

# Utah Bar JOURNAL



SPECIAL ISSUE

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Volume 34 No. 4  
Jul/Aug 2021



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# The Utah Bar Journal

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## Interested in writing an article or book review for the *Utah Bar Journal*?

The Editors of the *Utah Bar Journal* want to hear about the topics and issues readers think should be covered in the magazine. If you have an article idea, a particular topic that interests you, or if you would like to review one of the books we have received for review in the *Bar Journal*, please contact us by calling 801-297-7022 or by e-mail at [barjournal@utahbar.org](mailto:barjournal@utahbar.org).

### GUIDELINES FOR SUBMISSION OF ARTICLES TO THE UTAH BAR JOURNAL

The *Utah Bar Journal* encourages the submission of articles of practical interest to Utah attorneys and members of the bench for potential publication. Preference will be given to submissions by Utah legal professionals. Submissions that have previously been presented or published are disfavored, but will be considered on a case-by-case basis. The following are a few guidelines for preparing submissions.

**ARTICLE LENGTH:** The *Utah Bar Journal* prefers articles of 5,000 words or less. Longer articles may be considered for publication, but if accepted such articles may be divided into parts and published in successive issues.

**SUBMISSION FORMAT:** Articles must be submitted via e-mail to [barjournal@utahbar.org](mailto:barjournal@utahbar.org), with the article attached in Microsoft Word or WordPerfect. The subject line of the e-mail must include the title of the submission and the author's last name.

**CITATION FORMAT:** All citations must follow *The Bluebook* format, and must be included in the body of the article.

**NO FOOTNOTES:** Articles may not have footnotes. Endnotes will be permitted on a very limited basis, but the editorial board strongly discourages their use, and may reject any submission containing more than five endnotes. The *Utah Bar Journal* is not a law review, and articles that require substantial endnotes to convey the author's intended message may be more suitable for another publication.

**ARTICLE CONTENT:** Articles should address the *Utah Bar Journal* audience – primarily licensed members of the Utah Bar. Submissions of broad appeal and application are favored.

Nevertheless, the editorial board sometimes considers timely articles on narrower topics. If an author is in doubt about the suitability of an article they are invited to submit it for consideration.

**EDITING:** Any article submitted to the *Utah Bar Journal* may be edited for citation style, length, grammar, and punctuation. While content is the author's responsibility, the editorial board reserves the right to make minor substantive edits to promote clarity, conciseness, and readability. If substantive edits are necessary, the editorial board will strive to consult the author to ensure the integrity of the author's message.

**AUTHOR(S):** Author(s) must include with all submissions a sentence identifying their place of employment. Unless otherwise expressly stated, the views expressed are understood to be those of the author(s) only. Authors are encouraged to submit a headshot to be printed next to their bio. These photographs must be sent via e-mail, must be 300 dpi or greater, and must be submitted in .jpg, .eps, or .tif format.

**PUBLICATION:** Authors will be required to sign a standard publication agreement prior to, and as a condition of, publication of any submission.

### LETTER SUBMISSION GUIDELINES

1. Letters shall be typewritten, double spaced, signed by the author, and shall not exceed 500 words in length.
2. No one person shall have more than one letter to the editor published every six months.
3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal*, and shall be emailed to [BarJournal@UtahBar.org](mailto:BarJournal@UtahBar.org) or delivered to the office of the Utah State Bar at least six weeks prior to publication.
4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters that reflect contrasting or opposing viewpoints on the same subject.
5. No letter shall be published that (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners or any employee of the Utah State Bar to civil or criminal liability.
6. No letter shall be published that advocates or opposes a particular candidacy for a political or judicial office or that contains a solicitation or advertisement for a commercial or business purpose.
7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.
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# The Perks of Being a Bar Member

by Heather Farnsworth

If you are reading this, chances are you are at least somewhat familiar with the Bar, and likely more familiar than I was before I became a Bar Commissioner. You no doubt have heard of the benefits of Bar service and, while I too can extol the virtues of this, I also remember a time when I thought little about and, perhaps admittedly, little of, the Bar. I became involved with the Bar fortuitously: I was Past President of the Women Lawyers of Utah (WLU) and a “perk” of this position was to sit as a representative of WLU in an ex-officio position as a Bar Commissioner. I did not know what the Bar Commission did and had little idea of the role into which I was walking. I had not really thought much about the Bar, its function, or what it had to offer me. In my mind, the Bar was just the group that administered the Bar exam and required me to pay dues and report CLE compliance. I would occasionally flip through the *Bar Journal* and would often read the attorney discipline section (attorney discipline is actually a function of the Office of Professional Conduct), but other than that I had no real concept of what the Bar is.

So who or what is the Bar really? The Utah State Bar is a nonprofit organization, authorized and designated by the Utah Supreme Court and its constitutional power, to administer rules and regulations that govern the practice of law in Utah, including regulating licensed paralegal practitioners. Utah R. Jud. Admin. 14-102(a). The Utah State Bar is overseen by a group of volunteers who form the Board of Commissioners. This includes thirteen voting members: eleven elected lawyers, and two non-lawyers appointed by the supreme court. *Id.* R. 14-103(a). The elected lawyers represent the members of their geographic divisions for a term of three years. The commission also includes non-voting ex officio members, which include the Bar's representative to the Utah Judicial Council, the Past President of the Bar, the deans of the University of Utah S.J. Quinney College of Law and the J. Reuben Clark Law School at Brigham Young University, the Bar's delegate to the American Bar Association, the Utah American Bar Association members' delegate to the ABA, the president of the Young Lawyers Division, and representatives of affinity bars including the Women Lawyers of Utah, the Utah Minority Bar Association, and LGBT and Allied Lawyers of Utah. *See Bar Commission*

*Leadership*, UTAH STATE BAR, <https://www.utahbar.org/about/meet-bar-commissioners/> (last visited June 2, 2021). The Utah State Bar also has a paid staff to serve the membership of the Bar and the citizens of Utah with a variety of services, programs, and clinics. *See Meet the Bar Staff*, UTAH STATE BAR, <https://www.utahbar.org/about/meet-bar-staff/> (last visited June 2, 2021).

So what does the Bar do? Officially, the Bar is charged with

- (1) advancing the administration of justice according to law; (2) aiding the courts in the administration of justice; (3) regulating the admission of persons seeking to practice law; (4) fostering and maintaining integrity, learning competence, public service, and high standards of conduct among those practicing law; (5) representing the Bar before legislative, administrative, and judicial bodies; (6) preventing the unauthorized practice of law; (7) promoting professionalism, competence, and excellence through continuing legal education and other means; (8) providing a service to the public, the judicial system, and Bar members; (9) educating the public about the rule of law and responsibilities under the law; and (10) assisting Bar members in improving the quality and efficiency of their practice.

Utah R. Jud. Admin. 14-102(b).

At the Bar, we frequently share the programs we offer for the public and our efforts to advance access to justice. However, we often take for granted that our membership is aware of the benefits and services offered to them. So, what does the Bar do for you? To start, the Bar provides multiple opportunities for education and networking through its New Lawyer Training Program, CLE presentations, Fall Forum, and Spring and Summer Conventions. Additionally, the Bar provides access to an online CLE video library, with



many free CLE opportunities. You can manage your personal information and sign up for CLE events using the Practice Portal.

The Practice Portal is a free service through the Bar's website where you can access the CLE calendar and sign up for events as mentioned, but you also have access to free legal research through Fastcase, Office 365, and Google Drive. Your portal is linked to e-filing and provides links to recent court decisions, rules for public comment, and new bills before the legislature – all in one place. Additionally, your associations within the Bar are listed with links to their websites and activities, as well as links to the Utah Bar's Twitter and Facebook accounts. The Bar's IT department is available to support you with using the Bar's website, Practice Portal, and Fastcase, and often provides recommendations for different software needs, ransomware, cyber security, and hardware support. Additionally, the Bar offers reduced rates on practice management software.

In addition to offering technology services, the Bar provides a free referral service through Licensed Lawyer where you can promote your business and list the services you offer to the public. This too is accessible through the Practice Portal. You are able to see the referrals sent to you with contact information for each client and to see your site activity, including practice area search matches, profile views, and contact requests. The Bar directs phone calls requesting attorney referrals to this service.

We realize attorneys often have a stressful schedule and lifestyle, so, the Bar prioritizes wellness. The Well-Being Committee for the

Legal Profession (WCLP) was created in 2019 to advance the recommendations of the Utah Task Force on Lawyer and Judge Well-Being. WCLP provides various CLE opportunities and Lawyer Well-Being Week activities. Additionally, the Bar provides free, anonymous counseling for its members through Blomquist Hale and through Utah Lawyers Helping Lawyers, which is committed to rendering confidential assistance to any member of the Utah State Bar whose professional performance is or may be impaired because of mental illness, emotional distress, substance abuse, or any other disabling condition or circumstance.

The practice of law itself is often challenging. If you find yourself unsure of your obligations and duties, the Bar is available to clarify gray areas. If you need assistance with ethical issues, the Bar provides a free ethics hotline, staffed by the Bar's General Counsel. If you should find yourself facing an issue with a client, the Bar's Consumer Assistance Program will work with you and your client to help resolve issues before they rise to the level of a Bar complaint. If you do get a Bar complaint, they can walk you through the process and tell you what to expect.

There are other benefits to Bar membership beyond those listed, including savings on malpractice insurance and various group discounts and deals available through the Beneplace-member benefits tab at <https://www.utahbar.org/member-services/>. Truly, the biggest benefits to me personally have been the relationships I have formed outside of my practice area. As a small firm attorney running my own practice, the connections to mentors and colleagues have been invaluable.



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# Reflections on Jury Trials and the Constitution

by The Honorable Lynn W. Davis

I welcome the invitation to share a few remarks regarding jury trials. I have conducted hundreds of jury trials in the last 33½ years on the bench, ranging in length from one day to three weeks. I have been called to jury duty, but it was in one of my own felony cases. Fortunately the jury clerk took care of it so counsel and I were spared the burden of figuring out how I might serve in the dual capacity of judge and juror.

In Utah we have attorneys who are very well prepared, very professional, very articulate, and always treat jurors with dignity and respect. They are exceptional advocates.

First of all, many attorneys may anticipate, post COVID-19, that the courts will return to an in-person, pre-pandemic, traditional jury selection process. It must be highlighted and underscored that that is not the case. Most, if not all, jurisdictions will continue a virtual jury selection process where prospective jurors will receive packets (summons, jury qualification form, juror questionnaire etc.) via the internet. They will continue to fill out questionnaires online. There is an extensive jury backlog in every jurisdiction.

Every day of our professional careers, we gratefully practice, defend, sustain, and articulate applicable constitutional principles. We not only appreciate, but are bound by, the Constitution. From time to time we have experiences that highlight, sustain, and deepen this profound foundational appreciation. Allow me to share a few experiences.

### Experience # 1

In many jurisdictions across the country, those called to jury duty simply refuse to appear. The delinquency rate in some states frequently exceeds 50%. I wish to contrast that failure with a tender note that I received from a prospective juror. In a very, very unsteady hand, she wrote: "I am 80 years old. . . . I am crippled with arthritis and phlebitis, a hip replacement, and am on crutches. But if I can help, I am willing to try. I sometimes need help getting out of chairs."

### Experience # 2

Several years ago, I welcomed a group of lawyers from Ukraine to spend a week with me in court. Though their constitution provided for a criminal jury trial, they had never witnessed or even heard of a jury trial being conducted in their country. As we proceeded, they were amazed and expressed their personal and collective admiration of the American system.

### Experience #3

A few years later, I welcomed ten law students to my courtroom from another foreign country. They joined me for a felony law and motion calendar. Afterwards, I invited them into chambers and responded to their questions.

One student observed: "In our country, it's really hard to work in a system where bribery is at every corner. If we could change that, I would love to be a judge where I would not have to deal with persons who try to corrupt me."

It is a sad commentary that in his country, at the present time, every decision comes with a price tag, that bribery and corruption pervasively rule the day, and that ethics, integrity, and professional conduct are the exceptions. Such a corruption-laden system shows no reliance on, and cannot even acknowledge, precedent. Decisions reached because of political exigencies and expediencies of the day result in a litany of legal contradictions and convoluted legal quagmires. Such decisions simply express the vagaries and whims of corrupted, "moneyhungry" judges, resulting in a consummate divorcement from applicable constitutional principles.

*JUDGE LYNN W DAVIS served for over thirty-three years, first as a Circuit Court judge and then as a District Court judge, in Utah's Fourth Judicial District. Recently retired, he will continue his judicial service as an active senior judge.*



## Experience #4

I desire to emphasize the importance of the U.S. Constitution by sharing a contrasting experience that I had with my family back in 2008 in a country that was formerly part of the Soviet Union.

