

# Women Trial Lawyers Caucus

~ ENDOWED BY ROXANNE BARTON CONLIN ~

Association of Trial Lawyers of America

Summer 2005

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## Message from the Chair

### The Close of a Successful Year

by Laura Faircloth, Chair, Women's Caucus

It is hard to believe that my year as Chair of the Women's Caucus is coming to a close. I am extremely pleased with the progress and impact that we have made this year. This has been accomplished through the efforts of all of our members.

I can remember when the Women's Caucus was a small group of women



Laura Faircloth

trial lawyers who gathered to provide support for one another. We shared stories about our clients and how we approached the practice of law in a predominately male environment. In the early days, we struggled to have a place at the table.

Today, the Women's Caucus is all that it started out to be, and so much more. We still seek out advice from each other as it relates to our clients and our continuing efforts to manage time. It seems, however, that we have won our place at the table and now our focus is on helping to solve the political problems that confront all of us.

In April, ATLA women attorneys participated in Women's Lobby Days in Washington, D.C. The hugely successful event included a record-breaking 195 visits with members of Congress. The feedback has been tremendous. The effect has been so overwhelmingly positive that ATLA leadership has asked us to consider making this an annual contribution of our time and our combined efforts.

None of this could have been accomplished without the tremendous sacri-

ifice of some very important women. Julie Kane, our Women's Caucus representative to ATLA's Executive Committee, volunteered to help chair the event. She was joined by Ruth Bernstein and Robin Brewer who are our representatives to ATLA's Board of Governors. These three women are past chairs of the Women's Caucus and continue in their ef-

orts to advocate on behalf of all of us.

The Toronto convention, July 23-27, promises to be one you won't want to miss. Our Women's Caucus Brunch is scheduled for Sunday, July 24, 10:00 am - noon, in the City Hall Room, at the Sheraton Centre Toronto Hotel. Our guest speaker is Lucinda Finley who is Vice Provost for Faculty Affairs at the University at Buffalo, State University of New York. She is a leading scholar on gender issues and tort law.

Our convention education program on jury selection and the dynamics of women in the courtroom, promises to be one of the most interesting programs scheduled. Roxanne Barton Conlin was the first woman president of ATLA and a former chair of the Women's Caucus. As a tribute to her continuing commitment to encouraging women to participate in ATLA, she has endowed the Women's Caucus. Please do not miss her inspirational message to all of us during the education program scheduled for Monday, July 25, also at the Sheraton Centre Toronto Hotel, Mezzanine Level, Conference Room B-C, (Message, Continued on page 2)

# Every Voice Counts

By Adrienne Hobbs, Hobbs & Halperin, Atlanta, GA

I had the honor of joining fellow women attorneys in Washington D.C. in April for ATLA Women's Caucus Lobby Days to fight against proposed changes in our tort law, and to advocate for the preservation of our civil justice system. I prefer to look at it the latter way as it is a positive rather than a negative and it makes more sense to a lay person who does not know what "tort" means.

Corporations are spending millions of dollars to prevent state court judges from being re-elected to protect corporate interests at the expense of our citizens. As attorneys, we have a duty to educate the citizens of our country and to preserve our system of civil justice. If we fail in this effort, at least we have tried to educate folks about their rights. If we succeed, we have accomplished our goal and completed our task. If we do not try, we are shirking our duty to the people of the United States.

In this regard, I have thought long and hard about how to preserve the civil justice system. Obviously, we do not have enough money to compete with corporate America and insurance companies. But we do have the truth on our side and we have the people's best interests at heart. I hope and believe that the truth and the best interests of the people are far more powerful than the almighty dollar.

I am in my early thirties and fairly new to the practice of trial law. I clerked for two years and have only been in practice for three. It is a tough time to be a trial lawyer, especially for those of us just starting out who must devote countless hours and untold energy to preserving our clients' and our potential clients' rights. We also have the additional hurdle of overcoming our tarnished image in *voir dire*. Trial law is an honorable profession that we must fight to defend. After all, we are the last bastions of protection for the people. Tort reformers are destroying the opportunity for folks to fight and rise above adversity. They are destroying compensation to the poor and middle class for injuries caused by someone else's negli-

gence. Tort reformers are making sure that people who have been harmed by someone else cannot recover fairly for those injuries; and are causing more harm to people who have already suffered and are in need. As attorneys, we have a duty and a calling to protect people from the destruction of our system of justice.



