substance. Once the root canal is filled, its bottom tip is closed with an inert sealant.

The plaintiff alleged that during one of

the root canals, the dentist went through the tip of the tooth root, through a series of tissues, and into her sinus cavity, and that he expressed the sealant past the root tip into the alleged hole in her sinus cavity. For the other root canal, she alleged that the tooth was misdiagnosed and that a root canal should not have been performed on it. She claimed that, as a result of these root canals, she suffered a multitude of symptoms, including headaches, nausea, pain, swelling and disfiguration of the mouth, infection, burning, fevers, an inability to sleep, a bad taste in her mouth, permanent sinus drainage, and chronic sinus problems. She also believed that the inert, biocompatible sealant was a carcinogen and feared she would develop cancer. She eventually chose on her own to have both teeth pulled. In the course of her treatment, our client referred her to several oral surgeons, ear/nose/throat doctors, and primary care providers, none of whom could find an objective, clinical source for her subjective complaints.

Our defense had two prongs: first, that the defendant's care was entirely within the standard of care for root canal therapy; and, second, that the plaintiff's complaints resulted from a psychiatric disorder called undifferentiated somatoform disorder (USD), akin to intense hypochondria, which caused her to express her psychological suffering in the form of perceived, albeit somatically and medically unsupported, illness. This second prong developed during discovery as we reviewed thousands of pages of the plaintiff's prior medical records from the 40-plus providers she visited in the five years before the root canals were performed. We saw a pattern, going back years, of the plaintiff's subjective complaints of problems that were unsubstantiated by objective clinical findings. These thousands of pages of records also showed us that the plaintiff had, in the past, complained of many of the very same symptoms that she

was now claiming were caused by our client's treatment of her.

To explain that the dentist's treatment was within the standard of care, we brought an endodontist, an oral surgeon, and the plaintiff's treating oral pathologist to testify.² The endodontist planned to demonstrate, using two types of demonstrative aids, that our client had not deviated from the standard of care for root canal therapy. First, he wanted to use a model of a human skull to demonstrate that there was no hole in the plaintiff's sinus cavity from the root canal therapy. Second, he wanted to use X-rays from one of his own past patients to demonstrate that the excess sealant material present past the tip of the plaintiff's tooth root (but not in her sinuses) was an ordinary occurrence that happens to any provider performing root canal therapy at one time or another, with no resultant harm whatsoever—so ordinary, in fact, that it had happened to him in the past. We wanted to use the X-rays and the skull as demonstrative aids that the expert could show the jury during his testimony but that would not go into the jury room during deliberations.

To explain that USD—rather than the root canals—was the source of the plaintiff's perceived medical problems, we brought a dual-board-certified psychiatrist/internist to testify. To arrive at her opinion, the psychiatrist/internist had reviewed about six feet of medical records and hours of the plaintiff's videotaped deposition testimony. The plaintiff refused to consent to a medical examination by our expert, and the court denied our motion to compel the examination. Among the six feet of medical records were documents that showed that a variety of health care providers had, in the past, suspected that there may have been a psychiatric, rather than physical, explanation for the various problems she complained of. We planned to offer these prior med-

ical records into evidence as full exhibits prior to the psychiatrist/internist's testimony so that the expert could then use the exhibits to illustrate how she had arrived at her opinion that the plaintiff had USD. We also wanted the jury to understand the plaintiff's long-standing pattern of subjective complaints of illness for which there was no clinical source.

Use of Demonstrative Aids and Trial by Standard of Care Expert Witness

As those who practice medical malpractice defense know, the standard of care expert witness is the base on which a solid defense is built.

The plaintiff's counsel objected to our expert's use of either the skull or the X-rays as demonstrative aids, on the grounds that they were not necessary for his testimony and that the X-rays were irrelevant and prejudicial because they were not the plaintiff's. We argued that, pursuant to established Connecticut case law, the expert was permitted to use the demonstrative aids to help the jury understand the complex endodontic and dental concepts that the expert was explaining. We referred the court to two decisions in particular: *State v. Asherman*³ and *DiVonaventura v. Ayoub*.⁴

In *State v. Asherman*, the defendant was indicted and tried for murder. At trial, a forensic orthodontist testified, after "exhaustive comparative analysis," that a bite mark on the victim's back had been inflicted by the defendant's teeth, to a reasonable degree of dental certainty.⁵ To explain his expert opinion to the jury, he used several different demonstrative aids, including photographs of the bite mark and photographs and models of the defendant's teeth.⁶