We were in the airport just about to board a plane bound for America. Suddenly and unexpectedly, uniformed officers surrounded me and escorted me to a small room in the airport. They were suspicious of very inexpensive trinkets I had purchased. They separated me from my family and would not allow my son, who spoke their language, to accompany me. In that small, windowless interrogation room, they confronted me in a loud and accusatory manner.

They searched my luggage. In a very demeaning manner, they accused me of stealing national treasures.

I feared for my life and the safety of my family. The claim was absolutely outrageous, baseless, and absurd. Just when I believed they were about to extort me for money, or jail me or assault or attack me, I confidently responded that I had no idea what they were talking about. That although I was not aware of their laws and constitution, as an American and a lifelong devoted student of the U.S. Constitution, I knew something of international law and treaties.

Remarkably, the threats and accusations immediately ceased, and the men expressed their sincere apologies. A welcoming hand was extended and I was immediately released to join my family and catch our flight.

This incident confirmed and ratified my loyalty to the fundamental principles of the Constitution and to the fact that the rule of law is absolutely essential to a free society.

## Experience #5

We must never allow the U.S. Constitution, this quintessential historic experiment, to be neglected. We can be a valued part of constitutional destiny. What a glorious cause! We must recognize that we, as citizens, are not only beneficiaries of the Constitution, but that we have responsibilities to preserve it as devoted ambassadors. As attorneys and judges we each have the ability, as one author stated, “to instill confidence in the American Constitutional system.” We can draw insight and confidence from the writings of others. Consider the following.

Justice William O. Douglas highlighted the importance of a jury as follows:

A jury reflects the attitudes and mores of the community from which it is drawn. . . . It is as human as the people who make it up. It is sometimes the victim of passion, but it also takes the sharp edges off the law and uses conscience to ameliorate a hardship. . . . It gives the law an acceptance which verdicts of judges could never do.

Almanac of Liberty 112 (1954) [see citation in *United States v. Miller*, 284 F. Supp. 220 (D. Conn. 1968)].

Anna Quindlen, in *Newsweek Magazine*, observed: “At a time when so many rituals and civic experiences have lost that sense of moment. . . service on a jury remains perhaps the only public service that, for all its shortcomings, still has the power to elevate an ordinary citizen.” Anna Quindlen, *Duty? Maybe It’s Really Self-Help*, NEWSWEEK MAGAZINE (May 6, 2001), available at <https://www.newsweek.com/duty-maybe-its-really-self-help-152911>. And the noted historian, David McCullough, invites us to “stay faithful to our fundamental beliefs and do something for this country. . . . As beneficiaries, we must have an historic, but also contemporary, view and recognition of highly principled, courageous leaders that still give us strength and vision.”

Allow me to offer insightful and treasured words of Abraham Lincoln regarding the Constitution:

Let [the Constitution] be taught in schools, in seminaries, and in colleges. Let it be written in primers, in spelling books and in almanacs. Let it be preached from the pulpit, proclaimed in legislative halls, and enforced in the courts of justice. And, in short, let it become the political religion of the nation.

*The Perpetuation of Our Political Institutions*, Address given to the Young Men’s Lyceum of Springfield, Ill. (Jan. 27, 1838), available at <http://www.abrahamlincolnonline.org/lincoln/speeches/lyceum.htm>.

## Conclusion – A Fond Memory

“I am crippled with arthritis and phlebitis, a hip replacement, and am on crutches. But if I can help, I am willing to try.” This glimpse of greatness is a story that must be told. Without people like this woman, the 6th Amendment right to a jury trial would be meaningless.



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*In mid-January, the Utah Committee of the American College of Trial lawyers presented a six-hour trial advocacy CLE, "The Trial Academy Boot Camp Series." Over 250 lawyers attended the virtual program. The event was very well received. The program included short informative lectures on opening statements, closing arguments, direct examination, and cross-examination. Each piece was written by a Fellow in the College. They are reprinted here.*

*In addition, nine trial and appellate judges participated in the program. A summary of their advice is included in the article entitled: "What Judges Expect from Trial Lawyers."*

## Opening Statements

by Alan Sullivan

### Trial Practice and Personal Expression

Trial practice is an art, not a science, and the preparation of an effective opening statement is most certainly an art. There is no scientific formula that will yield a perfect opening statement in every case. Rather, the lawyer must bring judgment, experience, skill, and attention to the task of deciding how long the statement should be, what to include, and what not to include. There are a few rules that apply to all opening statements, and I'll tell you what I believe they are. But for the most part, every good trial lawyer will approach an opening statement differently, and every case will require a different approach.

The opening statement is one of only two chances the lawyer will have to address the jury directly. Although it's not an argument, the lawyer must draw on the skills of an advocate, on a deep understanding of the facts, and on knowledge of human nature to boil the case down and explain it to the jury in a compelling way. There's a human dimension to every case. The challenge for the advocate is to communicate the values at stake in the case – values like fairness, the sanctity of a promise, or the arbitrariness of government overreach. Cookie cutter approaches don't work. Pat formulas and clichés don't work either.

Like other aspects of trial practice, the opening statement is an act of self-expression. To be persuasive, you must be yourself. You must deliver the opening statement from the heart, and you must be authentic. So, the trick is to find your own voice, and don't try to be anyone else.

### Importance of Preparation

Your opening statement will be the first the jury will hear about your case. Many lawyers give little advance thought or preparation to the opening statement. They simply wing it with no preparation, or otherwise repeat the same series of opening statement clichés they use in every case.

Other lawyers, and I'm one of them, believe that the opening statement is crucial and that it deserves careful preparation. It's the lawyer's first chance to look the members of the jury in the eye, to establish a relationship, and to introduce your case's themes. Jurors will often forget evidentiary details as they emerge throughout the trial, but they're likely to remember the essence of a good opening statement. Since your opening statement comes at the very beginning of the trial, before the jury has formed any opinion, you have the chance to command attention, establish trust, generate sympathy for your client's position, and frame the issues in a memorable and useful way.

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Some cases are won or lost in the opening statements of counsel. So don't squander this opportunity. Give the opening statement plenty of thought. And don't be boring.

## Objectives

You should think carefully about your specific objectives for the opening statement. Although some of your objectives will naturally depend on the nature of the case and whether you represent the plaintiff or a defendant, there are a few things you'll probably want to accomplish in your opening statement in every case.

Your main objective will be to capsule your client's version of the facts in simple, concrete language. In explaining the facts, you'll want to frame the issues the jury will be called upon to decide and present your trial themes, identifying which facts are going to be important and why.

You may also want to explain – very briefly – something about the trial process: how the case will unfold and how you, as the advocate for one of the parties, are going to fit into the process. Jurors like to know generally what to expect, in a sequence they can understand. You may also want to introduce the people who will be working with you – the lawyers and paralegals on the trial team – so that each of them can stand and say hello to the jury.

You'll probably want to identify a few key witnesses, telling the jury who they are, what they're expected to say, and (most importantly) what the significance of their testimony is likely to be in relation to the issues.

You may want to "inoculate" the jury by telling them about the most obvious problems with your case so that they're not caught off guard later in the trial.

At the end of your opening statement, you'll want to explain what you'll be asking the jury to do at the close of trial. You'll want to tell them that you'll be speaking with them about the evidence and the issues in the closing argument.

You may well have other objectives. For example, if you're a prosecutor, you'll want to explain the charges against the defendant and perhaps something about the grand jury process that led to the charges. If the case involves technology or a field of commerce with which the jury will be unfamiliar, you may want to provide the jury with some background. If the case is likely to involve obscure terms of art, you may want to explain them. If the case involves a crime scene, an accident scene, or a specific industrial setting, you'll probably want to show them a

diagram or map or photograph. The opening statement is a great opportunity to provide basic orientation.

Beyond all of this, your overriding objective should be to gain the jury's trust, making it clear that you're going to be an honest broker of the facts and a resource they can rely on. By the end of the opening statement, you'll want the jury to understand that you have their interests in mind, that you'll tell them the truth, and you'll operate efficiently. You might want to commit to being prepared and not wasting their time.

## Do's and Don'ts

Before discussing some of the specific elements you're likely to include in your opening statement, let me give you a few do's and don'ts:

- Strive for immediacy. Avoid clichés. Avoid long prologues or speeches that waste time.
- Strive for brevity. There are few cases that require an opening statement of more than thirty minutes. The longer your opening statement, the greater the risk of your losing the jury's attention.

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- Strive for factual accuracy. If you tell the jury something that they learn is untrue, they won't forget it. If you tell the jury you're going to prove a set of facts, you must be sure of your ability to deliver.
- Avoid legalese and jargon at all costs. There is *always* a clearer and more immediate way to explain what you mean to a lay person of ordinary intelligence.
- Don't patronize the jury. Treat them like adults. Jurors are usually pretty smart, and they're usually interested in doing their job well. You can assume that they are people of normal intelligence. If you do your part as an effective advocate, the jury will understand everything they need to know to decide the case.
- Don't argue the evidence or the law in the opening statement. If you do, the other side will object and the court will stop you. Rather, explain what you expect the evidence will be and what it will show. As an example, the following is permissible: *"The evidence will show that Mr. Smith was at home sleeping in his bed when the alleged crime was committed."* But the following is not permissible: *"There's no way Mr.*

*Smith could possibly have committed the crime."* The line between argument and explanation is sometimes unclear, and some judges are more sensitive to this issue than others.

- Never personally attack any party or attorney. Treat counsel, the parties, the court, and the court's staff with respect.

### The Power of a Good Five-Minute Summary of Your Case

Good lawyers often decide to begin their opening statements with a short, compelling account of the most important facts. My own preference is to begin with a five-minute summary crafted to persuade the jury (1) that the case is simple and understandable, and (2) that my client should prevail. This is something I work hard on during trial preparation, and I commit it to memory so that I can deliver it without notes, making eye contact with the members of the jury. I hone the language of the summary to deliver the maximum impact. My factual summary should embody my most important trial themes, and it must connect with the jury on an emotional level. I normally deliver the summary immediately after I introduce myself – and before I say anything else.

For example, in a fraud case in which my client is a defendant, I might begin my opening statement as follows:

*"Ladies and gentlemen, I'm Alan Sullivan, and I represent the defendant Mr. Robert Smith, who is sitting beside me. The issue in this case is very simple. It's whether Mr. Smith lied to Ms. Jones about the condition or suitability of the property he sold to her in March 2019. The evidence will show that in February 2019, just a month before the sale, Mr. Smith encouraged Ms. Smith to inspect the property carefully, and she did so with her realtor, not once, but on three different occasions. Then, on the basis of those inspections, Ms. Jones and her realtor prepared a detailed written statement on the condition of the property, which they gave to Mr. Smith to read. He agreed with it and told her that he agreed with it. Apart from this, he never communicated with her about the property or, indeed, anything else. Mr. Smith will tell you that he never told Ms. Jones, as she now claims, that the property would be suitable for her business. In fact, at the time of these events, he did not know what her business was, or why she wanted to buy the property."* And so on.

I try to keep the summary brief and simple so that the jury will understand and remember it. This is not the time to get into the weeds of the case. I try to present the summary at the very

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beginning of the opening statement so that the jury will appreciate the overall thrust of my case from the get-go. Once the jury understands the thrust of my case, they'll be on the lookout for evidence to support it. There's an old saying that the first lawyer who is actually understood by the jury wins the case.

### Identification of key witnesses

I think it's always a good idea to tell the jury about the most important fact witnesses from whom they'll hear, explaining a bit about each of them, what you expect them to say, and how their testimony will relate to the issues in the case. For example, I might say the following about a witness: *"We'll call Mr. James Burton, Mr. Smith's long-time neighbor. He'll testify that he observed Ms. Jones and her realtor on one of their visits to the property. He'll tell you how long they were present on the property and what they did. He'll tell you about a brief conversation he had with Ms. Jones at that time. You'll want to listen carefully to his testimony because it will help you evaluate the important question whether Ms. Jones had a meaningful chance to inspect the property during the period leading up to the purchase."*

In a complicated case with many witnesses, you'll probably want to focus the jury's attention on only three or four of them, and then indicate generally that there will be other witnesses whose testimony will address this issue or that issue.

