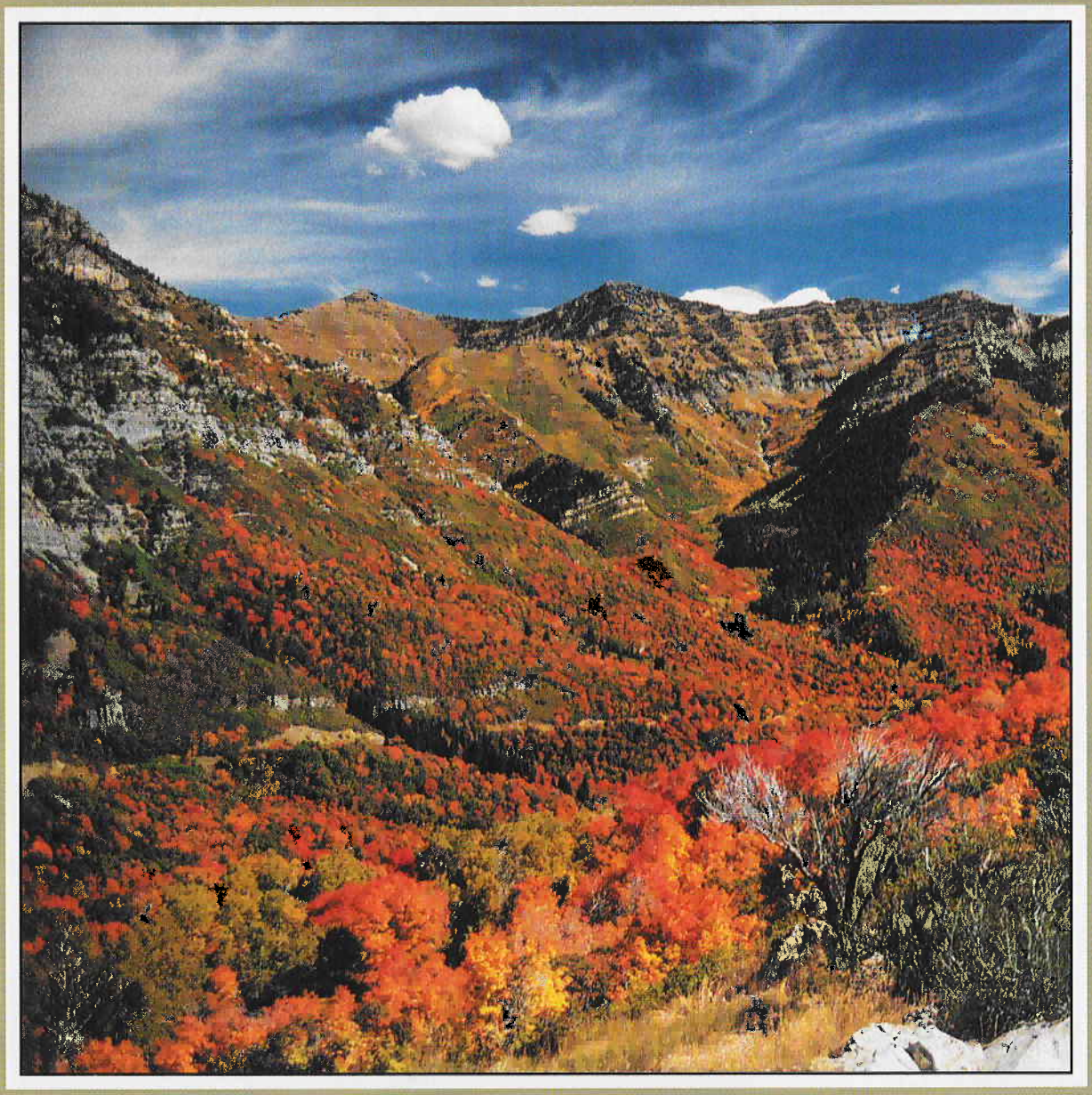
UTAH BAR JOURNAL

Vol. 8 No. 9 November 1995



The Premier Trial Lawyer's Seminar: The Ultimate Utah Trial Notebook

Collector's Issue

COMPUTING
READERS CHOICE AWARDS
WINNER

Move over Nexis. Now Westlaw has more business and financial information.

Move over Nexis®.

WESTLAW® now offers the legal community more business and financial information online than you'll find anywhere else.

Including Nexis.

The numbers tell it all.

For example, WESTLAW gives you more full-text U.S. newspapers.

Exclusive access to Dow Jones newswires.

Fifty percent more full-text market and technology newsletters than you will find on Nexis.

And that's just the beginning. Because we're adding even more information to WESTLAW at an unprecedented pace.

It's no wonder that so many are making the switch from Lexis/Nexis.

WESTLAW. One name. One source for all your legal and business research needs.

TO LEARN MORE, CALL 1-800-328-9963.

WESTLAW®

536309 6-9123-1A/8-95 ©1995 West Publishing

West. An American company serving the legal world.

Utah BJ

Published by The Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111
Telephone (801) 531-9077

President
Dennis V. Haslam

President-Elect
Steven M. Kaufman

Executive Director
John C. Baldwin

Bar Journal Committee and Editorial Board

Editor
Calvin E. Thorpe

Associate Editors
M. Karlynn Hinman
William D. Holyoak
Randall L. Romrell

Articles Editors
Christopher Burke
Lee S. McCullough

Letters Editor
Victoria Kidman

Views from the Bench Editors
Judge Michael L. Hutchings
Judge Stephen VanDyke

Legislative Report Editor
Lisa Watts Baskin

Case Summaries Editors
Scott A. Hagen
Clark R. Nielsen

Book Review Editor
Betsy L. Ross

"How to . . ." Editors
Brad Betebenner
David Hartvigsen
Patrick Hendrickson

Judicial Profiles Editors
Marnie Funk
Derek Pullan
Stephen K. Christiansen

ADR Editor
Cherie P. Shanteau

Law and Technology Editor
R. Bruce Findlay

Young Lawyer Representative
Michael O. Zabriskie
Mark E. Burns

Glen Cook
David Brown
David Erickson
Thomas Jepperson
J. Craig Smith
Denver Snuffer
Judge Homer Wilkinson

Committee Liaison
Maud C. Thurman

UTAH BAR JOURNAL

Vol. 8 No. 9 November 1995

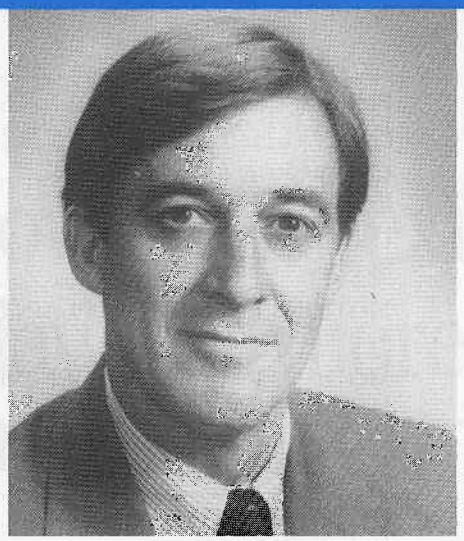
COVER: Provo Peak and Friends, Utah County by Phillip E. Lowry, Provo, Utah.

Members of the Utah Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal* should contact Randall L. Romrell, Associate General Counsel, Huntsman Chemical Corporation, 2000 Eagle Gate Tower, Salt Lake City, Utah, 84111, 532-5200. Send both the slide, transparency or print of each photograph you want to be considered.

The Utah Bar Journal is published monthly, except July and August, by the Utah State Bar. One copy of each issue is furnished to members as part of their State Bar dues. Subscription price to others, $30; single copies, $4.00. For information on advertising rates and space reservation, call or write Utah State Bar offices.

Statements or opinions expressed by contributors are not necessarily those of the Utah State Bar, and publication of advertisements is not to be considered an endorsement of the product or service advertised.

Copyright © 1995 by the Utah State Bar. All rights reserved.



Vision, Mission and Goals of the Bar

By Dennis V. Haslam

A few weeks ago, the Board of Bar Commissioners met to review critical issues and goals facing the bar and to reexamine the vision of the bar and its mission. We waxed philosophical for hours, parroted a few Bruce S. Jenkins stories about lawyers, beat on our chests saying what good people lawyers are, and listened to former Justice D. Frank Wilkins insert a few Abraham Lincolnisms.

In the end, we came up, tentatively of course and subject to your input, with a "Vision" of the Utah State Bar, and a Mission Statement, Critical Issues and Goals.

VISION

A famous disk jockey once said that you should keep your feet on the ground and reach for the stars. Well, here is our Vision:

> To lead society in the creation of a justice system that is understood, valued, respected and accessible to all.

We have much to do in improving the public's understanding of our justice system. Once the public understands it they will value and respect it. As lawyers, we need to take the lead in making legal services accessible to everyone.

MISSION

We adopted the following as the Mission Statement for the Utah State Bar:

> To represent lawyers in the State of Utah and to serve the public and the legal profession by promoting justice, professional excellence, civility, ethics, respect for, and understanding of, the law.

It is pretty hard to argue with this one except, of course, that we have probably left out a few important messages. Nonetheless, in a relatively simple statement, without too much legalese, we think we've got it. The bar should adopt this statement as its mission. Each element of the statement is achievable if it is reflected in the conduct of all members of the bar.

CRITICAL ISSUES

We reviewed the many critical issues facing the bar. In our current environment, the social issues include increasing poverty, violent youth crimes, breakdown of the family, physical abuse, racial discrimination and low income citizens who are unable to obtain access to the legal system.

Practice issues are particularly significant for solo and small firm practitioners. As you know, approximately 40% to 50% of lawyers nationwide are small firm and solo practitioners. Those lawyers need access to information in order to remain current with legal and technological changes. We are working to get Utah lawyers closer to the web of the ABA internet.

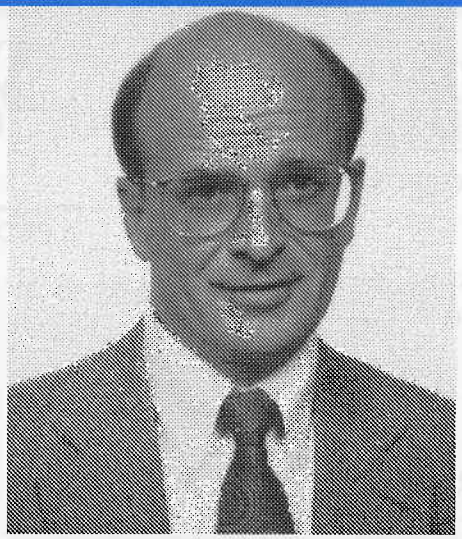
The public standing of lawyers in society is also an important issue to our members. Our image, in light of recent legal proceedings televised nationally, is probably not too good. Negative public perceptions must be changed by setting good examples of doing the right thing, both privately and publicly.

GOALS

Five goals were adopted by the Commission:

1. To promote the administration of justice.
2. To uphold and elevate the standards of courtesy, ethics, competence, professionalism, public service and collegiality in the legal profession. Do unto other lawyers as you would have other lawyers do unto you.
3. To educate the public about the rule of law and the public's responsibilities under the law and to increase public understanding of the role of the legal profession within the system of justice.
4. To provide improved access to legal services for the public.
5. To promote the value of lawyers in the legal system.

The vision, mission statement, issues and goals are the fabric of our bar. If you like any of these ideas, let us know. If you don't, let us know. If they can be improved, let us know that, too.



The Public Image of Lawyers

By James C. Jenkins, Bar Commissioner, First Division

Perhaps the single most important purpose of an organized Bar is to promote public confidence in the judicial system. In a democracy, the integrity and efficiency of an institution is dependent upon its public support, and public support is affected by the image the institution portrays to the public and the experience the public has with the institution.

Attorneys of the Utah Bar support legal services to the poor and disadvantaged, contribute to the regulation of judicial conduct and lawyer discipline and the unlawful practice of law. Utah lawyers participate in continuing legal education to improve competency and professionalism. We advocate principles of justice and promote many other improvements to the law.

Perhaps the public has taken our profession and the legal system for granted. Certainly it is much easier to sell magazines and newspapers or commercial air time with controversy and criticism, than with optimism and education. We must continue to promote the good in our profession and the qualities of our system. It is easy to focus on the O.J. Simpson case and its examples of professional acrimony and legal posturing, judicial disorder, and the commercialization of trial. Yet the public needs to be reminded that such is not representative of the judiciary or the legal profession, nor is it necessarily the model for resolution of controversy. The public needs to be reminded that the overwhelming majority of attorneys and judges are people who have devoted their lives to order, justice and equality. They are people who serve their community outside their occupation as religious leaders, volunteers on civic boards, commissions and committees, and as local government leaders on school boards, city councils, zoning commissions, and other organizations. They are PTA leaders, scout leaders, little league and soccer coaches, police instructors, volunteers at nursing homes, and civic leaders. Lawyers are called upon, and willingly serve, in a myriad of volunteer assignments sharing their unique educational skills and training for the improvement and benefit of the community.

Rather than accept or ignore the criticisms of our system and profession, I believe it is our duty to inform and remind the critics and the general public of who we are and what we do. When we improve the public image of lawyers, we build the public's confidence in lawyers and the judicial system.

The mission of the Utah Bar should be to make better lawyers and improve public respect for the profession. I am honored to be a lawyer. I consider it a privilege to be a member of the Utah Bar. I am pleased with the accomplishments of Utah lawyers. We need not apologize for our profession, but rather we should continue to strive to honorably serve our clients and the community, to improve our skills and services, and to otherwise help earn and maintain public respect.

THE LAW FIRM OF

WORKMAN, NYDEGGER & SEELEY

A PROFESSIONAL CORPORATION

TAKES PLEASURE IN
ANNOUNCING THAT

JEFFREY L. RANCK
CHARLES J. VEVERKA
JONATHAN D. WOOD
ROBYN L. PHILLIPS
DAVID B. DELLENBACH
TIMOTHY M. FARRELL

HAVE JOINED THE FIRM AS ASSOCIATES

LENA I. VINITSKAYA

HAS JOINED THE FIRM AS A
REGISTERED PATENT AGENT

WORKMAN, NYDEGGER & SEELEY

ATTORNEYS AT LAW

1000 EAGLE GATE TOWER
60 EAST SOUTH TEMPLE STREET
SALT LAKE CITY, UTAH 84111
TELEPHONE (801) 533-9800
FACSIMILE (801) 328-1707

PATENT, TRADEMARK, COPYRIGHT,
TRADE SECRETS, UNFAIR COMPETITION,
LICENSING AND COMPLEX LITIGATION

WORKMAN
NYDEGGER
& SEELEY

A PROFESSIONAL CORPORATION

H. ROSS WORKMAN
RICK D. NYDEGGER
DAVID O. SEELEY
BRENT P. LORIMER
THOMAS R. VUKSINICK
KENT S. BURNINGHAM
LARRY R. LAYCOCK
TODD E. ZENGER
JONATHAN W. RICHARDS
DAVID R. WRIGHT
JOHN C. STRINGHAM
MICHAEL F. KRIEGER
BRADLEY K. DESANDRO
JOHN M. GUYNN
GREGORY M. TAYLOR
DANA L. TANGREN
ERIC L. MASCHOFF
KEVIN B. LAURENCE
GREGORY V. BEAN
BRIAN C. KUNZLER
SUSAN K. MORRIS
JEFFREY L. RANCK
CHARLES J. VEVERKA
JONATHAN D. WOOD
ROBYN L. PHILLIPS
DAVID B. DELLENBACH
TIMOTHY M. FARRELL

REGISTERED PATENT AGENT
LENA I. VINITSKAYA

OF COUNSEL
ALLEN R. JENSEN

Overview of the Trial Practice Seminar

By Robert D. Maack

Time was when the legal profession was held by the public in high esteem. Lawyers were considered to be Brahmans of our society and to pursue a career in the law was considered to be a high calling.

In recent times, however, the profession is under siege, the public is cynical and lawyer jokes abound.

Paradoxically applications to law schools are still very high and entry into the profession is still vigorously sought.

One of the goals of the American Board of Trial Advocates (ABOTA) is to strive to enhance the image of the profession. Not merely for personal satisfaction, but because the entire premise of the American legal system depends upon the public's faith and confidence not only in the fairness, but the timeliness, of the law as a means of dispute resolution and social control.

Without public confidence, the system cannot function optimally. The solution can only lie with the members of the profession.

The idea for the Premier Trial Lawyer's Seminar sprang from the Trial Notebook seminars that began in New York City, California and Texas with one important difference. Rather than selecting just good journeyman trial lawyers, the decision was made to invite the very best trial lawyers in the state.

Having tried cases all over the United States, I began to develop a broader prospective and a new appreciation for the unusually high quality of trial practice that still exists in the Intermountain area.

Possibly due to Utah's relatively small population, Utah courts have not yet turned into the overcrowded and impersonal litigation factories that now exist in many large metropolitan areas.

In Utah, most of the judges know most of the lawyers who try cases. In Utah, most of the lawyers know most of the lawyers who try cases. As a consequence, a lawyer establishes a reputation among his or her fellows at the Bar and a lawyer cannot disappear into the anonymity that exists in States with larger Bar memberships.

ROBERT D. MAACK, program chair for the Ultimate Utah Trial Notebook, is a senior trial attorney with the Salt Lake City firm of Campbell Maack & Sessions. He specializes in litigation involving complex scientific issues and has served as Regional Trial Counsel for Honda Motor Company and Westinghouse Corporation. In that capacity, he has been lead trial council and had oversight and supervisory responsibilities for litigation throughout the United States. President of the Utah Chapter of the American Board of Trial Advocates, Mr. Maack is also a Fellow of the American College of Trial Lawyers and Master of the Bench, American Inn of Court I.

In Utah trial lawyers still do develop a personal reputation based on accomplishments, whether good or bad, and not just through notoriety. Accordingly, in casting the participants for the Utah Trial Notebook Seminar, a decision was made, not merely to invite good competent trial lawyers, but to swing for the fence and invite the best of the best — the very best, those Utah based trial lawyers who truly are the premier trial lawyers in their fields.

In analyzing the faculty, it is immediately apparent that each of the presenters has at least three fundamental things in common:

1. Each Had Mastered His Craft: Each of the lawyers has a deep and broad based knowledge and understanding of evidence, procedure and the substantive law in his field that comes from experience and dedicated focus.

2. Honesty and Ethics: Each of the lawyers has a reputation for being trustworthy. Their words are still their bonds and they stand as examples of what lawyers ought to be.

3. Civility, Dignity and Professionalism: Many good lawyers are possessed of the first two qualities; what sets the premier trial lawyers apart is the dignity and integrity they bring to the proceedings. The lawyers selected for the Seminar have reputations for deportment and gentility both in and out of the court room. They are proof that a lawyer can at once be both a strong litigator, a fiercely vigorous advocate and still be a gentleman who tries his case with grace and style.

From post-trial jury interviews, we learn that for the most part jurors come to serve on jury duty with high expectations and take their responsibility very seriously.

They expect a lot from the judicial process and quickly become disillusioned when lawyers are unprepared or disorganized, when there is rancor among counsel or if the proceedings degenerate into a shouting match or common argument.

It was the goal of the Premier Trial Lawyer's Seminar to pass the knowledge of one generation of trial lawyers onto the next and to preserve what might otherwise be lost.

Studies show that a juror's faith and confidence in the fundamental fairness of the system is renewed when the judge and the counsel conduct the trial with dignity, civility and professionalism. That is what they expect and that is what the deserve.

The following premier trial lawyers have mastered the technique of litigation and done much to maintain the integrity of the judicial process. They do us all proud. Through this seminar they once again serve as examples to the younger members of the Bar of what a trial lawyer ought to be.

Motions in Limine — Plaintiff's Motions

By Philip R. Fishler

INTRODUCTION

The Latin term "in limine" literally means "[o]n or at the threshold; at the very beginning; preliminarily."[1] Thus, a motion in limine is simply a preliminary motion made and generally decided prior to trial.

In Utah the motion in limine is used most frequently to determine evidentiary issues, however, the term has also been applied to various procedural motions which are not necessarily restricted to matters of evidence.

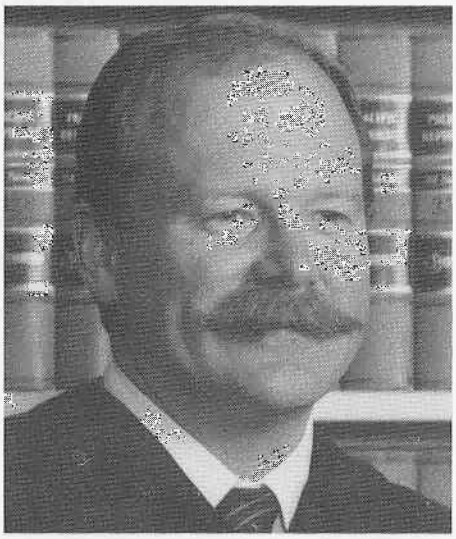
The motion in limine is one of the litigator's most useful procedural tools. Indeed, cases are often won or lost on the motions, and the motion in limine is "one of the most powerful weapons in the litigator's arsenal."[2]

HISTORICAL DEVELOPMENT

The term "motion in limine" first appeared in Utah case law in *Bridges v. Union Pacific Railroad Co.,* 488 P.2d 738, 739 (Utah 1971) (affirming trial court pretrial ruling to exclude opinion testimony that railroad crossing was hazardous). The first appearance of the motion in American case law was in *Bradford v. Birmingham Electric Co.,* 149 So. 729 (Ala. 1933), although it was not until the 1970's that the motion in limine became a widely accepted practice in litigation.

SCOPE OF APPLICATION

Generally, a motion in limine is confined to matters regarding admission or exclusion of evidence;[3] however, the term has recently been applied by the Utah court to a variety of procedural motions as well. *See State v. Payne,* 1995 LEXIS 22 (Utah March 21, 1995) (motion in limine raised to determine issue of jurisdiction); *Dalley v. Utah Valley Regional Medical Center,* 791 P.2d 193, 195-200 (Utah 1990) (implying plaintiff used a motion in limine in a medical malpractice case to establish that an injury was of a type that does not occur in the absence of negligence; thus, plaintiff could apply the doctrine of res ipsa loquitur and would not require the testimony of an expert); *Prowswood, Inc. v. Mountain Fuel Supply Co.,* 676 P.2d 952, 953 (Utah 1984) (referring to "motion in limine to dismiss plaintiff's fraud claim").



PHILIP R. FISHLER, former judge and presiding judge of the Third Judicial District Court of Utah, practices with the Salt Lake City firm of Strong & Hanni in the areas of medical malpractice, insurance defense, products liability and professional liability defense. He is a Fellow of the American College of Trial Lawyers, Master of the Bench of the American Inn of Court II and a member of DRI and the Utah Defense Lawyer's Association.

AUTHORITY AND FORM

Like many other jurisdictions, Utah has no specific rule which addresses the form or use of motions in limine. Authority may be inferred from various civil and criminal rules.

Civil

- Utah R. Civ. P. 16(a)(11) (discussing pretrial conferences which involve "such other matters as may aid in the disposition of the case").
- Utah R. Civ. Proc. 10 (form of pleadings and other matters).
- Utah Code Jud. Admin. R. 4-501 (discussing general procedure for filing motions).

Criminal

- Utah R. Crim. P. 12(b)(2) ("Any . . . request for rulings on the admissibility of evidence, which is capable of determination without the trial of the general issue may be raised prior to trial by written motion.").
- Utah R. Civ. P. 81(e) (directing that civil rules govern any aspect of criminal proceedings where not in conflict with other rules, statutes, or constitutional requirements).

Note that Utah R. Evid. 611(a) gives the court broad discretionary powers in controlling witness interrogation, testimony, and presentation of evidence.

STANDARD OF APPELLATE REVIEW

The court applies a standard of review appropriate to the substance of the motion. There is no different standard applied because the issue was raised and decided on a motion in limine. *See Hill v. Dickerson,* 839 P.2d 309, 311 (Utah App. 1992) (applying abuse of discretion standard in regard to admissibility of evidence).

EFFECT OF RULING & NECESSITY TO OBJECT

Once a matter is raised and definitively decided by the court it is not necessary to object at trial to preserve the issue for appeal. **Merely raising the issue on a motion in limine is, however, by itself, not enough.** If the court defers the matter for decision at trial, the party opposing the ruling at trial must make a specific and timely objection in order to preserve the issue for purposes of appeal.

Issue preserved

• *Onyeabor v. Pro Roofing, Inc.,* 787 P.2d 525, 528 (Utah App. 1990) (finding issue preserved for appeal even though plaintiff did not object to testimony at trial, where court denied plaintiff's motion to exclude testimony of defendant's expert).

Issue not preserved

• *Billings v. Nielson,* 738 P.2d 1047, 1048 (Utah App. 1987) (finding issue waived on appeal where judge reserved ruling on plaintiff's motion to exclude documents and defendant did not offer the documents at trial).

• *State v. Saunders,* 259 U.A.R. 24, 27 & n.9 (Utah App. 1995) (failure to object to prosecutor's comments concerning uncharged incidents of sexual abuse amounted to waiver even though trial court had previously ruled that such evidence would be excluded). Note that in the *Saunders* case defense counsel "opened the door" by eliciting testimony on the subject. *Id.* Furthermore, the court rejected the defendant's ineffectiveness claims because it reasoned that defense counsel may have made a tactical decision not to object in an effort to avoid focusing the jury's attention on the incidents. *Id.* at n.9.

EXAMPLES OF APPLICATION IN UTAH

• Relevance

– Slip and fall accident. Affirming trial court decision on defendant's motion in limine to exclude "prior fall" testimony if not based on same location and time as subject of the claim but approving of admission of testimony which met those parameters. *Erikson v. Wasatch Manor Inc.,* 802 P.2d 1323, 1325-26 (Utah App. 1990).

– Automobile products liability claim. Affirming trial court's granting of plaintiff's motion to exclude evidence regarding use of seatbelts. *Whitehead v. American Motors Sales Corp.,* 801 P.2d 920, 927-28 (Utah 1990).

– Excessive use of force. Affirming denial of defendant policeman's motion to exclude "inflammatory" letter from police department to plaintiff. *Meyers v. Salt Lake City Corp.,* 747 P.2d 1058, 1059-60 (Utah App. 1987).

• Prejudice

– Auto-pedestrian injury action. Affirming court's granting of defendant's motion to exclude testimony regarding defendant's flight from scene of accident to support plaintiff's negligence claim. Prejudicial effect outweighed probative value. *Fisher v. Trapp,* 748 P.2d 204, 204-05 (Utah App. 1988).

– Wrongful death. Remanding for new trial where trial court denied plaintiff's motion in limine to exclude evidence of alcohol consumption the day prior to drowning accident. *Pearce v. Wistisen,* 701 P.2d 489, 493-94 (Utah 1985).

• Experts

– Fraudulent misrepresentation claim. Affirming grant of defendant's motion to preclude plaintiff from calling expert where defendant's witness list was submitted shortly before trial. *Radcliffe v. Akhavan,* 875 P.2d 608, 611 (Utah App. 1994); *Hill v. Dickerson,* 839 P.2d 309, 311 (Utah App. 1992) (same in claim for dental malpractice).

"No need to raise objection in front of jury. Jury won't wonder what they're missing at sidebar or have to deal with the tedious process of having to leave the courtroom while the attorneys argue evidentiary issues."

• Hearsay

– Automobile accident. Affirming denial of plaintiff's motion in limine to exclude deceased doctor's testimony as hearsay because it was admissible under Rule 803(4) (statements for purposes of medical diagnosis or treatment). *Hansen v. Heath,* 852 P.2d 977, 978-79 (Utah 1993).

• Miscellaneous

– Just compensation proceeding. Decision pursuant to motion in limine to assume presence of a planned interchange for purpose of determining value of property prior to condemnation. *UDOT v. 6200 South Associates,* 872 P.2d 462, 469-70 (Utah App. 1994).