In *DiVonaventura v. Ayoub*, a medical malpractice case, the court allowed the doctor to use slides to help illuminate certain technical issues for the jury's convenience, over the objection of trial counsel.⁷ In so holding, the court stated that "the use of slides by the doctor to illustrate to the jury what he was talking about was properly allowed. Plaintiff's counsel also used helpful illustrative material, such as poster boards, to aid the jury in understanding the medical evidence he introduced."⁸ A comparable federal district court holding in *United States v. Blackwell* notes that "[t]he

use of demonstrative charts to aid the jury's comprehension is well within the court's discretion."⁹

Despite our arguments, the court sustained the plaintiff's objection to these demonstrative aids on the grounds that the jury was intelligent enough to understand our expert's testimony without them. We objected strenuously, of course; we felt that the standard of care for endodontic procedures was not something within the purview of any layperson, and that any aids that our expert could use to convey complex medical and dental terminology to the jury would assist the trier of fact in understanding the facts at issue. The court, unfortunately, disagreed, and our endodontic expert's trial testimony was conducted without the use of either one of those aids. He was confined to using the plaintiff's own X-rays for reference during trial.

Be sure your expert is comfortable both with and without any demonstrative aids.

What can you take from this anecdote to prepare for examining a witness at trial? First, be sure that your expert is completely comfortable both with and without any demonstrative aids; he or she should be fully able to communicate his or her opinions solely by answering questions on direct (and, of course, on cross-examination, because you will have worked hard to prepare your expert). Prepare your expert for the possibility that the court may not allow the use of any aids at all so that he or she will not be caught off-guard on the stand.

Second, keep your examination nimble. If there is an objection or adverse ruling on your expert's use of demonstrative aids, keep your case on track by switching to a "demonstrative aids-free" line of questioning. That is, you'll have to avoid questions such as "Doctor, could you please demonstrate for us, using the skull model in front of you, how that next step in the procedure is performed?" Both you and your expert will have to be skilled at communicating complex medical ideas in

plain English—which you should be adept at doing anyway if you are to succeed in making your case before the jury. Many trial attorneys believe that they can impress juries by using complex medical terminology and trading abstruse terms with the medical experts on the stand. From my limited experience, I think that simpler language is always better.

Non-Admissibility of Medical Records

The plaintiff's prior medical records showed that before she had ever received root canal therapy from our client, she had complained of some of the very same symptoms—headache, pain, burning, sinus problems, among others—that she now claimed were caused solely by our client's treatment. We offered some of these medical records as full exhibits under Section 8-4 of the Connecticut Code of Evidence, which permits the admission of business records. We argued that the medical records from the plaintiff's prior visits to other medical providers, complaining of the same symptoms at issue in our case, were records made in the ordinary course of the health care provider's business and were therefore admissible. Because the plaintiff's counsel refused to agree to a certification as to the authenticity of the medical records, we were prepared to have the appropriate medical office personnel testify that the records being offered were kept in the ordinary course of the physician's business or, in the alternative, to present the medical records with affidavits from these medical personnel attesting to the records' authenticity.

Medical records may be admitted in Connecticut under the business records exception in Section 8-4 of the Connecticut Code of Evidence, which reads as follows:

Admissibility of Business Entries and Photographic Copies: Availability of Declarant Immaterial. (a) Business records admissible. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial

judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter.¹⁰

Federal Rule of Evidence 803(6) is comparable:

RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL. The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the ordinary course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the records custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The medical records we sought to present contained health care providers’ recollection of their visits with the plaintiff, often in the form of “SOAP” notes. “SOAP” is an acronym for a health care provider’s record-keeping methodology in a patient’s chart. The letters stand for Subjective complaints, Objective findings, the Assessment or the documented analysis and conclusions concerning the findings, and the Plan for further diagnostic or therapeutic action.¹¹

The court initially ruled that the records were inadmissible because it considered the doctors’ assessments to be expert opinions. We argued that expert opinions differ from the assessments or

diagnoses from treating physicians, as the latter would not be giving their opinion on any ultimate issues in the case, only on their discrete treatment of the plaintiff, what they found her medical condition to be, and their treatment of same. The court did not agree and ruled that the records could not be admitted unless the treating doctors were disclosed as defendant’s expert witnesses pursuant to Connecticut Practice Book Section 13-4(4).¹²

Courtroom application of the rules can do more to educate a new lawyer than two rounds through law school.