You may also want to mention your expert witnesses. You might say, for example *"We expect to call as a witness Mr. Dan Simmons, an expert real estate appraiser with over forty years' experience in this community. Mr. Simmons will testify as an independent expert, meaning that he has no interest in this case, and he doesn't have any relationship with either of the parties. We have asked him to testify because his expertise will help you in deciding the issues. He'll provide you with his opinion on whether the price Ms. Jones paid was fair."*

Identifying some of your witnesses to the jury in the opening statement serves several purposes. It allows you to develop your major themes by explaining the evidence you expect to present on the questions the jury must answer at the end of the case. It tells the jury what to expect and why they should listen carefully. And it sends the jury the message that you are prepared, that you have a sensible trial plan, that you've been deliberate in the selection of your witnesses, and that you're not wasting their time with random witnesses. You want the jury to understand that with you in charge of the case, they're in good hands.

### Discussion of Your Adversary's Case

If you know that the other side is going to challenge your version of the facts in a particular way, it may be a good idea to deal with that challenge up front, in the opening statement, so that the jury doesn't feel blindsided later on. This part of your opening statement is damage control. You are inoculating the jury from testimony or documents they'll get from the other side.

For example, if the opposition is going to contend that your client actively prevented Ms. Jones from inspecting the property or from learning of its environmental problems, you may want to say the following in your opening statement:

*"Ms. Jones and her lawyer will tell you that she never had a meaningful chance to inspect the property, that Mr. Smith prevented her from performing a complete inspection and then withheld from her a negative environmental report. But I ask you to listen carefully to the evidence on each of these points. The evidence will show that Mr. Smith repeatedly invited Ms. Smith to inspect the property, with no time limits or preconditions. We'll show you that she visited the property on three occasions with her realtor for the specific purpose*

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*of determining if it was suitable for her business. And we'll show you that the allegedly negative environmental report was issued by the government long before Mr. Smith bought the property. Mr. Smith himself was unaware of it until this lawsuit began."*

Or, for example, if the plaintiff contends that your client was motivated by a desire to destroy the plaintiff's business, you might say, *"Counsel told you in his opening statement that Mr. Smith intended to destroy Ms. Jones's business. But we will show you that this could not have been the case. At the time of these events, Mr. Smith had never met Ms. Jones and had no knowledge of her business interests. On this score, you'll want to listen carefully to the testimony of Mr. Smith himself as well as the testimony of his realtor."*

As you prepare this portion of your opening statement, be sensitive to the difference between an explanation of the evidence to be presented (which is permissible) and argument based on the evidence (which is not permissible in the opening statement).

### Explanation of What You Will Ask the Jury to Do

By the end of your opening statement, you should make sure that the jury has a clear idea of what its job is going to be in the case. The more specific you can be about this, the better the jury will be prepared to listen to the evidence in a useful way.

In a criminal case, the defense lawyer will want to tell the jury that at the end of the case, they will have the duty to decide innocence or guilt beyond a reasonable doubt on each of the charges in the indictment. The lawyer will tell the jury that in closing argument he or she will review the evidence with them and then ask them to return a verdict of not guilty on all counts.

Plaintiff's counsel in a civil case might say, *"Ladies and gentlemen, at the end of the case you'll be given what's known as a special verdict form, a sort of questionnaire in which you'll be asked, in effect, whether Mr. Smith should be held liable to Ms. Jones and, if so, how much he should be required to pay her. I'll have the opportunity to speak with you after all the evidence is presented. At that time, I'll go over with you each of the questions in the special verdict form so you'll know exactly where we stand. I'll review with you the evidence relating to each question. I will ask you to render a verdict in Ms. Jones's favor on all questions and to award damages in an amount that fully compensates Ms. Jones for her losses."*

### Use of Visuals

PowerPoint presentations, photos, maps, diagrams, and documents may all be useful in opening statements. They can be helpful in orienting the jury to the facts that will be presented. They can focus the jury's attention on the most critical information with which they'll be presented. And they can make the opening statement much more interesting. But I have three words of caution regarding the use of visuals.

First, before the trial starts, you'll want to discuss the visuals you intend to present in the opening statement with opposing counsel. I normally send my visuals to opposing counsel a week before trial and ask if there will be any objection to my use of them. If there are objections, I may decide to approach the court for a ruling that I can use the visuals. If there are no objections from counsel, I will provide the court with a copy of the visuals and ask for permission to use them in the opening statement. One potential problem may be that a visual embodies evidence that has yet to be admitted and about which there will be an objection. (This, of course, will not be an issue if exhibits are pre-admitted on the parties' stipulation.) Another potential problem is that a visual is argumentative and therefore impermissible at the opening statement phase.

Second, don't let visuals overwhelm your presentation. Remember that you want the jury to be watching you and listening carefully to your presentation, not staring continuously at a screen. So be selective about what you present on the screen.

Third, if you're going to use technology to present your visuals, don't bungle it. A seamless visual presentation speaks volumes about your competence and preparation. On the other hand, nothing reflects more poorly on your competence than the failure to operate a laptop presentation effectively. So, before trial starts, practice.

### The Importance of Tone

At the beginning of trial, the jurors are interested in obtaining useful information from you; they are not interested in hearing overblown oratory. They are interested in hearing about the facts of the case and the trial process, without argument or theatrics. So, be calm and genuine. Avoid attempts at humor because they may be perceived as a self-indulgent waste of the jury's time.

The opening statement is as much about you as it is about the case. Your objectives should be to convince and enlighten, but also to engender the trust and confidence of the jury.





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# Direct Examination

by George A. Hunt

You all have probably heard that “a trial is theater” – and to an extent, this is true. Especially with jury trials. But what does this mean, particularly to a trial lawyer who is facing the prospect of an upcoming trial? It means that your mindset must not only be about evidence and witnesses and exhibits, but you must place yourself in the role of a theater director whose job it is to plan the production, develop the storyline that encompasses all elements of your claim or defense, and orchestrate the timing and sequence of witnesses and exhibits. It is within this framework that we consider the subject of this article – direct examination of witnesses.

The first consideration is the sequence of the witnesses you intend to have testify in the direct portion of your case. The sequence should follow your storyline, with an introduction, a middle, and an end. In other words, start out with a strong witness who can introduce the storyline of your case in a natural, logical way, and end with a strong witness who can wrap up your prima facie case and leave a positive, credible impression with the jury. Other necessary but weaker witnesses should be sandwiched in between. Selecting a witness who understands the overall story of the case and who knows enough about the facts is ideal, and that choice will lend itself to a comfortable, intuitive introduction to the story of your case. In making this selection, consider credibility and self-interest – even though a party may have the most detailed knowledge of certain facts, if another witness who is disinterested in the case can also tell the story, that witness may be preferred due to his or her superior credibility. And speaking of credibility, building trust and credibility between yourself and the jury is critical. In a world where lawyers are denigrated and often seen as TV hucksters, it is very important to use every available opportunity to build a trust relationship between yourself and the jury.

Now, for some specifics:

Utilize the basic tools of direct examination, which are open-ended, non-leading questions that elicit a narrative response. To do that, begin your questions with words such as Who, What, Where, When, How, and sometimes Why. Using this simple format throughout direct examination will avoid leading questions, will elicit narrative responses, and will allow you to keep up the tempo of your case. Tempo is very important because it creates a comfortable flow and avoids awkward pauses that distract the

jury and the judge and that depart from the seamless presentation of your storyline. My old mentor, John Snow, of Snow, Christensen & Martineau fame and an early fellow of the American College of Trial Lawyers, was a stickler for tempo. He avoided any break in the rhythm of the case that

would make the judge and jury uncomfortable or distract their attention from the important details of the case and the testimony being presented. From the many cases I have tried, I have learned to respect the rhythm and the tempo of the case. It is important – but I digress.

To keep your examination flowing, it is also helpful to use the occasional transitional phrase. Examples include “describe,” “explain,” “what happened next,” or “did there come a time that.”

*GEORGE A. HUNT, formerly of Williams & Hunt, is now General Counsel at Cache Valley Electric. He is a fellow in the American College of Trial Lawyers.*



*“[I]n today’s society we get almost all our information from screens.... Jurors will expect counsel to use screens to tell the story of the case – embrace this and do not disappoint.”*

The objective is to periodically jog your witness with these transitional phrases to keep the testimony flowing and stimulate further detail on a subject or cause a slight redirection if the witness gets off point. Using these phrases deftly allows you to shape and mold the testimony to fit your storyline while keeping up the tempo and maintaining the rapt attention of your fact finders.

Repetition and re-emphasis are also techniques that can be used to effect during direct examination. This is often referred to as “double direct” examination, and goes something like this:

Q: How did you feel after the accident?

A: I felt pain in my back with a knife-like pain shooting down my right leg.

Q: How much time elapsed from the accident until you felt this knife-like pain shooting down your right leg?

A: About two minutes.

You get the idea. Do not over-use this technique, but it can occasionally be an excellent tool to emphasize a point and etch it into the collective memory of the jury.

Another effective direct examination tool is the use of demonstrative evidence in connection with the testimonial evidence that you present. With the wide availability of digital tools currently installed in courtrooms, there is no reason not to share scene photos, contract terms, or drawings or photos of whatever object that is important to your case and is linked to the testimony of your witness. Remember that in today’s society we get almost all our information from screens: cellphone, computers, iPads, and television. Jurors will expect counsel to use screens to tell the story of the case – embrace this and do not disappoint.

It may be trite to say a picture is worth a thousand words, but it is true, and using demonstrative exhibits can greatly aid in the jury’s understanding of your case. For example, I once had a case that involved the question of whether a slurry tank in a mill designed to process and recover gold from crushed ore was functioning as designed and represented, or not. To demonstrate the problem (which was awkward to explain to a lay jury), we had the plant engineer make a short vignette that demonstrated operation of the tank in question juxtaposed side-by-side with a similar tank that functioned properly. The little video worked perfectly and showed the jury exactly what the engineer was

talking about when he criticized the operation of the slurry tank at issue. Moreover, the jurors bought into it and seemed proud of the fact that they fully understood what the witnesses were talking about. Animations can explain manufacturing processes, chemical reactions, physiology, and other abstract concepts that are very difficult to explain verbally. Seeing a process evolve and play out in real time can be crucial to a jury’s understanding of key issues in a case. One important thing to consider when using demonstrative exhibits – particularly the electronic variety – is laying the proper foundation as a predicate to admitting the exhibit into evidence. Historically, a demonstrative exhibit was considered an exhibit that was used merely to illustrate the testimony of a witness. That simplistic approach has largely been abandoned with further analysis and the increasing sophistication of demonstrative exhibits that in fact impart information beyond the witness’s testimony and add *real* evidence to the record. The basic rule is that proper foundation for an exhibit requires that it be authentic, reliable, and relevant. However, some exhibits such as computer animations may require additional elements. A complete discussion of the subject is beyond the scope of this article, but I refer you to the treatise of Thomas A. Mauet, TRIAL TECHNIQUES 185–86 (7th ed. 2007) and David S. Santee, *More*

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*Than Words: Rethinking the Role of Modern Demonstrative Evidence*, 52 SANTA CLARA L. REV. 105 (2012).

Another aspect of direct examination that bears comment and discussion is the direct examination of expert witnesses. Remember that an expert is

a witness who is qualified as an expert by knowledge, skill, experience, training, or education [who] may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Utah R. Evid. 702(a). Note that the very definition of an expert witness defines someone who can help the jury to better understand the case, and that should be of utmost importance when you select an expert to assist you in educating a jury. Counsel often make the mistake of choosing the expert with the most impressive academic credentials instead of the witness who is qualified but also relatable, has “walked the walk,” and who can engender the confidence of the jury and lead to a better understanding of the case. I learned this lesson the hard way in a case I tried many years ago against my friend, Dick Burbidge. We both needed an expert in mortgage financing. I chose a Harvard-educated fellow who had superb academic credentials, and Dick chose a local mortgage broker educated at BYU who was a jovial fellow and who related to the jury. I paid heavily for my poor choice, but the experience indelibly etched this lesson on my frontal lobe and I never made that mistake again. It is not the expert with the best academic credentials who wins, but the one who relates to the jury and sells his or her opinion.

After choosing your expert, you then need to prepare that person to testify. You need to thoroughly educate the expert on the facts of your case and then work on simplification and straight talk. Discourage your expert from over-using technical jargon, acronyms, or arcane language. Make certain that your expert understands that the opinions given need to be explained in lay persons' terms. Finally, rehearse with your expert how you intend to present credentials and background facts in conjunction with the expert testimony. I like to do this by having the witness introduce herself or himself and then explain to the jury what I have hired the expert to do in the case. Then I ask what the expert has done to prepare herself or himself to be able to give that opinion, including education, training, and

practical experience. This can and should all be done in a very conversational manner, thus avoiding a boring recitation of credentials that will destroy the tempo of your case and distract the jury. Although one generally should not lead during direct examination, remember that leading questions are generally allowed respecting matters that are undisputed and preliminary. Thus, when setting up the opinion and providing background information, you can occasionally lead your witness a bit to retain tempo and keep the jury's interest. Remember not to over-teach with your expert. It is not necessary for the jury to know how to build an automobile just to understand why the brakes failed. Stay focused on what matters. And finally, if you have bad news or a disagreement between expert opinions, bring it out on direct and deal with it. For example:

Q: I understand that some experts may suggest that the brakes were under-designed on this vehicle – what do you say about that?