ADVANTAGES

1. No need to raise objection in front of jury
   • Jury won't wonder what they're missing at sidebar or have to deal with the tedious process of having to leave the courtroom while the attorneys argue evidentiary issues.
2. Saves time at trial
   • Judge, jury, parties
   • Avoids lengthy sidebars, objections, and offers of proof at trial
3. Puts opponent on guard
   • Opponent must be careful not to inadvertently go into an area prohibited by the court's ruling on the motion in limine
4. Issues are simplified at trial by eliminating or clarifying technical matters regarding evidence.
5. Opportunity for careful consideration and a fair decision
   • Parties can fully brief their sides of the issue
   • Judge may be more patient and take time to conduct necessary research and balancing of alternatives in making a decision
   • Judge is more likely to take the time to give reasons for a ruling than during the course of trial
6. Foundation for appellate review
   • In limine proceedings may provide a better record of arguments and rationale underlying court's decision

DISADVANTAGES

1. Sacrificing of surprise
   • Gives the opponent a preview of strategy
   • Opponent has time to respond carefully whereas at trial there may be insufficient time for creative thinking
2. Time in pretrial
   • Much time could be wasted in briefing and deciding an issue that may be of limited importance
3. Judges don't like to decide in a vacuum
   • Might want to weigh cumulative effect of evidence at trial
   • See if nonrelevant evidence becomes relevant in the context of the trial
4. Additional paperwork.

[1] BLACK'S LAW DICTIONARY 708 (5th ed. 1979).

[2] William S. Lerach, *Invoking the Motion in Limine,* Cal. Lawyer, Nov. 1988, at 94, 94.

[3] "A motion in limine, in plain English, is a pretrial motion to exclude certain evidence." *Reiser v. Lohner,* 641 P.2d 93, 100 (Utah 1982) (Stewart, J., dissenting) (medical malpractice case affirming trial court's exclusion of evidence). Note that the motion may be used to establish the admissibility of evidence as well.

Motions in Limine — Defendant's Motions

By P. Keith Nelson

I. BACKGROUND

A. Definition

1. "In limine. On or at the threshold; at the very beginning; preliminarily. Any motion, whether used before or during trial, by which exclusion is sought of anticipated prejudicial evidence." *Black's Law Dictionary* 787 (6th ed. 1990).

2. "Motion in limine. A pretrial motion requesting court to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to moving party that curative instructions cannot prevent predispositional effect on jury." *Black's Law Dictionary, supra,* at 1013-14.

3. "A motion in limine, in plain English, is a pretrial motion to exclude certain evidence." *Reiser v. Lohner,* 641 P.2d 93, 100 (Utah 1982) (Stewart, J., dissenting).

4. "A motion in limine, sometimes termed a motion to bar or a motion to exclude, is analogous to a pretrial motion to suppress in a criminal case. The primary difference is that the motion to suppress is not based on the rules of evidence but upon a defendant's constitutional rights." James E. Sullivan & Rose Marie Lipinski, *Recent Trends in Motions in Limine*, 78 Ill. B. J. 244, 244 (May 1990).

B. Scope & Purpose

1. A motion in limine is used to exclude evidence which could be objected to at trial, that is irrelevant or unduly prejudicial before it is referred to in the presence of the jury. *3 Witkin Evidence* § 2011, at 1969 (3d ed. 1986). The "[p]urpose of such motion is to avoid injection into trial of matters which are irrelevant, inadmissible, and prejudicial and granting motion is not a ruling on evidence and, where properly drawn, granting motion cannot be error." *Black's Law Dictionary, supra,* at 1013-14.

2. Three uses of motions in limine are: first, the motion may completely bar certain evidence; second, it may limit the consideration of specific evidence to particular purposes or parties; third, it may prohibit particular witnesses from testifying at trial.

P. KEITH NELSON, president and shareholder of Richards, Brandt, Miller & Nelson, specializes in general civil litigation with an emphasis on professional liability defense and an additional concentration in mediation. A Fellow in the American College of Trial Lawyers and a member of DRI, Mr. Nelson has been involved in several high profile cases, including the Fashion Place Mall roof collapse, the Wilberg Mine fire and the shooting of John Singer.

Sullivan & Lipinski, supra, at 244.

3. "Although the motion in limine is particularly well suited to evidence with potentially inflammatory characteristics outweighing whatever materiality it may possess, the motion may be used to obtain an advance ruling on any ground regarding matters at trial." Henry R. Sarpy, *Handling Sympathy in Jury Trials,* 455 PLI/Lit 37 (Mar.–Apr. 1993).

For example, a motion in limine could "seek an advance ruling that certain evidence is admissible." Robert J. Smith, *A Practical Guide to Motions in Limine: How to Keep the Cat in the Bag,* 23 SPG Brief 49 (Spring 1994). Motions in limine have also been used to "address claims and defenses as well." Robert G. Johnston & Thomas P. Higgins, *Motions in Limine: Use and Consequences in Illinois,* 26 John Marshall L. Rev. 305, 308 (1993). In *Dalley v. Utah Valley Regional Medical Center,* 791 P.2d 193, 195 (Utah 1990), the "plaintiff filed a motion in limine seeking the trial court's determination that the injury was of a type that does not occur in the absence of negligence and that expert testimony was therefore unnecessary." After hearing all of the motions, the trial court granted defendant's motions for summary judgment because plaintiff failed to produce expert testimony sufficient to establish foundation for res ipsa loquitur doctrine. Id. The Utah Supreme Court reversed because the doctrine of res ipsa loquitur raised material issues of fact inappropriate for summary judgment. Id.

Additionally, in *Utah Department of Transportation v. 6200 South Assoc.,* 872 P.2d 462, 469 (Utah App. 1994) *cert. denied,* 890 P.2d 1034 (Utah 1994), "[t]he trial court ruled at the hearing on the motion in limine that the property's value before condemnation was to be determined by assuming the presence of the I-215 diamond interchange . . .".

Finally, in *Prowswood, Inc. v. Mountain Fuel Supply Co.,* 676 P.2d 952, 953 (Utah 1984), pursuant to defendant's motion in limine, the court dismissed plaintiff's claim for negligent misrepresentation.

Some courts, however, may be reluctant to grant a motion in limine if it is a substitute for summary judgment. In *Bradley v. Pittsburgh Board of Education,* 913 F.2d 1064, 1069-70 (3d Cir. 1990), the court cautioned that extensive motions in limine do not allow the same procedural safeguards provided by FRCP 56.

C. Authority

1. The authority in Utah state courts for granting motions and orders in limine lies

within the courts' inherent powers. Support for this inherent power includes:

a. "An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief sought." Utah R. Civ. P. 7(b) (1).

b. "In any action, the court in its discretion or upon motion of a party, may direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as: (1) expediting the disposition of the action; (2) establishing early and continuing control so that the case will not be protracted for lack of management; (3) discouraging wasteful pretrial activities; (4) improving the quality of trial through more thorough preparation; (5) facilitating the settlement of the case; and (6) considering other matters as may aid in the orderly disposition of the case." Utah R. Civ. P. 16(a).

c. "Preliminary questions concerning the qualification of a person as a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of Subdivision (b)." Utah R. Evid. 104(a).

d. "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Utah R. Evid. 104(b).

e. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of the state. Evidence which is not relevant is not admissible." Utah R. Evid. 402.

f. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Utah R. Evid. 403.

2. In federal court, support for the court's inherent authority for granting motions or orders in limine can be found in Federal Rule of Civil Procedure 16 and Federal Rules of Evidence, Rule 103(c), 104(c), and 611(a). FRCP 16(c)(3) provides that "at any conference under this rule consideration may be given, and the court may take appropriate action, with respect to . . . advance rulings from the court on the admissibility of evidence." Additionally, FRE 103(c) requires that "[i]n jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements on offers of proof or asking questions in the hearing of the jury."

D. Form & Content

1. While there is no express statutory format for a motion in limine, Utah Rule of Civil Procedure 7(b)(1) may require the motion to be in writing, unless it is made at a trial or hearing, to set forth with particularity the grounds for the motion, and to identify the relief sought. The motion should be specific. If it is too broad or vague it may not be granted or if granted, it may not be effective either because it unduly restricts the other party's presentation or because the objectionable conduct does not explicitly violate the order. Johnston & Higgins, *supra,* at 309-10.

"The judge may order a complete bar of specified evidence. Because, however, the order is interlocutory, counsel will need to be prepared to defend the order at trial. Counsel should also be careful not to open the door by alluding to the excluded matter."

2. It is advisable to file the motion not only with a supporting memorandum of points and authorities but also with a proposed order. *3 Witkin Evid., supra,* at § 2011(d). The protective order should explicitly prohibit counsel, parties, or witnesses from conduct forbidden by the order. David Herr, *Motion Practice* § 18.5, at 494 (2nd ed. 1991). Additionally, the proposed order may specifically reference possible sanctions for violation. Smith, *supra,* at 23-SPG Brief 49.

E. Timing

1. A motion in limine is available before trial. Bringing a motion before trial may help to "foreclose opponent's use of damaging (and inadmissible) evidence in opening statement, or to get an advance ruling on evidence you propose to use. The motion should be brought as close to the commencement of trial as possible, however, in order to avoid premature disclosure of trial strategy." Robb M. Jones & Rhonda L. Neil, *Motions in Limine and Other Trial Motions,* 294 PLI/Pat 125 (May 21, 1990).

2. A motion in limine is available during trial. "[A] motion in limine may also be presented in the form of an oral motion made just before jury selection or during trial, but out of the presence of the jury." Johnston & Higgins, *supra,* at 305. A motion in limine can be presented any time that counsel has reason to believe that opposing counsel may refer to or introduce objectionable evidence.

F. Consequences of Motions in Limine

1. The ruling is interlocutory and may be changed at any time during the proceedings. In *Nelson v. Peterson,* 542 P.2d 1075, 1076-78 (Utah 1975), the trial court had granted plaintiff's motion in limine to exclude mention of illegitimacy and welfare in a wrongful death action of a full-term fetus. *Id.* During cross-examination the defendant doctor referred to the illegitimacy and welfare while explaining the plaintiff's name change in his records. The trial court altered its earlier ruling by allowing the testimony to stand stating that the illegitimacy "might very well have bearing" on the plaintiff's degree of anguish. *Id.* The Utah Supreme Court affirmed, reasoning that the "jury was entitled to know all the circumstances if they were to fairly appraise the quantum of mental anguish." *Id.*

2. A motion in limine could be subject to FRCP 11 sanctions if it is frivolous or not made in good faith.

3. The judge may order a complete bar of specified evidence. Because, however, the order is interlocutory, counsel will need to be prepared to defend the order at trial. Counsel should also be careful not to "open the door" by alluding to the excluded matter.

4. The judge may order a partial bar of specified evidence. Additionally, the judge may limit the scope or purposes for which the evidence can be used. For example, in Matter of Estate of Justheim, 824 P.2d 432, 437-38 (Utah App. 1991), in testimony about inter vivos gifts, the court prohibited direct discussion of undue influence, fiduciary obligations, or confidential relationships.

5. The judge may reserve ruling on the motion until the trial develops more fully.

In *Schmidt v. Intermountain Health Care, Inc.,* 635 P.2d 99, 101-02 (Utah 1991) the court allowed evidence of prior medical treatment where the court had reserved ruling on the plaintiff's motion to exclude.

"However, if the court reserves its ruling on the order, it must then determine whether it will allow any mention of the subject matter during the voir dire process and the opening statement." Johnston & Higgins, supra, at 312.

6. The judge many deny the motion and proposed order. If the motion is denied counsel should make the motion again at trial and object to the proffered evidence.

G. Consequences & Sanctions for Violation

1. Contempt. "First, the court may find an attorney who violates an in limine order in contempt." Johnston & Higgins, *supra,* at 314.

2. Corrective Jury Instructions. If the prejudice is severe then corrective jury instructions may be insufficient. Alternatively, if the prejudice is not so severe then seeking corrective jury instructions could draw even more attention to the objectionable material.

3. Mistrial. The court has broad discretion in granting or refusing to grant either a mistrial or a new trial.

4. New Trial.

5. Refer to Bar for Discipline. If the violation is egregious enough, the court could refer counsel to the Bar for discipline for violating rules of professional conduct.

6. Additional Costs. "[E]xcess costs of litigation that occur because of a violation of an in limine order may be recovered." Johnston & Higgins, *supra,* at 314-15.

7. Nothing. If, however, the court determines that the violation was not prejudicial then, in its discretion, it may afford no relief.

H. Appellate Review

1. Standards

a. If the order relates to a ruling of law or interpretation of the rules of evidence then the appellate court will review the order under a correction of error standard. *Utah Department of Transportation v. 6200 South Assoc.,* 872 P.2d 462, 465 (Utah App. 1994), *cert. denied,* 890 P.2d 1034 (Utah 1994).

b. Ordinarily, orders in limine will be reviewed under an abuse of discretion or reasonability standard. *Id.* "Even where error is found, reversal is appropriate only in those cases where, after review of all of the evidence presented at trial, it appears that 'absent the error, there is a substantial likelihood that a different result would have been reached.'" *Id.* (citations omitted). For example, in *King v. Fereday,* 739 P.2d 618, 622 (Utah 1987), the court stated that any refusal to exclude evidence for assessing damages was harmless and irrelevant because the jury determined that defendant was not negligent.

2. Preserving Appeal

a. Currently, courts are divided over whether a limine motion is sufficient to preserve an appeal. In some jurisdictions, failing to object may act as a waiver of appeal. *Collins v. Wayne Corp.,* 621 F.2d 777, 784 (5th Cir. 1980). In other jurisdictions, a limine motion is adequate to preserve an objection for appeal. *Sheehy v. Southern Pacific Trans. Co.,* 631 F.2d 649, 652-53 (9th Cir. 1980). Thus it is always advisable to renew any objection at trial.

"Corrective Jury Instructions. If the prejudice is severe then corrective jury instructions may be insufficient. Alternatively, if the prejudice is not so severe then seeking corrective jury instructions could draw even more attention to the objectionable material."

b. In Utah, a motion in limine may be sufficient to preserve the objection for appeal. *Onyeabor v. Pro Roofing, Inc.,* 787 P.2d 525, 528 (Utah App. 1990). In *Onyeabor,* defendant's expert was identified for trial only twelve days before trial. Plaintiff's counsel was however, familiar with the expert's testimony because he had previously planned on testifying, but then became ill. When the expert's health returned, defense counsel identified him as a witness for trial. "Defendants argue[d] that plaintiff failed to preserve the issue for appeal by failing to object at the time [the expert] was called to the witness stand. Plaintiff's pretrial motion to exclude the testimony was however, adequate to preserve the issue . . . because the court had an opportunity to rule on the admissibility." *Id.* The court held that the plaintiff had failed to demonstrate that admission of this expert's testimony prejudiced plaintiff's case. *Id.* at 529.

On the other hand, in *Billings v. Nielson,* 738 P.2d 1047, 1048 (Utah App. 1987), the court found that defendants had lost their right to appeal an alleged erroneous exclusion of evidence by not attempting to introduce evidence at trial after the judge had "specifically reserved ruling" on its admissibility at the in limine hearing. *Billings* may be distinguishable from *Onyeabor* in that the trial court in *Billings* "never ruled on the admissibility" of the excluded evidence. *Billings,* 738 P.2d at 1048. Whereas in *Onyeabor,* the court stated that the "'matter is sufficiently raised if it is submitted to the trial court, and the court is afforded an opportunity to rule on the issue.'" *Onyeabor,* 787 P.2d at 528 (quoting *Hardy v. Hardy,* 776 P.2d 917, 924 (Utah App. 1989) (citations omitted)).

Additionally, the court may limit the appeal to the specific grounds of the objection. See *Meyers v. Salt Lake City Corp.,* 747 P.2d 1058, 1059-61 (Utah App. 1987).

II. UTAH CASE REVIEW

A. Overview

There are 79 appellate decisions in Utah that explicitly mention "limine" motions. Of those, 27 are civil cases and 52 are criminal cases.

B. Utah Examples

1. Prior Accidents. In *Erickson v. Wasatch Manor, Inc.,* 802 P.2d 1323, 1325-26 (Utah App. 1990), the court allowed defendant's motion in limine excluding evidence of prior falls, by plaintiff and others, in a parking lot unless plaintiff could establish that prior falls were in the same depressed area.

2. Defendant's Negligence. In *Reiser v. Lohner,* 641 P.2d 93, 96-97 (Utah 1982), the court affirmed the trial court's exclusion of evidence that the defendant doctor had previously failed to perform Rh sensitivity testing on the plaintiff because it was irrelevant and prejudicial.

Similarly, in *Kitchen v. Cal Gas Co.,* 821 P.2d 458, 461 (Utah App. 1991), *cert. denied,* 832 P.2d 476 (Utah 1992), the court prohibited testimony regarding the speed of defendant's vehicle forty-five minutes before the accident.

3. Plaintiff's Negligence. In *Whitehead v. American Motors Sales Corp.,* 801 P.2d 920, 927-28 (Utah 1990), the court properly

excluded evidence of plaintiff's non-use of seatbelts in a rollover accident. The court noted that the legislature, subsequent to this action, had passed a statute disallowing evidence of seatbelt non-use as constituting contributory or comparative negligence. *Id.*

4. Consumption of Alcohol. In *Pearce v. Wistisen,* 701 P.2d 489, 490-95 (Utah 1985), the court reversed the trial court's decision not to exclude evidence that plaintiff had been drinking alcohol the night before he drowned because its effect was too prejudicial where defendant failed to prove the relevance of drinking the night before.

5. Post Occurrence Reactions. In *Fisher v. Trapp,* 748 P.2d 204, 205-07 (Utah App. 1988) *cert. denied,* 765 P.2d 1278 (Utah 1988), the court affirmed the exclusion of evidence that defendant driver had initially fled the scene of the auto-pedestrian accident.

6. Remedial Measures. In *Meyers v. Salt Lake City Corp.,* 747 P.2d 1058, 1059-61 (Utah App. 1987), the court allowed results of an internal police investigation confirming plaintiff's complaint of excessive force. The evidence was allowed because it was in a letter from the police department to the plaintiff and because the defendant had opportunities to clarify the different standards for internal police investigations and civil liability, but failed to do so.

Additionally, in *Nay v. General Motors Corp.,* 850 P.2d 1260, 1262 (Utah 1993), the court affirmed the trial court's ruling on a defense motion to exclude evidence of prior recall and redesign of the vehicle. Also in *Bridges v. Union Pac. R. Co,* 26 Utah 2d 281, 488 P.2d 738, 739 (Utah 1971), the court precluded evidence about redesigned plans of a railroad crossing and intersection.

In *Barson v. E.R. Squibb & Sons, Inc.,* 682 P.2d 832, 837-38 (Utah 1984), however, the court allowed evidence of post-injury, Delalutin inserts for the limited purpose of strict liability consideration.

7. Product Efficacy. In *Squibb,* 682 P.2d at 839-40, the court allowed testimony about the effectiveness of Delalutin, notwithstanding an order in limine, because defendant had "opened the door."

8. Defendant's Wealth. In *Ong International (U.S.A.) Inc. v. 11th Avenue Corp.,* 850 P.2d 447, 455-56 (Utah 1993), the court affirmed the trial court's denial of defendant's motions in limine to exclude evidence of defendant's wealth until a prima facie finding of liability because the trial court was prepared to make a prima facie finding of malice at the time it ruled.

9. Inappropriate Expert Testimony. In *Hill v. Dickerson,* 839 P.2d 309, 311 (Utah App. 1992), the court disallowed plaintiff's expert on defendant's motion to exclude because plaintiff had designated witness in an untimely fashion and in violation of the court's instruction. *See also, Radcliffe v. Akhavan,* 875 P.2d 608, 611 (Utah App. 1994) (denying untimely designation of expert witness).

Additionally, in *Redevelopment Agency of Salt Lake City v. Tanner,* 740 P.2d 1296, 1303-04 (Utah 1987), the court excluded an expert's opinion of property value because he had not actually appraised the property.

10. *Hearsay. In Hansen v. Heath,* 852 P.2d 977, 978-80 (Utah 1993), the trial court properly denied plaintiff's motion to exclude the statement of a deceased driver made to his doctor because it qualified as a hearsay exception as a statement made for the purposes of medical diagnosis or treatment.

III. COMMON APPLICATIONS

A. Evidence of:

1. Remarriage
2. Collateral Source
3. Non-compensable Damages
4. Prior Accidents
5. Prior Negligence
6. Consumption of Alcohol
7. Post Occurrence Reactions
8. Remedial Measures
9. Product Efficacy
10. Felony Conviction
11. Misdemeanor
12. Out of State Convictions
13. Settlement Negotiations
14. Subjective Belief
15. Hearsay

B. Limiting the Scope of Demonstrative Evidence

1. Graphic Exhibits
2. Day in the Life Films

C. Improper Expert Testimony

1. Improper Foundation
2. Inappropriate Method
3. Timeliness

D. Miscellaneous

1. Claims and Defenses
2. Procedural Matters

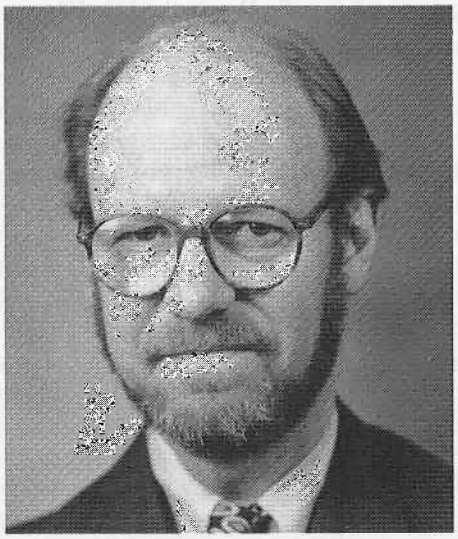
IV. CONCLUSION

If effectively used, motions in limine can be one of the most powerful tools in your litigation arsenal. Motions in limine can be used: to preclude prejudicial evidence before the jury hears it and refocuses on it when you object; to obtain advance rulings allowing your evidence in at trial; to limit the scope of your opponent's objectionable evidence; to educate the judge; to encourage settlement; to foreclose claims and set up motions for summary judgment; for any other matter your imagination allows. Indeed, litigation can often be won or lost on these motions.

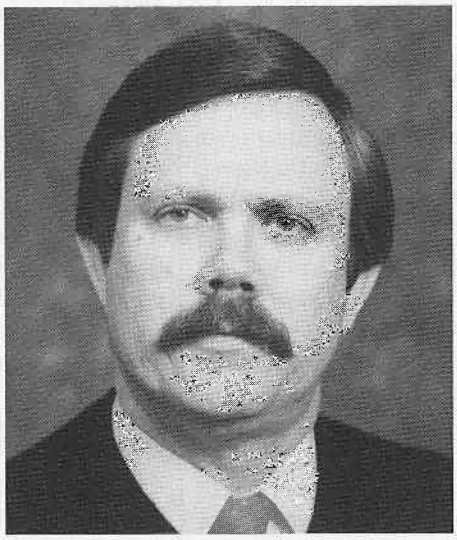
Happy Thanksgiving

Jury Selection

By Gordon L. Roberts & Honorable Timothy R. Hanson



GORDON L. ROBERTS was named Utah Trial Lawyer of the Year by the American Board of Trial Advocates in 1991. His trial practice at Parsons Behle and Latimer includes complex commercial torts, toxic waste ligation, RICO, labor, intellectual property and major contract and tort litigation. He served as trial counsel in connection with various litigation matters arising out of the death of Howard Hughes. He is a Fellow in the American College of Trial Lawyers and a Fellow of the Trustees of the American Bar Foundation. A past president of the Salt Lake County Bar Association, he was also a charter member in the first American Inn of Court ever organized.



HON. TIMOTHY R. HANSON was appointed as a State District Court trial judge for the Third Judicial District in 1982. In addition to general trial duties, he has also served as the assigned tax judge for the Third District for cases involving state taxation matters. Prior to his appointment to the bench, Judge Hanson engaged in a civil litigation practice, where his experience included contract actions, products liability, personal injury and death claims, professional malpractice cases and insurance coverage questions.

Notwithstanding how much reverence we generally have for the jury system, we must all admit to a certain cynicism when jury panels so routinely and so uniformly raise their hands and swear to God Almighty that there is absolutely nothing they have heard about the case during *voir dire* or otherwise which would in any way make then an unfit juror or which would in any way prejudice them for or against either party to the controversy.

Even those jurors who may initially admit of some tiny prejudice are quickly led back to rectitude by judges who for some reason view it as a failure on their part if they have to disqualify a juror for cause. How many of you have witnessed colloquies like this:

Juror No. 6: "Well your Honor I'd have to admit that I don't think that the people who were injured should sue someone else for their injuries. Being injured is just part of life and everyone should learn to live with it."

Judge: "Well, notwithstanding those feelings, do you feel that you can be fair and just in *this* case and render a just verdict?"

Juror No. 6: "Yes."

Lawyers may be left with only their preemptory challenges to weed out such people.

THE IMPORTANCE OF JURY SELECTION

There are serious people, who have given this matter a great deal of thought, who have concluded that the selection of the jury is not only the most important part of a jury trial — it is verdict determinative. Warren Platt spoke on this subject a couple

of years ago and stated that in his judgment when the jury was picked the trial was over. As trial lawyers we obviously don't wish to believe that because, we as trial lawyers like to think that the things we do such as searching cross-examination and brilliant closing argument have some impact on how the trial turns out.

While we do not yet fully accept Warren Platt's thesis, it is worth noting that it may indeed be supported by the famous University of Chicago study done regarding opening statements. And further, there is no question that a substantial industry has not been built up around the proposition that the scientific and psychological study of jurors pays off in a big way.[1]

We have had some experience with these psychological studies — mock trials and discussion groups. It is probably not worth spending a great deal of time on it here since it is such expensive help that it is the rare case that can carry the financial burden. Nonetheless, there is a lot written about it, it is a growing area, and if you're engaged in a substantial matter where the cost can be justified, it is worth exploring. Briefly, our own experience has been that these professional litigation assistance groups can be of help to you but that you should view them as a resource rather than letting them run your case for you.

METHODOLOGY

The typical experience in Utah, in both state and federal courts, is that by and large *voir dire* examination is conducted by the court. It has been our experience that most courts are generally receptive to voir dire suggestions made by counsel, particularly if those suggestions are in advance and in writing. This procedure is sanctioned although not dictated by Rule 47 of the Utah Rules of Civil Procedure which provides:

> "The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as is material and proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as is material and proper."

Most federal courts through the land follow this same methodology although many states, a notable example is Texas, allow far-reaching attorney conducted *voir dire*. There has been a strong push by some trial lawyers, most notably Jackson Howard of Provo, who has mounted a substantial campaign on this subject, to push for attorney conducted *voir dire* in Utah. However, most state courts remain hesitant and the appellate courts in Utah have consistently held that the matter is discretionary with the trial court.[2]

"The typical experience in Utah, in both state and federal courts, is that by and large voir dire examination is conducted by the court. It has been our experience that most courts are generally receptive to voir dire suggestions made by counsel, particularly if those suggestions are in advance and in writing."

We do not advocate a wholesale conversion of our system here to lawyer conducted *voir dire*. For one thing, we do not believe the Bar in general is competent to do it simply because so few have had any experience with it. We would encourage increased use of attorney conducted *voir dire* under circumstances where all participants in the trial have advance knowledge, the court can work with counsel on the scope of permissible questioning, and care can be taken to avoid error or mistrials. If the *voir dire* is conducted properly, there is much to be gained from it and little real risk. Attorneys and their clients would have an opportunity to more personally evaluate the prospective jurors in order to form more cogent reasons for either challenges for cause or preemptory challenges. Abuses can be managed by the courts. If a prospective juror blurts out something which might affect the remainder of the panel, it is probably better to hear it up front rather than having those thoughts come out in deliberations for the first time.

Yet another approach, which has a great deal to recommend it, is the use of confidential written juror questionnaires. This is a practice that has been utilized in both state and federal courts here and elsewhere. Among its virtues are the following:

1. It does allow the court and both counsel to work together in preparing a meaningful series of appropriate *voir dire* questions;
2. The questionnaire is filled out confidentially by each juror thereby permitting the utmost candor by the juror — presumably it would be easier for a juror to admit some possible bias or prejudice on a confidential questionnaire than it would to admit the same bias or prejudice in open court in front of the entire venire, counsel, and the court personnel;
3. The questionnaire can provide the basis for individualized questioning of the juror, in chambers with the court and counsel but out of the presence of the other jurors, which would allow a more probing questioning of that juror's biases, prejudices and attitudes, without the danger of possibly infecting the entire venire.

We have personally seen this methodology used quite effectively in a major product liability case and understand that it has been utilized in various other cases locally including one which received publicity where the plaintiff's counsel was the Wilcox, Dewsnup & King firm. Such questionnaires can allow probing not only as to the specific parties or circumstances of the case (which can usually be done relatively well orally), but deal as well with touchier issues particularly biases and prejudices the jurors may have formed as a result of tort reform propaganda or widespread publicity of the case in question.

Some sample questions which might be considered include the following:

Question: Have you read magazine or newspaper articles or other literature suggesting that jury verdicts are excessive or unreasonable?