We moved for reconsideration, arguing that the case law supported the admission of the treating doctors’ records without expert disclosure. As we stated at argument, if every treating doctor’s medical record were treated as an expert opinion that could not be admitted without a disclosure, such a ruling would cause unnecessary expense, delay, and widespread inefficiency, especially in trials of claims for complex personal injury or medical malpractice, which often require the testimony of scores of medical experts and the admission of their treatment records and reports. We also argued that there was no prejudice to the plaintiff from the admission of these records without expert disclosure, as the plaintiff had had possession of these records for as long as two years and had therefore had adequate time to examine the records and to depose the doctors to whom the records belonged. Finally, we pointed out to the court the inequity of the prior ruling, given that a number of doctors’ records that the plaintiff had offered as exhibits—without the disclosure of the doctor as an expert witness—had been admitted without objection by us, because we understood that the records were properly admissible. After hearing oral argument on our motion for reconsideration, the court subsequently reversed its ruling, holding that as long as the records contained no expert opinions (which would be

determined in a case-by-case review under the Connecticut Code of Evidence, if necessary), they would be admissible.

However, the story does not end there. Many of the records were not admitted as full exhibits and were therefore never seen by the jury, because the records had the treating doctor’s electronic signature, in the form of his or her typewritten name or initials, rather than his or her physical signature. The court did not find the electronic signature a sufficient authentication of the records—despite an affidavit from the custodian of records or the doctor’s office manager—and accordingly excluded those records.

Furthermore, we were not able to raise the substance of the medical records (and the discussions between the treating doctor and the plaintiff about her condition) during our cross-examination of the plaintiff, as she was an extremely difficult witness. However, because of the sheer volume of the plaintiff’s prior medical records, there were still a number of documents that had a physical signature. These documents were deemed authentic by the court and were therefore admitted as full exhibits. These exhibits included some of the most important documents in our defense, so we were ultimately pleased with the evidence we were able to submit to the jury. In addition, our psychiatric expert was able to interpret these health records, and their significance, during her testimony.

What can you glean from the above? If the admission of medical or other business records is critical to your case, you should be armed in advance with all applicable case law in your jurisdiction supporting your argument. Prepare for the curve ball: Have a backup plan for the admissibility of these records, for example, through your expert witnesses. Finally, don’t assume that the records, even if they appear to fall squarely under the definition of “business records,” will be admitted. You should plan for a scenario in which the records are ruled inadmissible: Do you have another way to present the evidence? Can you bring in a witness to present the evidence in person? Can you effectively cross-examine an adverse party about the records, or the underlying transaction or medical visit, and use the record to impeach him or her?

So, how did the case turn out, you may

ask. After a three-month trial and seven days of jury deliberation, we achieved a successful outcome for our client: The jury awarded the plaintiff only \$2,600 for her medical bills (a fraction of what she had spent) and nothing for pain and suffering. At one point during the litigation, the plaintiff had made a demand for \$125,000 to settle the case. This verdict indicated to us that the jury had accepted our psychiatric expert's testimony. However, because the jury did not find for the defendant altogether and deny the plaintiff even nominal damages, it led us to wonder whether the adverse rulings we received on our endodontic expert's use of demonstrative aids played a factor in the verdict. That is, if our endodontist had been able to use the demonstrative aids, it is possible that the jury would have better understood the standard of care and that the defendant did not deviate from that standard.

A young litigator's first trial is a challenging experience, no matter how prepared you are. The courtroom application of the black-and-white text of the rules of practice and the rules of evidence for a given jurisdiction can do more to educate a new attorney than two rounds through law school.

The experiences relayed in this article hopefully have demonstrated some of the myriad twists and turns you may encounter at trial. Expecting the unexpected in the courtroom, and having contingency plans for the introduction of all of your evidence, will hopefully smooth your ascent up that steep learning curve. ■

Ami Gadhia is policy counsel with the Washington, D.C., office of Consumers Union, the nonprofit publisher of Consumer Reports magazine. She focuses her advocacy on product, food, and auto safety issues. She was formerly a litigation associate with Shipman & Goodwin LLP in Hartford, Connecticut. Reprinted with permission from Trial Practice Journal, published by the Trial Practice Committee 22:1, Fall 2007. Copyright 2007 by the American Bar Association.