A: [Witness explains.]

Then if necessary, to draw the point out you can use the techniques and words discussed above to provide focus and repetition.

Q: Why did you conclude there was no under-design?

A: [Witness explains.]

And so on. The idea of course is to be able to put your own spin on a controversial issue and face it up front, so it does not appear as though you were hiding or avoiding a sensitive point. In other words, anticipate cross-exam and steal the thunder by disarming the point on direct.

## SUMMARY

For effective direct examination, create your storyline, select and sequence your witnesses, keep the examination conversational and narrative, and mind the rhythm and tempo of your case. If you do this, you should keep the attention and focus of the jury, shape your case as desired, and present your client's cause in the best light possible. Moreover, you will enjoy the presentation more and your stress level will abate – when the courtroom is happy, you will be too. Good luck!

**AUTHOR'S NOTE:** A nod is due to Fellows A. Roy DeCaro of Philadelphia, PA, and Gerald A. Klein of Newport Beach, CA, for use of some of their ideas in this piece.



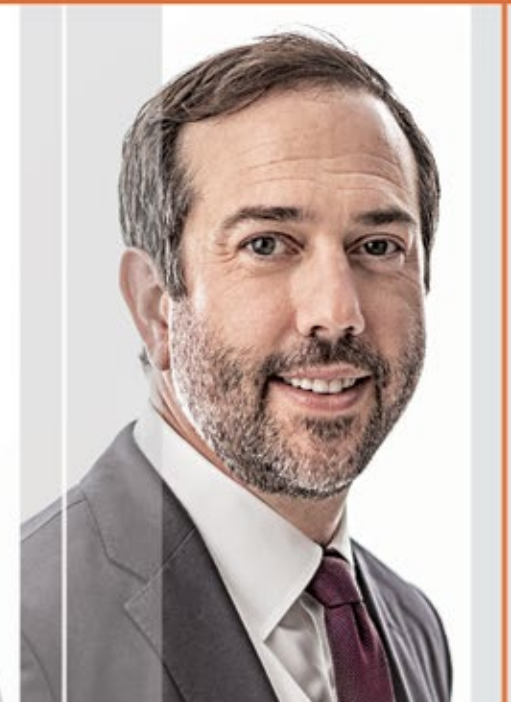
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# Cross-Examination

by Dale J. Lambert

I still remember the gasp from a cross-examining attorney when, after establishing some strong admissions from a critical witness, he asked a “why” question, eliciting a response referring to a damning conclusion from an otherwise inadmissible report. He pleadingly objected to the judge who responded with, “You asked the question.” I’ve watched a lawyer squirm as his expert demonstrated under effective cross that he did not know some essential facts. I do not have space here to regale you with stories of winning and losing cross-examinations, but the point is that cross-examination can win or lose your client’s case. Following proper techniques in preparing and conducting cross-examination is critical. The following guidelines, based on the teachings of experts and my own experience, are the most important.

### Thorough Preparation is Critical.

Although beyond the scope of my article, let me make a brief comment about preparing a witness for cross-examination. I, like you, have a standard lecture that I give my witnesses before being cross-examined in a deposition and trial, which includes directions to tell the truth, listen to and understand the question, refrain from speculation or volunteering information, not let them put words in your mouth, etc. One of the mistakes we sometimes make, however, is not having the witness articulate in his or her own words his or her own answers to anticipated questions. It is also important for the witnesses to understand and articulate what is important about what he or she has to say. It is the witness who has to testify, and the witness should not be burdened by trying to parrot what you told them.

In preparing my own trial cross-examination, I found that it would often take hours to prepare for a few minutes of cross-examination. My cross at trial was always from a prepared script, following principles I will discuss below. My written script had references to prior testimony and documents for ease of reference. If I was going to use exhibits, they were already organized for uninterrupted use.

Occasionally, there is some surprise helpful or harmful testimony given on direct that requires you to adjust your cross, but that is unusual. Generally, you know well ahead of time what you are going to ask, how you are going to ask, and in what order you are going to ask. Prior preparation is critical.

### You Must Have Important Purposes for Your Cross-Examination.

Never ask questions to just ask questions. Generally, there are two overall purposes for cross-examination: to enhance your case by obtaining facts and agreement in support of your case and to diminish unfavorable testimony. Do not bother with questions that do not advance your purposes. If you cannot advance your goals, consider asking no questions. Sometimes a witness is highly credible, testifies only about matters you cannot dispute, and has nothing to say that enhances your case. Crossing such witnesses may well reinforce the damage.

### Ask Only Leading Questions.

Your questions should be designed to produce only a “yes” answer, or at least make a witness look bad if he or she does not answer yes or provide an answer that is obvious to the jury. This is your chance to tell your side of the witness’s story in your own way. Never ask an open-ended question, such as one that begins with “why,” “how,” “explain,” or “what is your opinion.”

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### Ask Short and Clear Questions.

Your leading question should be a short, declaratory statement with a question mark. Avoid stock introductions or tag endings, such as “Isn’t it true.” Do not ask compound questions. Phrase questions to avoid objections and witness equivocation.

An important rule suggested by experts is that each question should only ask about one new fact. The initial question discusses one fact. Each succeeding question contains one additional new fact, adding to the body of facts established by previous questions.

### Control the Witness.

Short and clear leading questions are the most important techniques for controlling the witness on cross. Do not abandon your question. If the witness doesn’t really answer or otherwise avoids the question, ask the same question again. Ask a third time if necessary. Sometimes you can say something like “Perhaps I wasn’t clear, let me phrase my question this way.” You can also follow up an equivocal answer with, “That means yes?” or “That means no?” In the very least, you should either get the answer you seek or have the jury believe that the witness is being evasive, uncooperative, or dishonest.

I have found that a witness is less likely to argue with you if you demonstrate a command of the facts or rely on documents and deposition transcripts. Although you should not lose your temper or appear that you are being unfair to the witness, do not abandon control.

### Organize Your Cross-Examination in a Logical Progression to Achieve Your Goals, Starting and Ending with a Punch.

Rather than organizing your cross-examination to follow the direct examination or chronology, organize it logically to achieve your goals. Each section of your cross-examination should have a specific goal. In organizing the different parts of your cross-examination, be sure to start and finish with your strongest points. That is what the jury is most likely to remember. Usually, you will start with cross designed to undermine the testimony of the witness, but if the witness has things to say that help your case, start there.

Make your points, and sit down. Shorter cross-examinations are frequently more effective than long drawn-out crosses. Remember to begin and end with a bang.

### Guidelines for Cross-Examining Experts.

#### Make the expert your witness.

- Establish agreement with facts and opinions helpful to your case.

#### Undermine credibility.

- Professional witness who makes a good living by providing opinions.
- Demonstrate bias; lack of objectivity.
- Question qualifications.
- Impeach with prior inconsistent statements and opinions.

#### Undermine factual basis for opinions.

- Demonstrate inadequate investigation.
- Establish different and/or additional facts.

#### Undermine opinions.

- Establish different facts and how they affect the opinions.
- Impeach with learned treatises.

### Do No Harm.

You do not want your cross-examination to end with your case worse off than when you began. You also do not want your cross-examination to result with the jury thinking less of you than the witness. Some suggestions to avoid such results:

- Follow the guidelines I have discussed.
- Listen to answers to direct and cross.
- Don’t ask a question to which you don’t know the answer.
- Don’t ask one question too many.
- Be respectful.
- Do not quarrel with the witness.
- Do not conduct a dishonest cross-examination.

### Conclusion – Further Study.

This article has been necessarily brief and general. I encourage you to study some of the many helpful sources on cross-examination. In preparing this advice, I have borrowed liberally from Irving Younger (known for his ten commandments of cross-examination), Larry Pozner and Roger Dodd’s book *Cross-Examination: Science and Techniques*, and James McElhaney’s writings on trial techniques.

# What Judges Expect from Trial Lawyers

by Andrew M. Morse

The most effective trial lawyers meet judges' expectations. During the Trial Academy Bootcamp program, Justice Paige Petersen, Honorable Todd M. Shaughnessy, and Honorable Robert J. Shelby discussed their specific expectations. Still other judges gave their advice during the panel discussions, including Magistrate Judge Brooke C. Wells, Honorable Camille L. Neider, Honorable Derek P. Pullan, Honorable James T. Blanch, Honorable Kara L. Pettit, and Honorable Laura S. Scott. This is their consensus expectation of trial lawyers.

### Jurors' Time

The judges were unanimous that trial lawyers must pay close attention to their jurors' time. Jury duty interrupts and interferes with jurors' lives. To reduce that burden Judge Shelby urged lawyers to take advantage of every minute that the jurors are in the courthouse. Trial lawyers must first accurately state the length of the trial and stick to that length. They must be prompt, prepared, and efficient.

Above all, trial counsel must avoid interruptions when jurors are in the building. They must anticipate evidentiary issues and resolve them via stipulations or court orders well ahead of trial. The judges also advised counsel to resolve expert testimony issues with *Daubert* or *Rimmasch* hearings well before trial.

Judge Shaughnessy suggested that counsel address jury instructions with opposing counsel well ahead of trial, file a stipulated set of instructions in advance, and brief and argue disputed instructions before trial. Justice Petersen explained that a jury instruction is not a good topic for creative legal writing. If an instruction is not found in Model Utah Jury Instructions or federal court instructions, then file a thorough brief concerning the proposed instruction well ahead of time, she said.

The judges also suggested the following: file deposition designations well ahead of trial; file appropriate objections, again, well before trial; and know the rules of evidence backward and forward, especially the hearsay rules. Lawyers who do not understand hearsay waste valuable juror time.

Judge Blanch urged lawyers not to try to impeach a witness with prior deposition testimony unless they can do so effectively. Lawyers waste time when they quarrel with a witness over nuanced and complex questions and answers. Only use questions that are simple:

Question: "What color was the light when you entered the intersection?"

Answer: "Green."

Identical question at trial.

Answer: "Red."

Judge Blanch stressed that unless the impeachment is clear, the jury will think counsel is picking on the witness.

Judge Pettit and others said jurors are insulted by repetitive evidence. She explained that jurors invariably complain, "Lawyers do not think we are smart, but we get it. They do not need to repeat the same fact three or four times." Judge Pettit said, "Less is more. Don't overdo it." Be succinct. Jurors will pay closer attention to the efficient lawyer and tune out the lawyer who does not respect their intelligence.

Leave at least one-half day after closings and instructions for deliberations, advised Judge Shaughnessy. He explained that jurors feel unnecessarily rushed if they get the case at 4:00 p.m. or 5:00 p.m. Finally, the judges urged counsel to avoid big surprises. Surprises waste juror time because they invariably invite sidebar conferences, hearings outside the presence of the jury, or full-blown evidentiary hearings that interrupt trial.

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Judge Shaughnessy was very clear that jurors work hard to understand the law. He explained that they are getting a crash course in the law, evidence, and procedure. They take their jobs very seriously. He asked counsel to make their job as easy as possible by using instructions that are plain and understandable. Keep instructions to a minimum.

### Help Court Clerks

The judges were likewise unanimous that trial counsel should be very mindful of the court clerks. They advised counsel as follows: check with the judge's clerks well ahead of trial to determine how they want exhibits marked. Timely exchange and file a set of properly marked exhibits. At the end of each trial day, review the admitted exhibits with the clerks to avoid delays in submitting the case to the jury.

Anticipate the jurors' needs while they deliberate, advised the judges. For example, supply laptops with basic operating instructions to allow jurors to review electronic exhibits.

### Maintain Integrity of the Process

The judges agreed that the first job of any trial lawyer is to maintain the integrity of the process. They urged that counsel follow these rules: never lead jurors astray with improper references to non-evidence. Never argue an unfounded inference. Never promise to deliver evidence that is inadmissible or that cannot be produced. Obey the Rules of Professional Conduct, especially Rule 3.1 Meritorious Claims and Defenses, Rule 3.3 Candor Toward the Tribunal, and Rule 3.4 Fairness to Opposing Party and Counsel.