Yes_____ No_____

If yes, describe the magazine or newspaper and generally what the article or literate stated:

Question: Have you heard anything on television or radio about a lawsuit crisis or excessive jury verdicts?

Yes_____ No_____

If yes describe what you saw and/or heard:

Question: Do you have negative feelings about lawyers who represent injured people in negligence cases?

Yes_____ No_____

If yes, please explain:

Question: Do you feel that limits should be placed on a person's right to recover compensation for another's negligence?

Yes_____ No_____

If yes, please explain:

Question: Plaintiffs in this case are suing for $1.2 million. If you find for the plaintiffs and if you find that plaintiffs have suffered damages which justify an award in that amount, would you have difficulty in awarding that amount?

Yes_____ No_____

If yes, please explain:

The foregoing are by no means exhaustive nor is it guaranteed that a court would give them.

AREAS OF INQUIRY

Probably the biggest concern in jury selection at present is the tremendous volume of information being made public about the need for tort reform. Tort reform is a major political agenda of the party presently in power in our Congress. News releases bombard us with stories such as the "McDonald's Hot Coffee case" and the "O.J. Simpson case" — all showing that the judicial system has gone awry. Even in Utah, which has been known for conservative, even stoic, juries, a jury in Tooele County rendered a verdict against Texaco for approximately $450 million. In short, there are a lot of things happening which may lead various members of the public to believe that our judicial system is simply not functioning properly. In consequence, it is very important that attorneys be permitted to probe this area through appropriate *voir dire.*

There are a number of Utah cases which address this issue. The citations include: *Barrett v. Peterson,* 868 P.2d 96 (Utah App. 1993) (where the trial court failed to ask threshold questions concerning jurors' potential exposure to tort-reform and medical negligence information, plaintiff's right to exercise peremptory challenges was substantially impaired); *Evans By and Through Evans v. Doty,* 824 P.2d 460 (Utah App. 1991), *cert. denied,* 836 P.2d 1383 (Utah 1992) (although trial court did not err in refusing to inquire into jurors' knowledge concerning specific 3-year-old tort reform article, court did err in failing to question potential jurors concerning their general knowledge about and attitudes toward medical negligence and tort reform); *Ostler v. Albina Transfer Co., Inc.,* 781 P.2d 445 (Utah App. 1989), *cert. denied,* 795 P.2d 1138 (Utah 1990) (trial court sufficiently inquired into jurors' potential tort reform bias by asking if jurors would object to awarding amount of damages sought by plaintiff and whether jurors believed they could render a fair and true verdict); *King v. Fereday,* 739 P.2d 618 (Utah 1987) (voir dire concerning juror's stock interest in any business and the nature of the business was sufficient o reveal any connection a potential juror might have to the defendant's insurer).

CONCLUSION

There are a number of do's and don'ts in jury selection by plaintiffs! Always pick the "little guy"; avoid businesswomen; pick someone who has been injured; never pick accountants, etc. From our experience, we question the value of such set rules and suggest instead reliance on individual judgment and client's intuition, which can be very helpful.

Through whatever methodology, we would advocate broader and more thorough going voir dire together with a more aggressive attitude by courts on challenges for cause.

[1]Gary Moran, Brian Cutler & Anthony De Lisa, *Attitudes Toward Tort Reform. Scientific Jury Selections and Juror Bias: Verdict Inclinations in Criminal and Civil Trials,* 18 Law & Psychol. Rev. 309 (1994).

[2]James W. McElhaney, *Getting the Most Out of Jury Selection,* 79-Jan. A.B.A. J.78 (1993). Professor McElhaney notes that lawyer conducted voir dire is disappearing in many states not so much because of abuse but because it wastes time and can be incredibly boring if not handled properly.

Join us for the
1996 Mid-Year Convention
March 7 - 9 at the
St. George Holiday Inn.

Demonstrative Evidence: Seeing May Not Be Believing But it Beats Not Seeing at All

By E. Scott Savage

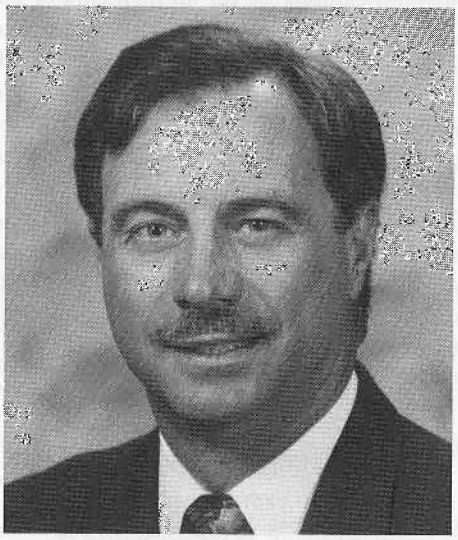
I. INTRODUCTION

Unfortunately, most clients don't think you're worth very much as a trial lawyer if you only win the cases you should win. You might even be better off losing cases you should win so that then you would at least have a shot at becoming the managing partner in a large law firm. Because most of us aspire to be neither managing partners nor poorly regarded trial lawyers, our quest is to find a way to win cases we should lose, or, at least, obtain better results than those attainable by lesser trial lawyers.

Obviously, your ability to persuade is directly related to your ability to communicate and the most important aspect of communication is clarity. The jury must understand clearly the facts upon which you believe the case turns. To understand those facts, the jury must also have a sufficient background to appreciate the salient facts. Therefore, you must be an effective teacher before you can become an effective persuader.

Clear, concise presentation of both the background facts which the jury needs and the particular facts of the case also helps establish your credibility. The highest praise I have received from former jurors is when I've been told, "You really helped us understand what we needed to know to decide the case." Jurors appreciate lawyers who appear to be helping them understand what happened. They expect less from lawyers and too often get it.

The selection and use of demonstrative evidence usually is imperative to the jury's understanding of the particular facts which support your view of the case. Demonstrative evidence, of course, must be tailored to each case and each courtroom. There are no fungible demonstrative exhibits. There are, however, certain generalities which you should always consider and it is the purpose of this article to assist you in applying such guidelines when you make decisions concerning the use of demonstrative exhibits.



E. SCOTT SAVAGE, a Fellow in the American College of Trial Lawyers, has tried to verdict over one hundred cases throughout the Western United States. He is a senior litigation partner of the law firm of Van Cott, Bagley, Cornwall & McCarthy, where he has practiced since 1972. His practice includes antitrust, contract litigation, natural resources, products liability and negligence cases.

II. REAL VS. ILLUSTRATIVE EVIDENCE

There are two categories of demonstrative evidence. The first is what Wigmore terms "real evidence" (or "autoptic profference" if you went to Harvard). Real evidence, as its name implies, is not subject to any conscious inference or impression of the presenter of the evidence (*e.g.*, a witness). The jury sees, hears, or touches the actual evidence. [I've never known a jury to smell or taste evidence but I suppose such is not beyond the realm of imagination.] Examples of real evidence are site inspections and courtroom demonstrations. Although somewhat less "real," I also include under this heading photographs, films and video tapes since they function as options for site inspections and courtroom demonstrations.

The second broad category of demonstrative evidence is illustrative evidence. Diagrams, charts, summaries, and models fall into this category. Often overlooked in this category is the use of an easel pad. Next to interrogation skill, this may be your most effective courtroom tool. See discussion, *infra,* Section V.

III. PHOTOGRAPHS, VIDEOTAPES, DEMONSTRATIONS AND SITE INSPECTIONS

In deciding upon the use of "real" evidence, photographs should always be your first consideration. You should consider video tapes or films if you cannot adequately present the necessary information through the use of still photographs. Still photographs easily can be enlarged to two by three feet and even larger if necessary. A close, continuing relationship with a good professional photographer is essential in an effective trial practice. I often involve a professional photographer immediately after an accident since the scene may change before trial and investigators and parties generally have neither the training nor camera equipment necessary to obtain photographs which can be effectively enlarged for trial.

Video tapes are generally more favorable to plaintiffs than are still photographs. Videotapes tend to illustrate how quickly

an event happened. Re-creating the last thirty seconds before an accident occurred can take twenty minutes or more to present through a witness by using still photographs taken at, for example, five second intervals. On the other hand, that same time frame will seem to pass very quickly if one plays a thirty second video tape to the jury. This aspect of video tapes, obviously, can be used to advantage if your point is to show how quickly something happened. Video tapes also have the advantage or disadvantage (depending upon which side of the case you represent) of showing the size, power, and even terror of an accident. This is especially true with respect to computerized reconstructions which "re-create" the impact and motion of the actual accident. See Section VI *infra.*

One limiting fact about video evidence is that most video cameras have very poor sound quality. Indeed, they usually use microphones which equalize all sounds to the same intensity. That is, soft sounds are automatically boosted and loud sounds are automatically reduced so that all sounds seem of equal loudness. This often makes insignificant background sounds appear load and even annoying. If sound is significant to your case, you will need to use much more sophisticated equipment than that possessed by most video technicians. If sound is not significant, don't record with any sound.

Photographs and video tapes at night pose particular problems. Cameras must be adjusted to recreate actual nighttime visual conditions. Otherwise, the prints and tapes will be too dark or too light. This will require extra effort to lay a proper foundation. Generally, you can accomplish whatever you need from daytime photographs even if the event occurred at night.

Courtroom demonstrations and site viewings are much more risky than photographs. Site viewings by the jury in my experience generally favor plaintiffs in accident cases. They tend to cause jurors to re-enact the accident in their own minds. For both parties, site inspections also run the risk of jurors viewing something you did not intend or anticipate the jury to see or focus upon when you requested the inspection. Defense counsel, in particular, should always consider whether there is any other way to get the point across before even considering an on-site inspection.

Courtroom demonstrations can be very dramatic, but they also are very risky. Don't present this type of evidence unless it is absolutely foolproof and even then you must ask yourself why this can't be covered with photographs, diagrams or videotapes.

IV. ILLUSTRATIVE EXHIBITS

Diagrams, summaries and models are very useful and it is hard to imagine trying a case without using this type of exhibit. Before selecting illustrative exhibits, you must first know your courtroom. How large must the exhibits be for all members of the jury to see them? Will the witness have to leave the stand to refer to the exhibit? Will the judge readily permit this? Is there a place where the jury, the judge and the witnesses can all see the exhibits? How large must the exhibit be to be seen from that place? Is there an easel in the courtroom which will hold such an exhibit? How many television sets will be needed to show a video tape? Can this be done without turning the lights down?

"[E]asel pads can be used to highlight testimony. Something written on the pad while a witness is testifying can be referred to during summation. The pad can also be used to refer the jury back to what a prior witness knew or didn't know when examining a subsequent witness."

Once you know the physical restraints imposed by the courtroom, you should consider how expensive the exhibits will appear to be. Many defense counsel become too enamored with the glitz of fancy, professionally done exhibits. Keep in mind that money you appear to have spent on exhibits can send a subliminal message that this is a significant damage case. Defense counsel should try to use simple diagrams instead of models, and photographs instead of computerized video reconstructions. Plaintiff's counsel, if the potential of the damage case merits more expensive exhibits, should opt for them for the same reason.

V. EASEL PADS

Most importantly, don't ignore simple easel pads and magic markers. Their use can be just as effective as beautifully drawn foam core exhibits. Practice using an easel pad. You may even want to draw or have someone else draw what you need on the pad before the trial commences. The jury will assume you put whatever is on the pad during a break. This is especially true if you represent the defense. The jury will get the same benefit of the illustration without the message that it cost a lot to produce the exhibit.

Moreover, easel pads can be used to highlight testimony. Something written on the pad while a witness is testifying can be referred to during summation. The pad can also be used to refer the jury back to what a prior witness knew or didn't know when examining a subsequent witness.

It, of course, is improper to have one witness comment upon what another witness said. However, it is proper and very effective to write down on an easel pad a key point made by one witness and then later, for example, when you frame a "hypothetical" fact, flip back to that page on the pad so that the jury recalls this was prior testimony and not mere conjecture.

It is equally effective if a witness concedes he cannot remember a certain event or date. You may, for example, list key points from a witness's testimony and then skip a space where the witness denies or cannot remember something you know will be provided by a later witness. You can then refer back to that page and physically fill in the blank with the later witness's testimony.

Chronologies are often a very effective way to organize testimony. Reciting facts in chronological order is the most common means of organizing your openings and summations. Once again don't overlook the use of an easel pad for this purpose.

VI. HIGH TECH EXHIBITS

Many trial lawyers recently have become quite enamored with computerized exhibits. I have not been one of those lawyers, but perhaps that is simply because I haven't had the right case to use them since they have come on the litigation scene. In general they involve television screens and computer programs which allow one to instantly display on the screen a particular document, photograph or videotape.

These exhibits can be bar coded and

they allow the jury to first see the entire page of a document or the entire scene of a photograph and then zoom in on a particular area or particular words that the examiner wishes to highlight. This can be an obvious advantage in focusing the jury on the significance of a particular exhibit. However, they are quite expensive to use and do not provide the flexibility often necessary in trial.

Obviously, this type of exhibit must be extensively prepared in advance of trial and, unfortunately, what you anticipated would be very important may, during the course of the trial, lose its significance in favor of something you did not code into the computer.

The equipment for these exhibits also poses problems since few courtrooms are designed in a manner that makes their use easy. If at all possible you should attempt to have one very large television screen that everyone can view at the same time rather than separate screens for the judge, the witness, the jury and counsel. In addition to televisions, there is also necessary computer equipment and various cords running around the courtroom interconnecting the equipment. Projection type big screen televisions have off-angle viewing problems, but several manufacturers are now making regular televisions in very large sizes which eliminates this concern. You may still, however, have a problem in finding a screen that is large enough for everyone to see what you wish to emphasize when zooming in to particular parts of the exhibit.

An additional problem is that most of us have become conditioned to falling asleep in front of a television set. Using different sized blowups of documents or photographs may actually keep the jury's attention better than utilizing televised representations of these exhibits, once the novelty of the high tech presentation wears off.

Computerized re-creations generally favor the plaintiff and can be very powerful evidence. Defense counsel almost always object to the admissibility of these for lack of foundation and prejudice. Since they are vulnerable to foundation objections and are very expensive to produce, their use must be very carefully evaluated.

In summary, demonstrative evidence is only bounded by the limits of your creativity. Find the most effective way to re-create reality in the courtroom.

INTRODUCING

EvictRite™

Eviction Documents for Utah

It's 4:13 p.m....
Your secretary went home early...
Your client just called and needs an eviction...
And you have a dinner appointment in an hour...

The Shortened Summons, Complaint, Petition for a Shortened Summons, Possession Bond, Notice of Possession Bond, Order of Possession Bond and the Statute must be delivered to court by end of day.

Impossible?
Not any more.

With EvictRite, you can prepare all of the documents in a matter of minutes. By inputing the information provided by your client, the documents, delivered with Capsoft® document automation software, will be generated and ready for final printing in a fraction of the usual time.

The system provides the user with:

- **Five Eviction Notices**
- **Six Complaints**
- **Summons and Petition for Shortened Summons**
- **Four Possession Bond Documents**
- **Two Ex Parte Motions for an Order of Restitution**
- **Three Order of Restitution Documents**
- **And More**

For more information or to place an order call

(801)221-8875 *or fax (801)221-2750*

Special Introductory Rate $189
Available in either DOS or Windows version

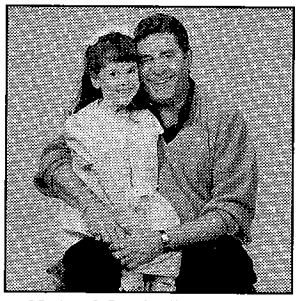
Retail Price $239 Introductory Rate valid until Jan. 15, 1996

Another product from LegalRite, a division of Jeffs Software Development, Inc., P.O. Box 644, Provo, UT 84603
®Capsoft is a registered trademark of Capsoft Development Corp.

Help Light the Way...

For many of the million-plus Americans who live with progressive neuromuscular diseases, tomorrow means increasing disability and a shortened life span. But thanks to MDA research—which has yielded more than two dozen major breakthroughs in less than a decade—their future looks brighter than ever.

Your clients can help light the way by remembering MDA in their estate planning. For information on gifts or bequests to MDA, contact David Schaeffer, director of Planned Giving.



Kelly Mahoney, National Goodwill Ambassador, and Jerry Lewis, National Chairman

MDA®

Muscular Dystrophy Association
3300 East Sunrise Drive
Tucson, AZ 85718-3208
1-800-572-1717
FAX 602-529-5300

People help MDA...because MDA helps people.

Plaintiff's Opening Statement

By Daniel L. Berman

1. An opening statement is the first and best opportunity for the Plaintiff to tell the Plaintiff's story — being on the offense is a great advantage, you get to set the agenda and force the other side to respond.

2. Tell your story — clearly, simply, and with conviction. Some preparation suggestions:

a. Chronological bullet points.

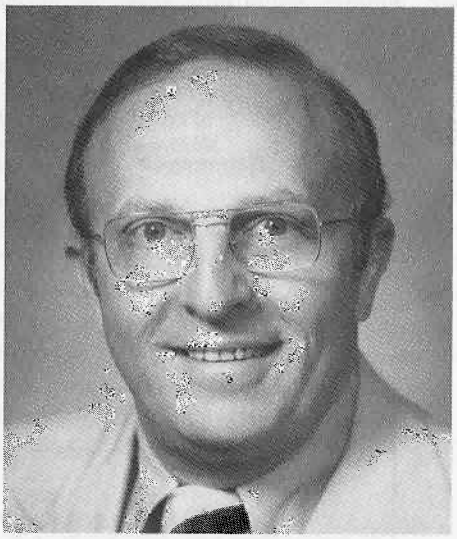
b. Take one page and write out what the case is about.

c. Draft a non-lawyer and take 10-15 minutes to tell the draftee your story.

3. Do not argue — you don't have to argue. The facts will be far more damaging and persuasive.

4. Tell the jury the legal basis for your claim — not in detail — but the jury should have the basic idea, from your opening, of your right to relief as they hear the evidence. The jury shouldn't have to wait until the end to figure out what the case is all about.

5. Give the jury the basic idea of your right to relief. Do not try to give the jury instructions or explain every claim you have — we all overplead our cases and it can sound like you aren't sure about what you're doing — one or two strong claims are better than a smorgasbord of legal theories.



DANIEL L. BERMAN senior partner at Berman, Gaufin & Tomsic, has practiced law in Salt Lake City since 1962. A member of the Board of Directors of the Utah Transit Authority, he is a member of the American Law Institute and a former assistant professor of law at the University of Utah. His primary area of practice is complex federal and state litigation, including antitrust, securities and commercial banking.

6. Cover the key facts — not every piece of evidence. Don't just regurgitate the story, craft the story to cover the critical and prejudicial facts — a little well-grounded good guys vs. bad guys never hurt a Plaintiff. Give the jury a credible basis to identify with your story.

7. Cover damages — don't forget or be afraid to ask for money. Justice is fine, but you don't want to be cheap.

8. If you have some bad facts and tough issues, deal with them in your opening. It's much better that the jury hear it from you — hear your explanation — than hear it for the first time from the other side. Your credibility, and the credibility of your case, are your stock and trade.

9. Shorter is better than longer. You need to cover the story, not put the jury to sleep. Just ask yourself how do you like sitting through an hour lecture. The jury, generally, will be interested. Don't turn them off.

10. Be yourself — be yourself. Don't feel you have to do it the way someone else does. Every one of us can tell a story, but we don't have to tell the story in the same way — be prepared, be sincere — give it a go. A lawyer doing it for the first time, a sole-practitioner, can be every bit as effective and every bit as much trouble as an established, seasoned, self-important veteran.

11. These points are not rules — there are no rules. Every case, every story is different, but you are a lawyer. Your client has been wronged. The client has a story. The opening statement is your opportunity to tell that story.

Defendant's Opening Statement

By Carman E. Kipp

I. IN GENERAL

A. Style — Be yourself. Use your own personality, your own methodology of presentation, your own words, expressions, and general methods of communication. Don't overact, don't try to copy incompatible presentation with which you are not comfortable.

B. "This is Show Business" — Juries tend to pay better attention to, and rely more on, presentations which appeal to them.

C. Juries relate to good style, presence, personality, and presentation and tend to accord them better credence.

D. Adjust the approach and presentation to the case at hand and the personality of the forum and jury.

E. KISS (Keep it simple). Often too much detail, presentations which are too lengthy, too much repetition or too much anything have a negative rather than a positive effect. Well organized, direct and persuasive presentations are the most effective

F. Be organized and accurate. Have your facts straight, Have them well in mind and written down in some fashion that will refresh your memory. Juries tend to have strong negative reactions to lawyers who are caught in erroneous statements, errors or claims which prove to be incorrect or not supported by the facts

G. Style? (Outline or script). This document is my format sort of a "shopping list." Others are happier with written narratives. In either or any case, keep it alive and don't just read from a bunch of pages to the judge or jury.

H. Show and tell (clear with judge if any questions). Use graphic depictions, illustrations, exhibits, subject to clearing this with the court so that you won't get into a problem of showing a jury an exhibit which is not later received. Visible impact coupled with your vocal presentation are better remembered and have a larger impact on the jury.

I. Statement at start of case and after plaintiff's statement with *very* rare exceptions.

CARMAN E. KIPP past-president of the Utah State Bar, is senior partner in the firm of Kipp & Christian where he practices all types of civil litigation, with emphasis in insurance, business and commercial matters. He is a Fellow of the American College of Trial Lawyers, past president of the American Inn of Courts II, former director of the Utah State Bar and a charter member of the Utah Chapter of the American Board of Trial Advocates. He was named Utah State Bar Lawyer of the Year in 1987.

In the past, some defendants have thought it was tactically advantageous to withhold making the defendant's statement until the completion of the plaintiff's case in chief. I think this is dead wrong. You need a jury to be able to consider your theory of the case when hearing the evidence fro the very beginning.

II. OPENING STATEMENT IS CORNERSTONE OF DEFENDANT'S CASE

A. Jury's first impression of you, your client, and your cause. This is crucial and lasting. A good impression will be helpful particularly in the more difficult times during the presentation of everyone's evidence.

B. You *must* communicate with the jury. Don't be too lawyery, don't talk down, make them believe you will be fair with them. It is essential the jury thinks you respect them, honor the difficult task which they have undertaken, and are trying to fairly present the entire dispute to them so that they can do their job.

C. Be affirmative — "accentuate the positive." Work hard on the good points of your case and work hard on the bad points of the plaintiff's case. Try to minimize the weaker points. (As they say, if you have to eat a little crow, eat while it's young). If you devote too much time, attention and energy to your bad points, you simply help the plaintiff to emphasize the plaintiff's good points in that area.

D. Don't just defend. Find the weak parts of plaintiff's case and let the plaintiff worry about your attacks in these areas. Try to find someway to let the plaintiff deal with some hard subjects and hard evidence so that you minimize the potential of a jury envisioning the defense as being negative rather than positive.

E. Don't be too cute or funny. The jury thinks this is serious business and wants you to be serious about it. Be professional, be restrained unless there is some very significant reason to be otherwise. Show your high regard for the court and jury and for the system in general.

F. Keep case moving and keep jury interested. Juries are easily bored and unfortunately, many lawyers are more than tedious. Not only do you lose the jury's interest, but they forget things that you want them to remember.

G. Be professional. You can legitimately win the jury's respect.

H. Don't get mad. Do it right and like a good lawyer. (As suggested in some of the sections above.)

III. EXPLAIN TRIAL PROCEDURE AND FORMAT TO JURY. TELL THEM "HOW IT GOES" BEGINNING TO END

A. Explain plaintiff gets first and last because plaintiff has burden of proof, but you will try to be complete, fair, and to meet all important points and issues. After the plaintiff has told the jury what good guys their clients are and what bad guys your clients are and how you are the culprits, malefactors and villains, you need to try to counteract this early headset by telling the jury that just because the plaintiff claims this, it is not true, that in fact "any damn fool with a filing fee can file suit," and that you are entitled to their fair and just considerations, just as is the plaintiff. The mere fact that a claim is made is absolutely no proof that your client did anything wrong or owes any damages.

B. Plaintiff may call witnesses that would ordinarily be defendant witnesses and offer exhibits that would ordinarily be defendant exhibits.

Explain defendant gets benefit of all evidence no matter who puts it on.

C. "The Way It Works" (A little additional explanation of they system, the process of how a case is tried, who has what role and hopefully how justice is served by the combination of all of these things, helps to have the jury function in a more realistic, professional and objective fashion rather than emotionally. It also should create some good impression for you with the jury in that you are helping them to do their job.

1. Jury finds facts.
2. Court tells law.
3. Lawyers present the case to be decided under the law applied by the court with the decision to be rendered based on the law and the facts decided by the jury.

(Lawyer talk is not evidence.)

D. Be aware of the serious responsibility of being a juror. There is always the problem of emotions in favor of the plaintiff and against the defendant. It is essential that at every opportunity from the very beginning you explain that all parties are entitled to equal justice under the law, that sympathy or emotion has no place in the jury's deliberations or decision, that you are confident that they will fulfill this difficult duty and meet this high standard which is essential to our system of justice.

1. Be true to your oath as a juror.
2. Not a place for sympathy or emotion.
3. Fair play, diligent consideration of the issues, and your honest finding of the facts you believe will result in a verdict that does justice.
4. The jury system is the very foundation of our system of justice in such disputes.

IV. TELL THE JURY WHAT THE CASE IS ALL ABOUT

This is your chance to tell the jury what you claim for your client in the case. You need to tell a story that is organized, understandable, believable and persuasive. It is essential that you achieve this goal before the plaintiff starts putting on its evidence so that the evidence can be viewed fairly from both sides u can gain whatever benefit there may be from the plaintiff's evidence.

A. Make *sure* you are prepared, accurate and minimize surprises. Your believability and persuasiveness are enhanced by meeting these standards and diminished by mistakes, oversights, surprises or other glitches in the presentation of your case and in the accuracy of your various presentations to the jury including statements and arguments as related to the jury. If there are disputes, point out the dispute and tell why the facts supporting your side of the dispute are the more persuasive and should be believed.

"As the Dean many, many years ago when I was in law school said, 'Any damn fool with a filing fee can sue.'"

B. The rule of the seven P's. (PRIOR POSITIVE PLANNING PREVENTS PISS POOR PERFORMANCE). See above.

C. Use jigsaw puzzle example. (More pieces than you can fit into the final picture, you have to decide which pieces fit to compose the correct final picture which is your verdict. Your description of the picture that the pieces should make up when the are assembled is like the picture on top of the box which contains the assorted jigsaw puzzle pieces, and if the correct pieces are assembled, the picture which results will be a verdict in favor of the defendant. The pieces which don't fit are the disputed evidence items which are contrary to the defendant's claim in favor of the plaintiff's claim, but they are less believable and don't fit into the total picture, thus a defendant's verdict should result).

D. The case is in two parts:

(1) Liability (Fault); You don't want a jury to think that you are tactically making any concessions about liability by presenting evidence in the damage area of the dispute. You need to explain that the system requires this even though you are confident and you believe they will be confident that the defendant is not liable or responsible and that the plaintiff should not receive any award, but you also question the plaintiff's damage claims for whatever reasons you have, cite the evidence and your theory of the case in both liability and damage aspects.

(2) Damages. See above. You can then further amplify the damage issue of the case. Again, carefully pointing out that this is not any kind of a concession that you think the plaintiff has anything coming.

1. While defendant is required by the system to try both liability and damages in the same proceeding, this does not suggest that the defendant admits liability or concedes that plaintiff is entitled to any damages.

E. "Who Can Sue"

As the Dean many, many years ago when I was in law school said, "Any damn fool with a filing fee can sue." The fact that the plaintiff has sued is absolutely no proof that the plaintiff has any right to make a claim or that plaintiff has any damages as a result of the alleged wrongdoing. The plaintiff, as mentioned elsewhere, is entitled to equal consideration, fair treatment and the benefit of the law and facts even though there may be some emotional or sympathetic bias in favor of the plaintiff. Who is the plaintiff and who is the defendant is not a consideration in determining whether there is a claim or not, and if there is a claim, what it may be worth, if anything.

V. DESCRIBE THE CLAIMS OF THE PARTIES AND THE BURDEN OF PROOF

This again deals with potential that a jury may start out with the notion that because the plaintiff has made a claim, the

plaintiff probably does have a benefit of all the evidence no matter which party presents it and that if plaintiff does not met the burden, that is to say, if the evidence is evenly balanced or less, they cannot find for the plaintiff on the issue to which that evidence is directed. Don't get over wordy. Don't get tedious in this description. Some suggested elements are as follows:

A. Stick with the main claims and issues.

B. Summarize the evidence. Emphasize that which supports the claims of the defendant.

(This should probably take about two-thirds of your time, depending on the type of case.)