**Adrienne Hobbs**

Gerry Spence single-handedly fought off tort reform in Wyoming, Dick Cheney's home state. He and his son Kent held a town hall meeting in each and every county of Wyoming. They invited folks to attend to hear "A VERY IMPORTANT MESSAGE" and they advertised the meetings. The people did come and they listened. Most important, the Spences helped the people of Wyoming preserve the right to access civil justice in their state by explaining how the proposed changes to tort law would harm them. The people protested the changes in the law in support of their rights and the legislature did not pass tort "reform" in Wyoming.

The Georgia Legislature passed Senate Bill 3 (SB 3) on Valentine's Day of this year. Georgia has the most restrictive tort laws in the country and has provided a great deal of immunity to emergency room and other physicians who admit through the emergency room, such as obstetricians and surgeons. The only way that it seems possible to sue for emergency room care is in the event the treating physician is impaired by the use of drugs or alcohol while on the job. How sad for the patients in Georgia, especially those in lower socio-economic groups who receive treatment through the emer-

gency room because they do not have a primary care physician. The law blends nicely with Georgia's Good Samaritan Bill, which grants immunity to physicians who treat on a pro bono basis. The message is clear to me—if you are poor, you are not entitled to the same standard of care as others who can afford to pay for their medical care or who have Medicaid, Medicare, or health insurance.

The Georgia legislature also capped non-economic damages to \$350,000. The "caps" cannot be aimed at frivolous lawsuits since a case valued by a jury over \$350,000 is not frivolous. The law protects insurance companies' profits. Again the message seems pretty clear—if you do not earn money (i.e., you are retired, a stay-at-home mom, a child, etc.), you do not deserve to be fully compensated for the damages you suffered due to a physician's negligence. The message is that jurists are no longer competent to determine damages in a civil lawsuit, but are still deemed competent to determine whether someone convicted of a crime should live or die. I say we stick to the system we have relied on since this country's inception and continue to trust a jury of our peers in both civil and criminal justice matters.

We must all continue to work at every level to educate folks and to preserve access to the civil justice system, whether it is lobbying in Washington, D.C. or our home states, making donations to candidates or ad campaigns, grassroots efforts, or actually running for office. Women are especially adept at delivering our message since we communicate well and are often the most affected by these laws. Women also soften the image of the hardened, greedy trial lawyer that some work so hard to promote. Together, we can preserve our system of civil justice and our courts.

*(Message, Continued from page 1)*  
2:00 pm – 5:00 pm.

She will be joined by other terrific speakers to include V. Hale Starr with Starr Litigation, Sandra Robinson, and Mary Beth Ramey. All of these speakers are insightful and knowledgeable about what all of us confront in the courtroom. Best of all, they have answers to some of our questions and problems.

Be sure to look for the newest edi-

tion of TRIAL magazine. You will see some of the strength of the Women's Caucus featured on the cover for the first time in the history of that magazine. I am so very proud to leave the Women's Caucus in good hands. One of the women appearing on the cover of TRIAL magazine is our Women's Caucus Chair-Elect, Kathleen L. Brandt.

Thank you for allowing me to be part of the mission of the Women's Caucus. I look forward to seeing you Toronto!

# Negotiation Strategies

By Carolin K. Shining, Paul Hanley & Harley, Berkeley, CA

While year-end annual reviews seem as far away as Christmas shopping lists, it is an excellent time to think about the end-of-the-year performance review and/or profit sharing meetings. Even highly accomplished women often have great difficulty negotiating for themselves and the summer months are an excellent time to start taking stock of one's accomplishments and goals.