Always be polite and respectful to everyone. Not only is it the right thing to do, but the jury will think more highly of you, which helps you, your client, and your case.

Along these lines, Judge Pullan spoke extensively about the role of trial counsel as truth seekers. Trial lawyers play an honorable and necessary role to get to the truth of the matter, he explained.

The judges expect trial counsel to make an accurate record: state facts accurately for the record. For example, if you see any juror falling asleep, be specific: "Your Honor, juror #4 has been asleep since 11:15 a.m. and it is now 11:22 a.m." They instructed counsel to make timely and accurate proffers.

### A Trial Lawyer's Credibility

All trial lawyers start trial before jurors who do not believe them. Judge Scott explained that good trial lawyers spend the entire trial building credibility. She said that the jury must see counsel as honest and credible in order for the jury to listen to that lawyer at the end of trial.

### Consider the Judge's Perspective

Judge Neider remarked that counsel often forgets that judges are a blank slate. She explained that judges know or remember very little about a case as pretrial hearings commence. Yet lawyers assume the judge knows too much about the case. A trial lawyer's job is to make the judge's life less difficult by helping the judge recall the factual and procedural status at all times.

Justice Petersen said that all a judge wants to do is get it right. She explained that lawyers who mislead the court by misstating a holding or the record make the judge's job more difficult. What is worse, it damages the lawyer's reputation such that a court cannot believe what counsel says. Double checking a lawyer's arguments adds hours to the judge's job.

Justice Petersen also suggested that lead counsel should have younger lawyers argue legal issues and question witnesses. She believes that the young lawyer who has briefed the various legal issues is in a better position to accurately state the law.

### Be Genuine

Finally, be yourself. The judges were unanimous in their advice that the collective wisdom of a jury immediately detects when a lawyer is not genuine. If the jury does not believe that counsel is genuine, it will have a very hard time believing anything counsel says.

### Conclusion

This Trial Academy Bootcamp CLE offered valuable insight into how judges think. The American College of Trial Lawyers is grateful for the time these judges gave us all.



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# Closing Arguments

by Francis M. Wikstrom

The evidence is in, the parties have rested, the judge has instructed the jury, and now is your last opportunity to convince the jury that your client should win. If you have waited until now to present a convincing case, you are too late. Based on my experience of trying cases for more than forty-five years and having been on a jury, most jurors will have chosen sides before the closing arguments, and few will change after hearing them. Although jurors are instructed throughout the trial to keep an open mind and not decide the case until they deliberate, human beings have great difficulty dealing with conflicting evidence and remaining neutral throughout the course of a trial. Think about the last time you sat down to watch a sports event between two teams that you didn't really care about. Inevitably, as the game progresses, you will find yourself rooting for one team or the other.

As trial lawyers, we cannot wait until the end of the trial and hope for a "Hail Mary" closing argument to save the day. We must try to get the jury subconsciously pulling for our side during the opening statement. We do this by presenting a theme for our case that strongly resonates with human nature and by telling a story that builds on our theme. Then we must present evidence that supports our theme and proves our story and do our best to discredit any evidence that is inconsistent. If we have done our job effectively, most, and hopefully all, of the jurors will be ready to rule for us before we stand up to present our closing argument. Nonetheless, I'm not advocating that you waive your closing argument.

The closing argument is our opportunity to "tie the case up with a bow" before the jury deliberates. We can remind the jury of our theme and how the evidence supports the story we told them in our opening. And perhaps most importantly, it is our chance to provide favorable jurors with arguments they can take into the jury room and use to persuade any jurors who are not yet convinced. There are many books and articles on the subject and any good trial lawyer will immerse himself or herself in the subtleties of the art. I would like to give you some thoughts on things that have worked for me.

I think the most important thing in trying cases is to know yourself and to be yourself (assuming you're not a jerk). Don't try to be someone you're not, particularly a Hollywood actor's version of a lawyer doing a closing argument. Every person has his or her unique style, and you shouldn't try to emulate someone else. Jurors are unsurpassed in spotting phoniness, and when they do, it does not bode well for the trial lawyer.

For myself, I know that I'm no Cicero. I'm not an orator who can hold an audience spellbound with my eloquence. We all must do the best we can with the skills we have. The goals are sincerity and credibility, not a perfectly polished presentation.

I don't like to think of closing as an "argument." Rather, I think of it as my chance to just chat with the jury about the case. For me, it's not a speech, it's not a TED Talk, and it's not a pedagogical presentation. But how is it possible to have a dialogue when you are doing all of the talking?

Before I answer that, let's talk about mechanics. If you want to have a meaningful chat with someone, you don't write out a speech in advance. You don't lock yourself into a PowerPoint presentation. You want to sound sincere, not canned or rehearsed. Of course, you do think about your closing well in advance. You start thinking about your closing argument when you are preparing your opening statement. During the trial, you will maintain a closing argument file where you put points you want to make in closing, excerpts of critical testimony, and references to important items of evidence. Some lawyers write out their closing arguments, but I do not. I've learned that if I write it out, I'll take it to the podium and then I'll turn the pages and try to follow it. Rather, I prepare a short outline of

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points I want to be sure to cover, and I leave it at counsel table where I can refer to it in a glance if I have a brain cramp. It's a psychological crutch that I've never had to use, but it's a comfort to know it's there.

I like to have a few props handy to refer to during closing. These include the elements instruction and, perhaps, one or two other key instructions. They help provide an organizational structure. I also like to have a few key documents, photos, or video clips ready to use along with important items of real evidence. For electronic exhibits, I tell my legal assistant the order that I will ask for them to be presented on the screen. A little "show-and-tell" adds interest as you chat with the jury about how the evidence fits your theme and story.

Where should you stand for your closing argument? I never use a podium. People stand behind podiums to make speeches or present lectures, not to have a chat. Even when a judge requires that counsel use the podium, I stand beside it so that I'm fully exposed to the jury. Rather, I prefer to stand about six to eight feet in front of the jury box and move from side to side so that I can stand in front of every juror at some point. You will intuitively know the right distance – close enough for a chat but not so close that you are invading the jurors' personal space. If the jurors start leaning back from you, you know you're too close.

You will feel uncomfortable the first time you do this. You'll feel completely open and exposed without the security of the podium to hide behind. But that's the point – to be vulnerable and, hence, more credible. A little nervousness will not hurt you, but slickness and polish might. I promise you that once you start talking

about the case, you will forget about your nervousness. Your demeanor will project honesty, authenticity, and knowledge of the case. In short, you will stand there, as Mark Twain said, "with the calm confidence of a Christian holding four aces."

During the closing, I want to make eye contact with every single juror. Your peripheral vision will embrace the entire jury and you will occasionally scan back and forth as you watch their reactions to what you are saying. But I want to have some one-on-one time with each juror in turn. As you look that juror in the eye and talk to the juror, you can sense from his or her body language whether the juror is receptive. Often, as you talk directly to a juror, you will notice that the juror will start nodding as you make your points – always a good sign. If the juror is crossing his or her arms and shaking his or her head, however, your work is cut out for you.

A good way to begin your closing is to harken back to your opening: "Members of the jury, at the beginning of this case I told you that this was a case about [your THEME]. And I told you that the evidence would show that [STORY]." (This is the old notion of triple repetition: Tell them what you will say, say it, and then tell them what you told them.) "And a few minutes ago, you heard Her Honor, Judge Smith, tell you the three elements we must prove in order for you to rule in our favor."

Another thing I like to say is: "Before we chat about each of those elements and the evidence to support them, I'd like to mention one of the most important tools you have to evaluate the evidence in this case. Judge Smith told you that you must decide the case solely on the evidence and the law as she presented it to you.



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But you'll note that she did not tell you that you must leave your common sense at the jury room door when you begin to deliberate. Have you ever wondered why the United States is one of the few countries in the entire world that allows its regular citizens to decide disputes that arise among them, no matter how complicated? This is because we trust the wisdom and common sense of our citizens. So, you will note as we discuss the evidence in this case, I will often ask you the question: What does your common sense tell you here?"

This is one way that I try to turn a one-way presentation into something more akin to a "chat." I try to anticipate questions the jurors have and say: "You might be asking yourselves why did she do this, or what was he thinking, or how could this have happened." The answer I give them is: "You heard the evidence. Your common sense will tell you the answer."

On credibility issues, I also use rhetorical questions: "X told you this but Y testified just opposite, what does your common sense tell you about who is telling the truth here?" I almost never tell the jury how I think they should answer these questions.

You, as the trial lawyer, have lived with your case for years. You may be absolutely convinced that a witness is lying through his or her teeth, but the jury may just think the witness is mistaken. If you come on strong and brand the witness as a "liar" in your closing argument, you run the risk of putting the jurors off if they think it was just an innocent mistake. Your client wins the issue either way – whether the jury thinks the witness is lying or simply mistaken, and your credibility is enhanced by showing you trust the jury to get it right.

It's the same with your opponent. You may think that he or she has blatantly misstated the evidence. Do you say to the jury that your opponent is lying, or, perhaps more gently, mistaken? I suggest not. I think it is far more effective to say: "Mr. So-and-So told you that Witness X said this. My recollection is that the witness said [the opposite]. But you all heard the testimony, and your collective memory is far better than any one of us. You know what the witness said."

Or, if you have the luxury of a daily transcript, then you might say: "Counsel said that Witness X said this. I asked the court reporter for the transcript and I'd like to read the testimony." Again, let the jury decide whether counsel was lying or mistaken. You win the point either way.

The bottom line is that you must respect and trust the intelligence of the jury. No matter how smart you are, or think you are, your intelligence does not hold a candle to the collective intelligence

of twelve people (or even eight or six). Your memory of the evidence presented at trial will not match the collective memory of the jury. All you need to do is remind them of the critical questions and trust them to come up with the right answer. Nobody wants to be told how to think or what to decide. A skilled trial lawyer will lead the jury to the brink and remind them of the critical evidence – but let them reach the conclusion for themselves.

What about emotion? We all know that facts do not move people to action; emotion does. Anger is a much stronger motivator than sympathy. And, of course, it depends on the type of case and your role in it. A plaintiff's personal injury lawyer will want the jury to return a verdict that contains "mad money." A prosecutor wants the jury to be angry with the defendant; a defense lawyer wants them to be sympathetic, not angry with the client. Even contract cases and patent cases have potential emotion. In a contract case, one party did not keep his word. In a patent case, a defendant willfully stole another's invention. On the other hand, the challenge for the defense lawyer in these cases is how to defuse or take the emotion out of the case.

No matter the case, I think trial lawyers have to be careful how they use emotion in their closing arguments. You can easily overdo it and turn off the jury. I believe that the art is in the understatement. I like to prime the pump by reminding the jury of the key evidence but allow the jurors to take the final step themselves. Rather than tell them how they should feel about the conduct of the other party, I like to use rhetorical questions: "Members of the jury, how do you feel about what XYZ Company did here?"

One final thing to keep in mind is that a trial is not a college debate. You do not need to – nor should you – respond to every single point your opponent raises at trial or in closing. Often in a trial there are one or two "credibility moments" or credibility issues that are critical, and you must address them. But you do not have to address every red herring or rabbit trail that your opponent raises. If you have done your job well, you can count on the phenomenon of cognitive dissonance and trust that the jurors will ignore these distractions that simply do not fit with the theme and story that you have presented at trial.

In case it is not obvious, I am a huge proponent of the jury system. It is the rare, rare case where I would consider waiving a jury and trying it to the bench. That would be a case where your client is so unsympathetic, your facts are so bad, and your only hope is a hyper-technical legal defense that might appeal to a judge. Other than that, give me twelve, or eight, or six jurors, good and true!



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## Developing Juror Trust with Integrity and Personality

by William E. Frazier

On September 24, 2007, in Redwood City, California, I found myself trembling in my Florsheims before twelve jurors and two alternates with a stack of neatly printed index cards and a new appreciation for trial lawyers. I was a fourth-year associate starting my first jury trial and had the benefit of having our firm's founding partner, Steven R. Bangerter, at counsel table with me.

As the judge finished up with preliminary instructions, he looked in my direction and indicated that it was time for the plaintiff's opening statement. I stood up, walked to the lectern, and glanced at my first index card. Making eye contact with the jury, I introduced myself, co-counsel, and my client. As I was doing this, Mr. Bangerter casually moved toward the lectern and removed my index cards. I was a bit irritated, but deeply trusted my mentor. After a few moments of malaise, I told the jury that the evidence would show that the accident was caused by the defendant failing to stop at a red light, leading to my client's injuries for which she received reasonable and necessary treatment. I further described how the accident affected her hobbies, personal life, and job. Finally, I previewed the evidence relating to the likely long-term sequelae of the injuries sustained. I thanked the jury for their time and consideration and took a seat. As defense counsel made his opening statement, my boss passed me a sticky note that said, "Nice job. Don't read to the jury. SPEAK to them." I *thought* I understood what he meant.