C. Identify witnesses and exhibits, but don't belabor the details. (Don't get tedious or overly talkative.)

D. Discuss comparative fault or other issues as they may apply.

E. Include description of questions which may be submitted to the jury on both parties and non-parties.

F. Damages: Duty of plaintiff to mitigate as well as to prove by a preponderance of the evidence.

VI. JURY DUTY IS A "HARD JOB."

This again deals with the problem of bias, sympathy, prejudice or any predisposition in favor of the plaintiff because the plaintiff has made the claim. You need to keep reminding the jury that they have a sworn duty to uphold our system of justice, to follow the instructions from the court about the law, and to make fair, realistic, credible, objective findings of fact regardless of whether they like those findings from their personal vantage point or not.

A. Jurors must use common sense and follow the court's instruction. The verdict cannot be affected by sympathies, emotions, or personal bias.

B. You are sure jurors will carry out their sworn duty.

VII. WINDUP COMMENTS

I try to avoid being argumentative here to the greatest extent possible. I think you are better by being practical, organized, and giving a presentable summary that will keep the jury's interest and that will help them to have a snapshot of your side of the case in mind. It also is helpful to explain some sideline events which may occur which the jury may find distracting and to avoid the potential for a jury having some annoyance or other negative reactions to various things which the proceedings themselves may require you to do.

A. Explain possible motions and lawyer court conferences and why they must take place in the jury's absence.

B. The opening statement is a set of architectural drawings. It is a road map for the jury to hear, assemble, and evaluate the evidence and complete the proper structure or arrive at th correct destination, which is the verdict.

C. You will hear me remind you of this opening statement in my closing argument and tell you why the evidence justifies the result which the defendant thinks is a correct result.

D. We will try to fully and fairly present the case and to submit a final argument to you which will be helpful in your deliberations.

FOOTNOTE:

Finish on a high note. Once again, I do think that this is a fairly large measure "allow business." It is not to detract from the legitimacy of the judicial process, but it is to say that jurors are not lawyers or judges, are new in the courtroom and need to be dealt with having that in mind. The last impression is the one that is best remembered and may have the most impact so as they say "always leave them laughing." Finish on a high not with a ring of confidence, with a similarly positive demeanor and attitude and thank for their performing this service.

References:

C. Ogletree, *The Defense Theory of the Case: "Getting to Not . . .*, The Defender 8 (April, 1988) [pp. 246-248 of 1995 Utah State Bar Annual Meeting Booklet].

C. Ogletree, *The Theory of the Case: Opening Statements* [pp. 249-323 of 1995 Utah State Bar Annual Meeting Booklet].

D. Scofield, *Trial Handbook for Utah Lawyers* (1994), Chapter 6, pp. 109-115.

P. Bergman, *Trial Advocacy in a Nutshell, Second Edition* (1989), Chapter 6, pp. 285-297.

J. Jeans, *Trial Advocacy* (1975), Chapter 8, pp. 197-210.

M. Belli, *Ready for the Plaintiff* (1956) pp. 3-11.

L. Lake, *How to Win Lawsuits Before Juries* (1954), Chapter 7, pp. 113-130.

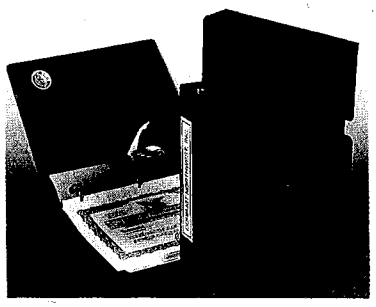
CORPORATION KITS
FOR
UTAH
COMPLETE OUTFIT
$52.95

Pre-printed By-Laws, minutes & resolutions, printed stock certificates & full page stubs, corporate seal w/pouch, binder & slipcase, index tabs & tax forms for EIN & S Corporation.

Complete kit w/o pre-printed By-Laws & minutes. 50 shts bond paper.

$49.95

$4.00 additional S & H per kit (UPS Ground).
Next day delivery available on request.
Kit w/o seal $40.95 plus S & H



OTHER PRODUCTS

- NON-PROFIT OUTFIT $59.95
- LTD. LIABILITY CO. OUTFIT $59.95
- LTD. PARTNERSHIP OUTFIT $59.95
- FAMILY LTD. PART. OUTFIT $59.95
- SEAL W/POUCH (CORP., NOTARY) $25.00
- STOCK CERTS & STUBS (20) $25.00

NEW !!!
EXHIBIT INDEXES & CLOSING SETS
WE STOCK A LARGE INVENTORY OF EXHIBIT INDEXES (ALPHABETICAL & NUMERICAL), CLOSING SETS (ALPHABETICAL & NUMERICAL), BLANK WRITABLE TABS & SPECIALTY INDEXES, ALL FOR QUICK SHIPMENT. CALL FOR PRICING INFO. MIX FOR QUANTITY DISCOUNTS.

ORDER TOLL FREE !
PHONE 1-800-874-6570
FAX 1-800-874-6568

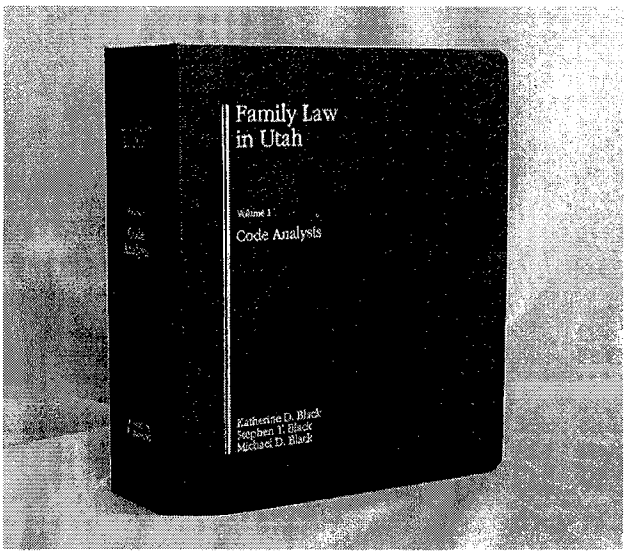
ORDERS IN BY 2 PM MT SHIPPED SAME DAY
WE WILL BILL YOU WITH YOUR ORDER.
SATISFACTION GUARANTEED.
CORPORATION OUTFITS REQUIRE THE FOLLOWING INFORMATION:
Exact name of the corporation, state & year of incorporation, total shares of stock authorized with par value (or no par), preferred shares, complete or w/o By-Laws.
NO CHARGE FOR STANDARD CLAUSES WITH KIT PURCHASE.
SPECIAL CLAUSES AND MULTIPLE CLASSES OF STOCK EXTRA CHARGE.

CORP-KIT NORTHWEST, INC.
413 E. SECOND SOUTH
BRIGHAM CITY, UT 84302
SERVING THE NORTHWEST

NEW!

Family Law in Utah

Everything you need, right at your fingertips . . .



. . . Current, concise, authoritative --
A professional desk reference for the professional practice.

Your time is precious. That's why you need *Family Law in Utah.*
A thorough and extensive coverage of Divorce (including property, alimony, custody, child support, visitation, etc.), Separate Maintenance, Annulment, Abortion, Contempt, Abuse, Adoption, Termination of Parental Rights and more! It's all there: code sections, current cases, helpful explanations that bring you up to date on the state of the law in Utah -- all easily accessible so that ***when you need it, you can find it.***

Written by Utah attorneys <u>for</u> Utah attorneys.

Send check or money order to:
ADVOCATE PUBLISHING, 1780 E. 1850 N., North Logan, Utah 84341.

Name_____ No. of copies _____ x $165 $_____
Firm_____ Add 5.875% Sales Tax _____
Address_____ Shipping and Handling
City, State, ZIP_____ No. of copies _____ x $7.50 _____
Phone( )_____Fax( )_____ TOTAL $_____

or Call/Fax **(801) 755-9696** to order.
Order before December 1, 1995 and pay just $145 per volume!

Trial Objections

By Stephen B. Nebeker

INTRODUCTION

At trial, counsel will confront testimony under oath and writings offered to prove the existence or non-existence of a disputed fact. Utah R. Evid. 401, 402.

Under our adversarial system it is each party's obligation to object to improper evidence. To challenge inadmissible evidence there must appear of record either:

- an objection timely made on the specific ground;
- a motion to strike;
- an offer of proof. Utah R. Evid. 103(2).

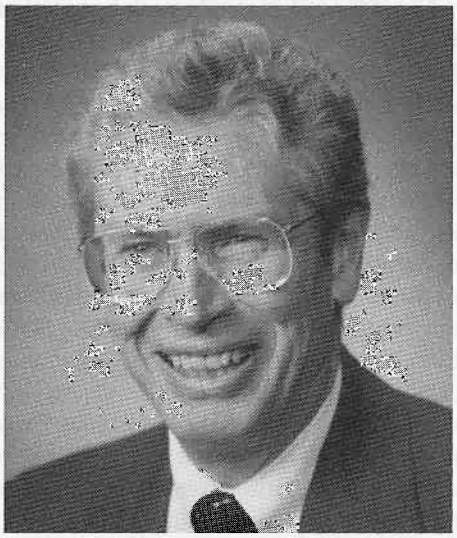
Absent such challenge the error in admission of such evidence is waived. Utah R. Evid. 103. Waiver may occur by failure to object; an untimely objection; or an objection that fails to state a specific and proper ground.

Of all the things you do to get ready for trial, your efforts to shape the case by offering and objecting to evidence are among the most important. This article is a quick reference source for objections and motions challenging admissibility. There are some preliminary comments about foundations and objections generally, and sample offers and objections follow. The types of evidence and objections are listed in alphabetical order. The code references are to Utah Rules of Evidence.

MAKING OBJECTIONS

There are many reasons for making objections: to exclude improper evidence; to make a record for appeal; to protect one's witness from harassment or embarrassment; to expose the opposing party's unfair tactics; to prevent confusion of the jury; and to streamline the interrogation. Utah R. Evid. 403.

Good reasons for not objecting are: Danger of alienating the trier of fact; danger of highlighting harmful evidence; where the harm threatened by the evidence is negligible; and where reversal on appeal is unlikely. Note: The consequence of allowing inadmissible evidence to be received without a timely objection is that the error is waived and may not be used as a basis for a new trial or an appeal. Utah R. Evid. 103; *Board of County Commissioners v. Ferrebee,* 844 P.2d 308 (Utah 1992).



STEPHEN B. NEBEKER, named Utah State Bar Lawyer of the Year in 1986 and Utah State Bar Trial Lawyer of the Year in 1994, has been a trial lawyer with the law firm of Ray, Quinney and Nebeker for 37 years, specializing in insurance defense, products liability and insurance coverage matters. He is a member of the American College of Trial Lawyers, the American Board of Trial Advocates, the International Association of Insurance Defense Counsel and the Federation of Insurance Counsel.

When counsel has decided to object, make sure to state the specific ground for the objection. Utah R. Evid. 103. Additionally, objection to inadmissible evidence must be made at the earliest opportunity. This means at the time it is offered in evidence. *State v. Schreuder,* 726 P.2d 1215 (Utah 1986); *Szarak v. Sandoval,* 636 P.2d 1082, 1084 (Utah 1981). Opposing counsel may not speculate on obtaining a favorable answer to an improper question and then object after the answer proves unfavorable. Counsel is not expected, however, to object to a question before it is answered if it is not apparent until the answer that the evidence is inadmissible. On hearing the answer, counsel must immediately move to strike the evidence. (However, in *State v. Velasquez,* 672 P.2d 1254, the court found a motion to strike is not an adequate substitute for an objection.)

The rules for objecting may create the impression that objecting is something you do only at trial. However, even before trial you may object to evidence through a motion in limine. Objections outside the presence of the jury before trial should be carefully considered. *If you must object at trial, only do so if it is worth it.* When objecting at trial, be polite, since you are interrupting when someone else is speaking. Do not take the objectionable questions or answer personally. *If jurors can see that you have a good reason for objecting it minimizes any lessening of your credibility.*

Occasionally, in the objections set forth below, it is suggested that counsel first approach the bench before making an objection. This is particularly true of objections seeking to exclude evidence where the jury might draw significant inferences from the making of the objection.

OBJECTIONS TO THE FORM OF THE QUESTION

Argumentative

Objection, Your Honor. The question is argumentative.

This objection is available when the question does not elicit information, calls for an argumentative answer or asks the witness to agree to inferences drawn by the lawyer. An answer may also be objectionable as argumentative. (Use a motion to strike such an answer.) Undue harassment or embarrassment of a witness may also be objectionable as argumentative.

Asked and Answered

Objection, Your Honor. The witness has already answered that question.

This objection is available where a question is repeated after having been previously asked. (Note: Distinguish from objection as "cumulative" which applies where the proposed evidence merely adds to other similar evidence on a point.)

Assumes Facts in Dispute/Not in Evidence

Objection, Your Honor. The question assumes facts [in dispute/not in evidence]. I ask that the jury be instructed that statements of counsel are [in dispute/not in evidence].

This objection is available when a question either 1) asserts or assumes a fact in dispute has been proved or 2) asserts or assumes a fact for which no evidence has been introduced. The question may also be objectionable as "leading". (Note: Be cautious with questions prefaced with "Did you know . . .").

Complex

Objection, Your Honor. The question is too complex for a witness to understand.

This objection will more likely be available if the witness is very young, very old, or handicapped.

Compound

Objection, Your Honor. The question is compound. (Optional – I have no objection to having the question rephrased, Your Honor).

This objection is available if there are two questions conjoined in one question with the disjunctive "or" or the conjunctive "and".

Cross Examination

Objection, Your Honor. This question exceeds the scope of direct examination.

Note: Courts generally permit wide latitude on cross-examination, however, some limit cross-examination strictly to matters brought out on direct. The modern view allows cross-examination as to any matters that have a logical tendency to rebut an unfavorable inference which might be drawn from the direct examination — any matter relevant to the subject matter of the direct. Very broad latitude is given where a witness is a party, an expert, or a witness against defendant in a criminal case.

"Opening the door": The fact that no objection was made on direct examination to inadmissible evidence may give the cross-examiner the right to cross-examine regarding matters within the scope of direct examination of the witness.

General

Objection, Your Honor. The question is too general.

If it cannot be determined from the question what specific admissible testimony is being sought, the question is too general. Questions which are too general normally are also objectionable as vague and ambiguous or as calling for narration.

Harassment

Objection, Your Honor. The question is unduly harassing.

This objection is available if the question is insulting to or constitutes undue harassment or embarrassment to the witness. (Note: Questions on cross-examination are often harassing and non-objectionable. The question must be unduly harassing.)

Incompetent, Irrelevant, Immaterial is Not Sufficient

Such an objection fails to meet the required specificity.

Lack of Foundation is Not Sufficient

This objection is too general to identify the specific reason the foundation is inadequate. *State v. McCarlell,* 652 P.2d 942 (Utah 1982).

When you offer clients a more convenient payment method, you end up with more clients.

The Utah State Bar brings you the Professional Services Account® from MBNA America.

More and more law firms are enhancing their practices by offering clients the option to pay legal fees with a MasterCard® or Visa® card. MBNA America, one of the nation's leading financial innovators, has developed a credit card acceptance program specifically for this purpose—the Professional Services Account.

With a Professional Services Account, payments are credited directly to your account. You benefit by fast receipt of payments and savings on administrative costs associated with old-fashioned billing and collection methods. Your clients benefit from the flexibility of choosing whether to pay their balances in full or carry balances and make small monthly payments.

For more information about an MBNA America® Professional Services Account,

CALL 1-800-526-8286

MONDAY THROUGH FRIDAY FROM 8 A.M. TO 8 P.M. AND SATURDAY FROM 8 A.M. TO 5 P.M. (EASTERN TIME).

MBNA AMERICA®

MBNA America and Professional Services Account are federally registered service marks of MBNA America Bank, N.A. MasterCard is a federally registered service mark of MasterCard International Inc., used pursuant to license. Visa is a federally registered service mark of Visa U.S.A. Inc., used pursuant to license.
©1995 MBNA America Bank, N.A. AD 7-185-95USB

MasterCard VISA

Leading

Objection, Your Honor. The question is leading.

A question is leading if it suggests the answer that the examining party desires from the witness. Leading questions are objectionable on direct or redirect examination, except they are allowed:

- to establish preliminary matters;
- to refresh the witness' recollection;
- to question expert witnesses;
- to question hostile witnesses;
- to question witnesses who change their stories; and
- to identify exhibits.

Leading questions are proper on cross or recross-examination, except where the witness is biased in favor of the cross-examiner.

Misquoting the Witness

Objection, Your Honor. Counsel is misstating/misquoting the witness.

Misquoting generally occurs in a prefatory statement before a question is asked. Often a subsequent question will also be objectionable as "argumentative" and/or "irrelevant".

Motions to Strike

An expert may not be allowed to answer a hypothetical question that incorporates assumptions not presently in evidence, subject to a motion to strike.

Narration

Objection, Your Honor. The question calls for a narrative answer.

This objection is available when the question invites a witness to narrate a series of occurrences. (A judge may allow a witness to give a narrative answer.)

Non-Responsive

Objection, Your Honor. The witness' answer is non-responsive. ["Sustained"]. I move the court to strike the answer and I request the court to instruct the jury to disregard the witness' answer.

This objection is available when the answer is non-responsive, or responsive but the witness adds non-responsive matter, or the witness volunteers testimony when no question is pending.

Offer of Proof

Made out of the jury's presence — the party offering evidence may make an offer of proof to explain its substance and relevance. Utah R. Evid. 103(2); *Bradford v. Alvey & Sons,* 621 P.2d 1240 (Utah 1980).

Prejudicial Comment

Objection, Your Honor. There is no question pending; or, Objection, Your Honor. The comment is prejudicial.

This objection is available when a lawyer makes a statement to a witness that is not a question or is prejudicial to the party.

Preliminary Fact Determinations

Where there is a dispute about admissibility of particular evidence which depends upon a determination of some factual issue regarding the preliminary facts, the court may hold a separate hearing out of the jury's presence to determine the admissibility of the proffered evidence. Utah R. Evid. 103(c).

Speculation

Objection, Your Honor. The question calls for speculation by the witness.

A lay witness is allowed to state his opinion only about a matter he has personally perceived and only if it is helpful to a clear understanding of his testimony. Utah R. Evid. 602. A properly qualified expert witness may state an opinion within the field of his expertise even if he has no personal knowledge of the facts. Utah R. Evid. 703, 705. However, if the data on which an expert bases his opinion included many varying or uncertain factors that he is required to guess, surmise or conjecture about that data, the expert's opinion is speculative.

Vague and Ambiguous/Unintelligible

Objection, Your Honor. The question is ambiguous in that (state reason) or, Objection Your Honor. The question is unintelligible.

PLAIN ERROR

If a trial court's action constitutes plain error affecting substantial rights of a party, an appellate court may consider an issue of evidence not brought to the attention of the trial court on the ground the judge should have acted sua sponte. Utah R. Evid. 103(d).

PRELIMINARY QUESTION OF FACT

Preliminary questions concerning qualification to be a witness, privilege, or admissibility of evidence are to be determined by the court. Utah R. Evid. 104(a)(b).

SUBSTANTIVE OBJECTIONS

Authentication

Objection, Your Honor. A sufficient foundation has not been laid showing this exhibit as authentic.

There must be a showing that a writing was made or signed by its purported maker and sufficient evidence that it is the writing that the proponent claims it to be. Utah R. Evid. Article IX, X. A writing includes letters, words, pictures, sounds, symbols, or combinations of them.

Best Evidence Rule

Objection, Your Honor. This is not the best evidence of the contents of . . . [describe the writing, e.g., the lease].
See § 78-25-16, U.C.A. (1953).

Response: *Your Honor, an original is not required, and other evidence of a writing/recording/photograph is admissible if:*

- *The original has been lost or destroyed without fraudulent intent by the party offering the copy* (Utah R. Evid. 1003);
- *The original is not reasonably procurable* (Utah R. Evid. 1004);
- *The original is under control of an adverse party and wasn't produced after suitable notice* (Utah R. Evid. 1004);
- *The instrument is not closely related to a controlling issue* (Utah R. Evid. 1004(4));
- *The original instrument is voluminous and the evidence concerns only "the general result of the whole"* (Utah R. Evid. 1006).

Competency

Objection, Your Honor. This person is incompetent to be a witness because he cannot express himself so as to be understood.

Objection, Your Honor. This person is incompetent to be a witness because he cannot understand his duty to tell the truth.

Experiments

Objection, Your Honor. The experiment counsel wishes to present before the jury is not admissible because it was not conducted under conditions substantially similar to those existing at the time and place of the accident.

Hearsay

Objection, Your Honor. The question calls for inadmissible hearsay.

Response: *Your Honor, this [describe evidence] is not hearsay, because [state why evidence is not hearsay — e.g., it is not offered to prove the truth of the matter asserted].*
or

Your Honor, I am prepared to present evidence to establish that [identify testimony or exhibit] is admissible under the hearsay rule because [specify facts establishing foundation]. These facts are not in dispute and in the interest of saving everyone's time, I think a stipulation would be appropriate. [Turning to opposing counsel] Counsel, will you stipulate that [specify facts that will establish foundation].
or

Your Honor, please allow me to lay the foundation to permit the introduction of this evidence under the [state applicable exception] to the hearsay rule.

Hearsay evidence is a statement made

other than by a witness while testifying at the hearing and offered to prove the truth of the matter asserted. Utah R. Evid. 801.

Hearsay Exceptions — Declarant Unavailable

The following hearsay exceptions require the declarant be "unavailable as a witness," Utah R. Evid. 804, which covers declarants who are privileged, disqualified, dead, ill, or absent. Most notable exceptions requiring unavailability are:

- Declaration against interest;
- Dying declaration;
- Statement of personal or family history;
- Former testimony.

The following are several commonly applicable hearsay exceptions:

- Declaration Against Interest

Under Utah R. Evid. 804(b)(3), a statement by unavailable declarant who had sufficient knowledge of the subject is admissible if a reasonable person would not have made the statement without believing it to be true (statements against declarant's pecuniary or proprietary interest, subjected him to civil/criminal liability, rendered a claim invalid, subjected declarant to disgrace).

- Former Testimony

Under Utah R. Evid. 804(b)(1) a statement by unavailable declarant is not excluded by Hearsay Rule if:

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Hearsay Exceptions — Availability of Declarant Immaterial

- Past Recollection Recorded

A witness' prior out of court statement is admissible if:

- he has insufficient recollection to testify fully;
- prior statement in writing;
- writing made when event fresh in memory;
- writing by witness/under witness' direction by third person;
- witness testifies statement true;
- writing authenticated as accurate record of statement.

Utah R. Evid. 803.

- Spontaneous Declarations

A statement is admissible if it describes an act, condition or event perceived by the declarant and was made while declarant was under the stress of the excitement caused by that perception. Utah R. Evid. 803(2).

Hearsay Exceptions — Even Though Declarant is Available as a Witness

- Business Records

Objection, Your Honor. The exhibit has not been properly authenticated.

Objection, Your Honor. The exhibit is hearsay as it constitutes an out of court statement offered to prove the truth of the matter stated and no exception to the hearsay rule applies.

Response: *Your Honor, these records meet the business records exception under Utah R. Evid. 803(6). They have met the foundational requirement of this exception because:*

- *Made in the regular course of the business;*
- *Made at or near the time of the event;*
- *A qualified witness will testify to its identity and mode of preparation;*
- *The information sources and preparation method and time indicate trustworthiness.*

Utah R. Evid. 805 provides:

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Hospital records are business records.

Police Reports:

The requirement of personal knowledge as a basis of a record is the chief barrier to the introduction of a police report of an accident. The report is a record of an act, condition or event but is often made by an officer who did not see the accident and includes both hearsay statements of others and opinions of the officer. If so, it is inadmissible.

However, officers who prepared a police report, if called as witnesses, are properly allowed to use the report to refresh their recollections on all matters of which they had knowledge and as to which the report would have been admissible.

- Vital Statistics

Birth certificates, death certificates, and marriage records are admissible hearsay if the maker is required to file the record in a public office, and the record was made and filed as required by law. Utah R. Evid. 803(9). *See* § 78-25-2, U.C.A. (1953)

A death certificate is prima facie evidence of the facts stated in it. Conclusory statements on the record, for example, statements as to the cause of death, are admissible when the record is made in a jurisdiction in which such conclusions are among the required data to be inserted.

Public records are self-authenticating. Therefore, it is not necessary to lay a foundation regarding identity and mode of preparation.

- State of Mind

Objection, Your Honor. That question calls for hearsay.

Response: *Your Honor, this evidence fits under the Utah R. Evid. 803(3) exception to the hearsay rule in that it constitutes a statement of the declarant's then existing state of mind, emotion, or physical sensation and it is offered to prove the declarant's state of mind, emotion, or physical sensation as an issue in the case (or it is relevant to prove or explain acts of the declarant in conformity with such state of mind, emotion, or physical sensation).*

Rejoinder: *Your Honor, that exception does not apply because this is a statement of memory or belief offered to prove the fact remembered or believed.*

Response: *Your Honor, it is not a statement of the declarant's existing memory or belief concerning a past event but rather a statement of declarant's then existing state of mind, emotion, sensation, or physical sensation.*

Rejoinder: *Then, Your Honor, I move the court to instruct the jury that this testimony can be considered only as it reflects on the state of mind [etc.] of the declarant, and that it cannot be considered in any way to prove a fact supposedly remembered or believed.*

Judicial Notice

Objection, Your Honor. The court cannot take judicial notice of the fact as requested by counsel because under Utah R. Evid. 201 a judicially noticed fact cannot "reasonably be the subject of dispute" in that it is either 1) common knowledge within the territorial jurisdiction of the court, or 2) is capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. The point raised by counsel doesn't meet with these criteria.

A court may take judicial notice on its own motion. A party who requests judicial notice should supply the court with necessary information. The opposing party is entitled to be heard before the taking of judicial notice. Upon taking judicial notice, the court should instruct the jury to accept as conclusive any fact judicially noticed.

Utah R. Evid. 201.

Limited Purpose

When counsel has offered evidence and an evidentiary objection has been sustained, then try offering the evidence for a limited purpose other than the purpose which led to the objection.

Your Honor, I would like to offer this evidence for the limited purpose of establishing _____.

When evidence is inadmissible for one purpose but admissible for another purpose, the court can let it in "for a limited purpose". The court should state what the limited purpose is, and what the evidence cannot be considered for. The opponent of the evidence should request that the jury be instructed not to consider the evidence for X but to consider it only for Y.

Opinion (Expert)

General Rule: Must have special knowledge about the subject of his testimony and this subject must be sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. Utah R. Evid. 702. *State v. Rimmasch,* 775 P.2d 388 (Utah 1989). Compare *Daubert v. Merrill Dow Pharmacy,* 113 S.Ct. 2786 (U.S. S.Ct. 1993).

Basis for Opinion Unreliable

Objection, Your Honor. The witness is basing his opinion on improper matter. There has been no showing that matter on which the expert bases his opinion may reasonably be relied on. Utah R. Evid. 703.

Assist Trier of Fact

Objection, Your Honor. This is not a proper subject matter for expert testimony since the jury is equally competent to form an opinion.

Utah R. Evid. 704. The ultimate test is whether the field of inquiry if "one of such common knowledge" that persons "of ordinary education could reach a conclusion as intelligently" as the expert witness.

Not Qualified as an Expert

Objection, Your Honor. Insufficient foundation has been laid showing that the witness is qualified as an expert by special knowledge, skill, experience, training or education as required by Utah R. Evid. 702.

Unmistakable trend in recent years has been towards liberalizing the rules relating to testimonial qualification of medical experts.

Relying on Inadmissible Data

Objection, Your Honor. The witness is relying upon inadmissible data. There has been no showing that experts in the field reasonably rely upon such data.

The matter upon which the expert bases his opinion need not itself be admissible in evidence. Utah R. Evid. 703. The test is whether it is the type of matter that may reasonably be used by experts in forming an opinion on the subject to which the expert testimony relates. Utah R. Evid. 703.

Be on guard against the use of an expert simply as a conduit for getting hearsay before the jury. A hearing outside the jury's presence may be the safest way to determine whether inadmissible hearsay was necessarily part or all of the basis for the opinion. Move to strike the expert's testimony as soon as it is apparent the hearsay evidence is inadmissible.