In their recent book, Women Don't Ask: Negotiation and the Gender Divide (2003: Princeton University Press) UC Berkeley Business School Professor Linda Babcock and business writer Sara Laschever compile strategies to analyze why otherwise highly successful women still have difficulty when discussing their own salaries. They provide compelling and interesting ideas on how to break this stigma and reach across the salary divide.

## I. Women Simply Don't Ask: The Existing Divide

At the center of this controversy is a 2003 Harvard study demonstrating that salaries for male graduates of Ivy League business schools were 6% higher than women, even when adjusted for various differences in industries and geography. Male graduates had first year guaranteed bonuses that were an astronomical 19% higher than their female counterparts. One explanation provided in that study was that women graduates felt grateful to have any job offer. These women never even considered negotiating the terms of this first employment. In sharp contrast, their male counterparts negotiated the best possible situation, never doubting that they could lose. The authors list study after study showing how successful career women in all professions lag in their abilities to negotiate for themselves.

So how to explain this continuing divide? One reason is that most men are still trained from youth to treat everything in life as a negotiation. From the price of a mattress to betting over a football game, men continue to learn at an early age that losing a negotiation is simply the price that one pays to win—if one does not risk losing, then there can be no gain.

In contrast, the book argues that women even in today's progressive so-

ciety are still socialized in their early years as caretakers. In a very positive sense, this allows women to use those skills powerfully and aggressively for their clients. There is still little formal or informal training of women in the aggressive self-interest required to brave successful negotiations for salary increases, bonuses or even to demand assignment to the best and most lucrative cases. And even worse, the authors illustrate chilling situations where powerful, demanding women continue to be branded as domineering and threatening by their colleagues.

## II. The Real Impact

While overall earnings of women may be improving, due to these inequities, women professionals may be losing nearly \$1,000,000 in total lifetime earnings as a result of the failure to negotiate for higher salaries and bonuses in their first job.

When employers allow successful women to stagnate due to the popular belief that since "she didn't ask, so she must be satisfied," it is both society and the employer who ultimately suffer most. The authors note that "paying women less means apportioning inadequate amounts of [the] "rainy day" guarantees to huge numbers of the populace" in the forms of social security payments, disability insurance, pensions and 401(k) contributions. "American women over sixty-five are more than twice as likely to be poor as men of the same age." Who ends up taking care of these women? Presumably their hard working daughters, now nicknamed "the sandwich generation."

Applying these thoughts more directly to trial practice, women who enter their trial practices later in life face the need to catch up in terms of skills and abilities to their counterparts. Similarly, young women trial lawyers often post pone having children in order to solidify their careers in ways their male counterparts might not consider, or indeed simply to pay for college loans. If women negotiated the best possible salaries and bonuses in their initial years of employment, these stresses might be greatly reduced indeed.

Even the most progressive employers who believe that they do not

discriminate may send subtle signals that a woman's work is not as valued as her male counterpart, simply because she must demand equality even in this day and age. Yet it is not completely the employer's fault: Women must work to overcome any hidden fears of negotiating on their own behalf as much as employers can learn to help women remove this negative tendency.

## III. Strategies for Negotiation

There are numerous strategies that can be used to overcome the fear of negotiating for your own self-benefit:

1) Stay informed about salaries, bonuses, and profit sharing available in your regional marketplace. Numerous sources exist for comparing lawyer and associate salaries, including salary.com and findlaw.com. Don't be afraid to share what you can within the terms of your employers' policies. Knowledge is power.

2) Next, convince yourself that negotiation of one's salary is not tantamount to disloyalty. Many women are incredibly loyal employees—but this loyalty is misplaced when it comes to an inability to engage in serious salary negotiation. One way to think about it is that your law partners will actually expect their top level legal talent to negotiate hard on their own behalf — they will respect you more for standing up for yourself and see a failure to do so as a potential weakness.

3) Get rid of the belief that meritocracy pays. According to Babcock and Laschever, women more typically also believe that it is up to the employer to recognize merit and therefore they do not need to ask for more pay or higher bonuses. Again, many male trial lawyers are also some of the world's best negotiators and a key strategy of negotiation is never to deal against yourself. Therefore, it is logical that many women lawyers will be "leaving money on the table" if they never ask for a raise or an increase in their bonus.