After opening statements, I called plaintiff's first witness. While he was sworn, I assumed my position at the lectern with my witness outline and a pen. As I navigated preliminary matters, I would check off questions or subject headings while making an occasional note. Once again, Mr. Bangerter subtly approached the lectern and took my pen. I glanced at the jury, noticing a few amused countenances. I finished direct examination of the first witness and took my seat. This time, my boss wrote, "Don't read to the witness. Interact with the witness."

At lunchtime of trial day one, I walked to a nearby cafe with my client and boss. We noticed some jurors in the general vicinity

walking to a different establishment. The boss said to us whilst walking, "Appearance always matters. Be calm and professional. Don't appear stressed, but don't laugh either. The jurors can see us."

After the completion of trial day one, Mr. Bangerter and I were eating dinner and discussing day two. The boss indicated that, when I was reading or paying attention to notes and outlines, I was not developing any rapport with the judge, witness, or jury. Instead, I was appearing to be overly formalistic, tense, and impersonal. Knowing that I was a musician, Mr. Bangerter asked how I would feel if I went to a rock concert and all the musicians were reading sheet music and stationery. I told him that I would be critical of such a lack of showmanship and professionalism. Now I understood what he meant. He not-so-gently instructed me to be myself, ditch the notes, and handle the trial as though I knew the documents, facts, and arguments better than anyone in the room. After a few moments of reflection, I realized that I indeed knew more about the case than anyone in the courtroom.

At the conclusion of the trial, the jury returned a verdict in excess of the amount our client demanded via California's statutory offer-to-compromise statute, CCP 998, resulting in the defense being required to pay our client's reasonable expert fees. The six-figure verdict was triple the amount predicted by our experienced settlement conference judge. The judge excused the jury, and told them that they could speak with counsel, but were by no means required to do so. I strode into the hallway hoping to speak with some of the jurors, incorrectly assuming that I might only get to chat with one or two. To my surprise, all of the jurors gathered around us, and began firing off questions.

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*Q: Is the plaintiff your mother?*

*A: No, she is my aunt. (The case was called Frazier v. Emcor)*

*Q: Was this your first trial?*

*A: Yes. I was hoping it wouldn't be that obvious!*

*Q: Were you scared?*

*A: Terrified.*

*Q: Did you like it?*

*A: I loved it!*

*Q: Didn't the other side have insurance? (No mention could be made of insurance during the trial by counsel or witnesses.)*

*A: Strangely, they did not.*

I wanted to learn from the jurors' perspectives before they left the courthouse and returned to their lives after a week in court. I asked them what I did poorly and how I could improve. Almost unanimously, they told me that I was obviously nervous during jury selection, stiff during opening statement, and improved when Mr. Bangerter deprived me of my pen and notes. They all laughed heartily when recalling those moments. It seemed that everyone in the courtroom, except for me, saw the bigger picture. I thanked everyone for their attention and patience, and excitedly left the courthouse with my first favorable jury verdict in hand.

A jury trial is not unlike going to a movie theater. Jury selection is a bit like seeing a movie trailer. The jury pool learns a bit about the case, but they don't know much about the characters, their motivations, or positions until the opening statement. The jury learns about the case between the opening and closing statements and will base their decisions on what they learn during that finite period. The jury must be kept interested. Important points must be made, but tedium is to be avoided whenever possible. A few critical points outweigh dozens of small ones. This article is meant to be a primer on what I've learned in the fourteen years since jury trial number one. I hope it helps.

### VOIR DIRE

The Utah Rules of Civil Procedure govern voir dire; however, the methods described by the code are "non-exclusive." Regardless of which method a judge prefers, voir dire provides an excellent opportunity to establish a rapport with the diverse group of people that may be deciding your case.

Most experienced trial attorneys have encountered potential jurors that will do or say anything to get out of serving – especially in a lengthy matter. Some of the "interesting" responses I've heard include:

- "I'm racist toward white people," spoken by what appeared to be a white person.
- "I'm against organized religion," spoken by a person wearing a small crucifix.

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- “I don’t think I can wait to decide the case until the defendant goes. I usually make up my mind very quickly.”
- “I can’t be here very long. I have a lot of cats that will destroy my house.”

Dealing with suboptimal potential jurors provides an excellent opportunity to navigate a difficult conversation with sensitivity, dignity, and respect. This does not go unnoticed. Juries notice and care about how you treat people. On several occasions, jurors have told me that the way our firm treated witnesses and court staff during the trial had a positive effect on how they viewed my clients. If you have an affable personality, use it! Don’t leave it at the door and succumb to the formality of the process or the stress of the occasion. People are more inclined to listen to pleasant personalities and people.

## OPENING STATEMENT

Preparation begets comfort and confidence. When starting a trial, one should know the documents and discovery better than opposing counsel. One develops this sentiment via deprivation of luxuries like sleep, food, and enjoyment of life. Yes, there are significant drawbacks to this approach, but during trial, confidence in preparation is a warm blanket. Preparation allows the advocate to discard notes and avoid being a slave to an outline. Instead, well-prepared counsel can operate with fluency and fluidity. Keeping your eyes off an index card or outline allows you to gauge the responses or engagement level of the people that ultimately will be making critical decisions in the trial; namely, the judge and jury. Further, being able to see reactions of opposing counsel and adverse parties can provide fodder for summation. You do not need the cards. Ditch them. You know the case better than anyone.

Now that the cards have been recycled responsibly, we can pay attention to my five opening statement objectives. These are not in any particular order.

### After Basic Introductions, Lead with Your Worst Fact

Each case has flaws. It is tempting to lead with your strengths and hide or minimize weaknesses. In my view, this is a misstep. If you represent a plaintiff, this is an incredible opportunity to control the narrative about a bad fact. Sidestepping such a fact typically affects credibility in a negative way. Hiding a bad fact gives it power. When counsel leads with their worst fact, they control the manner in which it is discussed, and can provide a

preview of how the evidence will negate or minimize the bad fact. I tell juries about bad facts before my adversary can, whenever possible. Leading with bad facts conveys that my client is a human. I am willing to share that my client’s case is imperfect. A case need not be perfect to be strong. Juries respect that an advocate is willing to level with them, being honest in their dealings instead of hiding the ball.

I find that my adversaries are surprised by this tactic. It can take the wind out of their sails. After trials, colleagues have shared that they hated that I stole the power from their opening by addressing the weakness in my client’s case first. Would you rather control the narrative of the bad fact, or leave that to your adversary?

Another compelling reason to open with a bad fact is the passage of time. Opening statements are at the beginning of a trial. As the case wears on, the jury will have time to get over any shock value and digest the information. By the time the parties rest, the bad fact seems like old news. While the bad fact may still be relevant and have an effect on the ultimate result, the shock value is gone.

### Limit Themes to Two if Possible, and Certainly No More than Three

During opening statements, the jury will have heard no evidence. Unlike you, your client, and opposing counsel, they have not lived with the case for years. They do not know why page ninety-six of a bank statement is critically important. They do not know what the significance of encephalomalacia is. Stated simply, the jury does not know your case. The jury is curious about the macro of the case, not the micro. Accordingly, there is benefit in macro-level themes. Knowing all the evidence is much easier than succinctly grouping it into broad and critical themes. However, this grouping is worth the energy. A jury can remember two or three themes – not fourteen. Spend time on the important themes and continually build upon the thematic foundation as the case continues. Do not be afraid to use the themes in crafting direct examination questions. For example, “Let’s talk about mitigation. Did you follow through with your doctor’s recommendation to undergo an MRI?” If I covered mitigation of damages as a theme during opening statement, I want to use the words from that theme as a preface to questions whenever possible. Themes must be revisited to ensure retention.

Finally, excess detail is overwhelming during opening statement. Mentioning more than two or three themes will water down the entirety of the case at this stage. During opening, it is critical to alert the jury as to what they will hear, and why it is thematically important.



### Tickle At Least Two Senses – Three if You Can

Confucius is said to have coined the proverb, “I hear and I forget. I see and I remember. I do and I understand” nearly 2,500 years ago. Author Tansel Ali, former Australian Memory Champion, writes in his book *Yellow Elephant: Improve Your Memory and Learn More, Faster, Better*, “Research has shown that engaging as many senses as possible at once improves retention of information most.” (2013) We want juries to retain information. It is a mistake to only use our voice to convey information, because we want them to remember that information. It is critical to show and tell at bare minimum. Using more senses will yield more retention.

It is usually not possible to allow jurors to handle evidence during opening statements (though, at times, it can be done via stipulation). Some data suggests that people who can use their visual, auditory, and tactile senses during a task retain more information than people that use only one or two of these. Accordingly, a PowerPoint with bullet points, maps, or photos along with a complementary narrative is an excellent choice for opening. When tactile stimulation is not an option, I ask jurors

to make a special note about something. For example, “The evidence will show and **you may wish to note [emphasis on note, with slight pause]** that the defendant’s speed at the time of the crash was sixty-two miles per hour according to the electronic data recorder.” Seeing, hearing, and writing engages three of the five senses. The other two senses are difficult to elicit or demonstrate during opening statement, unless the quality of your opening causes your adversary to sweat profusely.

### Make Promises, and Keep Them

During opening, I make very careful use of bold red font in my PowerPoints. I try to keep as many of the subject headings and subparts in plain font. Anything in bold red font is a promise. I beseech the jury to trust the evidence instead of spoken words about the evidence. I tell them that anything that is referenced in bold red font will be something that they can see or touch for themselves in the jury room. They will be able to review the document. Jurors like this promise, because they can, as the Russian proverb suggests, “trust but verify.”

It is a cardinal sin to promise the jury that they will have something



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and not deliver. Yet worse is to promise that an item of evidence will say or demonstrate something when it does not. It is critical that you can deliver on each and every promise in bold red font.

### **Argue Without Arguing Using Inflection and Volume**

Thou Shalt Not Argue During Opening Statement. With that said, it is possible to argue without arguing.

Sure. Suuuuuuuuuuuuuure. Right. Riiiiiiiiiiiiiiiiiiiiight. The first, normally pronounced words, stand for an ordinary purpose. While elongating a word or emphasizing a particular syllable does not change what was spoken (or recorded by a court reporter), certain pronunciation conveys information about legitimacy or credulity. Further, short sentences with pauses between words can convey (or argue) the importance of an idea. Consider the following two alternatives:

“The evidence will show that Sally was travelling fifty-three miles per hour in a thirty-five mile per hour zone.”

“The evidence will show Sally was speeding. [pause] Fifty-three in a thirty-five. Fifty-three.....in.....a.....thirty-five.”

The latter sentence changes cadence to emphasize a point: it indicates three times in different ways that Sally was speeding. Alternating volume and pace can prevent an opening statement from blending together. When emphasizing a point, reduce volume instead of increasing it. Yelling grows tiresome over hours and days. Further, overuse of cacophonous bellows may subject you to one of my favorite jury lines: “The loudness of my adversary’s argument does not improve its quality.”

## **WITNESS EXAMINATION**

Direct and cross-examination provide numerous opportunities to garner favor with the jury. We have already discussed preparation and the importance of direct interaction with the witness, as opposed to an outline. There are numerous additional techniques to connect with jurors during examination.

### **Call Your Adversary First if You Can**

Going first has advantages. One of those advantages is being able to call one or more defendants during the plaintiff’s case-in-chief. By doing so, you deprive the other side of controlling the order or narrative of the defense case. Calling the defendant first may not be advisable in every case. That said, our firm has done this for the majority of our matters in which we represented a plaintiff.

Calling the defendant first demonstrates to the jury that you are not afraid of the defense case. Further, you can commence with cross-examination, which forces a defendant to testify whilst the trial is new and nervousness abounds. Nervousness can lead to diminished testimonial performance. A defendant can choose to answer damaging cross-examination questions honestly or be impeached by prior testimony or discovery under oath. Both are bad for optics, especially when the defendant is trying to make a first impression.

### **Limit Objections When Possible**

“Just because you can doesn’t mean you should” is a commonly used phrase that applies to trial objections. Jurors rarely understand the technical reasons for objections. Frequently, when an attorney objects, jurors wonder what an attorney does not want them to hear. Preserving the client’s rights is paramount. With that in mind, if there are questions that are objectionable but not dangerous to your client’s rights, consider swallowing the objection.