Opinion (Lay Witness)

Objection, Your Honor. The question calls for inadmissible opinion.

Utah R. Evid. 701 limits the opinion testimony of a lay witness to such an opinion that is (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony. Personal

WHEN YOU NEED THE BEST MEDICAL EXPERT EVALUATION and TESTIMONY AVAILABLE...

YOU NEED DR. STEVEN E. LERNER & ASSOCIATES.

Within 90 minutes of your conversation with Dr. Steven Lerner we will fax to you the specialist's curriculum vitae and retainer agreement for review.

All of our physician specialists are board-certified medical school faculty members or are of medical school faculty caliber.

Upon completion of record review the specialist will contact you by telephone with an oral opinion. If requested the specialist will then prepare and sign a written report and be available for testimony.

Since 1975 our MD's, DDS's, DPM's, OD's, PhD's and RN's have provided services to legal professionals.

Call now for a Free Consultation, Specialist Curriculum Vitae and Fee Schedule Based on an Hourly Rate.

DR. STEVEN E. LERNER & ASSOCIATES ■ 1-800-952-7563

knowledge is a prerequisite to any lay witness' competency. Utah R. Evid. 701. To be "perceived," the event must be observed with the witness' senses. Thus, a lay witness cannot express an opinion or draw an opinion that is partially based on hearsay.

Personal Knowledge

Objection, Your Honor. There is no showing that this witness has personal knowledge of that matter as required by Utah R. Evid. 602.

A witness can testify to an issue only if he has personal knowledge of the matter.

Prior Inconsistent Statement

Under Utah R. Evid. 613 it is not necessary to disclose to the witness any information concerning a prior inconsistent statement when the witness is being examined about such statement. However, there are circumstances where opposing counsel is entitled to the information.

Privileges

Attorney–Client

Objection, Your Honor. The question calls for the disclosure of communication protected by the attorney–client privilege.

Utah R. Evid. 504 protects from disclosure of information transmitted between a client and his lawyer within the course of that relationship and which, so far as the client is aware, discloses the information to no third persons other than those present to further the client's interest in the communication or reasonably necessary to do so. The client is the holder of the privilege but either client or lawyer can claim it on the client's behalf.

Physician–Patient

Objection, Your Honor. The question calls for the disclosure of information protected by the physician–patient privilege.

The patient is the holder of the privilege (Utah R. Evid. 506). Under the patient–litigant exception, there is no privilege as to communication relevant to an issue concerning the condition of the patient if such issue was tendered by the patient.

To lay a proper foundation, counsel must show:

- person to whom patient made communication was licensed medical practitioner;
- patient consulted physician for medical purposes;
- the communication made as part of physician–patient relationship.

Marital Communications

Objection, Your Honor. The question calls for disclosure of information protected by the confidential marital communications privilege.

The party asserting the privilege must show that:

- the spouses were legally married;
- communication in dispute was made between spouses during time of marriage;
- communication in dispute was made in confidence.

The proponent of the evidence has the burden of proving communication not made in confidence, or was waived, or falls under an exception.

Remedial measures

Your Honor, may we approach the bench? . . . Your Honor, counsel is eliciting evidence about subsequent remedial measures, and subsequent remedial measures are inadmissible to prove negligence or culpability.

Utah R. Evid. 407 provides that repair measures taken after an event (that is, measures that would have made the event less likely to occur) are not admissible to prove negligence or culpable conduct because without this provision defendants would tend to postpone making repairs. Subsequent remedial measures may, however, be admitted for a limited purpose such as impeachment (i.e., to show prior inconsistent acts or statements), ownership, control or feasibility.

Summaries

Utah R. Evid. 1006 provides that "the content of a writing is not made inadmissible by the Best Evidence Rule if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time and the evidence sought from them is only the general result of the whole . . ." The court in its discretion may require that such accounts or other writings be produced for inspection.

Videotapes

Authentication: *Objection, Your Honor. This videotape has not been properly authenticated.*

Relevancy: *Objection, Your Honor. This videotape contains evidence that is not relevant.*

Hearsay: *Objection, Your Honor. This videotape contains inadmissible hearsay.*

Utah R. Evid. 403: *Your Honor, may we approach the bench? . . . Your Honor, under Utah R. Evid. 403 of the Evidence Code, the court should exclude evidence where its probative value is substantially outweighed by the danger of undue prejudice, confusion of issues, or misleading the jury. Counsel is offering a videotape that [describe prejudicial evidence]. The prejudicial effect of this videotape against my client would be great and would outweigh the probative value of the evidence.*

Unduly Inflammatory: *Your Honor, may we approach the bench? . . . Your Honor, the videotape counsel is about to offer is unduly inflammatory and has no probative value at all, because [describe inflammatory nature].*

Cumulative: *Your Honor, may we approach the bench? . . . Your Honor, under Utah R. Evid. 403, the court should exclude evidence to avoid undue delay or needless presentation of cumulative evidence.*

Computer Simulated Accident Reconstruction:

To date no reported Utah case has ruled on the admissibility of computer simulation. Computer simulations will likely be treated like other scientific tests. The admissibility may depend on a showing that (1) the computer is functioning properly; (2) the input and underlying equations are sufficiently complete and accurate; and (3) the program is generally accepted in the scientific community.

Writings

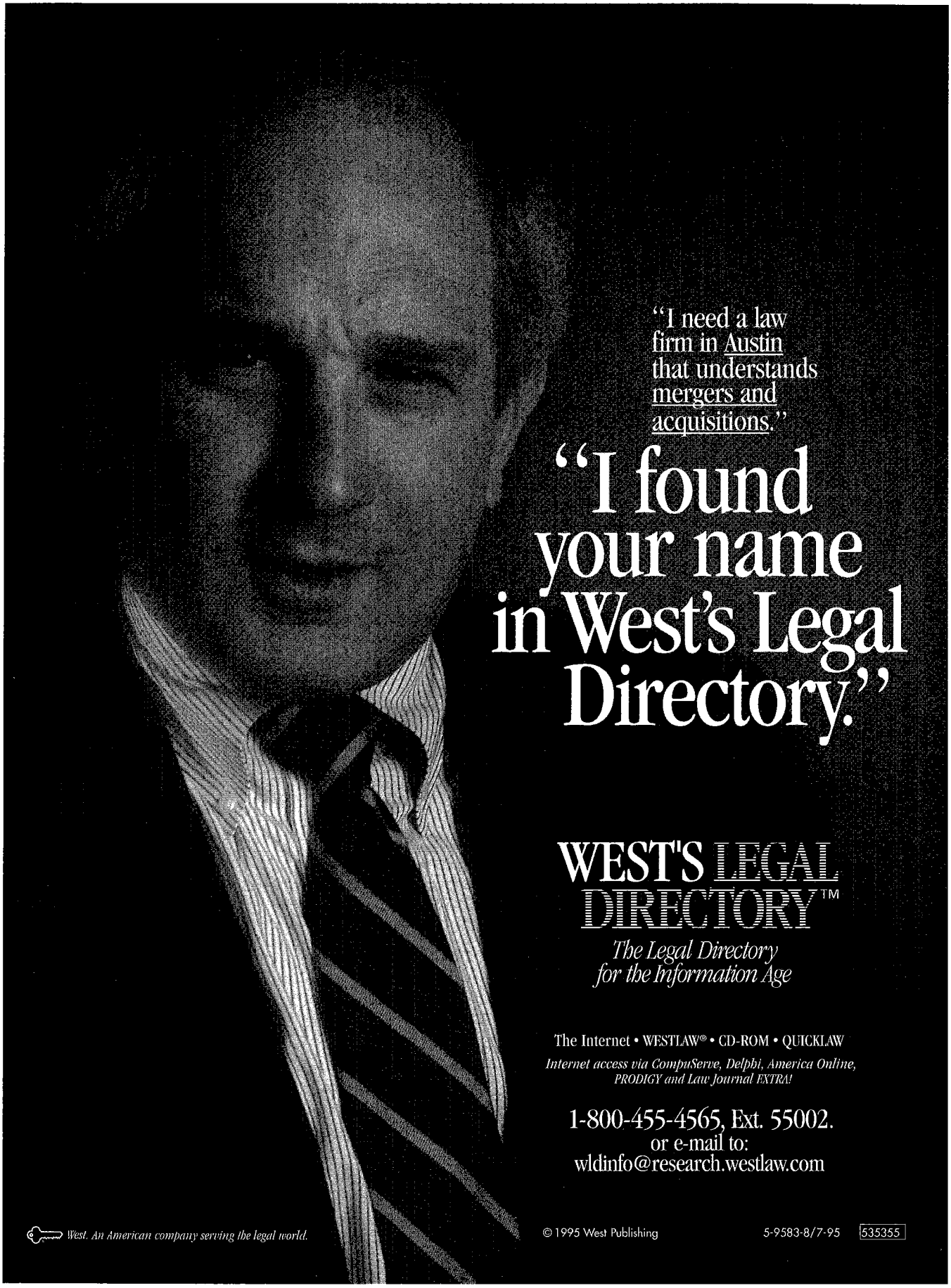
Writings may be direct or circumstantial evidence of disputed fact. They may also be demonstrative evidence illustrating or explaining other evidence. Writings include motion pictures, videotapes, photographs, tape recordings, computerized records, artists' sketches, credit cards, graffiti. Generally, foundation requirements are authentication, i.e., the writing is what it purports to be. (Utah R. Evid. Art. IX).

With the court's permission counsel may use maps, charts, diagrams, graphs, etc. that have not been received in evidence in examining a witness to illustrate testimony in closing argument to the jury subject to the court's discretion.

(Practice pointer: Before spending large sums on trial exhibits, meet and confer with counsel and the trial judge to ascertain their attitude toward use of the contemplated exhibits.)

CONCLUSION

For an excellent review of the Utah Rules of Evidence, see Utah Rules of Evidence 1983 – 1985 Utah Law Review 63; Utah Rules of Evidence 1983 – Part II, 1987 Utah Law Review 467. Part III of the Utah Rules of Evidence 1983 will be published in the fall of 1995. (Articles written by Professor Ronald N. Boyce and Professor Edward L. Kimball.)


"I need a law firm in Austin that understands mergers and acquisitions."
"I found your name in West's Legal Directory."
WEST'S LEGAL DIRECTORY™
The Legal Directory for the Information Age
The Internet • WESTLAW® • CD-ROM • QUICKLAW
Internet access via CompuServe, Delphi, America Online, PRODIGY and Law Journal EXTRA!
1-800-455-4565, Ext. 55002.
or e-mail to:
wldinfo@research.westlaw.com
West. An American company serving the legal world.
© 1995 West Publishing
5-9583-8/7-95
535355

Direct Examination

By Ray R. Christensen

I. THE IMPORTANCE OF DIRECT EXAMINATION

Direct examination is a subject frequently overlooked in trial seminars. It is perhaps less glamorous and less dramatic than cross-examination or closing argument. However, it is of critical importance to the outcome of the trial. This is your "up to bat." To win, you must score.

Your case in chief is presented, almost exclusively, by direct examination of witnesses selected by you. This is where you "prove" your case to the trier of fact. No matter how skillful you are at cross-examination, and no matter how many holes you are able to punch into your opponent's case, you cannot reasonably expect to prevail solely upon your opponent's weaknesses. No matter how good you are at final argument, you need something more to talk about than the weakness of your opponent's case. You must have some strengths upon which to rely. These strengths almost always must be presented to the jury through direct examination.

Good direct examination, that is, good presentation of your case in chief, is largely a matter of common sense. It is amazing, nonetheless, how frequently an ineffectual presentation is made.

II. CREATING THE GAME PLAN.

First, to present an effective case in chief, consider what facts you need to prove (or disprove) to prevail at trial. For most attorneys, this is best accomplished by preparing a written outline.

Second, take an inventory of available evidence to prove or disprove the crucial facts.

Third, after the available evidence has been canvassed, decide what evidence is indispensable to the presentation of the case, what evidence is probably helpful, and what evidence is better left out. If only one witness has knowledge of a crucial fact, that witness is necessary and must be called. If several witnesses have knowledge of the same facts, some of them probably should not be called for several reasons:

(a) The court may not receive or will greatly restrict cumulative evidence.

(b) Some witnesses are more convincing in relating their testimony than others. While some repetition may be essential to get the point across, too much repetition may be counter-productive. The trier of facts may tire of hearing the same evidence repeatedly. Furthermore, the testimony of weaker witnesses may dilute the testimony of stronger witnesses.

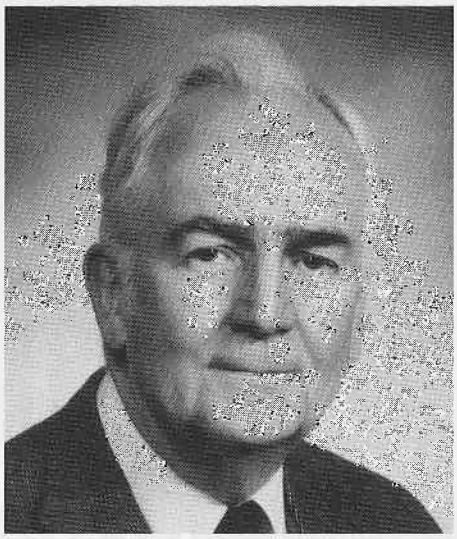
(c) Almost without exception, jurors desire to have the case tried as expeditiously as possible. Calling several witnesses to testify to the same facts may be perceived as foot-dragging, or worse — insulting the intelligence of the jury. Be the "good guy" who is trying to move the case along as rapidly as possible.

Choose those witnesses who have the most complete knowledge of the case; whose observations put the facts in the best light for your client; who are most articulate, and who, by their appearance and demeanor, are most credible. Choose only those witnesses who, in composite, will present the strongest case for the client.[1] If there is a question as to whether to call a particular witness, the old adage, "when in doubt, don't," is a safe guideline.

Fourth, every game plan should include an "order of proof," or outline of the order of presenting each piece of evidence. You should open and close your case with your two strongest witnesses. A strong first witness will create a favorable first impression with the trier of fact which will carry through the rest of the case. Your last witness will be the one who will be best remembered when the jury retires to deliberate. Ideally, the testimony of each witness should relate in some fashion both to that of the preceding witness and the following witness.

If possible, don't conclude the direct examination of an important witness near evening recess to avoid giving your opponent all night to prepare for cross-examination. Present "heavy" evidence, such as expert testimony, when the jury is most alert and attentive, which is usually during the morning session of court.

Keep the game plan as tight and compact as possible. Discard the irrelevant and trivial. Too many cases are spoiled by a weak opening witness whose testimony is of little importance to the case. The jury is immediately bored, confused, and disinterested. Focus on the major points of your case. Do not be distracted by red herrings. **Caution:** The game plan must be flexible. Things do not always go as anticipated at trial.



RAY R. CHRISTENSEN, founding partner of Christensen & Jensen, is a past president of the Utah State Bar. Named Utah State Bar Lawyer of the Year in 1983 and Trial Lawyer of the Year in 1993, he is also a Fellow in the American College of Trial Lawyers and the International Academy of Trial Lawyers. Mr. Christensen is a charter member and past president of the American Inn of Court I and is a member of the International Association of Defense Counsel and the Federation of Insurance and Corporation Counsel.

good teacher. A long string of academic degrees is no guarantee of good expert testimony. Avoid those who are pedantic, "ivory tower" types and professional witnesses ("hired guns") to the extent possible.

In qualifying an expert, it is not necessary or even desirable to recite all of his or her academic degrees, publications, and work experience. A long recital of qualifications can be boring and even may give an impression of arrogance. Quality, not quantity, makes a good impression. If you give the judge or jury reams of information, they will remember none of it. Some qualifying experiences can be better reserved and woven into the opinion testimony, or the bases of the opinions. For example, "When I was at Princeton, I did a research project on this very problem, and I subsequently published an article on the same subject in *Science,* a peer review journal."

Under modern day practice, the expert (once qualified) may state his or her opinion and the reasons therefor, at the outset. Most experienced trial attorneys prefer to present it this way. Once the opinion has been stated, the underlying data which support the opinion become more meaningful to the trier of the facts.

It is imperative that the expert testify in plain understandable English. Technical jargon should be avoided. Some experts, intentionally or not, overwhelm everyone in the courtroom with polysyllable technical words. The best experts can make their opinions come alive to ordinary people. Experts frequently can educate the jury and hold their attention by drawing sketches or diagrams as they speak. The drawing or sketch can then be marked as an exhibit and offered in evidence. The expert's role is to be a teacher, not an advocate. He should convey the impression of fairness and impartiality.

Under modern practice, the hypothetical question to the expert has virtually disappeared. Most experts investigate the issue at hand in order to prepare themselves to testify. There is, therefore, very rarely any need for the hypothetical question. If a hypothetical question is to be used, it must be very carefully drafted and written out in detail. It should be carefully reviewed with the witness. Indeed, a copy of the proposed question should be presented both to adverse counsel and the court in advance. Any objections to the question should be resolved before the witness even goes on the stand.

9. Exhibits.

It is axiomatic that "a picture is worth a thousand words." The range of possible exhibits is limited only by the imagination of counsel and/or the expert, and the financial resources of the client. Models, computerized re-enactments, video tapes, maps, slides and overheads are only a few of the things which have been used as court room exhibits. Besides their value as teaching tools, they add variety to the presentation, and tend to hold the jury's attention.

Most exhibits have to be identified by a witness before they are admissible. If a witness is to be asked to identify an exhibit, it should be reviewed with him or her beforehand. You must be sure that the witness is familiar with the exhibit, can positively identify it, and, if necessary, explain it. If an exhibit such as a diagram, chart, model or gadget requires an explanation, the witness must walk through it with the trier of fact, clearly explaining exactly what the exhibit shows or demonstrates.

Many documents, such as lengthy contracts, product manuals or instructions, hospital records, etc., are far from understandable to the average juror. Documents of this type should be kept to a minimum, although they may be necessary as a foundation for oral testimony. In most instances, the important language will be relatively brief. Its location in the document should be identified to the jury, preferably by the witness, although on some occasions, the examiner may read the critical language to the jury. The same language can again be read to the jury during closing arguments.

The number of exhibits, like the number of witnesses, should be carefully limited. A jury can be overwhelmed with a mass of paper. At best, they will disregard it. At worst, they may be completely turned off and disregard the rest of your presentation.

Exhibits should be carefully organized in the order in which they are expected to be offered. They should be readily available when they are needed. Nothing ruins the flow of a case like having to search for an exhibit which is intended to be offered. A trial associate or a paralegal can help track exhibits so they are readily available as needed, and keep an accurate record of those exhibits which are offered and received.

IV. REDIRECT

Re-direct examination is used primarily for damage control. Not infrequently, a witness may misunderstand questions put to him on cross-examination, or may become confused under the stresses of the courtroom atmosphere, and give erroneous or incomplete answers. It then becomes necessary to attempt to rehabilitate him. Ask for a recess before conducting redirect examination, even though there may have been a recess only a short time before. A request couched in terms something like the following, will usually be honored by the court. "Your Honor, I have only a brief re-direct examination, but I believe that it might save us some time if we could take a short recess now."

The recess, of course, is used to make clear to the witness where he or she has gone astray, and arrive at a set of questions which will hopefully clarify and straighten out the entire matter. Redirect examination should always be brief. Its purpose is not to replough the ground which was covered in direct examination, but only to rehabilitate the witness. However, if something important to the case was inadvertently omitted from the direct examination, leave can usually be obtained to go into it on redirect examination.

In most cases, cross-examination is your friend. It frequently repeats and emphasizes testimony that was developed on direct examination. It may also open doors wide for your witness to give detailed explanations in support of his testimony. If a witness is knowledgeable and has testified honestly, he or she cannot be damaged much by cross-examination. The more the cross-examiner attempts to discredit, the better image the witness creates, and the stronger his or her testimony becomes. If cross-examination has gone well, there is no need for redirect. In fact, it is contraindicated.

In summary, create an organized game plan for direct examination, execute it well, and don't rely solely on the weaknesses of your opponent's case to win.

[1]There is an excellent paper on the subject of "Selecting the Right Trial Witnesses" in the Winter 1991 Number of Litigation by Lundquist at p. 25.

[2]Although I have never tried it, many practitioners recommend making a video tape of the witness' proposed testimony. This can be relatively inexpensive, and the witness can see exactly how he or she does.

[3]If there is a question whether the adverse evidence is admissible, it is wise to file a motion in limine and to attempt to get a court ruling prior to trial, to exclude the evidence. If there is any reasonable probability that the court will receive the evidence, it should be developed on direct examination. There is an excellent article on "Exposing Your Warts" in the previously cited issue of Litigation by Fullenweider at p. 22.

Cross Examination

By Robert S. Campbell, Jr.

I. INTRODUCTION

Much has been written and more said about the judicial philosophy and psychology of cross examination. There is no reason to expect that this will be the last. In fact, some of the best materials written on cross examination were published over 50 years ago. More recently, Exhibit A of "how not to conduct cross examination" has been seen on virtually every television set in America this past year as a result of a sensational criminal trial in Los Angeles.

Purportedly skilled cross examiners have appeared on the screen incapable of asking short, punctuated and non-repetitive questions. Rather, the examination has been conducted as though a jury is incompetent to arrive at even the most self-evident conclusion, but rather must be led by the paw to the mundane conclusion of every redundant point.

In all but that one California courtroom, no other method apart from cross examination has yet to be invented in our socratic process which, if employed properly, is better able to penetrate bias, expose fault and phony argument, and reveal the ultimate truth. It is a method which, upon proper use, can devastate the opposite side's case. As the Supreme Court of Utah wrote:

> There is no other instrument so well adapted to discovery of the truth as cross examination, and as long as it tends to disclose the truth it should never be curtailed or limited. Any inquiry should be allowed which an individual about to buy would feel it in his interest to make.

State of Utah v. Peak, 265 P.2d 630, 637 (Utah 1953).

Despite its importance, cross examination remains one of the most difficult skills to utilize effectively. The Primer which follows assumes the typical case, with the unusual case or witness almost always invoking an exception to the rule. It will examine general concepts applied to a typical witness which have been assembled through association with some of the best common law trial lawyers in this Country and England.

ROBERT S. CAMPBELL, JR., senior partner in Campbell Maack & Sessions, practices in trial and appeal of corporate and complex commercial litigation, including antitrust, products liability, intellectual property, investment fraud, white collar crime and eminent domain. He has participated as lead trial counsel in over 425 major litigated trials and approximately 85 appeals, including the United States Supreme Court. A Fellow in the American College of Trial Lawyers and the International Academy of Trial Lawyers, he was selected as Utah Trial Lawyer of the Year in 1992 by the American Board of Trial Advocates.

II. THE FOIBLES OF CROSS EXAMINATION

In many if not most cases where it is a close call on the facts, cross examination may be the key to unlocking the mysteries or the conflict in the evidence. Often, it will determine the outcome in the case. For a tool that can be so decisive in result, it is wrapped in a shroud of myths which are largely responsible for the perplexities of cross examination. In providing a setting for strong and meaningful cross examination, it is well to spend a few moments reviewing the myths of what cross examination is not.

MYTH 1 — Every adverse witness must be cross examined as to what has been said on direct examination.

MYTH 2 — Waiving cross examination is the sign of a weak lawyer or a frail case.

MYTH 3 — Every witness needs to be examined on every issue, even if it means repeating the evidence a second or third time.

MYTH 4 — Every witness should be attacked for bias, competency, experience, knowledge, or all of the above.

MYTH 5 — The form of the question on cross examination is not particularly important.

MYTH 6 — Cross examination needs to be hostile, acrimonious and abusive in order to reflect the proper degree of righteous indignation.

MYTH 7 — Preparing for cross examination deprives the trial of spontaneity.

III. FOUNDATIONAL PRINCIPLES TO SUCCESSFUL CROSS EXAMINATION

A number of these principles are unremarkable insofar as they relate to the preparation of the larger case. Nonetheless, they deserve mention in any roll call of the factors instrumental to a winning cross examination.

1. Be prepared. Prepare in some detail an outline of cross examination, even to the extent of writing out key questions. The notes, themselves, may never be used in the actual cross examination and in all events, you will not read verbatim from the notes. Rather, the notes enable the examiner to:

- prepare where to go with the witness;
- select the areas of examination to pursue with the witness, *as well as the areas not to pursue*;
- select the documents to be used on cross examination and the order of use;

• determine when, if at all, the witness' bias or credibility should be attacked;

• determine the subject matter and the line of questioning to terminate the cross examination.

• add spontaneity and allow more flexibility with follow-up questions.

2. Know The Rules of Evidence. Even though you are familiar with the common law and prescribed written Rules of Evidence, spend thirty minutes re-reading them to refresh your recollection. It will help you get a grasp on the entire case, as well as the specific areas of cross examination.

IV. TWELVE COMMANDMENTS OF SUCCESSFUL CROSS EXAMINATION

The following rules have not been necessarily prioritized, but they will come into play in some form during the cross examination of almost any witness. I would dub them the Twelve Commandments of Cross Examination.

RULE 1 — Decide whether the witness should be cross examined at all. If the witness has had difficulty on direct examination, if your objections have kept out the key evidence the witness had to offer, or if it is a particularly dangerous witness who may give damaging evidence on redirect examination, cross examination should be waived. The waiver can occur within a framework that will yield the conclusion that the witness has said nothing of importance to the case. Most experienced trial lawyers can recount cases in which a witness who has been damaged or has not otherwise fared well on direct examination has repaired and restored his credibility on cross examination. Generally speaking, there is much wisdom in the old adage that "less is more" when it comes to cross examination.

RULE 2 — Questions should be precise if not surgical in subject matter. One of the more unflattering exemplars of cross examination is a lawyer going to the podium with notebook in hand and proceeding down a checklist of virtually everything the witness said on direct examination. What is accomplished through that maneuver, most of the time, is simply a restatement of what the witness has already had to say on direct examination, with a concomitant and damaging emphasis on the points made.

Cross examination was not conceived to allow a witness to tell his story two or three times, but rather to test specific aspects of that story in light of experience or conflicting, contradicting, or questionable evidence. For a witness who has presented either memorized or chronological testimony, take specific areas on cross examination out of order or out of their chronological setting.

RULE 3 — Know the answer to each question before asking it. The purpose of strong cross examination is not to provide the witness a forum to repeat his direct examination, but rather to clarify, to show an inconsistency, a contradiction, or a point that is consistent with other parts of the cross examiner's case-in-chief. Use of the questions "why" and "what happened next" should be generally avoided unless the cross examiner knows that the answer is going to assist his or her case.

RULE 4 — Be polite. Attorneys should be polite during cross examination, but not sycophantic, even in the face of arrogance. A considerate but firm approach to a witness may be disarming and result in more candid responses. This notion conforms to the old saying that "more flies are caught with honey than with vinegar."

"Even though you are familiar with the common law and prescribed written Rules of Evidence, spend thirty minutes re-reading them to refresh your recollection. It will help you get a grasp on the entire case, as well as the specific areas of cross examination."

RULE 5 — Ask the most important questions as if they were just ordinary issues. Do not build up to the glorious or crowning question, unless you know quite precisely how the witness is going to answer. More often than not, that sort of cross examination results in disappointment.

RULE 6 — Use short, concise and pinpointed questions. The tempo of cross examination is extremely important and a rapid series of short questions will be impressive.

RULE 7 — Ask questions on cross examination which can be answered with "yes" or "no". While some judges may allow a witness to go to any length, however irrelevant, to give a narrative answer to a "yes" or "no" question, most trial judges will require an answer. Regardless if the witness does give a narrative answer, wait until the witness is finished and then ask the following question:

Q. Have you now said all you want to say?
A. Yes, I believe so.
Q. Then I would like you to answer my question — then repeat it or have the court reporter read it back.

After that happens two or three times, even a lenient judge on cross examination will require the witness to give an answer that is not evasive. At times, an "anything goes" judge will not require the witness to be at all responsive, in which case the best cross examination will be blunted.

If you want to take a page out of the book of "Horace Rumpole of the Old Bailey," the following line of examination might be pursued after the witness has given a completely evasive, argumentative and self serving answer:

Q. Mr. Witness, do you suffer from a hearing impairment?
A. No.
Q. Then please force yourself to answer my last question — the question is [then repeat].

RULE 8 — Do not quarrel with the witness. An experienced cross examiner will not get into either a shouting match or an argumentative confrontation with a witness. Maintain the position of examiner and don't allow the witness to engage in a semantical debate or ask questions in response.

