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INTRODUCTION

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This Symposium is partnered with a program presented by the *Stetson Law Review* and Stetson's Office of Continuing Legal Education, *Bridging the Gap between Evidence and Advocacy*.[1] When the *Stetson Law Review* contacted me, outlining the program and asking my advice on the feasibility of such an undertaking, I was out of state and knew I would be so for the duration of the planning stage. Consequently, my response was easy: "Yes, do it!" But never in my wildest dreams did I anticipate the availability of the distinguished group of presenters that the *Stetson Law Review* would secure. The authors of the articles in this Symposium issue are surely the "Who's Who" of evidence and advocacy teachers in the United States.

But they are more. In addition to being trial lawyers, judges, or professors of evidence and trial advocacy (and in most cases, more than one of these), they all have been involved in law school trial competitions as coaches or faculty advisors. That is where I first became acquainted with them, either by reputation, or more often, through a personal association. I strongly believe that law student trial competitions are the single most effective method for law students to "bridge the gap between evidence and advocacy," and consequently have long been an enthusiastic supporter of such competitions. For many years, Stetson's trial teams have enjoyed considerable national success in trial competitions, and quite frequently when our teams have *not* been successful, the defeat has

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1. *Bridging the Gap between Evidence and Advocacy* was held on the Stetson College of Law campus on January 12, 2001. The all-day program targeted attorneys of all experience levels. In addition, Stetson students with a special interest in advocacy were invited to attend. The response was such that the location had to be moved to accommodate the large number of attorneys and students requesting to attend.

come from a team coached by one of the authors in this Symposium. My respect for their advocacy teaching came quickly and has not been forgotten. My students and I have learned much from watching the trial advocacy skills of the students they have coached. They know their subject well, and they have the knack for teaching it. Thus, this Symposium promises a masterful learning experience. Of course, the subject matter here may be more advanced than that generally offered to law students, so take your time and enjoy — you will not be disappointed. Now, let me give you a brief introduction to these articles and their authors.

Professor Edward D. Ohlbaum is the Director of Trial Advocacy and Clinical Legal Education at the James E. Beasley School of Law at Temple University. He is a trial lawyer, a dynamic and forceful speaker, and an accomplished author. I also know him as a colleague from his days as a visiting professor at Stetson.[2] But like some of the other authors in this Symposium, I know him best as an extraordinary trial competition coach. An Ohlbaum-coached team is always a formidable opponent — competent, skilled, and professional. Stetson teams and his Temple teams have met in national trial competitions so many times that a sense of comradery has emerged. And while the friendly debate continues over whose trial advocacy program deserves the number one rating in *U.S. News and World Report*,[3] there is no question that Temple will retain a convincing claim as long as Eddie Ohlbaum is in charge.

Professor Ohlbaum's article, *Jacob's Voice, Esau's Hands: Evidence-speak for Trial Lawyers*, reveals his fascination with what he calls "our currency in the courtroom" — the law of evidence.[4] Echoing a theme from Justice Warren D. Wolfson's article later in the Symposium, the time to "win" is at trial.[5] Evidence and advocacy

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2. Professor Ohlbaum taught both Trial Advocacy and Advanced Trial Evidence at Stetson University College of Law in the spring semester of 1999.

3. In the seven years that *U.S. News & World Report* has been ranking law schools in the Trial Advocacy specialty, Stetson and Temple have each garnered the top rank three times, and have tied once for number one. *America's Best Graduate Schools*, 118 U.S. News & World Rpt. 77, 85 (Mar. 20, 1995); *America's Best Graduate Schools*, 120 U.S. News & World Rpt. 79, 83 (Mar. 18, 1996); *America's Best Graduate Schools*, 122 U.S. News & World Rpt. 67, 77 (Mar. 10, 1997); *America's Best Graduate Schools*, 124 U.S. News & World Rpt. 66, 80 (Mar. 2, 1998); *America's Best Graduate Schools*, 126 U.S. News & World Rpt. 74, 95 (Mar. 29, 1999); *America's Best Graduate Schools*, 128 U.S. News & World Rpt. 56, 74 (Apr. 10, 2000); *America's Best Graduate Schools*, 130 U.S. News & World Rpt. 60, 79 (Apr. 9, 2001).