Endnotes

1. The Connecticut Code of Evidence section and the cases discussed below have federal counterparts. Therefore, in each subsection below, I provide both the text of the applicable Connecticut Code of Evidence Section or case,

as well as the corresponding Federal Rule of Evidence or federal court case.

2. An endodontist practices endodontics, "a branch of dentistry concerned with diagnosis, treatment, and prevention of diseases of the dental pulp and its surrounding tissues."

TABER'S CYCLOPEDIA MEDICAL DICTIONARY 639 (17th ed. 1993).

3. State v. Asherman, 193 Conn. 695 (1984), 478 A.2d 227.

4. DiVonaventura v. Ayoub, CV94-0138051-S, 1997 Conn. Super. LEXIS 23, at *10 (Conn. Super. Jan. 6, 1999).

5. Asherman, 193 Conn. at 703.

6. Id. at 717.

7. DiVonaventura, 1997 Conn. Super. LEXIS 23, at *10.

8. Id. at *11.

9. United States v. Blackwell, 954 F. Supp. 944, 971-72 (D.N.J.1997).

10. State v. Bermudez, 95 Conn. App. 577, 587, n.5, 897 A.2d 661 (2006) (citing Calcano v. Calcano, 257 Conn. 230, 240-42, 777 A.2d 633 (2001)).

11. See TABER'S CYCLOPEDIA MEDICAL DICTIONARY, supra note 2, at 1822.

12. See CONN. PRACTICE BOOK § 13-4(4); cf. FED. R. CIV. P. 26(a)(2).

THE BENEFITS OF MEMBERSHIP

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Juvenile Regional Services

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in juvenile proceedings, providing an array of effective community-based services in an individually tailored dispositional plan can mean the difference between probation and a lengthy jail term, between success and failure. A vigorous training program for all staff, a more sophisticated and uniform file management system, strong motions and appellate practice, and a policy of aggressively pursuing all substantive and procedural avenues for achieving the expressed interest of the client now ensure that each child receive the zealous advocacy he or she deserves.

The strength of JRS is its staff. Derwyn Bunton, an African-American and graduate of the New York University School of Law, leads the charge in this endeavor at reform as the director of JRS. He built an organization with a diverse staff of passionate and talented individuals who wholeheartedly believe in the client-centered approach of the organization. With four staff attorneys and two investigators/youth advocates for four sections of court, JRS has the resources to devote the time truly necessary for effective trial preparation, particularly given the decreased number of delinquency cases due to lower juvenile crime rates since Hurricane Katrina. As a result, JRS has kept caseload levels just below the level recommended by Louisiana and the National Legal Aid and Defender Service of 150 new cases per year per attorney. Furthermore, JRS's status as an independent nonprofit allowed the organization to raise funds outside the state-allocated budget in the form of grants and donations, which allowed the office to use more resources for training and the defense of its clients and to offer greater compensation in order to recruit competent and committed employees. The goal of the organization is eventually to have a full-time social worker on staff as well as an attorney exclusively devoted to advocacy on collateral issues such as in the area of education and mental health. Once these goals are achieved, JRS will truly be able to implement the holistic approach to juvenile defense that it envisions.

Like all nonprofit start-ups, JRS experienced plenty of bumps in the road. In many ways, the greatest challenge in the organization's first year was not the traditional challenges involved in fast-paced criminal litigation; rather, it was those challenges involved in changing the culture of an entire institution. Orleans Parish Juvenile Court previously operated as an institution centered on the convenience of the adults running the system, instead of one mindful of the best interests of the child and maintaining the constitutional protections to which each child is entitled. At first, many of the players in the court were not happy about the longer hours and extra work involved in the operation of a truly adversarial system. Trials, preparation of transcripts, issuance of subpoenas, motions hearings, and objections all take time. The system of vertical representation JRS implemented required greater administrative cooperation. For a while, employees of JRS were some of the least popular people in the courthouse. However, in many areas, the initial resistance has given way to a respect for the way JRS aggressively fulfills its role in the juvenile delinquency system.