RULE 9 — Quit when a favorable answer is received. Quit even though the answer is not as firmly implanted as would be desirable. The cross examiner who follows up a favorable answer with a "clarifying" or "summing up" question, only highlights the importance of the previous answer and inevitably the witness modifies or changes altogether the prior answer, blunting the success of the earlier examination.

RULE 10 — Develop testimony on cross examination that is favorable to your side. Pursue a line of examination that adds emphasis and requires the witness to elaborate on favorable points. For example, when the defendant is called as an adverse witness and acknowledges that his conduct

has resulted in a setback of plaintiff's business, the question could be asked:

Q. Isn't it true, that plaintiff's business has been damaged in a number of ways by the conduct of your company?

A. Yes.

However, it would be more emphatic and persuasive to turn the question into a line of examination:

Q. Tell the jury, specifically, the ways in which your company's conduct has harmed the plaintiff's business.

A. Well I don't know his exact business, I just know that there are probably some things that have caused some business inconvenience.

Q. Well, with the experience that you've had in business, tell us specifically what your understanding is as to each of those factors of inconvenience?

The same approach may be taken with a witness who acknowledges that he has known the plaintiff for seven years, but never has seen him limp. The cross examiner should go through each one of the years rather than ask the general question:

Q. So in the seven years after the accident in this case, you have never seen the plaintiff walk with a limp?

RULE 11 — Don't ask remaining questions once a line of questioning has severely damaged credibility. Once credibility has been destroyed, continued examination of the witness on other issues may allow him to restore his credibility and erase the importance of the previous damaging admissions. If the damage is something that the cross examiner knows may be cured on redirect examination, the cross examination should possibly continue. However, if the damage is incurable, the best approach is often to conclude all cross examination so that the jury remembers the witness' damaging admission as the last evidence received.

RULE 12 — Attempt to develop the cross examination so that the witness faces the dilemma of making a damaging admission, no matter which way the question is answered. If the answer is "yes", he will admit the substantive aspects of the cross examination. If he answers "no", he will acknowledge his lack of knowledge of the facts or experience in similar matters.

V. CONCLUSION

Bear in mind, the purpose of cross examination of an adverse witness is to point out quickly and surgically the fallacies of his evidence, his bias, lack of integrity or credibility, and to develop the truth of your client's case. The better the lawyer knows his case and has confidence in it, the clearer the nature and extent of cross examination will be.

A NEW PARTNERSHIP. . .

We are pleased to announce that the Utah State Bar has recently endorsed a new carrier for the Bar-Sponsored Lawyers' Professional Liability Insurance Program.

COREGIS is rated "A" by A.M. Best and brings 20 years of professional liability insurance knowledge and experience to the Utah program.

Call us for details— RMH ROLLINS HUDIG HALL

Program Administrator for over 35 years

2180 South 1300 East, Suite 500 Salt Lake City, UT 84106 (801) 488-2550 / (800) 759-2001

Plaintiff's Experts: Finding, Preparing and Presenting an Expert Witness

By W. Brent Wilcox

I. LOCATING A GOOD EXPERT.

Locating and retaining the right expert witness is a vital skill which must be learned in order to have a winning trial practice. Such a skill is not taught in schools and must come from experience and common sense. Work hard to find your expert witnesses. Expert witness services are helpful but I look beyond them initially and try to find experts who have had exceptional practical experience with the subject matter of the lawsuit. The expert who has worked with the product or the process in issue will have much more credibility than the theoretician.

You would be surprised at how easily you can find good expert witnesses if you get out of your office and start talking to people in that industry. I tried a mining case a few years ago involving a roof fall. Our expert witness was a former supervisor from the mine. When we found him, he was working for another company outside Utah. He walked into court wearing working clothes and a cowboy hat. The jury gave great weight to this unsophisticated man who had worked for many years in the mines. I always try to find such an expert.

Find your expert early in the case. Many a case has been lost or unduly complicated because experts were not brought into the case to help develop the appropriate theories.

When you meet with your prospective expert, it is critical that you be prepared to present the facts and the essentials of the case to him. Some experts will be put off if you are not prepared. They will follow your lead in the attention that they give to the case.

Do not immediately discard an expert who initially disagrees with your position. He may convince you that your case is misplaced, or it may be that if further facts and information convince the expert, you will end up with a better expert than one who readily agrees with you.

W. BRENT WILCOX is president of the personal injury firm of Wilcox, Dewsnup & King, where his practice concentrates on representing plaintiffs in workplace injury and product liability claims. He is a Fellow in the American College of Trial Lawyers, a past president of the Utah Trial Lawyers Association and is on the Board of Governors of the American Trial Lawyers Association. In addition to his membership in the American Board of Trial Advocates, he is also a Master of the Bench in the American Inns of Court VII.

In complex and large cases, it is a good idea to have overlapping experts who can give you protection against being misled or worse. In the Sunshine mine disaster case, we hired an expert witness who had worked with NASA and was highly recommended. We gave him custody of some critical and irreplaceable evidence — respirators that had been worn by the miners who died. The respirator filters contained evidence of the content of the smoke in the air during the initial stages of the fire. We were trying to determine whether polyurethane was consumed in the initial stage of the fire. Our expert tested the masks and claimed he had found irrefutable evidence that the polyurethane burned. At his deposition it was revealed that he had ruined the evidence and his testimony was useless. The case finally got settled, but we had to overcome a major hurdle caused by his ineptitude. If we had hired another expert, he would have seen early on what was happening and could have warned us.

Avoid using experts that you distrust or who appear too slick. If you believe you need them despite your concerns, talk to other attorneys who have used them.

Make sure you have a clear understanding as to the fees which the expert will charge, the manner in which they want to be paid (i.e., on a monthly or quarterly basis), and, if you are dealing with a corporation, make sure you understand who is going to do the work and what level of charges each person will be charging. It is a good idea, initially, to set dollar limits on the amount of work you want the expert to do until you get the feel of the expert and the case.

Since credibility is the key issue, look at all aspects including physical appearance, sincerity, demeanor, experience, and communication and teaching skills. One of my most successful experts is a retired professor from Brigham Young University who is a very good teacher. He is able to use his years of teaching experience to develop effective ways of explaining difficult concepts to the jury.

Don't be afraid to discard an expert if he can't help you.

Use consulting experts. They can be extremely valuable to your case in helping you develop your theories and facts.

II. PREPARING THE WITNESS.

Have your expert visit the locale where the accident occurred and inspect the product or process involved. Give the expert all of the known facts and issues. I prefer to provide transcripts not summaries of depositions. I am suspicious of experts who are only given a portion of the facts; therefore, I make sure the expert has all of the facts, positive or negative.

Do not force your theory on the expert since it is now a partnership in which you should work with the expert in developing the proper theories. The attorney remains the captain, but the expert is the helmsman.

The expert should participate in determining what other facts need development and what work needs to be done in order for a final opinion to be formed. If testing or computerized re-creation are contemplated, make sure that you and your experts fully discuss all aspects of such work, including the things that may go wrong. Testing and computerized re-creation are costly and often do not enhance the case. Look for an expert who is able to demonstrate a phenomena in a simple, inexpensive way. My BYU professor expert once created a simple demonstration that cost only $1,200. It was much more effective than the sophisticated testing that would have cost us $30,000-40,000 at a laboratory.

"Do not force your theory on the expert since it is now a partnership in which you should work with the expert in developing the proper theories. The attorney remains the captain, but the expert is the helmsman."

Finalize the expert's opinion, always leaving the expert flexibility if new facts come to light before trial. The use of multiple experts has potential pitfalls which you must be careful to avoid. While there are situations where having the experts meet and discuss their opinions would be helpful, particularly where there is a difficult issue unresolved, having all of your experts meet and arrive at identical opinions gives an appearance of orchestrated opinions. However, having more than one expert come to the same conclusion by different routes lends credibility to the opinions.

Know and inform the expert of the applicable rules for expert testimony in your jurisdiction. In Utah, the following rules of evidence apply:

Rule 702. Testimony by experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereof in the form of an opinion or otherwise.

See State v. Rimmasch, 775 P.2d 388 (Utah 1989) and its progeny.

Rule 703. Bases of opinion testimony by experts.

The facts or data in the particular case upon which an expert bases an

NOTICE TO ALL BAR MEMBERS

Regarding Mandatory Continuing Legal Education Late Fee Increase

The Utah Supreme Court has approved a late filing fee increase from $10.00 to $50.00 in the Rules and Regulations governing mandatory continuing legal education. The purpose of the increase is to create incentive to file timely, as well as to cover the administrative costs associated with untimely filings. The change affects regulation 5-102 which would read as follows:

Regulation 5-102

In accordance with Rule 8, each attorney shall pay a filing fee of $5.00 at the time of filing the statement of compliance. Any attorney who fails to file that statement or pay the fee by December 31 of the year in which the reports are due shall be assessed a **$50.00** late fee.

The court's approval was conditioned upon a 45-day comment period before the court takes definitive action to approve the change. The comment period begins October 16, 1995.

Please direct any questions or comments to Sydnie W. Kuhre, MCLE Board

opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 704. Opinion on ultimate issues.

(a) Except as provided in subparagraph (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of facts.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

III. THE DEPOSITION OF YOUR EXPERT.

Sell your case when your opposition takes your expert's deposition unless you don't want to settle it.

Your expert must have a definitive theory and thoroughly know the facts underpinning the opinions.

An expert impresses the opposing counsel if the witness knows the facts, testifies directly, and is not argumentative and arrogant.

Occasionally, an expert may at the deposition present such important and compelling opinions that the case settles. For example, in one of my cases, the victim was working with cyanide in a gold mine and somehow he got a dose of hydrogen cyanide even though he was wearing a protective mask. Well into the case, an expert showed us how this accident happened. He demonstrated how a little saliva could dry on the mask and cause a small diaphragm to not close properly. We had learned through discovery that a plastic cover on the mask had been made for a different kind of a mask but had been sold with this particular mask because the manufacturer had some extras. The expert demonstrated the defect at his deposition. The case settled shortly thereafter.

Before the deposition, spend whatever time is necessary to make sure the expert understands the key legal phrases and concepts involved in the case, and that he is able to express his expert opinions, keeping in mind the proper legal form.

The expert will be persuasive in deposition and at trial if the expert is telling the truth; knows all of the facts, both positive and negative; knows the contentions of the opposite side; stays within the expert's own realm of expertise; and is not seen as being coached during the deposition by the attorney.

Before deposition or trial, particularly with an inexperienced expert or an expert with whom this is your first experience, conduct an informal direct examination and cross-examination. However, do not use this as an attempt to rehearse the questions and answers since they may appear staged if you do. Teach the expert to avoid the "yes/no" hypnotism that can come in a series of leading questions, but rather to answer the questions with substance.

IV. PRESENTING THE EXPERT WITNESS AT TRIAL.

Take enough time to establish the expertise of your expert even though it seems a little monotonous. Avoid stipulations that the expert is an expert. The jury needs to know about the expert's background and why she is an expert.

Have the expert educate the jury on whatever technical terminology is involved in the case and, in his opinions.

Use the expert to present demonstrative evidence and tests if they have been conducted.

Take on negative issues in your direct examination and the expert should be willing to concede points which are obviously in the opponent's favor.

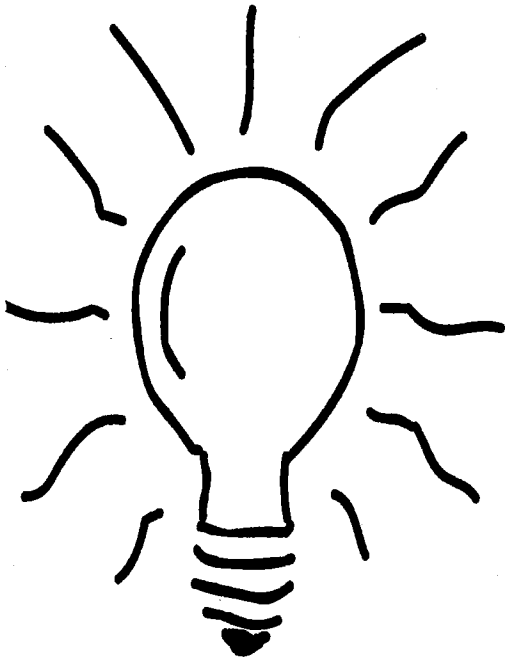
Without being patronizing, have the expert be a teacher to the jury.

Even though the rule allows an expert to give her opinion without disclosing the foundational facts, it is a good idea to give a few of the key facts in your opinion question and then have the expert expand and explain the factual underpinnings of the opinion. Remember, though, that cross examination gives your expert an opportunity to expand on the underlying facts.

If the expert is in court for any extended time before or after his testimony, see that he does not appear to be a member of your team; rather, keep him aloof.

Recently, there have been cases where lawyers have sued their experts for malpractice. Keep in mind, however, that if you are the lawyer that is involved in hiring and using the expert, you may be brought into such a lawsuit. Therefore, make sure the expert is given all the facts.

Finally, some recent decisions have held that a lawyer's letter to his expert witness is admissible in evidence. If you are going to write a letter to your expert, write it with the understanding that it may be given to the jury.



Great Idea!

Advertising in the Utah Bar Journal is a really great idea. Reasonable rates and a circulation of approximately 6,000! Call for more information.

Shelley Hutchinson
(801) 532-4949

Defense Experts: Defendant's Examination of Experts

By Harold G. Christensen

Lawyers rely too much on experts in presenting their cases. Trying a case through an expert witness is far less effective than generally believed. A judge or juror will hold more tightly to a conclusion arrived at by them from the evidence itself than to a conclusion presented to them by an expert witness. In addition, expert testimony is also attended with great risk.

There are several threshold questions that a defendant should consider before calling an expert. First, when can a defendant call an expert? Civil Procedure Rule 702 provides a broad standard for admissibility. This very broadness may encourage lawyers to feel a need for expert testimony when expert testimony is not required.

However, an expert is necessary where the establishment of the standard of care requires professional expertise. The Utah Court of Appeals dealt with this issue in *Schreiter v. Wasatch Manor,* 871 P.2d 570 (Utah App. 1994), where an apartment resident sued the owner for smoke inhalation injuries suffered when the apartment house caught fire. The defendant moved for summary judgment, contending that the plaintiff was required to present expert testimony to establish that the apartment owner was required to install a fire sprinkler system. The court of appeals held that expert testimony was not required, and stated that expert testimony is only required "where the average person has little understanding of the duties owed by particular trades or professions, as in cases involving medical doctors, architects, and engineers." 871 P.2d at 574-75.

Some defense attorneys feel a need to call an expert whenever the plaintiff calls an expert. This is unwise if the issue is a matter of common sense.

When the defendant intends to claim that the plaintiff's expert is from a scientific discipline that has no credibility, the defendant certainly would not want to put on an expert with a background in that same discipline. Instead, the defendant should put on an expert from a recognized discipline to call into question the credibility of the other expert's discipline.

HAROLD G. CHRISTENSEN served as Deputy Attorney General of the United States during the Reagan and Bush administrations, where he had responsibility for the operations of the Department of Justice and direct supervision over all civil litigation divisions. Before serving as Deputy Attorney General, Mr. Christensen was Chairman of the Board of Snow, Christensen & Martineau which he first joined in 1953 and recently rejoined as counsel to the firm.

Assuming that the decision is made to call an expert, the next step is to find the right expert. Paradoxically, the most effective witness often is the least qualified. The least qualified witness may be the most articulate, the best presenter, the best-appearing to the jury, and the most able to withstand cross-examination.

The most qualified experts from an objective standpoint often turn out to be the very worst witnesses, uncertain, overly willing to concede possibilities and too agreeable.

Therefore, in selecting an expert, make sure that the witness is not only qualified as an expert in the field, but also is able to communicate with the judge or jury, and to defend your theories under cross-examination. I have found that high-school teachers can be very effective expert witnesses because they are accustomed to explaining complex ideas at a beginning level of understanding. As major corporations have been downsizing in recent years, many very qualified people have become independent consultants. Often these consultants make effective expert witnesses.

Some business clients prefer to use their in-house experts as witnesses. Obviously, these experts have a bias, but usually they are better informed about the subject matter than independent consultants. Company experts should not necessarily be ruled out, therefore, particularly if they are able to present well to the fact finder. Using in-house experts also avoids the problem of disclosing proprietary information.

Defense attorneys need to be familiar with the rules of evidence on expert witnesses, and with the case law interpreting those rules. In particular, defense lawyers should consult the case of *Daubert v. Merrell Dow Pharmaceuticals,* 43 F.3d 1311 (9th Cir. 1995), where the Ninth Circuit in attempting to follow the Supreme Court opinion, exemplified the frustration the lower courts are having in interpreting the Supreme Court's mandate in *Daubert,* 113 S.Ct. 2786 (1993). Although there is a diversity of views on the meaning of *Daubert,* my own view is that it is intended to permit experts to testify when they have a minority position. That is, the experts may testify where their view on the science does not represent the beliefs of a majority

of the experts in the field, but nevertheless is based on credible minority support.

The examination of expert witnesses is probably easier than any other form of witness examination, particularly if the expert is experienced, skilled and articulate. Although the rules have been liberalized and no longer require a step-by-step review of the expert's qualifications and activities, I believe that careful questioning is very helpful and persuasive.

Direct examination of an expert should begin with the expert's qualifications, even if opposing counsel is willing to stipulate that the witness is an expert. The factfinder should next hear about the data that the expert relied on in support of the opinion to be expressed although this is not required. After that foundation is laid, the expert may be asked for the opinion, and then asked to explain how the data supports the opinion and does not support the contrary opinion that the plaintiff's expert already has expressed.

It is helpful then to ask the witness to testify about any tests or other efforts used to verify the opinion offered. Finally, direct examination should end with a showing that the expert is not biased for either side. It helps, for example, that the witness testifies in both plaintiff's and defendant's cases, and that the witness does not make his or her living solely from acting as an expert witness. It is good if the expert actually has a real job.

Demonstrations and experiments can be very effective if done properly. Video presentations are best. A demonstration in open court in front of the jury can be devastating when it fails, as it occasionally does. As an example of how a live demonstration can backfire, I would refer you to the O. J. Simpson case, where the prosecution attempted an in-court demonstration to show that the "bloody glove" fit O. J. Simpson's right hand. It appeared that the glove was too small. This may have had a devastating impact on the case.

A video presentation avoids surprise. Moreover, jurors are accustomed to watching television and give video presentations great credibility.

The cross examination of the plaintiff's expert witness could follow the same form as the direct examination of the defendant's expert witness. However, that broad-based assault is rarely effective. It is better on cross examination to focus on particular areas and ask particular questions in such a form that you can be reasonably assured of receiving an affirmative response. The questions are not nearly as important as are repeated affirmative responses. To the jury, repeated affirmative responses indicate a good cross examination. It can make the plaintiff's expert appear to be making far more concessions than he actually is.

It is not entirely true that cross examination is the greatest vehicle for ascertaining the truth. Dishonest expert witnesses often are the hardest to cross examine and can frustrate the search for truth.

"It is better on cross examination to focus on particular areas and ask particular questions in such a form that you can be reasonably assured of receiving an affirmative response."

Many experts also tend to give speeches in response to questions on cross examination. When this happens, it may be helpful to politely say to the witness "That was not my question. Would you kindly answer my question which I will put to you again. And then after you have answered my question, you may explain your answer if you wish to. Would that be fair?" The witness will say "Yes." After the question is then put to the witness, the witness usually gives only the answer without the explanation. This works better than arguing with the witness or asking the judge to chastise the witness.

The most effective way to present a case to the factfinder is to present an opening statement that argues itself, and to then present the witnesses in a sequential order that also argues for the result that you are seeking. That proof should then be followed by a final argument that reinforces the conclusion that already has been reached by the judge or jury. Presenting the case in this manner is more forceful than having an expert witness argue the case for you.

LAWYERS:
YOU BE
THE JUDGE.

Choosing professional liability insurance requires a judicial mind.

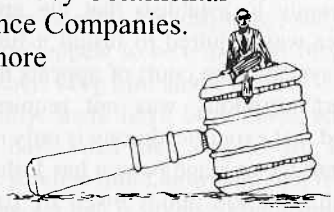
As insurance administrator for the *Lawyer's Protector Plan®*, we make the decision easy because we offer extraordinary coverage.

The Lawyer's Protector Plan is underwritten by Continental Casualty Company, one of the CNA Insurance Companies.

We can show precedent, too. More and more attorneys throughout the nation are siding with the *Lawyer's Protector Plan*.

Your peers have made a good decision.

Now you be the judge.



Sedgwick

Lawyer's Protector Plan

Phone SEDGWICK of IDAHO

800-523-9345 (Idaho)

800-635-6821 (Regional)

CNA
For All the Commitments You Make®

The Lawyer's Protector Plan® is a registered service mark of Poe & Brown, Inc., Tampa, FL. CNA is a registered service mark of the CNA Financial Corporation, CNA Plaza, Chicago, IL.

Plaintiff's Closing Statement

By Richard W. Giauque

The shorter the trial, the more important closing argument. Closing argument is less important in a longer trial because the jurors' minds have often been made up for some time about you, your case, and your witnesses. Closing argument confirms in the minds of jurors the general impression the evidence has already made on them. Literature on jury trials confirms that most jurors make decisions early about their verdict. Indeed, 80 to 90 percent make up their minds during or immediately after opening statements. *See* D. Vinson, "Juror Psychology and Antitrust Trial Strategy," 55 Antitrust L.J. 591 (1986). Because of this, counsel's argument should give the jurors reasons for their opinions in language that they understand and can repeat to convince other jurors. Jurors have to reach agreement to reach a verdict. Hung juries are relatively rare. Therefore, the purpose of closing argument is to give your allies on the jury the "bullets" to argue your cause in the jury room.

Jurors make decisions early based upon, and in conformity with, what they already believe. Try to use their backgrounds, knowledge and beliefs to filter and organize what you want them to remember from your presentation. To help them remember the things you want them to remember always stress the simple, never the complex. Try to isolate the three or four most important things to your case, so that if the jury forgets everything else, they will remember and use in their deliberation those points that can lead them to a conclusion in your favor. In deciding upon themes which you will use, reference to model jury instructions can be helpful, particularly with the knowledge that, at the end of the trial, the fact that a judge uses the same language that you have used in trying your case, and in your closing argument, can have a powerful effect on the jurors.

Above all, attempt to persuade the jury to identify with your client. The following

RICHARD W. GIAUQUE is President and senior partner in the firm of Giauque, Crockett, Bendinger & Peterson, recognized as one of the top 20 specialty trial firms in the nation for its work in antitrust and securities litigation. He has tried more than 50 major cases in various courts in the United States, including antitrust, securities fraud, wrongful death, products liability, contract actions, class action litigation and intellectual property. He has recovered more than $140 million for his plaintiff clients. His practice is also balanced with a substantial amount of defense work in complex commercial matters.

comes from a summation in one of my recent trials:

> If you were in the plaintiff's position, those are the very questions you would have asked. And you would have walked away feeling warm and comforted by the assurances of the defendant. And if the defendant hadn't made those promises to you to protect your interest, you would have done the same thing the plaintiff did. Despite the fact that he had spent a lot of time with that company, he was starting to question whether they were looking after their own interest, their own economic interest and willing to sacrifice his. He confronted the defendant's president, who assured him that wasn't the case.

In concluding, this same personalized theme was repeated.

> If you were in the plaintiff's position and the defendants gave you that memorandum and it said you were going to get one thing, and then later claimed that they were paying you on a basis contrary to their own memorandum, would you get unhappy? Would you get upset? Might you get an attorney and assert your rights? I guarantee if you did, ladies and gentlemen, the defendants would say the same thing about you they're saying about the plaintiff: He's "greedy, scheming and ungrateful."

This argument appeals to the juror's empathy and common sense, and deflects the defendants' appeal to many juror's native prejudice against a party initiating a civil suit. In helping the jury identify with your client, it is often useful to personalize the plaintiff and the plaintiff's experiences. This process can be facilitated by asking the jury rhetorical questions which imaginatively draw them into your case.

Use exhibits and demonstrative aids in your closing. These aids should be large enough for the jury to see and should be as simple as possible. Excess visual information will only detract from your argument. Using photographs of witnesses who have been called, along with a few words on a chart for emphasis can be very effective. An overhead projector is an effective tool, as are some of the newer computer and laser disc techniques. Use a mix of visuals. The importance of using visual aids with your oral presentation cannot be overstated. We learn 10 percent from what we hear and 85 percent from what we see. We retain

10 percent of what we read, 20 percent of what we hear, 30 percent of what we see, and 50 percent of what we both see and hear. H. Stern, *Trying Cases to Win* 121 (1991).

Establish themes in your opening argument, ring changes on those same themes during the course of trial, and bring home those themes in your closing. Effective jury technique involves telling the jury what you are going to do, then doing it, and then telling them you did it. Therefore, in closing argument, counsel should focus on the same central themes used in opening argument, using events that happened during the trial to buttress the argument. Show jurors exhibits, read transcripts or use actual witness statements from the transcripts, if available. Stress that you proved what you said you would prove in opening statement. Stress that your opponent cannot deny certain facts that you were able to prove.

In a recent case over disputed pension benefits, I stressed in closing the undisputed facts that the plaintiff had been instrumental in the success of the company which now was attempting to shortchange him. The plaintiff had given up a highly profitable job offer in reliance on the defendant's representations that his pension would be secure. These themes were established in our opening, emphasized during trial, and featured in closing. If there is an exhibit that further substantiates a thematic point, tell the jury about it and even better, show the jury.

In many longer trials these days, jurors are allowed to take notes throughout the trial. It is important that your strong points have been clearly made, and noted by the jurors.

With respect to focusing the themes of the case, the plaintiff is given a distinct advantage. Initially, the plaintiff is allowed to go first, and thus, may establish the dominant tone, and inflection of the case. In closing, the plaintiff's counsel has the last word (apart from the judge) before the jury retires, and, thus, a chance to leave the final impression guiding the jurors during deliberation. Here, a strong appeal to themes which have already been engraved in the jurors' memories can determine the outcome of a trial.

In rebuttal, avoid the temptation to answer questions that were posed by your opponent in his argument. This is fighting the battle on your opponent's turf. Your refrain should not be dictated by the melody sung by the defendant. Your closing argument should arrive as a natural, inevitable close to the course of your arguments, and the evidence you have presented during trial.

An attorney is given considerably more latitude in closing, than in an opening statement, where the emphasis is on "what the evidence will show," rather than your interpretation of that evidence. In closing, you may fully argue the case from your client's perspective. You should refer to the evidence in the case, as well as inferences and deductions you believe the jury should make from the evidence. But be careful, when attacking the credibility of the witness, do not assert your own opinion as to credibility, or to imply that you are substituting your opinions for those of the jury.

Finally, your sincerity and commitment are just as important in the closing as in the opening statement. If the jury believes that you have "shaded" the facts, or used "a lawyer's trick" to deceive them, their antagonism toward you may counterbalance any sympathy you have been able to create on behalf of your client.

"Establish themes in your opening argument, ring changes on those same themes during the course of trial, and bring home those themes in your closing."

As plaintiff's counsel, with the "last word," don't be bashful about the damage claim you are making. Spell out clearly what you want for your client. Too often, plaintiff's counsel tread lightly in this area, and all too often they pay a price for doing so. If the defense has emphasized how "speculative" your damage numbers are, point out that it is not the plaintiff's duty, in a commercial case for instance, to prove damages with "mathematical certainty," and that, as a matter of law, the risk of uncertainty in measuring damages falls on the wrongdoer.

Be sure to thank the jurors for their time, patience and public service. It may be effective to emphasize the importance of their function, and to touch upon the broader ends, particularly those that will be served by a verdict for the plaintiff. Your commitment to the case can be conveyed by emphasizing the ways in which a verdict in your favor comports with broader notions of fair play and justice. These should be discussed in simple, forceful language using specific facts of the case and applicable law. As in opening statement, begin strong and end strong. Avoid technical language or jargon. Speak in the common parlance of the jury.

EXEMPLAR ARGUMENT

Very recently, I had the opportunity to hear a dynamic closing argument given by one of my co-counsel, Richard Alan Arnold of Miami, a very effective antitrust trial lawyer. The transcript of portions of his closing argument, along with portions of my rebuttal argument, both on behalf of the plaintiff, show how both of us continued to develop a common theme during each phase of the closing argument.

MR. ARNOLD: Good morning.

After five weeks of testimony, we have demonstrated that there was a conscious commitment to a common scheme to restrain advertising in the infant formula market in the United States. That conscious commitment to a common scheme is a conspiracy in restraint of trade.

The effects of that are to keep infant formula shrouded in a medical mystery and to prevent effective competition from consumer-oriented companies and to shield anti-competitive pricing structures that cause overpayment through lack of price competition for infant formula products.