4) Practice, practice, practice. Just as with preparing a big opening statement or oral argument, get in front of the mirror, friends, and family, and rehearse how you are going to negotiate your raise. This is the most important

*Negotiation, Continued on page 5)*

# Oral Arguments: Tips and a Tale

By Nina E. Kallen, Roslindale, MA

Recently I argued in federal court a motion for summary judgment on an insurance coverage dispute. As I argued I struggled with an internal conflict of interest. My first interest, of course, was the need to do the best I could for my client, an insurance company who was very rightfully denying coverage on the basis that the loss alleged was excluded in FIVE policy exclusions. It was such an easy win that I would have been mortified if I had lost. (Of course, given the vagaries of the system, I still might.) My second interest was my need to impress my husband's nephew, about to start college, who had come along to see what a real courtroom looks like. Brought up in a very traditional household where his mother has never worked outside the home, all his life I have heard comments from him like "But a girl can't be president!" (at five years old) to "I didn't know you had a job" (last month). I wanted to use my brilliance at oral argument to replace his old-fashioned notion of gender roles with the thunderous realization that women—well, me, anyway—are great in the workplace as well as the home.

Unfortunately, the need to do well for the client clashed with the need to impress my nephew. The judge had read the papers and made it clear from the get-go that he thought there was no coverage under the insurance policy. In a situation like that, discretion is the better part of valor; in other words, sit down and shut up. When the judge is already on your side, the more you say the more you risk changing his or her mind. I threw my prepared argument out the window and answered the questions the judge addressed to me as concisely as possible. Answers like, "Exclusion N, your honor." My nephew, I fear, did not recognize my brilliance. (He was suitably impressed however, when former Massachusetts governor and presidential candidate Michael Dukakis happened to walk past us in the corridor of the courthouse, and I pretended to know him and introduced him to my nephew. Even if girls can't be president, we can pretend to know someone who ran for the office! But I knew I had done the best job I could for my client.

I specialize in drafting and arguing dis-

positive motions. Over the course of my career I have won the great majority of the dozens I have argued. These are some tips I have picked up along the way.

1. A thorough, well-written motion that clearly and accurately points out why the law as applied to the facts is on your side will carry the day. Judges will rarely decide a motion based on how well-spoken an attorney is. Even if they don't read the motion beforehand, after oral argument their law clerk will.

2. To win on summary judgment your argument has to be flawless. In Massachusetts a judge granting summary judgment is required to issue a written decision, but a judge is allowed to deny summary judgment by writing "denied" on the margin. Overburdened judges, therefore, whether consciously or not, look for excuses to deny summary judgment.

3. It helps a lot if the law and the facts are on your side.

4. If some points of law or facts are against you, discuss them in your written motion. This steals the thunder from the other side. Also, in figuring out how to minimize their impact, you might realize, and then convince the judge, that those points are not really against you.

5. If the cases don't stand for the proposition you claim, you will lose.

6. Shepardize! Shepardize before you submit the brief. Reshepardize just before oral argument.

7. Appearance counts in how the brief looks. Use exhibit tabs so the judge can find the exhibits. Use spell check, and also use point headings to outline your argument.

8. Appearance counts at oral argument. It's okay to flip through a couple pages of your legal pad to find a specific citation. It's not okay to go through piles of documents looking for a case.

9. Three legal arguments are the most you should make at oral argument; two are better; and one is best. A trick I



Nina E. Kallen

like to use is to make three arguments in my brief ("This case should be dismissed because of this, this, and this.") and then start my oral presentation by telling the judge that I'm only going to argue two points and I'll rely on my papers for the third. This tells the judge that I'm not going to waste his or her time with a weak argument, and that what I am going to say is worth listening to.

listening to.

10. Prepare, prepare, prepare. I practice my oral argument with a non-attorney, usually my running partner, because she'll always ask questions I'm not expecting. (Also, it makes that last mile go by a lot easier.) My basic argument is memorized; during my presentation I glance at a one page outline that really just provides phrases I'm likely to forget, such as the name of a case.