And of course, JRS has many allies who either laid the groundwork or are pushing through reforms in other areas of the juvenile system. The founders of JRS are all former employees of the Juvenile Justice Project of Louisiana (JJPL), a separate nonprofit with a 10-year history of success working on statewide juvenile justice reform. JJPL has a record of amazing reform triumphs of its own—suing Louisiana twice to shut down the state's two worst juvenile prisons in Jena and Talulah. JJPL and other organizations such as the Friends and Families of Louisiana's Incarcerated Children, a grassroots organization of parents, were also instrumental in passing landmark legislation that is slowly moving the juvenile prison system in Louisiana from one resembling just another version of the punitive adult justice system to a system focused on rehabilitation in small, regional facilities that offer therapeutic services in a treatment-oriented setting. These organizations and their allies were instrumental in reducing the Louisiana youth prison population from more than 2,000 in the late 1990s to

about 400 in just a few years. Currently, JJPL is suing the City of New Orleans to close down the Youth Study Center, the city's only juvenile detention center for housing youth awaiting trial.

In another area of reform, the court, under the leadership of Chief Judge David Bell, also began to implement the Juvenile Detention Alternatives Initiative (JDAI), a pilot program funded by the Annie E. Casey Foundation and designed to reduce the number of youth held in pretrial detention. JDAI uses alternatives to detention such as house arrest, electronic monitoring, and day reporting centers to ensure that youth safely await resolution of their cases in their communities. Prior to the storm, Orleans Parish's two juvenile detention centers were routinely filled to the brim with up to 130 children, often on minor nonviolent offenses. Now the Youth Study Center is usually well below its 32-bed capacity even though New Orleans's population has climbed back to more than 65 percent of its pre-storm size. This success is in part attributable to organizations such as the Youth Advocacy Project and Report Resources—court programs that provide counseling and case-management services to youth awaiting trial.

New Orleans has a long way to go before all court-involved youth receive the representation and services they need and deserve. However, JRS and other organizations and individuals involved in the local juvenile justice system are working to ensure that juvenile justice is one area of rebuilding that will be judged by future generations as an unqualified success. ■

Hector Linares is a staff attorney with Juvenile Regional Services in New Orleans, Louisiana.

Endnotes

1. Fox Butterfield, *Justice Besieged: New Orleans Juvenile Court System Is Called Nation's Most Troubled*, N.Y. TIMES, July 22, 1997, at A1.
2. ABA JUVENILE JUSTICE CENTER, THE CHILDREN LEFT BEHIND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN LOUISIANA (2001), available at www.jjpl.org/PDF/Children_Left_Behind.pdf.

Technology for Litigators

Continued from page 1

When purchasing a laptop, you will need to consider multiple factors to choose the right one. First, consider how much demand will be put on the machine. The fastest processor available will help make software applications run faster and more reliably. For the price, currently the best of breed are Intel's Core 2 Duo processors, although newer, faster processors are being developed every day. For those running resource-heavy software (trial presentation software such as Trial Director or Sanction), the best processor is essential.

Today's laptops and notebooks often lack legacy ports. Legacy ports allow peripherals such as older keyboards and printers to be attached. Part of a laptop purchase should be a port replicator or docking station. These small appliances provide a number of benefits. First, they add a small amount of protection, because it is more difficult to remove a laptop from an unoccupied office when it is attached to a docking station. Second, they allow for the creation of a desktop computing environment so that a standard mouse, keyboard, and monitor are available when the laptop is docked on a desk. For many attorneys, this is a much more comfortable setup than using the laptop as the primary computing device, with its smaller screen, touch pad, and small keyboard.

Available storage space on the hard drive is another consideration. Most standard business-class laptops come with a hard drive in excess of 120 gigabytes. For more storage space, consider an external hard drive or thumb drive. Increased storage space often drives up the cost of the laptop. Use a disc defragmentation application, such as Diskeeper, to keep things humming along smoothly.

In laptops, size does matter. A desktop-replacement laptop may be a great machine to work on, but any laptop weighing in at more than 5 pounds will become exponentially heavier as it is transported. Of course, a good laptop bag, preferably with wheels, is a must-have. Although superlight laptops are available (for example, the new MacBook Air),

some computing power is inevitably lost when size is reduced. However, as the new model in software becomes Software as a Service (SaaS), the applications—and power necessary to run them—will become less important as a high-speed Internet connection will become essential. Many attorneys are uncomfortable with the model of storing and accessing client files on a remote, third-party-owned site. In addition, steady high-speed Internet access is not yet so ubiquitous, especially in rural areas, that many litigators would be willing to forgo downloaded software in lieu of accessing it online.