Now, I'm going to go through the evidence as we presented it concerning this conscious commitment to a common scheme. The conspiracy is a group of interrelated activities. It's not the facts that are all put in a box, each in a single box, but these are facts that interrelate.

You can't look at each fact and then wipe the slate clean and then go look at the next fact and wipe the slate clean. You look at them, how they interrelate, and how they — when you put them all together, they lead to the inevitable clear conclusion that there was a conscious commitment to a common scheme to control advertising in the infant formula market in the United States.

Now, the best analogy I can think of on looking at how these facts interrelate is — you take a bowl of vegetable soup. Vegetable soup has ingredients in it: carrots and onions, potatoes and broth. It all turns

out to be soup.

Now, a conspiracy is like that. It's an ingredient here and an ingredient there, but when you look at the whole overall effect, you see this is a conspiracy, just as the recipe for vegetable soup leads to vegetable soup.

Now, if you serve vegetable soup to someone and they were trying to convince you that this, in fact, is not vegetable soup, they would probably do it by taking a spoon and reaching into the soup and pulling out a carrot and saying, "This isn't soup; it's a carrot," and setting it on the side. And then they reach in again and say, "This isn't soup; it's an onion," and set that out on the side and go through the entire ingredients and then look in the bowl and say, "This isn't soup; it's broth. There's no vegetable soup here."

That's the danger if you take a conspiracy and start taking it apart piece by piece. These facts all completely interrelate, and when they are put together and judged as to history and intent, it will be clear that there was a conscious commitment to a common scheme to control advertising in the infant formula market.

* * * *

We're trying to compete in a marketplace where there is 90 percent of the market share held by two companies. We're trying to come into the marketplace with a product that is designed to improve the position of mothers. It gives them an opportunity to buy formula at a time when they're weaning their babies, a formula that you'll see later on in the studies tastes better, a formula that's cheaper and a formula that is every bit as good nutritionally as products that were on the marketplace.

We felt this product would be in a position to break through that stranglehold that these companies had on the infant formula market that they achieved through this control of the medical detailing system.

[Mr. Arnold then reviewed the evidence tending to show improper collaboration between the two companies.]

Once again, this is all designed, it's a coordinated effort, a series of meetings together. Don't wipe the slate clean after each meeting and say, "Well, gee, they just got a letter here, that's all; they have nothing else going on." This is a letter that comes after a series of meetings, every one of which was designed to stop Carnation's advertising.

* * * *

What we've suggested is that when a medical society and a group of drug companies get together and put a stranglehold on a business, that the American free enterprise [system] allows people to come in and break through that. That's how consumers benefit. They get that opportunity. And the antitrust laws are the only barrier against these kinds of conduct. And the antitrust laws are designed to protect consumers. And the only people that can put the life blood into the antitrust laws are the people, the jurors in the jury system, and that is where the burden falls to you.

Now I appreciate very much your attention. And I'm sorry that I don't have any more time, but I have talked too much, but I thank you. And in a few minutes or this afternoon, Mr. Giauque will have an opportunity to get back up and talk to you about a few more things.

But we need to take care of the enforcement of the antitrust laws. The only way it can be done is for a company like Carnation to stand up, come to court and put its faith on the line with a jury of citizens that can put life into the antitrust laws.

Thank you.

THE COURT: All right. I thank you, Counsel.

* * * *

THE COURT: Mr. Giauque, is there rebuttal?

MR. GIAUQUE: Yes, your Honor.

We have some time constraints now, and I would like to address directly only three issues because of those restraints, which are the claims of the A.A.P. and [Company A] through their counsel, that there was no conspiracy or combination; that is, that they acted unilaterally and independent.

Secondly, the marketing mistakes; that is, Carnation was not hurt or killed here; that it committed suicide.

And finally, the alleged weaknesses of plaintiff's damage claims.

I listened carefully to the arguments of defense counsel. And it is as if the defendants had nothing whatever to do with Carnation's difficulties in entering this market. There is one thing that's expectable in a case like this; and, that is, that people who get together collectively to impair somebody else's ability to compete deny it, and they usually attack the party who has been the victim.

But there is something very unusual in this case. You don't find conspirators in a room and somebody there with a video camera. But in this case, there is direct, not circumstantial, evidence of numerous meetings.

[After reviewing evidence supporting Carnation's position, including three exhibits, the rebuttal argument closed as follows.]

You will be instructed that the focus of concern in an antitrust case is whether the practice or conduct being challenged has restrained trade. Under the antitrust laws, a practice that restrains trade cannot be justified by showing that practice serves some other social goal, such as the goal of advancing public health. This whole breastfeeding smokescreen is not a defense as a matter of law, ladies and gentlemen.

With respect to damages, you will hear instructions on the law that the risk of uncertainty falls upon the wrongdoer; that the plaintiff in an antitrust case is not required to prove its damages with mathematical precision or certainty. All we can do is make a reasonable estimate of damages, and that's all we are required to do.

We're attempting to calculate the performance of Carnation as if they had operated in the world quite different from that facing them; that is, if the people had not been engaged in collective activities to interfere with their entry.

* * * *

We ask you, ladies and gentlemen, to render a verdict in favor of our client, Carnation, to find that the defendants reached an understanding collectively that restricted the way infant formula is marketed in the United States, and that they collectively interfered with Carnation's attempt to enter this market.

And we ask you to employ your collective common sense and return a verdict for our client in this case.

Ladies and gentlemen, there is an old proverb where a young boy is holding a small bird in his hand and he's trying to fool an elderly man, and he says, "Is the bird dead or is it alive?" And the wise old man knows that if he says alive, the boy will squeeze the bird dead; if he says it's dead, he'll release it. So the old man says, "I don't know. I only know that it's in your hands."

This case is in your hands in the same sense. Release competition to freedom here. Don't squeeze it dead. Thank you ladies and gentlemen.

Defendant's Closing Statement

By David K. Watkiss

POINT OF VIEW

The following initial comments are set forth to let you know what I have come to believe after representing both plaintiffs and defendants for some 45 years and the questionable basis of my views on a "Defendant's Closing Statement":

(a) The trial is a four-phase, educational process with the voir dire, opening statements, evidence presentation, and finally the closing statements.

(b) A good defense counsel is a good teacher, not a preacher.

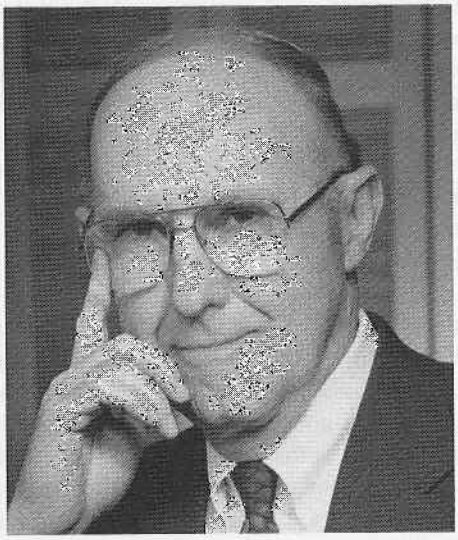
(c) For a defense counsel, the art of persuasion is indeed a gentle art and counsel must appear fair-minded and compassionate. While we have some colorful and flamboyant trial lawyers for the plaintiff, they are rarely found for the defense.

(d) The good defense lawyer influences a jury best with the careful preparation and presentation of the case, and by establishing the impression that the defendant and counsel are honest, fair and responsible.

(e) A good closing statement is a clear, credible and persuasive explanation of the defendant's case. A jury that doesn't understand your case can't return a verdict in your favor.

INTRODUCTION

There are differing views on the importance of a closing statement. Some trial lawyers believe that the summation is the keystone or crown of the case on which all other associated parts depend for maximum effectiveness. This is reflected in a recent book by a well-known trial lawyer entitled "How to Argue and Win Every Time." Others think that a case is won or lost when a jury is selected. However, the conventional wisdom is that most jurors make up their minds by the end of the opening statements and then pick out the evidence that supports their position. I personally believe that the best a defense counsel can do is select a jury that might have some tolerance for the defendant's case and that it will be won or lost during the proof and not by jury selection, the opening statement or the closing statement. As the witnesses speak and the evidence is presented, jurors' attitudes are being formed, they are judging the witnesses, believing or disbelieving, and taking sides.



DAVID K. WATKISS has practiced as a trial lawyer for 45 years, representing both plaintiffs and defendants in varied areas of law, including antitrust, aviation, bankruptcy, construction, corporate, criminal, energy, malpractice, mining, professional liability and products liability. He is a Fellow in the American College of Trial Lawyers, the International Academy of Trial Lawyers and the International Society of Barristers. He is also a member of the Utah, District of Columbia, American and Federal Energy Bar Associations.

What then is your function and objective in your closing statement if it is unlikely that you can persuade anyone who has formed a judgment against you? Your persuasive summation of your client's position through the application of logic and reason to the evidence can give jurors a basis for a reasoned discussion of the issues and your friends on the jury logical arguments to use in the jury room which hopefully will have some positive effect on the jurors who are not friendly. That, I submit, is all a defense counsel can reasonably expect to do in a closing statement.

COMMON DENOMINATORS

There is no other phase of a trial where a lawyer's technique is more personalized than in a closing statement. However, I believe most will agree that there are certain common denominators essential to all good defense closing statements:

(a) First and most important is sincerity. Be yourself, serious and courteous, emphasizing your main points with feeling in a natural conversational delivery, personalizing your client and your case. Never refer to your client as the defendant and make sure your client is present throughout the trial, dressed appropriately.

(b) Fairness and credibility are also important. Don't overstate your case or underestimate the intelligence of the jury. Many trial lawyers inform the jury that they will not intentionally misstate the evidence or knowingly mislead or confuse. Their actions will speak louder than their words.

(c) Courts impose time limits on argument so your summation must have a tight structure, focusing on the key facts and the law which has established the central theme of your case with jury instructions the basis of the theme. This theme was outlined in the opening statement and developed throughout the trial by using words and concepts from the court's anticipated instructions in the questioning of witnesses.

(d) Discuss liability instructions and instructions regarding defenses with evidence examples. Key instructions should be emphasized with reasons why such instructions are favorable to your client.[1] In a negligence case, make clear that the slightest degree of fault does not amount to negligence for the test is not what a perfect person would do but what an average, ordinary

person would do. All the law requires is that the defendant act as a reasonable, prudent person. Carefully explain special verdicts so that the jury understands each step, its consequences and the answers you want from the evidence.

(e) Do not wait until closing argument to deal with prejudicial matters. First impressions are hard to overcome and prejudicial facts or circumstances, particularly immaterial ones that should not affect the jury's judgment, should be handled early in the case. A Motion in Limine is one way to handle such a potential problem and another is to present the fact in the voir dire and obtain some positive commitment from the jury which can be recalled in summation.

(f) Do not memorize or read a closing statement. An outline or checklist may be useful, but defense counsel should not be committed to precise language. Summation must be spontaneous, for nothing bores a jury more than to have counsel read from trial notes or shuffle through papers in the middle of an argument.

RIGHTS AND WRONGS

The right to argument has been recognized as an essential function of trial counsel and one to which trial counsel should be afforded broad latitude in referring to the evidence presented, explaining its meaning and arguing its significance to counsel's theory of the case.[2] However, it is clear that the court has the discretionary power to reasonably control and limit closing argument.[3]

Unfortunately, some courts today unduly restrict closing summation, failing to recognize that it is necessary to tie together all of the preceding phases of communication and persuasion, particularly in close or technical cases.

While counsel should have broad latitude in argument subject to the court's reasonable control, there are certain ethical improprieties which counsel should not commit to avoid the risk of reversible error. Some of these are imputing improper behavior of other counsel; appealing to racial, national or religious prejudice; or appeals based on the wealth or poverty of one of the parties. Counsel also cannot state personal knowledge of disputed facts or unsupported inferences, indicate that a jury award is exempt from taxation or inject the existence or non-existence of insurance. While the credibility of witnesses is a proper subject for the closing statement, a lawyer may not state a personal opinion as to the credibility or motives of a witness.

PAIN AND SUFFERING

Many lawyers find it difficult to argue pain and suffering. How defense counsel handles this matter is determined in large part by the way the plaintiff presents and argues it. Unless the plaintiff overstates or misrepresents the facts of plaintiff's pain and injury, there really is not much for the defense to do. While a defense counsel must exhibit some sympathy and compassion, there is little he or she can say when facing true pain and suffering and only hope that the jurors will not be swayed by sympathy and will exhibit a reasonable tolerance for someone else's pain and trouble.

"The jury has a restricted tolerance for argument. For this reason, closing statements should be as brief as possible."

Defense counsel in a serious injury case must address the natural sympathy that a jury will have for the plaintiff by suggesting that while anyone could be expected to have sympathy for the plaintiff, it is their duty as jurors to lay aside such feelings and under the facts of this case, return a verdict for the defense. This challenges the panel to be courageous and can be effective. Plaintiff's counsel will, however, counter that sympathy is not the basis for plaintiff's claim and that he or she is in court for full and just compensation, not sympathy.

REBUTTING PLAINTIFF'S OPENING

It is to be expected that plaintiff's counsel will make a strong opening argument and try to put defense counsel in a defensive posture requiring the rebuttal of plaintiff's points and not the assertion of the defendant's best points. Some plaintiff's counsel believe it to be effective to challenge defense counsel to answer a number of questions. While the response required to the plaintiff's argument cannot be planned in advance, it can be anticipated. Defense counsel should not attempt to answer every argument made by the plaintiff but should focus on the most telling points and try to turn some of these points into questions that plaintiff's counsel must respond to in his or her reply. While some of plaintiff's arguments or questions may need to be addressed, defense counsel as an effective advocate must use a good part of the jury's span of attention clearly establishing the strong points of the defense firmly in their minds.

Frequently, certain key sections of testimony are critical and should be transcribed prior to closing so that this actual testimony can be read exactly as it was said on the witness stand. You can also graphically demonstrate your points to the jury by using trial exhibits. The jurors' attention should be focused upon the real issues in the case while at the same time removing from their consideration facts on which there is no conflict. Defense counsel must remain flexible so that he or she can rebut the plaintiff's arguments and devote most of the closing statement to simplifying the issues and evidence and reinforcing the case theme of the defense.

SHORT AND SIMPLE

The jury has a restricted tolerance for argument. For this reason, closing statements should be as brief as possible. Some think an effective conclusion is thanking the jury for their time, patience and finally again reminding them of the responsibility they have in rendering a just judgment. But to achieve such a result, you must have presented your case as a simple, straight-forward story supported with a few strong, understandable and persuasive arguments. Again, a jury that doesn't understand your case is unlikely to return a verdict in your favor. A defendant's closing statement has been successful if the jurors are left with the conviction that both defendant and counsel have been completely fair and forthright. If they are convinced of the integrity and sincerity of your cause, it will receive serious consideration.

[1]Fed. R. Civ. P. 51 requires the federal court to inform the counsel of its proposed action on the requested instructions prior to argument to the jury. This is intended to permit counsel to argue intelligently based upon the evidence, within the applicable law as the court will give it to the jury. Arguments in Utah state courts are made after the court instructs the jury and informs counsel of its proposed course of action upon requested instructions prior to instructing the jury. *See* Utah R. Civ. P. 51.

[2]Joseph v. W.H. Groves Latter Day Saints Hosp., 7 Utah 2d 39, 318 P.2d 330 (1957), appeal after remand, 10 Utah 2d 94, 348 P.2d 935.

[3]Harmon v. Sprouse-Reitz Co., 21 Utah 2d 361, 445 P.2d 773 (1968).

Post-Trial Motions

By H. James Clegg

For most of us, post-trial motion practice is far less exciting than the trial itself. Usually the movant is the losing party at trial and faces an uphill battle to snatch victory, or at least a second chance, from the jaws of defeat. In addition to the presumptions favoring the jury verdict, one must battle the inertia of the trial court's mind; in their hearts trial judges don't really want to retry cases any more than you want to read a novel twice. In the first place, they rationalize that a litigant is not entitled to a perfect trial, only a fair one. Secondly, their calendars are already packed with new cases for trial and don't allow a lot of room for re-trials. Lastly, as with summary judgment motions, they know that it is hard to sustain an award of new trial or JNOV and appellate courts are likely to question their sanity for having tolerated such foolishness and making *them* work.

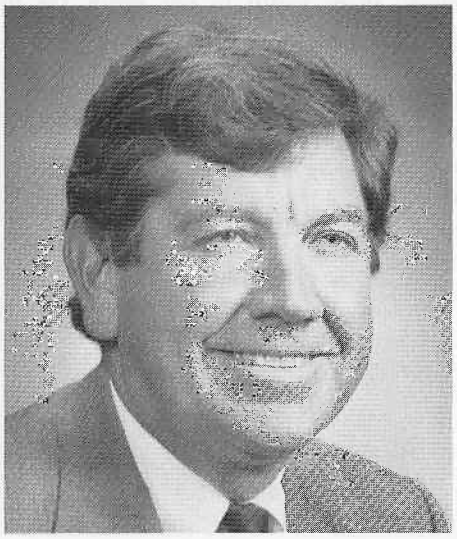
Thus, the movant generally has hat-in-hand and heart-in-throat when he or she argues a post-trial motion.

RULE 54(D)(2) MOTION FOR AWARD OF ATTORNEYS' FEES

The exception is when the successful party moves for award of attorneys' fees. Be aware that the federal rule *requires* that attorneys' fees issues be handled by post-trial motion *unless* substantive law permits their resolution at trial. Such a motion *must* be filed within fourteen days after entry of judgment and state the amount of fees claimed and the fee basis. While the losing party may challenge the right to recover fees or the amount to be awarded, local rule can permit dispensing with extensive evidentiary hearings; further, the issue may be referred to a magistrate or special master for resolution.

Although the state court rule does not contain similar language, the practice is similar in streamlining the evidence.

The wise lawyer expressly reserves fee issues by jury instruction so there is no question that the jury did not include them in its verdict.



H. JAMES CLEGG, a past president of the Utah State Bar and the Salt Lake County Bar Association, is also a Fellow of the American College of Trial Lawyers where he served as State Chair. His practice with the firm of Snow, Christensen & Martineau concentrates on product liability, environmental torts, drug and medical device liability and insurance defense.

RULE 59 NEW TRIAL, AMENDMENT OF JUDGMENT

The wording of post-trial motion rules differs between the state and federal versions. While I have not reviewed the history of the divergence, the practitioner should carefully review the pertinent rule before filing a post-trial motion. Note that Rule 59, U.R.C.P., is much more detailed than the federal rule and gives only the following grounds for new trial or amendment of judgment:[1]

1. IRREGULARITY IN PROCEEDINGS BY WHICH A PARTY WAS PREVENTED FROM HAVING A FAIR TRIAL.

2. JURY MISCONDUCT: COERCION OF JUROR, RESORT TO CHANCE, BRIBERY.

Jury misconduct may be proven by affidavit of any one juror, but opposing affidavits may also be received. Any juror who gives an affidavit is subject to oral cross-examination or examination by the court.

A jury's verdict may be impeached only by showing of bribery or resort to chance. Misunderstanding of the law, confusion or the disregarding of facts or law are insufficient, even if proven, to undermine the jury process.[2]

In state courts, a quotient verdict is impeachable as one based on chance.[3] Federal courts do not so hold. Chief Judge Winder, for one, refuses to give the state court instruction against quotient verdicts and I had one case where the jury broke an 11-1 deadlock by that device. I suspect that this is one reason there are so few hung juries in federal civil trials despite the requirement that all twelve jurors be unanimous in their verdict: They unanimously agree in advance that the quotient will be the verdict of each of them.

3. ACCIDENT OR SURPRISE NOT AVOIDABLE BY ORDINARY PRUDENCE.

Failure to object promptly constitutes a waiver.[4] If the evidence constituting the "surprise" could have been obtained easily through discovery, a motion does not lie.[5] Surprise may not be asserted for the first time on appeal.[6]

4. NEWLY DISCOVERED EVIDENCE WHICH WAS NOT DISCOVERABLE DESPITE EXERCISE OF ORDINARY DILIGENCE.

5. EXCESSIVE OR INADEQUATE DAMAGES APPEARING TO HAVE BEEN GIVEN THROUGH PASSION OR

PREJUDICE.

The granting of additur or remittitur is proper, giving the other party the option of a new trial.[7]

The amount of damages is ordinarily a jury question unless so high or low as to evidence that it was awarded as a result of misunderstanding, passion or prejudice.[8]

Crookston v. Fire Ins. Exch., 817 P.2d 789 (1991), established guidelines for the relationship of actual to punitive damages and requires the trial judge to make detailed and reasoned articulation for concluding that an award outside the presumptive bounds wasn't excessive.

6. INSUFFICIENCY OF EVIDENCE TO JUSTIFY THE RESULT.

The trial court should review the evidence and all reasonable inferences in a light favorable to the jury's verdict.[9] The same standard prevails for denial of motion for new trial or for JNOV.[10]

The trial court may modify an unjustifiable verdict and the party adversely affected may either accept the modification or take a new trial; he cannot complain that he has been deprived of his right to jury trial if the court so rules.[11]

A motion to alter or amend the judgment must be filed within 10 days.

7. ERROR IN LAW.

The federal rules do not enumerate the grounds for granting new trials or JNOVs but rely upon common law grounds.

A trial court may grant a new trial on its own motion but must do so, if at all, within 10 days after the entry of judgment.

STANDARD FOR REVERSAL OF AWARD OF NEW TRIAL

While folklore holds that the granting of a new trial is totally discretionary, that is not quite true. There must be at least substantial evidence justifying the movant's position.[12] This issue may be reviewed by interlocutory appeal provided an appellate court is willing to accept it.

Granting a new trial is *largely* a matter of discretion and reversal requires finding of abuse of discretion.[13]

An untimely motion for new trial must be denied and does not toll the running of the time for appeal.[14]

MOTION FOR RECONSIDERATION

This is not a proper motion and does not toll the running of appeal time in state courts.[15] Judge Benson and Senior Judge Jenkins, and perhaps other federal trial judges in this district, follow this same rule.

RULE 50(B) MOTION FOR JUDGMENT JNOV

Note the wide variance in language between the state and federal versions of this rule. For example, in 1991 the federal rules abandoned the words "directed verdict" in favor of "judgment as a matter of law" whether granted before or after the return of the verdict.

[To make the distinction between pre- and post-verdict motions, I will use the term "directed verdict" here.]

It is essential to remember that a motion for directed verdict *must* be made at the end of the opponent's evidence or the right to move for JNOV is forfeited.[16] The only exception occurs when there is plain error shown in the record and the failure to grant a JNOV would create a miscarriage of justice.[17]

In the unusual situation where a JNOV is granted, the trial court should also indicate whether it would grant a new trial if the JNOV ruling is reversed.

As a strategic matter, do you want a new trial if you can't get or hold onto a JNOV? In my quotient verdict case, the jury verdict, while unexpected and distasteful, was for a low amount and the client permitted me to request only JNOV, not a new trial.

STANDARD FOR APPELLATE REVIEW

The appeal court uses the same standard as does the trial court in reviewing post-trial motions: the evidence is examined in the light most favorable to the losing party; if there is a reasonable basis in the evidence and its inferences to support the verdict, the JNOV cannot be sustained.[18] Stated another way, there must be no substantial evidence to support the verdict.[19]

Stated yet another way, a JNOV is sustainable only if reasonable minds could not reach a different conclusion.[20] The trial court may not weigh or determine the preponderance of the evidence.[21]

RULE 62 MOTION FOR STAY OF ENFORCEMENT PROCEEDINGS

The federal rule and the state rule generally track each other, except that the federal rule does not, in most cases, permit a judgment to be enforced until 10 days after it is entered. Neither allows immediate enforcement against state or federal governments.

THE *SINE QUA NON*

Despite the many technical issues that could be claimed as error and which would delight Philadelphia theorists and bar exam writers, it is usually imperative that the trial judge be convinced that the verdict was simply not fair or it will not be set aside. The moving party's attorney can argue technical defects until the cows come home but, unless he or she convinces the trial judge that the verdict was next to unconscionable, it will stand. The order of importance is to attack its fairness and then find a rule to support relief rather than woodenly citing rules and cases.

Timing may be important. If your argument turns on evidence and the judge appears surprised or disturbed when the verdict is read, make your motion orally as soon as the jury leaves the courtroom. It will never sound better than before the judge starts rationalizing that the result isn't really *that* bad.

Prayer may also help; it's never been proven to hurt. It is probably best to pray before you reach the rostrum or your silence may be construed as either a focal seizure or lack of anything meaningful to say. Neither is helpful to your cause.

And good luck!

[1] *Tangaro v. Marrero*, 373 P.2d 390 (1962); *Moon Lake Elec. Assn v. Ultrasystems W. Constructors, Inc.*, 767 P.2d 125 (Utah Ct. App. 1988); *Schlinder v. Schlinder*, 776 P.2d 84 (Utah Ct. App. 1989).

[2] *Groen v. Tri-O, Inc.*, 667 P.2d 598 (1983).

[3] *Day v. Panos*, 676 P.2d 403 (1984).

[4] *Chournos v. D'Agnillo*, 642 P.2d 710 (1982); *Jensen v. Thomas*, 570 P.2d 695 (1977).

[5] *Anderson v. Bradley*, 590 P.2d 339 (1979).

[6] *Meyer v. Bartholomew*, 590 P.2d 558 (1984).

[7] *Utah State Road Comm'n v. Johnson*, 550 P.2d 216 (1976).

[8] *Paul v. Kirkendall*, 261 P.2d 670 (1853).

[9] *Deats v. Commercial Security Bank*, 746 P.2d 1191 (Utah Ct. App. 1987).

[10] *Hansen v. Stewart*, 761 P.2d 14 (1988).

[11] *Bodon v. Suhrmann*, 327 P.2d 826 (1958).

[12] *Wellman v. Noble*, 366 P.2d 701 (1961); *Randle v. Allen*, 862 P.2d 1329 (1993).

[13] "Clear abuse": *Jensen v. Thomas, supra; Lembach v. Cox*, 639 P.2d 197 (1981); *Pusey v. Pusey*, 728 P.2d 117 (1986); "manifest abuse": *Schmidt v. IHC*, 635 P.2d 99 (1981); *Haslam v. Paulsen*, 389 P.2d 736 (1964); *Page v. Utah Home Fire Ins. Co.*, 391 P.2d 290 (1964).

[14] *Burgers v. Maiben*, 652 P.2d 1320 (1982).

[15] *Drury v. Lunceford*, 415 P.2d 662 (1966).

[16] *Pollesche v. Transamerican Ins. Co.*, 497 P.2d 236 (1972).

[17] *Henderson v. Meyer*, 533 P.2d 290 (1975).

[18] *Hansen v. Stewart*, 761 P.2d 14 (1988).

[19] *Koer v. Mayfair Mkts.*, 431 P.2d 566 (1967).

[20] *Anderson v. Gribble*, 513 P.2d 432 (1973).

[21] *Finlayson v. Brady*, 240 P.2d 491 (1952).

Notice of Petition for Reinstatement

Gary L. Blatter has filed a Petition for Reinstatement to Practice Law with the Fourth Judicial District Court, Civil No. 940400036. Mr. Blatter was suspended from the practice of law on October 21, 1994, for violating Rule 8.4(b), Misconduct, of the Rules of Professional Conduct.

In accordance with Rule 25 of the Rules of Lawyer Discipline and Disability individuals desiring to support or oppose this Petition may do so within 30 days of the date of the publication of this edition of the Bar Journal by filing a Notice of Support or Opposition with the Fourth Judicial District Court. It is also requested that a copy be sent to the Office of Attorney Discipline 645 South 200 East, Salt Lake City, UT 84111.

Subcommittee Studying Recodification

The Utah Legislature has formed a subcommittee to study the recodification of Chapter 3a of Title 78 (Juvenile Courts) and to offer recommendations for needed changes. The subcommittee is working towards the completion of a comprehensive technical rewrite for the legislature's consideration during the 1996 General Session. Sen. Lyle W. Hillyard, Subcommittee Chair, is encouraging input from practitioners and others who have knowledge and expertise in this area of the law.

In addition to Chair Hillyard, the subcommittee is comprised of Sen. Robert C. Steiner, Rep. R. Lee Ellertson, Rep. Steve Barth, Hon. Arthur G. Christean, Hon. J. Mark Andrus, and Ms. Kim Rilling, Esq.