### **Identify Kept Promises / Talking to the Jury Without Talking to the Jury**

During opening statement, you asked the jury to hold you to promises about what the evidence would show. Now is the chance! For example, “Mrs. Gonzalez, this is Exhibit eighty-five, which was referenced in bold red font during opening statement.” The statement is an aside, and prefatory to a question (which should quickly follow). I have not encountered objections to this technique. This alerts the jury to the fact that you are keeping a promise, and perhaps they should pay particular attention to an important item.

### **Ask Direct Examination Questions That Appear Hostile**

In my experience, jurors understand that an attorney is being paid to advocate his or her client’s best interests, against the interests of the adversary. It is predictable that “softball questions” will be asked during direct examination. During preparation for your client’s direct examination, set up a “zinger” or “gotcha” moment, where it appears you are asking a hostile question incredulously, and providing the client an opportunity to succeed and gain credibility by providing an honest response as to an important aspect of the case. During post-trial discussions, jurors have mentioned that they appreciated that my questions would occasionally (and apparently) challenge my own witnesses.

## Be Sensitive to Roles and Perceptions

Please learn from my mistakes here. Witnesses can be sympathetic figures – often deservedly so. During trial, it is common to be hungry, sleep deprived, and stressed. Sometimes those physiological realities cause counsel to forget basic facts, such as the witness's sad circumstances or occupation.

For example, when representing a defendant in an admitted liability case, it is important to remember that it is already your client's fault that a claim was even necessary. Aggressively attacking a plaintiff who sustained a serious injury may not be the best strategy. Rather, it may be better to attack the plaintiff's experts or call into question the foundation of treating medical providers.

Once, during a three-month jury trial in southern California, I was questioning a building inspector who previously worked as a pastor for fifteen years. Our founding partner reminded me that, no matter how fallacious the testimony, I should avoid being overly aggressive. I was certain that the witness was either "misremembering" at best or lying at worst. I began to drive the point home with vigorous and agitated impeachment. Though we were fortunate to obtain a fully favorable jury verdict, I was

chastised by a juror for "attacking the pastor" during the post-trial debrief in the hallway. I did my clients no favors by doing that. It was satisfying in the moment but did not advance my client's cause.

## Risky Tactics That May Pay Dividends

I share these tactics because jurors shared with me that they were memorable moments in trials.

### Distraction.

During a particularly contentious trial in Mendocino County, California, our founding partner was examining a psychology expert designated by the plaintiffs. Mr. Bangerter was doing an excellent job of building momentum with well-crafted cross-examination questions. Suddenly, the psychologist deviated from the rhythm and offered an unsolicited tidbit that was arguably responsive to the question. Instead of moving to strike the arguably responsive portion (akin to unringing the bell), Mr. Bangerter asked an ordinary question with a predictable answer. When the witness gave the expected answer, Mr. Bangerter loudly exclaimed, "EXACTLY," and said he had no further questions. From my position at counsel table, I could see all of the jurors. Nearly all of them looked befuddled. I certainly was. My boss later indicated

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that, in the past, he had used that “tactic” with some success. When he had an unexpected moment that was favorable for the other side, he would pivot quickly and use a vocal inflection and volume he had not used during the trial to draw attention to that as opposed to the untidy testimonial tidbit. After obtaining a unanimous defense verdict, multiple jurors mentioned they were surprised to hear “mild-mannered Steve” become so emphatic when he had made a point. He had not made a point. Instead, he got the jury to forget that the adverse witness had made a point. Brilliant.

### **Non-lexical Responses to Non Sequiturs with Side-Eye**

I have used this technique more than once. Each time it made opposing counsel angry and amused some jurors. Having some experience in theater and blocking techniques is useful here. When an adverse witness provides an answer that is nonsensical or completely lacking in credibility, I like to let the ridiculous answer hang in the air for an uncomfortably long period, perhaps as long as ten seconds. I position my body so it is facing a point midway between the testifying witness and the jury box. I’ll drop my head a bit and look at the jury out of the corner of my eye and subtly say “Hmmmmmm.” On one occasion during a trial in Oakland, opposing counsel nearly levitated from his seat to make an objection that he had not yet formed fully. What is the objection to a question that has not been asked and a word that has not been spoken? I was thrilled by the fact that opposing counsel had tipped his hand that he was upset, and the prior bad answer continued to linger in the air and the minds of the jurors.

## **CLOSING**

Our firm tries more cases for defendants than plaintiffs. While the plaintiff’s attorney is closing, I take brief notes and maintain a calm, neutral demeanor. I think it is easy to lose points with the jury by head shaking, making guttural sounds, or other exhalations of disgust. Exuding dignity is important here. Disagree vehemently with your argument, as opposed to gesticulations and sighs. During rebuttal, refrain from taking notes. Since there is no opportunity to respond, taking notes makes it seem as though plaintiff’s counsel is somehow making points that bother you.

Most importantly, you started the case by making promises. You elicited evidence during the testimonial phase of the trial and kept those promises. Now is the opportunity to tell the jury about the promises kept, and what they mean.

During summation, drive home key points with a decrease in volume and speech rate. Key points should be made slowly and

methodically, with an integration of visual (PowerPoint), and if possible, tactile stimuli (items of evidence).

## **POST-VERDICT**

The jury has spoken. Your connection to this jury matters little at this phase. But an attorney can learn a tremendous amount about which tactics worked and which did not with this particular microcosm of society. If you are looking for compliments, call your mother. Instead, ask the recently released jurors about what worked for them and what did not. What did they find convincing? At any time did I do something that they did not like? What was discussed in the jury room? Did they appreciate the theme? Which experts were most effective, and why?

Juries pay attention to things that an attorney cannot fathom in the heat of battle. One humorous example was on March 1, 2013, when our firm just obtained a \$6 million jury verdict in favor of our client. In the hallway, the female jurors gathered around me quickly, which I found confusing, as it had never happened to me in my life! They all seemed concerned. The presiding juror asked if the three-month trial caused my marriage to end. In bewilderment, I answered in the negative and asked why she had that concern. Another female juror mentioned that they noticed that I was not wearing my wedding ring during the last two weeks of the trial. As it turned out, my ring was damaged during my youngest son’s birthday party two weeks prior, and I had sent it in for repair. I was astonished that the jurors noticed. I gleaned a lot from that experience. The jurors were incredibly perceptive, and they cared, even after three months of listening to arguments and witnesses.

## **CONCLUSION**

It is an amazing experience to be a part of a jury trial. These are called “trials” for a reason. They are trying, and at times, exasperating. Jury trials are a bit of a rare treat for civil practitioners, but I very much look forward to restarting jury trials with the pandemic hopefully waning.

Being prepared, honest, and humble are critical. Most importantly, be yourself. In the immortal words of Stuart Smalley, the protagonist of Saturday Night Live’s “Daily Affirmations” sketch: “[You’re] good enough. [You’re] smart enough. And doggone it, people like [you].” Don’t hide your personality under a basket due to the seriousness of a case. One can advocate zealously without adopting a robotic personality. Do not be afraid to crack a smile or display some comedic wit. The jurors likely will appreciate it. Happy juries lead to happy clients.



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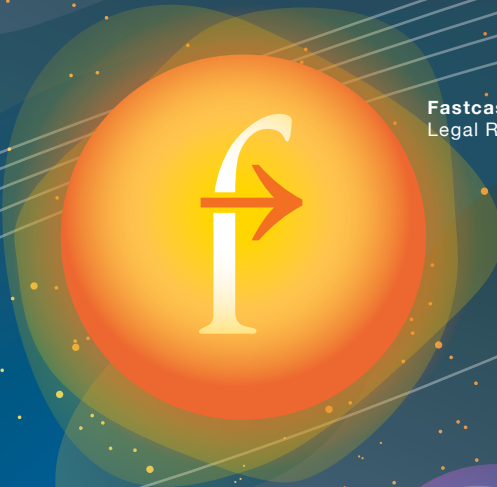
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## Appellate Highlights

by Rodney R. Parker, Dani Cepernich, Robert Cummings, Nathanael Mitchell, Adam Pace, and Andrew Roth

**EDITOR'S NOTE:** *The following appellate cases of interest were recently decided by the Utah Supreme Court, Utah Court of Appeals, and United States Tenth Circuit Court of Appeals. The following summaries have been prepared by the authoring attorneys listed above, who are solely responsible for their content.*

### UTAH SUPREME COURT

#### ***In the Matter of the Sex Changes of Gray and Rice*** **2021 UT 13 (May 6, 2021)**

The district court denied appellants' petition to change their legal sex designations pursuant to Utah Code section 42-1-1, which governs name and sex change petitions, reasoning that because Utah does not have a statute setting forth the standards or procedures for changing one's legal sex designation, it was a nonjusticiable political question. In reversing the district court and over Justice Lee's dissent, **the Utah Supreme Court held that one "has a common-law right to change facets of their personal legal status, including sex," and section 42-1-1's plain language is a statutory declaration that one can have a "sex change approved by an order of a Utah district court."**

#### ***Widdison v. Utah Bd. of Pardons & Parole*** **2021 UT 12 (Apr. 29, 2021)**

An inmate filed a petition for extraordinary relief arguing that the parole board violated her constitutional rights by rescinding her parole. The court dismissed the petition as moot because the parole board reinstated the inmate's parole after the appeal was filed, and the court held that the public interest exception to mootness did not apply because the issue was not likely to evade review. The majority held that **an issue can be likely to evade review in two situations: when it is inherently short in duration, or because of a party's likely actions.** The concurring opinion argued that an issue can be likely to evade review only when it is inherently short in duration.

#### ***State v. Biel*** **2021 UT 8 (Apr. 1, 2021)**

This appeal arose from a criminal trial where the defendant filed a motion *in limine* challenging the State's ability to call two witnesses in order to impeach each with prior inconsistent statements, and the prior statements coming into evidence. In reversing the district court's grant of the motion, the supreme court held that **nothing in the text of Utah R. Evid. 607 and 801(d)(1)(A) prevents the State, or any party, from calling a witness they know will contradict a prior statement solely to get the prior statement into evidence.**

### UTAH COURT OF APPEALS

#### ***Ackley v. Labor Commission*** **2021 UT App 42 (Apr. 15, 2021)**

In this appeal from the Labor Commission's denial of worker's compensation benefits, the court of appeals set aside the Commission's decision and instructed it to revisit the claim under the idiopathic fall doctrine. **In holding that the idiopathic fall doctrine applies to the plaintiff's fall, the court evaluated and explained the different legal causation standards for workplace falls that apply depending on the cause of the fall.**

#### ***Kodiak America LLC v. Summit Cty.*** **2021 UT App 47 (Apr. 15, 2021)**

This appeal arose from Kodiak America LLC's challenge to a land-use determination by Summit County. The county argued that Kodiak's challenge was barred by res judicata, citing a prior proceeding addressing the same land-use determination in which Kodiak was denied intervention because the county adequately represented Kodiak's interests. The county insisted that the determination of adequate representation in the prior proceeding meant that the county and Kodiak were also in

*Case summaries for Appellate Highlights are authored by members of the Appellate Practice Group of Snow Christensen & Martineau.*

privity for purposes of res judicata. The Utah Court of Appeals rejected this equivalency, reasoning that **privity requires two parties to have “the same legal right or legal interest,”** while intervention under Utah R. Civ. P. 24(a) requires only a shared “interest in the same outcome of litigation regardless of motivation or their respective legal rights.”

***Bohman Aggregates LLC v. Gilbert***  
**2021 UT App 35 (Apr. 1, 2021)**

In the district court, the jury returned a verdict to an attorney representing himself after he presented his case “riddled with first-person narrative and personal opinions,” vouching for himself throughout, and putting into evidence his own testimony that was not admitted during the trial. On appeal of the district court mistrial order, the Court of Appeals **held that Utah Rule of Professional Conduct 3.4 applies to pro se attorney litigants.**

***Brimhall v. Ditech Financial, LLC***  
**2021 UT App 34 (Apr. 1, 2021)**

After defaulting on their mortgage loan and their property being sold at a trustee’s sale, the plaintiffs sued the defendant, claiming they had submitted a complete application for mortgage relief and were negotiating foreclosure relief, which precluded the foreclosure sale. The court of appeals **rejected the plaintiffs’ “serial-application reading” of Utah Code section 57-1-25(1) that would “allow a borrower in default to submit multiple applications for foreclosure relief, each time retriggering the statutory notice requirements and potentially preventing a servicer from scheduling a trustee’s sale due to the pending application for foreclosure relief.”**

***Lehi City v. Rickabaugh***  
**2021 UT App 36 (Apr. 1, 2021)**

A jury found the defendant guilty of electronic harassment based on a barrage of angry messages sent via Facebook. The trial court rejected his challenge to the constitutionality of the electronic communications statute. Affirming, the court of appeals held **(a) Utah Code section 76-9-201(2)(b), which prohibits certain communications that insult, taunt, or challenge in a manner likely to provoke a violent or disorderly response, was not facially overbroad, and (b) the as-applied challenge failed where the defendant essentially repeated the facial challenge and failed to explain how the statute unconstitutionally applied to him.** The court also rejected defendant’s vagueness argument.