11. Always let the judge take the lead. Answer the question the judge asks. If you don't know the answer, be honest about it and offer to further brief the issue.

12. Know when to be quiet. If the judge indicates he or she will rule your way, say thank you and sit down.

13. Let the other side dig their own grave. If opposing counsel babbles on after the judge indicates that he or she has heard enough, sit quietly. If the other attorney claims you did or said something which is not true, calmly tell the judge this. A judge won't rule in your favor just because he or she likes you more than the other side, but it helps.

14. Don't argue to impress the client (or your nephew); argue to win the case. If your client will be in the courtroom, inform him or her beforehand what your strategy will be. Ultimately, clients are more impressed by a victory than by posturing in the courtroom.

*Nina Kallen, a litigator in Massachusetts, subcontracts to other attorneys on brief-writing and sundry other legal work, including tutoring on effective legal writing, and also represents parties in litigation. She can be reached at ninakallen@hotmail.*

# **ATLA Annual Convention July 23-27, 2005 Toronto, Canada**

**Here is a list of convention events you don't want to miss!**

**Saturday, July 23 Law Student Mentor Program 3:45pm – 4:30pm**  
**City Hall Room, Sheraton (Be a mentor to a law student)**

**Saturday, July 23 Opening Plenary 5:30pm – 7:00pm**  
**Civic Ballroom, Sheraton**

**Saturday, July 23 Opening Reception 7:00pm – 9:00pm**  
**Grand Ballroom, Sheraton**

**Sunday, July 24 Women's Caucus Brunch 10:00am – noon**  
**City Hall Room, Sheraton**

**\*Sunday, July 24 Women's Caucus Business Meeting 2:00pm – 4:00pm**  
**Huron Room, Sheraton**

**Monday, July 25 Women's Caucus Education Program 2:00pm – 5:15pm**  
**Conference Room B-C, Sheraton**

**Tuesday, July 26 Membership Awards Luncheon Noon – 2:00pm**  
**Grand Ballroom, Sheraton**

**Wednesday, July 27 Membership Business Meeting and Elections 8:00am – 10:30am**  
**Grand Ballroom East, Sheraton**

**\*If are unable to attend the Women's Caucus business meeting in person you can participate by conference call. Dial toll free 800-364-2312 and enter the passcode 202-965-1213.**

*(Negotiation, Continued from page 3)*  
negotiation of the year, so why simply go in without a prepared and strategic game plan?

5) Keep track of your benefit to the firm. Many trial firms do not require keeping of billable hours, to the great relief of most of us. But in formulating why a better bonus is required,

supporting evidence is important. Keep track of your achievements on a daily or weekly basis throughout the year in your trial calendar. Indeed, keep track of the settlements in your cases—regardless of how small—and calculate your “net worth” to the firm. That way you can leverage your skills and value into a dollar figure that

might surprise even yourself the first time you do it. Until the ranks of practicing and successful women trial lawyers equal our male counterparts, we know that there are still barriers to overcome.

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# ATLA 2005 Annual Convention Coming to Toronto

ATLA will hold its 2005 Annual Convention July 23-27, 2005, at the Sheraton Centre Toronto and Hilton Toronto Hotel in Toronto, Ontario, Canada. It will showcase creative networking opportunities, venues to share ideas and strategies with colleagues, and education programs with direct benefits to attendees' practices. Attendees can choose from 50 CLE programs, including the Advocacy Track, and earn up to 33.5 MCLE credits, including 5.4 ethics credits. Lawyers may register online at [www.atla.org/convention](http://www.atla.org/convention), for a chance to win a FREE registration to the ATLA 2006 Annual Convention in Seattle, WA. First-time attendees in practice less than 10 years, and paralegals attending the convention for the first time receive 50% off the regular registration fee! For more information please call 800-424-2725 or 202-965-3500, ext. 613.

# TORONTO

## ATLA 2005 Annual Convention July 23-27

Sheraton Centre Toronto · Hilton Toronto Hotel