Any person desiring a schedule of meetings or meeting materials should contact Ms. Esther Chelsea-McCarty or Mr. Kim S. Christy at the Office of Legislative Research and General Counsel, 436 State Capitol, Salt Lake City, Utah 84114 or at 538-1032. The cost of meeting materials is $10.

Continuing Garnishments

The Administrative Office of the Courts announces that amendments to Rule 64D, Utah Rules of Civil Procedure, have been adopted by the Utah Supreme Court with an effective date of November 15, 1995. These amendments will provide for a 120 day continuing garnishment. A text of the amendments has been published in Utah Advance Reports and will soon be published in Utah Court Rules Annotated. A text of the amendments can also be obtained by contacting the Administrative Office of the Courts.

Interim Suspension

On September 25, 1995, The Third District Court entered an order placing C. Lee Caldwell on interim suspension pending the adjudication of the formal complaint. Mr. Caldwell was convicted of Conspiracy to Defraud the United States Government in the Federal District Court for the District of Kansas. The Third District Court found that his conviction reflected adversely upon the practice of law pursuant to Rule 8.4(b) and involved dishonesty pursuant to Rule 8.4(c) of the Rules of Professional Conduct of the Utah State Bar.

ABA In Favor of Bill to Expand Status of U.S. Patent and Trademark Office

WASHINGTON, D.C., Sept 20 — The American Bar Association testified before Congress this month in favor of a bill that will give the U.S. Patent and Trademark Office "operating and financial flexibility similar to that of a private corporation."

Speaking on behalf of the ABA before the House Subcommittee on Courts and Intellectual Property, Donald Dunner, Chair of the ABA's Section of Intellectual Property Law, supported by the provisions of the bill, which include the appointment of board members from the private sector and a chief executive officer who will act as a national spokesperson on patent and trademark issues.

Dunner pointed out that since 1980, when the ABA recommended that the Patent and Trademark Office (PTO) be separated from the Department of Commerce, "the case for greater operating independence on the part of the PTO has grown even stronger. The fact that the PTO is now funded entirely by user fees is a development that argues most strongly for such independence."

Under the proposed bill, a chief executive officer will be appointed by the President to head the PTO for a six-year term and serve as a chief spokesperson on patents and trademarks. The bill also calls for an active board of directors that includes members from the private sector with experience in patent and trademark law.

The ABA also testified on the draft of an Administration bill that would establish a new Under Secretary of Commerce for Intellectual Property, under which all patents would be granted and trademarks registered, and convert the PTO into a government corporation called the "United States Intellectual Property Organization."

According to Dunner, the Administration bill does not provide "sufficient authority and independence to the Corporation and its CEO, and we question whether its enactment would constitute an improvement over the present system."

Last Chance Ethics Seminar

Even if you have your three hours of ethics credit you won't want to miss UTLA's ethics seminar, Friday, December 1, 1995. The seminar features three outstanding, accomplished speakers: Charles Thronson, Parsons Behle and Latimer, will discuss "Ethics in Advertising"; Linda F. Smith, professor of law, University of Utah, will present, "Conflicts of Interest – An Update"; and Laura M. Gray, Alternative Dispute Administrator for the U.S. District Court for the District of Utah, will address, "The Ethical Issues in Mediation." Ms. Gray's presentation will also discuss the federal court's alternative dispute resolution program.

The seminar is from 9 am until noon at the Law and Justice Center, 645 South 200 East, in Salt Lake City. The cost is $55 for UTLA members and $75 for non members. Call 531-7514 to make your reservation.

Need More CLE Before the December 31, 1995?

Mediator Training – Level 1
4-Day Course

December 1, 2, 8, 9
January 12, 13, 19, 20
27 Hours of CLE
(including 2 hours of Ethics)

Faculty
James R. Holbrook, Esq.
Cherie P. Shanteau, Esq.
Nancy W. Garbett, M.Ed.

"The Effective Mediator" training is sponsored by Transition Management, Inc. For information on this course and other future courses, please call:
(801) 272-9289 (or Fax 272-9598)

Speakers Say: There's Much More to the Law Than OJ

(Salt Lake City) The best way to avoid legal problems is through awareness and understanding of laws and procedures. Because this isn't always easy in our complex society, the Utah State Bar has established a Speakers Bureau to help educate people about our system of justice.

Utah lawyers are available to speak on a wide variety of issues including: arbitration, child custody, consumer issues, criminal law, costs of legal services, debtor-creditor problems, landlord-tenant, family disputes, wills and estates, and securities issues.

According to Utah State Bar President Dennis Haslam, more than 250 attorneys are participating in the Speakers Bureau which has been initiated under the direction of the Hon. James Z. Davis, Utah Court of Appeals.

"Throughout the state, Utah attorneys are prepared to talk to community, civic and special interest organizations on a wide variety of topics and to help educate people on the benefits of the U.S. adversary system, role of the Judiciary, and principles followed by attorneys as officers of the Court," Mr. Haslam said.

Any organization wishing to invite an attorney to talk on a legal topic should contact Maud Thurman at the Utah State Bar. There is no charge for the service.

Electronic Evidence:
A Guide to Courtroom Use of New Technologies

(Rochester, NY) — *Electronic Evidence* provides a technical bridge for attorneys involved in complex issues involving audio and video evidence. This new book from Lawyers Cooperative Publishing offers a thorough, comprehensive review of the uses of audio or video recordings in the legal environment – including evidentiary, technical and forensic aspects that are specific to the electronic medium. *Electronic Evidence* is a comprehensive treatise that analyzes how to use, present and work with electronic recordings in the courtroom.

Author Jordan S. Gruber is a former practicing attorney, president of LexTech Consulting in Menlo Park, Calif., and contributing writer to *WIRED* magazine. Gruber's book provides attorneys with an in-depth analysis of both audio and video evidence as well as practical guidelines on admission into evidence, discovery, and defense considerations. Plus, Gruber provides groundbreaking insight to such controversial topics as:

- Voicegram Evidence
- Video Editing
- Expert Witnesses
- Audio Dubbing
- Image Manipulation
- Model Discovery

Electronic Evidence contains the latest technical information on video and audio recordings and the current case law. For example, the Federal Rule of Evidence section provides an update on the current admissibility of video depositions in lieu of expert witness appearances. A section on the recent amendments to the Federal Rule of Civil Procedure covers the issues concerning the use of video depositions and other applications of electronic recording in the court system.

Practitioners get an up-to-date review of how to present information using electronic media as well as thorough treatment of the practical limits of using forensic experts and practical advice on the *realities* of using audio or video recordings as evidence – its advantages, disadvantages, and inherent complications. The author offers many different types of practice tools, such as checklists, guidelines and model discovery examples.

Lawyers Cooperative Publishing is a leading provider of legal analysis, state and federal case and statutory law, practice aids and forms-in both print and electronic formats, including LawDesk and CaseBase CD-ROM products. For more information,call Lawyers Cooperative Publishing at (800) 254-5274.

Utah State Bar Group Benefits Now Available

U.S. West Cellular

Group Discounted cellular air time and services are offered with their **Corporate Rate**.

- For information on different features, restrictions that may apply or to sign up with U.S. West, call **Todd Southwick** at 631-6000 in **Salt Lake City**, or 547-7304 in **Ogden**.

Disability/Life Insurance

The Bar has negotiated a 23.5% premium discount through Standard Insurance and Paul Revere.

- For information contact **Scott Buic** at 273-0160.

Malpractice/Liability

This program is monitored by our Professional Liability Committee and advised by **Rollins Hudig Hall**.

- For information call **Rollins Hudig Hall** at 488-2550.

Airborne Express

Bar members pay only $9.25 for a standard eight ounce Overnight Letter Express when shipping a *minimum of 10 shipments monthly*. Additional savings are available for using Airborne's Drop Box.

- Call Airborne Express at (800)642-4292 and give the Utah State Bar **Discount Code Number "0401220200"** to obtain your free personalized supply kit.

MBNA Goldoption Account

This is a loan through MBNA Corporation to consolidate higher interest loans at a 13.9% APR.

- Call 1-800-626-2760 for details.

MasterCard

Kessler Financial Services offers a MasterCard with an APR of 15.65%.

- For details call 1-800-847-7378.

Magic Kingdom Club

This Program offers reduced prices on Seasonal and Vacation packages at select Disney Resort Hotels.

- For information contact **Lynette Limb** at 531-9077.

ITC Long Distance

Office or home long distance needs can be met with **ITC Long Distance**.

- For a cost comparison, additional information or to participate, call 531-9230 or 1-800-999-6083.

Vantage Travel

Vantage Travel offers vacation packages to members of the Bar, 3-5 times a year.

- For travel dates and information call 1-800-833-0899.

Hertz

Car rental services with discounted rates.

- For reservations call (800) 654-2200 and give the Utah State Bar CDP card #150980.

Health Insurance

The Bar coordinates a group health program through Blue Cross/Blue Shield of Utah.

- For information contact **Wendy Montano** at 481-6180.

MEMBERSHIP BENEFITS POLICY

From time to time the Utah State Bar may provide access to certain economic benefit programs, designed to provide a savings or other such benefit to Bar members. through these programs, certain products or services may be offered to members at a discount. However, providing such access implies no bar endorsement or warranty of the Quality of such products or services over similar products or services offered by others. If you have any questions about our program, or if we can be of any assistance, contact our **Member Benefits Coordinator Lynette Limb at 531-9077**.

Bar Foundation Trustees Present Checks to 1995 Grant Recipients

Trustees of the Utah Bar Foundation recently presented checks to organizations providing free or low-cost legal aid, legal education and other law-related services to Utah residents. In the ten years since it has awarded grants, awards and scholarships, the Foundation has distributed more than $1.65 million. All active Utah lawyers are members and may voluntarily participate in the program which generates funds for grants. The Trustees for 1995-1996 are James B. Lee, Jane A. Marquardt, Stewart M. Hanson, Jr., Carman E. Kipp, Joanne C. Slotnik, Hon. Pamela T. Greenwood and H. James Clegg.

Receiving checks from Trustees are: (upper left and moving clockwise) Utah Law-Related Education Project Board Chair Kim M. Luhn and Director Kathy D. Dryer from Jane A. Marquardt; Utah Legal Services Board President William G. Fowler from Jane A. Marquardt with James B. Lee and Director Anne Milne watching; Legal Center for People and Disabilities Director Phyllis Geldzahler from Joanne C. Slotnik; Women Lawyers of Utah Chair Monica Whalen Pace and Beatrice M. Peck from Jane Marquardt; Legal Aid Society Board President Stephen C. Bamberger from James B. Lee; Catholic Community Services Executive Director Sister Margo Cain and Immigration Program Director Teresa Hensley from H. James Clegg; Utah Legal Services Senior Lawyer Volunteer Program Director Mary Jane Ciccarello and Ned D. Spurgeon (who began the program two years ago) from James B. Lee.

Photo credit: Robert L. Schmid

CLE CALENDAR

LAWYERS & LEGAL ASSISTANTS IN THE PRACTICE OF LAW: JOINT UTAH STATE BAR AND LAAU SEMINAR

Date: Friday, November 10, 1995

Time: 8:00 a.m. to 4:30 p.m. *(Registration begins at 7:30 a.m., lunch is included)*

Place: Utah Law & Justice Center

Fee: $150.00 for individual registration
$270.00 for joint attorney/paralegal team (maximum 2 people)

CLE Credit: Minimum of 7 HOURS

ENVIRONMENTAL LAW FOR CORPORATE COUNSEL AND OTHER GENERAL PRACTITIONERS

Date: Wednesday, November 15, 1995

Time: 7:30 a.m. to 12:00 noon *(Buffet breakfast begins at 7:30 a.m.)*

Place: Utah Law & Justice Center

Fee: $50.00 general registration, $35.00 for Corporate Counsel Section members

CLE Credit: 4 HOURS

NLCLE: ETHICS

Date: Thursday, November 16, 1995

Time: 5:30 p.m. to 8:30 p.m.

Place: Utah Law & Justice Center

Fee: $20.00 for Young Lawyer Division Members
$30.00 for all others
add $10.00 for a door registration

CLE Credit: 3 HOURS

EFFECTIVE WRITING FOR LAWYERS

Date: Friday, November 17, 1995

Time: 9:00 a.m. to 5:00 p.m.

Place: Utah Law & Justice Center

Fee: $140.00

CLE Credit: 7.5 HOURS

THE ETHICAL ADVOCATE

Date: Friday, December 15, 1995

Time: 9:00 a.m. to 12:00 noon *(Registration begins at 8:30 a.m.)*

Place: Utah Law & Justice Center

Fee: To be determined (please watch for a brochure to come in your mail)

CLE Credit: 3 HOURS ETHICS CREDIT

PROCRASTINATOR'S PARADISE: THE LAST MINUTE CLE VIDEO EXTRAVAGANZA

Date: Wednesday & Thursday, December 27 & 28, 1995

Time: 8:00 a.m. to 5:00 p.m.

Place: Utah Law & Justice Center

Fee: Full day = $50.00
Half day = $25.00
(Minimum charge of $25.00)

CLE Credit: 9 HOURS, WHICH INCLUDES AT LEAST 3 HOURS OF ETHICS, EACH DAY (Please note: A maximum of 12 hours of video CLE Credit can be applied toward your requirement of 27 hours.)

Seminar fees and times are subject to change. Please watch your mail for brochures and mailings on these and other upcoming seminars for final information. Questions regarding any Utah State Bar CLE seminar should be directed to Monica Jergensen, CLE Administrator, at (801) 531-9095.

CLE REGISTRATION FORM

TITLE OF PROGRAM FEE

1. _____ _____

2. _____ _____

_____

Make all checks payable to the Utah State Bar/CLE Total Due

_____

Name Phone

_____

Address City, State, ZIP

_____ _____ _____

Bar Number American Express/MasterCard/VISA Exp. Date

_____

Signature

Please send in your registration with payment to: **Utah State Bar, CLE Dept., 645 S. 200 E., S.L.C., Utah 84111.** The Bar and the Continuing Legal Education Department are working with Sections to provide a full complement of live seminars. Please watch for brochure mailings on these.

Registration Policy: Please register in advance as registrations are taken on a space available basis. Those who register at the door are welcome but cannot always be guaranteed entrance or materials on the seminar day.

Cancellation Policy: Cancellations must be confirmed by letter at least 48 hours prior to the seminar date. Registration fees, minus a *$20 nonrefundable fee*, will be returned to those registrants who cancel at least 48 hours prior to the seminar date. No refunds will be given for cancellations made after that time.
NOTE: It is the responsibility of each attorney to maintain records of his or her attendance at seminars for purposes of the 2 year CLE reporting period required by the Utah Mandatory CLE Board.

Classified Ads

RATES & DEADLINES

Utah Bar Member Rates: 1-50 words — $20.00 / 51-100 words — $35.00. Confidential box is $10.00 extra. Cancellations must be in writing. For information regarding classified advertising, please contact (801) 531-9077.

Classified Advertising Policy: No commercial advertising is allowed in the classified advertising section of the Journal. For display advertising rates and information, please call (801) 532-4949. It shall be the policy of the Utah State Bar that no advertisement should indicate any preference, limitation, specification or discrimination based on color, handicap, religion, sex, national origin or age.

Utah Bar Journal and the Utah State Bar Association do not assume any responsibility for an ad, including errors or omissions, beyond the cost of the ad itself. Claims for error adjustment must be made within a reasonable time after the ad is published.

CAVEAT — The deadline for classified advertisements is the first day of each month prior to the month of publication. (Example: May 1 deadline for June publication). If advertisements are received later than the first, they will be published in the next available issue. In addition, payment must be received with the advertisement.

BOOKS WANTED

Wanted: second-hand copy of **West's Pacific Digest** set, 1972 to present (green covers). Call Sam @ (801) 673-4892 (St. George).

POSITIONS AVAILABLE

Wanted: transactional lawyer with 2-3 yrs. exp. for in-hour position with rapidly growing Las Vegas-based casino company. Please submit resume, salary history to: Attn: Robert E. Bruce, 2411 W. Sahara Ave., Las Vegas, NV 89102.

Deputy Attorney I, Summit County is currently recruiting for a Deputy County Attorney I or II. Performs professional legal services as required for Summit County regarding litigation of juvenile, civil and criminal cases and handling planning and zoning matters for Summit County. Minimum Qualifications: Member in good standing of Utah State Bar with three to five years of practice experience. Salary range: $2,516.80 to $3,941.60 monthly. Please send resume to Summit County Personnel, P.O. Box 128 Coalville, Utah 84017. Summit County is an E.O.E. employer. Closing Date: November 30, 1995.

Large Salt Lake City law firm is seeking one or more experienced patent/intellectual property attorneys to head its section in firm. At least five years experience necessary with good academic credentials. Competitive salary and benefits. Please send resume to: Maud C. Thurman, Utah State Bar – Box 15, 645 South 200 East, Salt Lake City, Utah 84111.

POSITIONS SOUGHT

Tax Attorney, Admitted in **PA and UT, LL.M.** (Taxational), desires opportunity to practice with progressive firm, in any of the following taxation areas: Corporate Tax Planning, Partnerships, Limited Liability Companies, IRS issues, Asset Protection, Bond Issues, Trusts, Estate Planning or State & Local Taxes. Consultative/Specific-Issue relationships for small firms/solo practitioners also welcomed. Hourly or package rates. Call (801) 572-6156.

Expert **EMPLOYEE BENEFITS (ERISA)** ATTORNEY, (Labor and Tax) for corporation or law firm. Seventeen years experience. Will relocate. Call (713) 937-8195.

OFFICE SPACE / SHARING

Professional office space located at 7026 South 9th East, Midvale. Space for two (2) attorney's and staff. Includes two spacious offices, large reception area, sink/wet bar, file storage, convenient client parking immediately adjacent to the building. Call (801) 272-1013.

OFFICE SHARING SPACE AVAILABLE in downtown law office. Excellent view and location. Near state and federal courts and covered parking terrace. Complete facilities include 2 offices, conference room, reception area and full kitchen. Potential office equipment sharing and limited legal assistant services. Rent negotiable. Please call Flanders & Associates, (801) 355-3839.

"Fully equipped small firm has opening. Excellent location and view. No salary, but we will make overhead livable for right applicant. Call (801) 486-3751."

Downtown private offices for up to two attorneys. Great location near court buildings, restaurants, fed-ex office, post office. Conference room, reception area, library. Fax, laser printer, copier, telephones, postage meter. Three attorneys in office. Computer network and Internet. Parking next to building. Secretarial services available. Call Amy or Craig @ (801) 364-5600.

7200 South State area. Nice office and access to conference room, fax, reception, secretarial, etc. (801) 322-5556.

Prime office space in Layton Barnes Bank Building. One or two attorneys turn key operation. Office already has one attorney on site. Call (801) 546-1100 and ask for Erik.

Choice office space for rent in beautiful, historic building in Ogden, Utah. Several offices available. For information, please contact (801) 621-1384.

Professional office spaces available at 5296 South 320 West, Suite 100, Murray, UT 84107. All services available, call (801) 262-5300.

Prime office sharing space available for one attorney with established firm. Excellent downtown location, close to courthouse. Complete facilities, including conference room, reception area, telephone, fax, copier. Please call (801) 532-7858.

Office sharing available for one or two attorneys in free standing one story building at 3530 South 6000 West, West Valley City. Call (801) 963-6558.

SERVICES

NATIONWIDE LOCATES: Defendants, witnesses, debtors, heirs. No charge if not found. **FLAT FEE:** $195. Nationwide computer search and full scale investigation. **NATIONWIDE ASSET SEARCHES.** Search for real property, corporations, cars, boats, airplanes, bank accounts, credit reports, bankruptcies, liens/judgments. Business or Personal. Call for pricing. **MANHUNT INVESTIGATIONS. 1-800-355-HUNT.**

APPRAISALS: CERTIFIED PERSONAL PROPERTY APPRAISALS – Estate work, Fine furniture, Divorce, Antiques, Expert Witness, National Instructor for the Certified Appraisers Guild of America. Eighteen years experience. Immediate service available. Robert Olson C.A.G.A. (801) 580-0418.

LEGAL ASSISTANTS — SAVING TIME, MAKING MONEY: Reap the benefits of legal assistant profitability. LAAU Job Bank, P.O. Box 112001, Salt Lake City, Utah 84111. (801) 531-0331. Resumes of legal assistants seeking full or part-time temporary or permanent employment on file with LAAU Job Bank are available on request.

UTAH VALLEY LEGAL ASSISTANT JOB BANK: Resumes of legal assistants for full, part-time, or intern work from our graduating classes are available upon request. Contact: Kathryn Bybee, UVSC Legal Assistant Department, 800 West 1200 South, Orem, UT 84058 or call (801) 222-8489. Fax (801) 225-1229.

VIDEOTAPE DEPOSITIONS: Videotaping Services for Legal Professionals. Depositions – Insurance Investigations – Surveillance – Evidence. UTAH LEGAL VIDEO SERVICES (801) 484-8218.

CHILD SEXUAL ABUSE — CASE EVAL-UATION Statement Validity Assessment (SVA). An Objective method for determining the validity of child statements and interviewer quality – time saving and concise – advanced graduate training. No fee for initial consultation. Bruce M. Giffen, M.S., Investigative Specialist – (801) 485-4011.

EQUIPMENT FOR SALE: Toshiba BD 7812 photocopier with automatic feeder and sorter, 200. Needs some work. Call (801) 963-6558.

LEGAL COPY OF SALT LAKE
LEGAL COPY OF SALT LAKE
328-8707

LEGAL COPY OF SALT LAKE

THE LITIGATION DOCUMENT COPYING SPECIALISTS

CONFIDENTIAL FACILITY

QUICK, QUALITY, OVERNIGHT AND SAME-DAY SERVICE

FULL COLOR COPIES

COPY SERVICES AVAILABLE
24 HOURS - 7 DAYS

FREE PICK - UP & DELIVERY

328-8707

Cori Kirkpatrick J. Kelly Nielsen M. Lance Ashton

INFORMATION WANTED

Looking for LAST WILL AND TESTAMENT of Jeff S. Moore or Jeffrey Scott Moore: SS 529-19-0654, July 14, 1961 to July 10, 1995: 4635 South Sunstone Road #52, Salt Lake City, UT 84123. Any information, please call Joe Moore @ Payson, (801) 465-5077, S.L. @ (801) 265-1469 or Cell @ (801) 558-9126.

MCLE Reminder

Attorneys who are required to comply with the odd year compliance cycle will be required to submit a "Certificate of Compliance" with the Utah State Board of Continuing Legal Education by December 31, 1995. The MCLE requirements are as follows: 24 hours of CLE credit per two year period plus 3 hours in ETHICS, for a combined 27 hour total. Be advised that attorneys are required to maintain their own records as to the number of hours accumulated. Your "Certificate of Compliance" should list all programs that you have attended that satisfy the CLE requirements, unless you are exempt from MCLE requirements. Following is a Certificate of Compliance for your use. Should you have questions regarding the requirements, please contact Sydnie Kuhre, Mandatory CLE Administrator at (801) 531-9077.

CERTIFICATE OF COMPLIANCE

For Years 19_____ and 19_____

Utah State Board of
Continuing Legal Education
Utah Law and Justice Center
645 South 200 East
Salt Lake City, Utah 84111-3834
Telephone (801) 531-9077 FAX (801) 531-0660

Name:_____ Utah State Bar Number:_____

Address:_____ Telephone Number:_____

Professional Responsibility and Ethics — **Required: a minimum of three (3) hours**

1. _____
   Provider/Sponsor
   _____
   Program Title
   _____
   Date of Activity CLE Hours Type of Activity**

2. _____
   Provider/Sponsor
   _____
   Program Title
   _____
   Date of Activity CLE Hours Type of Activity**

Continuing Legal Education — **Required: a minimum of twenty-four (24) hours**

1. _____
   Provider/Sponsor
   _____
   Program Title
   _____
   Date of Activity CLE Hours Type of Activity**

2. _____
   Provider/Sponsor
   _____
   Program Title
   _____
   Date of Activity CLE Hours Type of Activity**

3. _____
   Provider/Sponsor
   _____
   Program Title
   _____
   Date of Activity CLE Hours Type of Activity**

4. _____
   Provider/Sponsor
   _____
   Program Title
   _____
   Date of Activity CLE Hours Type of Activity**

IF YOU HAVE MORE PROGRAM ENTRIES, COPY THIS FORM AND ATTACH AN EXTRA PAGE

**EXPLANATION OF TYPE OF ACTIVITY

A. Audio/Video Tapes. No more than one half of the credit hour requirement may be obtained through study with audio and video tapes. See Regulation 4(d)-101(a).

B. Writing and Publishing an Article. Three credit hours are allowed for each 3,000 words in a Board approved article published in a legal periodical. An application for accreditation of the article must be submitted at least sixty days prior to reporting the activity for credit. No more than one-half of the credit hour requirement may be obtained through the writing and publication of an article or articles. See Regulation 4(d)-101(b).

C. Lecturing. Lecturers in an accredited continuing legal education program and part-time teachers who are practitioners in an ABA approved law school may receive three hours of credit for each hour spent in lecturing or teaching. No more than one-half of the credit hour requirement may be obtained through lecturing and part-time teaching. No lecturing or teaching credit is available for participation in a panel discussion. See Regulation 4(d)-101(c).

D. CLE Program. There is no restriction on the percentage of the credit hour requirement which may be obtained through attendance at an accredited legal education program. However, a minimum of one-third of the credit hour requirement must be obtained through attendance at live continuing legal education programs.

THE ABOVE IS ONLY A SUMMARY. FOR A FULL EXPLANATION SEE REGULATION 4(d)-101 OF THE RULES GOVERNING MANDATORY CONTINUING LEGAL EDUCATION FOR THE STATE OF UTAH.

Regulation 8-101 — Each attorney required to file a statement of compliance pursuant to these regulations shall pay a filing fee of $5.00 at the time of filing the statement with the Board.

I hereby certify that the information contained herein is complete and accurate. I further certify that I am familiar with the Rules and Regulations governing Mandatory Continuing Legal Education for the State of Utah including Regulations 5-103(1).

DATE:_____ **SIGNATURE:**_____

Regulation 5-103(1) — Each attorney shall keep and maintain proof to substantiate the claims made on any statement of compliance filed with the board. The proof may contain, but is not limited to, certificates of completion or attendance from sponsors, certificates from course leaders or materials claimed to provide credit. This proof shall be retained by the attorney for a period of four years from the end of the period of which the statement of compliance is filed, and shall be submitted to the board upon written request.

Two Seminars on the theme of:

"Effective Direct and Cross Examination of the Business Valuation Expert" series

Continuing
Legal
Education

Presented by:
Strategic Valuations, Inc.
an affiliate of
Black & Isom Associates,
Financial Education and Consulting

Endorsed by:
The National Association of Certified Valuation Analysts (NACVA)

CLE approved and presented at:
The Utah State Bar
645 South 200 East
Salt Lake City, Utah

- *Seminar # 1*
  "How to Analyze a Business Valuation Report"
  Thursday, November 16, 1995
  8 a.m. to 12 p.m.
  4 Hours CLE Credits

- *Seminar # 2*
  "Common Pitfalls of the Valuator"
  Thursday, December 7, 1995
  8 a.m. to 12 p.m.
  4 Hours CLE Credits

For more information and to register, call:
Strategic Valuations, Inc. *at (801) 486-2999 or (800) 837-1300 or Fax to (801) 486-7500, 1245 East Brickyard Rd., Ste. 110 Salt Lake City, Utah 84106*

Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111

BULK RATE
U.S. POSTAGE
PAID
SALT LAKE CITY, UT
PERMIT NO. 844

Mr. William Holyoak
201 South Main Street
P. O. Box 45898
Salt Lake City UT 84145-0898

A BIG DEAL FOR SMALL LAW FIRMS OF THE UTAH STATE BAR

LEXIS MVP

GET A BIG DEAL AND SAVE MONEY...UNLIMITED ONLINE ACCESS TO STATE CASE LAW, STATUTES, LAW REVIEWS, BILL AND REGULATION TRACKING, AND MORE FOR AS LITTLE AS $130.

CALL 1-800-356-6548

LEXIS MVP

The Most Valuable Part of
LEXIS® for small law firms

LEXIS·NEXIS

* All pricing includes applicable subscription fee. Price quoted is for one attorney. Additional charge applies for each attorney in the firm. Note: state and local taxes not included. Some restrictions apply. LEXIS and NEXIS are registered trademarks of Reed Elsevier Properties Inc., used under license. The INFORMATION ARRAY logo is a trademark of Reed Elsevier Properties Inc., used under license. ©1995 LEXIS-NEXIS, a division of Reed Elsevier Inc. All rights reserved.

UT0108