Presentation software can bring key facts and evidence to the attention of the judge and jury at the click of a button.

Although installed software applications will still be de rigueur for some time, high-speed Internet access is essential for communications and, actually, one of the biggest benefits of a laptop. Wifi hotspots are often available for free in many locales, but at what cost? Often inherently insecure, a free wifi connection from an airport or a local coffee shop invites such dangers as packet sniffing and look-alike networks that enable hackers to capture transmissions. One way to ensure a reliable connection, often at broadband speed, is by purchasing an air-card or mobile broadband card. Available from many telephony providers, such as Sprint and Verizon, these cards plug into a USB port, PCMCIA card slot, or Express-Card slot and enable secure, reliable access to the Internet. One nifty benefit of these cards is that the user can be moving while accessing the Internet, as these use cell phone towers rather than a fixed router. Thus, rather than being rooted to a small area while accessing wifi, mobile broadband can work en route. New laptops, such as those available through the

Dell Latitude business line, come with mobile broadband capability built in, just as most laptops have built-in wireless connectivity. An unlimited data plan for air-cards runs around \$50 a month. This pays for itself if individual charges for airport and hotel access are added up.

One consideration for litigators is a tablet computer. Tablets are notebook computers with a screen that doubles as a legal pad, allowing the user to write with a stylus for note taking. This technology is appreciated by clients as a quiet, unobtrusive process in the courtroom (while the act of typing is often distracting and obtrusive to others who are present and, indeed, in some instances, the typist as well). Most tablets come with handwriting recognition software, so notes can be converted to searchable text for storage and access. Tablets range widely in price and functionality when compared with regular notebooks or laptops. However, for those who are more comfortable writing than typing, this is a viable option.

Scanners

A litigator's office is not complete without a scanner. Scanners, combined with optical character recognition (OCR) software allow paper files to become searchable electronic files. If paper reduction, organization, and easy access to files is a goal in the law office, then a good scanner is essential. Consider a multifunction device that combines the functionality of a copier, scanner, printer, and fax to reduce the hardware footprint in the office. For maximum benefit, consider a scanner that has both flat-bed and sheet-fed capabilities to scan oversized or bound items and multiple loose pages. Although OCR software often comes bundled with scanners, the software is often a "lite" version or a notoriously poor performer. Purchase fully functioning OCR software, such as products from Nuance or ABBYY Fine Reader. Adobe Acrobat 8.0 Professional has built-in OCR functionality. Although the scanner may scan to PDF, unless a full version of Adobe is bundled in, such as is the case with the Fujitsu Scan Snap, the OCR functionality will not be available without a full version of Adobe. Generally, OCR allows attorneys to reuse text from scanned documents, as well as index

and search the full text of scanned items. Without OCR, the only thing the computer “knows” about the scanned image is the file name, location, and size.

Software

Every litigator will have slightly different needs for software, depending on what types of cases are handled and other areas of the practice. However, office productivity software—such as the Microsoft Office suite consisting of Word, Outlook, and Excel—is an essential tool. As electronic filing becomes the rule rather than the exception, and PDF is the prevailing standard for file format, litigators will need a reliable way to create PDF documents. Although PDF creation software can be had for an extremely low cost (or free), consider learning to take advantage of more robust software for PDF conversion, which enables you to create e-briefs, remove metadata, redact, create forms, and more. Adobe Acrobat 8.0 Professional is packed with features that, if used, can be a boon to the litigator. However, other software products, such as Nuance PDF Creator and BlueBeam’s PDF software, offer feature-rich alternatives.

Practice management, time capture, and billing software are essential tools for any law practice. This software, with training and proper implementation, will speed an attorney on to find anything pertaining to a client or matter. Functionality shared by the entire office, including contacts, calendars, tasks, to-dos, notes, phone logs, documents, email management, time keeping, invoice generating, and more, lets attorneys focus on getting work done instead of hunting for an elusive file or fact. Imagine a client calling to check on the scheduling of a hearing and getting a response within seconds because the firm has invested in practice management software.¹

There are quite a few litigation-specific applications available. Some, such as CaseMap, help organize and sort through case information. Others, such as Summation or Concordance, allow for document review and litigation support. Trial presentation software, such as Trial Director or Sanction, can help bring key facts, documents, and evidence to the attention of judge and jury at the click of a button.