4. Edward D. Ohlbaum, *Jacob's Voice, Esau's Hands: Evidence-speak for Trial Lawyers*, 31 Stetson L. Rev. 7 (2001).

5. Hon. Warren D. Wolfson, *Evidence Advocacy — The Judge's Perspective*, 31 Stetson L. Rev. 35 (2001).

have much in common. Each supplements the other. Professor Ohlbaum demonstrates how to use the art of advocacy to win the judge's evidentiary ruling and, in turn, shows how this ruling is used in the art of advocacy. Noting that the trial itself is a series of offers of evidence and objections and, using specific examples, he demonstrates how the knowledgeable trial attorney can be effective in having evidence admitted or excluded by carefully explaining the purpose and relevance of it to the trial judge. The successful trial attorney is not only thoroughly familiar with the *contents* of the rules, but also with the *purpose* behind the rules. He or she is skillful in the art of showing the trial judge how the rules must be applied (to the attorney's advantage, of course) in the given factual situation.

Justice Warren D. Wolfson is not only a distinguished judge, but an evidence and trial advocacy professor and author as well. He is also a very successful law-student trial-competition coach. It was in this latter capacity that I became personally acquainted with Justice Wolfson. In the final round of the 1988 National Trial Competition, our Stetson team met a Justice Wolfson-coached team from Chicago-Kent College of Law. Just half way into the opening statements, I concluded that we were in for a long afternoon and likely a disappointing result. That early conclusion proved to be correct, and the Chicago-Kent team took home the National Championship trophy. Nevertheless, our team took home a respectable National Second Place trophy, and I took home a great respect for Justice Wolfson, his coaching skill, and his trial advocacy knowledge.

Justice Wolfson begins his article with the question every trial lawyer seeks to answer: "What makes a judge rule one way and not the other?"[6] And his answer of trust or distrust leads to the next and more important question: "What do trial lawyers do that makes judges trust them?"[7] His answer would be the same if the question were asked of the jury: *Trust* follows those who demonstrate *competence*.[8] Trust is earned by effective and competent evidence advocacy, and by giving the judge a clear roadmap of where the case is going. Competent evidence advocacy requires not only knowing the rules, but also "preparing" the judge to rule by explaining the purpose of the evidence.[9] Justice Wolfson explains a three-step

6. *Id.*
7. *Id.* at 36.
8. *Id.*
9. *Id.* at 36–37.

process for confronting evidence in the trial court, using "The Three Rs" — relevance, reliability, and rightness[10] — and provides an example of the process, illustrating each step. As Justice Wolfson clearly notes, because the standard for review is an abuse of discretion, evidence battles are won on the trial-court floor, and the time to demonstrate evidence competency is there, not in the appellate court where the battle is seldom won.[11]

Professor Steven Lubet is the Director of Northwestern University School of Law's nationally-acclaimed Program on Advocacy and Professionalism. He is certainly one of the most prolific authors in the nation on trial advocacy, litigation, and ethics. I speak with firsthand knowledge of his ability to communicate to students through his writings. I use his book, *Modern Trial Advocacy, Student Edition*,[12] in the trial advocacy course I teach. Not only does this book serve to bridge the gap between evidence and trial advocacy, but it also explains trial theory in such a way that students soon understand that the trial is not merely a series of separate and distinct parts; rather, it is a contest of ideas to be presented in a seamless and persuasive story.

It should thus come as no surprise that Professor Lubet's Symposium article has "storytelling" as its focus.[13] The story line of how the racial prejudice of an Italian community in the nineteenth century was successfully turned against the prosecutors is a classic example of correctly identifying a winning theme and focusing the jury's attention on it from the start of the trial.[14] His Symposium article is not only an interesting story in its own right, but also instructive in how powerful the trial theme can be — even a theme as repugnant as racial prejudice and, as he points out, even when it is not the whole truth.[15]

Professor Gary S. Gildin brings to his Symposium article[16] his experience from many years as both a practicing Chicago trial lawyer and a teacher of Trial Advocacy and Litigation at the

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10. *Id.* at 40.

11. *Id.* at 37.

12. Steven Lubet, *Modern Trial Advocacy* (L. Sch. ed., NITA 2000). This volume builds on an earlier book by Professor Lubet, *Modern Trial Advocacy: Analysis and Practice* (2d ed., NITA 1997), which is structured more for the trial practitioner than the law student.

13. Steven Lubet, *Storytelling and Trials: Playing the "Race Card" in Nineteenth-Century Italy*, 31 Stetson L. Rev. 49 (2001).

14. *Id.* at 57–59.

15. *Id.*

16. Gary S. Gildin, *Reality Programming Lessons for Twenty-first Century Trial Lawyering*, 31 Stetson L. Rev. 61 (2001).

Dickinson School of Law of the Pennsylvania State University. He foresees that trial lawyers in the new millennium will have to consider two interrelated changes that are occurring and will affect the way evidence is presented to the jury: the demographics of the jury as Generation X invades the jury pool, and the revolution in technology that has conditioned the jury's expectations, as well as its attention span.[17] He makes a compelling argument that not only *can* we learn from television, but we *must* learn from television.[18] Those involved in television programming have learned what sustains the interest of the viewer, and the same lessons must be translated into the trial presentation by the trial lawyer.[19] He explains that the story told to the jury must employ the same techniques that the *Nightly News*[20] and *SportsCenter*[21] utilize.[22] There are three components to study: how the shows (trials) open; how the shows (trials) report the individual stories; and how the shows (trials) employ visual aids.[23] Examining the reality television shows *Survivor*[24] and *Big Brother*,[25] he assesses the successful presentation techniques that made one so much more popular than the other; techniques that he urges the trial lawyer in the new millennium to follow. Familiarity with these shows is not necessary to reap the benefits from Professor Gildin's article; the article explains and compares the techniques in sufficient detail to make his arguments clear. The "survivor" in this new century will be the trial lawyer who is attentive to these "lessons learned."[26]

Professor Gerald R. Powell was a litigation attorney before joining the faculty at Baylor Law School in 1986. His subject areas are trial advocacy and evidence, but I suspect somewhere hidden in the Baylor curriculum is a Powell-taught course in storytelling. If not, there should be. He is the master, as those in attendance at the January Symposium soon learned when he made his presentation. His Symposium article reminds us that good stories involve people. They "revolve around a protagonist and an antagonist," and the trial

17. *Id.*
18. *Id.* at 64.
19. *Id.* at 65–66.
20. *Nightly News* (NBC 1970–present) (tv broadcast).
21. *SportsCenter* (ESPN 1979–present) (tv broadcast).
22. Gildin, *supra* n. 16, at 66.
23. *Id.*
24. *Survivor* (CBS 2000) (tv series).
25. *Big Brother* (CBS 2000) (tv series).
26. Gildin, *supra* n. 16, at 87.

lawyer must uncover this story no matter how deeply it is buried.[27] For example, in a contract case, the jury surely is not interested in the words of the contract; the *story* must be about the people involved in the contract.[28] There must be a human story underlying every claim. One of the most important points that Professor Powell makes in his article is about "internalizing" the story so that it can be delivered without appearing scripted.[29] This article is an authentic cornucopia of useful tips guaranteed to make your next trial's story more compelling and persuasive.

Professor Edward J. Imwinkelried, Director of Trial Advocacy at the University of California at Davis, is one of the pioneers in teaching trial advocacy. When I first began teaching the subject twenty years ago, his book, *Evidentiary Foundations*,[30] was my primary source for evidentiary doctrine at trial. It truly bridged the gap between evidence and advocacy. In his article in this Symposium, *A Minimalist Approach to the Presentation of Expert Testimony*, he cautions that the key to successful expert testimony before the jury is to "keep it simple."[31] As he succinctly states, the strategic imperative is to "reduce the complexity"[32] and eliminate the "clutter."[33] Then he proceeds to demonstrate techniques and specific tactics to accomplish this goal. The article addresses questions of whether and when to present expert testimony, how to select an expert and how much of the expert's testimony to present, and how to plan for the direct testimony. The article also mentions specific techniques that can be used to help an expert witness justify his or her opinion.

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27. Gerald R. Powell, *Opening Statements: The Art of Storytelling*, 31 Stetson L. Rev. 89, 92 (2001).

28. *Id.*

29. *Id.* at 98.

30. Edward J. Imwinkelried, *Evidentiary Foundations* (4th ed., LEXIS L. Publg. 1998).

31. 31 Stetson L. Rev. 105, 106 (2001).

32. *Id.* at 107.

33. *Id.*