Awareness of the functionality of these software packages will help a litigator decide whether the benefits of the software outweigh the cost. What is most important is that the purchase price assume training, as these software packages tend to be sophisticated and are best used by a skilled operator.

A critical fact of life for today’s litiga-

A security suite will help attorneys guard client confidentiality and avoid downtime.

tor is electronic discovery. For many, this is a daunting and perilous process. It is important to outline a plan in preparation for electronic discovery, preferably in advance of a request. There are literally hundreds of vendors offering software, hardware, services, and experts to help with this process. However, navigating the vendor maze is a study unto itself. Look to peers, bar conferences, and trade shows to get a sampling of what the vendors offer. Know what will be required before contacting a vendor for help.²

Smartphones

Yesterday’s cell phone, PDA, mp3 player, camera, and other devices have converged into one device. Multifunction, Internet-enabled devices such as the Apple iPhone have a wow factor that cannot be denied. However, many courts frown on cameras in the courtroom, and a telltale cell phone ring can wreak havoc. Consider the restrictions of the courts before purchasing a convergent device. More traditional appliances, such as BlackBerry, Samsung, or Palm Treo devices, offer real-time email, Internet access, and cell phone functionality, and may be a better fit for a litigator.

Essentials

No matter what hardware and software are used, there are a few essentials that absolutely must be followed in today’s computing environment. All devices and

all data must be backed up for disaster-recovery planning and business continuity. These backups should be tested and redundant. Security should be at the top of that mind. A security suite that includes a firewall; anti-virus, anti-spyware, and anti-spam protection; and intrusion detection will help attorneys guard client confidentiality and avoid downtime. Make sure to run security software that is automatically updated, and make sure the subscription is maintained. Popular products include AVG, McAfee, Norton, and Avast. Consider encryption for super-sensitive file transmission. Encrypt hard drives and protect laptops and other peripherals with passwords, using strong passwords (of more than 8 characters with a combination of symbols and alphanumerics).

No matter what technologies are purchased, training and support will help ensure a return on investment. Software that is purchased, and perhaps installed, but never used or used well is called “shelfware.” Whether training comes from the vendor, a consultant, a peer group, or a staffer who attends “train the trainer” seminars, understanding how a program works, what the functionality provides, and how to use it efficiently will greatly enhance the firm’s bottom line.

Staying Ahead of the Curve

Over time, hardware and software must be replaced and upgraded. If a firm fails to pay attention to advances and updates in its hardware/software or takes the attitude of “if it ain’t broke, don’t fix it,” the firm may find that when it does break—which it will—fixing it becomes a very daunting, expensive process. Plan to review firm technology annually, pay attention to upgrades, and consider budgeting with replacement cycles in mind. Software that is many versions behind and no longer supported becomes very expensive to upgrade, or fix. Older hardware will no longer be compatible with newer software and vice versa. Although early adopters of the newest technology are often punished, do keep up with advances and pay attention to vendors’ reminders of upgrades and the system requirements that might be necessitated. It will ultimately cost significantly more in resources, consulting, and time to renew and replenish software and

systems that are 10 years old, than if the firm is committed to keeping up-to-date.

There are virtually almost infinite numbers of software applications, hardware, peripherals, gadgets, and accessories to be had by a law firm. Only a few essentials have been touched upon here. Ultimately, a firm should first look at processes and procedures to determine where time is wasted and then determine whether technology can play a beneficial role. Plan for technology strategically, looking into the future at the firm's goals and objectives to help deter-

mine how technology can play a role in achieving that vision. A firm should budget for technology to ensure that dollars are earmarked for upgrades and replacements. Commit to training so that the dollars are well spent. Embrace the promise of technology and reap the benefits of technology, which can provide a route to becoming a more efficient, productive attorney. ■

Catherine Sanders Reach is director of the American Bar Association's Legal Technology Resource Center, which provides prac-

tice technology assistance to lawyers.

Endnotes

1. For a comparison chart of popular practice management/time and billing software, see www.abanet.org/tech/ltrc/charts/PracticeCaseManagement-TimeBilling-IntegratedSoftwareChart.pdf.

2. For a compilation of electronic discovery resources, see www.abanet.org/tech/ltrc/fyidocs/ediscovery.html.



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