## TENTH CIRCUIT

***United States v. Carter***  
**995 F.3d 1214 (10th Cir. May 4, 2021)**

***United States v. Carter***  
**995 F.3d 1222 (10th Cir. May 4, 2021)**

**These related appeals presented interesting questions about appellate standing, jurisdiction, and ripeness.** Both arose from a criminal case in which the district court learned after charges were filed that a prosecutor had obtained recordings of conversations between detainees and their attorneys. This led to a lengthy investigation, with the district court appointing a special master who conducted the investigation in three phases.

The first appeal was brought by four AUSAs who testified as fact witnesses in the third phase of the investigation. Their appeal argued that statements the district court made at the close of the proceeding that reflected negatively on them deprived them of due process. The Tenth Circuit held the four AUSAs – non-parties to the case – lacked appellate standing. **The court evaluated its attorney-standing doctrine, and held the AUSAs did not have standing under that doctrine because the district court’s statements did not “directly aggrieve the four AUSAs because they had acted only as fact witnesses and the district court had not found any misconduct.”**

The United States Attorney’s Office brought the second appeal, challenging statements the district court made in its order dismissing the indictment against the remaining defendant that were adverse to the USAO and its finding of contempt based partly on the failure to preserve evidence. Following the investigation, over a hundred prisoners filed post-conviction motions, challenging their convictions or sentences based on alleged Sixth Amendment violations. **The Tenth Circuit held that the USAO had not established a “stake in the appeal” sufficient for it to appeal from an adverse ruling collateral to the judgment on the merits, such that the court lacked jurisdiction.** It alternatively held that even if it had jurisdiction, the appeal would be prudentially unripe because the “statements about the Sixth Amendment lack any legal effect unless the district court applies them in the post-conviction cases.”



***United States v. Guillen*****995 F.3d 1095 (10th Cir. Apr. 27, 2021)**

This appeal from the denial of a motion to dismiss addressed the constitutionality of mid-stream *Miranda* warnings. Confronted with a splintered Supreme Court decision on the issue, the Tenth Circuit adopted, as a matter of first impression, the standard set forth in Justice Kennedy's concurrence for mid-stream *Miranda* warnings in *Missouri v. Seibert*, 542 U.S. 600 (2004). In doing so, the Tenth Circuit reaffirmed that its approach to a splintered decision would be to adopt the concurring opinion that reflects the narrowest grounds for the decision.

***Minemyer v. Comm'r of Internal Revenue*****995 F.3d 781 (10th Cir. Apr. 22, 2021)**

The Tenth Circuit joined the Third, Fifth, Seventh, and Ninth Circuits to hold that a tax court order disposing of some, but not all, claims arising from the same proceeding is not immediately appealable under 26 U.S.C. § 7482(a) (1) unless the tax court “expressly determines that the

order is final and there is no just reason for delay, similar to Rule 54(b) certification by a district court.”

Although the procedural rules applicable to tax courts do not contain a counterpart to Fed. R. Civ. P. 54(b), the appellate court concluded that application of that rule's requirements would promote “consistency and clarif[y] the time for taking an appeal” in tax court proceedings.

***Petersen v. Raymond Corp.*****994 F.3d 1224 (10th Cir. Apr. 22, 2021)**

The Tenth Circuit affirmed summary judgment to the defendant forklift manufacturer in this products liability case, based on the plaintiff's failure to provide admissible expert testimony showing that a safer, feasible alternative design existed at the time of his injury. The court held that the district court properly excluded expert testimony proffered by the plaintiff where the expert provided only generalized opinions that the forklift would have been safer if it had a door on it, but did not provide details about a feasible design alternative.

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***United States v. Perrault***  
**995 F.3d 748 (10th Cir. Apr. 21, 2021)**

A well-known priest in the community appealed his conviction on seven counts of sexual abuse, arguing that the jury pre-determined his guilt and the trial court abused its discretion in allowing so many former victims to testify. Affirming, **the Tenth Circuit provided a detailed analysis of the standards governing a claim of presumed or actual jury prejudice in a criminal case.** The Tenth Circuit also held that district court did not abuse its discretion when it permitted multiple witnesses, who were minors when the events occurred approximately twenty years earlier, to testify about uncharged conduct under Federal Rule of Evidence 414.

***Frasier v. Evans***  
**992 F.3d 1003 (10th Cir. Mar. 29, 2021)**

This Section 1983 case involved the police allegedly retaliating against a citizen filming another's interactions with the police resulting in the police grabbing the plaintiff's tablet out of his hand and searching it. The district court denied the officers' qualified immunity summary judgment because the officers' training instructed officers to not violate First Amendment rights. In reversing, the Tenth Circuit held that **"judicial decisions are the only valid interpretive source of the content of clearly established law, and, consequently, whatever training the officers received concerning the nature of...First Amendment rights was irrelevant to the clearly-established law inquiry."**



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***Frank v. Crawley Petroleum Corp.***  
**992 F.3d 987 (10th Cir. Mar. 29, 2021)**

The plaintiffs in this putative class action filed a motion for voluntary dismissal of the complaint without prejudice. The district court granted the motion but included a provision in the order saying that the plaintiffs' lawyer could not file similar putative class action claims against the defendant on behalf of other plaintiffs. The lawyer challenged the order on appeal. The Tenth Circuit held **the lawyer had standing to appeal because he was referenced in the order and bound by it, and that the filing restriction against the lawyer was improper because the dismissal did not cause any legal prejudice to the defendant.**

***United States v. McGee***  
**992 F.3d 1035 (10th Cir. Mar. 29, 2021)**

Enacted in 2018, the First Step Act, Pub. L. 115-391, §§ 101 et seq., 132 Stat. 5194, reduced the mandatory life sentence required for certain drug crimes under 18 U.S.C. 841. The Act also provides a separate mechanism for "compassionate release" based on "extraordinary and compelling reasons." In this appeal, the Tenth Circuit determined that a district court considering a petition for compassionate release under the Act is not bound by the United States Sentencing Commission's policy statements limiting the definition of "extraordinary and compelling reasons." Instead, **the district court must independently assess whether the reasons offered by the petitioner qualify as "extraordinary and compelling."** Furthermore, the Act's reduction of certain mandatory life sentences under Section 841 may be considered an "extraordinary and compelling" reason for early release of a petitioner who does not otherwise qualify for the reduction.

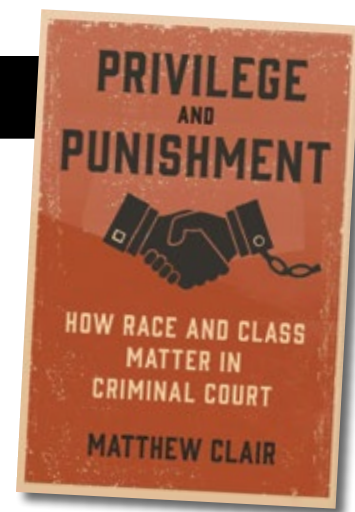
***Awuku-Asare v. Garland***  
**991 F.3d 1123 (10th Cir. Mar. 16, 2021)**

In this immigration appeal, plaintiff was in the United States on a nonimmigrant F-1 visa, which required him to maintain a full course of study. He, however, was incarcerated for 13 months on a charge that he was ultimately acquitted of. In rejecting the plaintiff's argument that the failure to maintain active enrollment must be the nonimmigrant's fault, **the Tenth Circuit held that section 1227(a)(1)(C)(i) is unambiguous and "contains no requirement that such failure to be the fault of the visa holder or the result of some affirmative action taken by the visa holder."**

# Privilege and Punishment: How Race and Class Matter in Criminal Court

by Matthew Clair

Reviewed by Sarah Carlquist



The criminal justice system is complicated. The reasons some are stopped by police and later charged, while others skate free, are complicated. The choices one must face when charged with a crime are complicated. The outcome of a criminal case, and whether it might be called good or bad, is complicated. And the relationship that undergirds it all, the attorney-client relationship, is complicated. Matthew Clair's book, *Privilege and Punishment: How Race and Class Matter in Criminal Court*, examines, to some extent, all of these things, and it's complicated.

When Clair, a sociologist, was still a graduate student at Harvard, he and a colleague presented a paper at a conference in Chicago on racial disparities in the criminal justice system. While there, the two decided to observe the Cook County criminal justice system in action. As it happened, one of the defendants they observed looked familiar to Clair and shared Clair's last name. Clair looked more closely at the defendant — they were both young black men and, to Clair's eye, they kind of looked alike, too. Knowing he had family in the Chicago area, Clair called his dad. It turned out that the defendant Clair saw in court that day was a first cousin he had never met.

Clair credits his experience in court that day as the impetus for his book. As a young person, in his late teens, Clair had consumed alcohol and smoked marijuana, so he could not help but wonder what if it had been him caught in the system. Clair decided to study the experiences of criminal defendants and how issues related to race, class, and societal privilege affected their experience in the criminal justice system. Clair studied sixty-three different criminal defendants and their experiences with the criminal justice system in and around Boston. According to Clair, his study showed that privileged defendants

fared better than disadvantaged defendants. While it is hardly surprising that a person of privilege would fare better than a person without privilege, what is surprising is Clair's suggestion that the attorney-client relationship explained the disparity. Clair observed that privileged defendants had better and more trusting relationships with their attorneys (sometimes privately retained counsel, other times a public defender) than disadvantaged clients had with their attorneys (almost always a public defender or bar advocate). He concludes that the disparate outcomes in their cases can be explained, at least in part, by the quality of the attorney-client relationship. As a practicing public defender, I felt skeptical of his conclusion.

After the preface and introduction, Clair's book is divided into four chapters, and that's when his book, at least for me, became interesting and entirely relatable even as I remained skeptical of his conclusion. In Chapter One, Clair introduces us to his study participants. For purposes of the study, he divided the participants not by race, and not necessarily by economic class, but rather by whether they met his definition of disadvantaged or privileged. Clair defines "disadvantaged people as those who live in neighborhoods with high levels of punitive police surveillance and who have routine (and often negative) experiences with the legal system, limited social ties with empowered people, and limited access to financial resources."

*SARAH CARLQUIST is an attorney at the Salt Lake Legal Defender Association where she represents indigent defendants on appeal.*



Matthew Clair, *PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT* 7 (2020). By contrast, “[p]rivileged people...are those who have access to empowered social ties and financial resources and who rarely have negative encounters with police or other legal officials.” *Id.* As Clair points out, the divide between the disadvantaged and the privileged tends to break along racial and socio-economic lines. People of color, the working class, and the poor are more likely to be disadvantaged, while people who are white or middle-class are more likely to be privileged. Through various anecdotes Clair paints a picture of his study participants, their respective brushes with the law, and the circumstances that led to their arrests. The stories of the people in Clair’s book and how they came to be arrested are all too familiar. The privileged, white, or otherwise connected describe being able to talk their way out of some scrapes, while the disadvantaged, black or brown, or unconnected weren’t so lucky. But even the privileged eventually found themselves in situations they couldn’t talk their way out of, and as a result they found themselves participating in Clair’s study.

Chapters Two and Three compare and contrast the study participants’ relationships with their attorneys. In Chapter Two, Clair analyzes the attorney-client relationship for the disadvantaged and finds that it is marred by distrust. Some of the distrust stemmed from the fact that the disadvantaged defendant’s attorney was court-appointed. The disadvantaged perceived their court-appointed counsel as “poorly compensated or underresourced,” as being friends with the prosecuting attorneys and so not willing to fight, or as simply overburdened with high caseloads. *Id.* at 71. But Clair also observed, “Cultural differences between disadvantaged defendants and their assigned lawyers also frustrate their relationships.” *Id.* at 73. Further, the disadvantaged defendants Clair met often had prior experiences in the criminal justice system – experiences that Clair said jaded their perceptions not just of their attorneys but of the entire system. As a result, the disadvantaged defendants tended to withdraw from their attorneys. For example, some defendants would attempt to rely on their own cultivated legal knowledge – things they learned

from their prior arrests or jailhouse lawyers – instead of relying on and deferring to their attorney’s professional expertise. As in Chapter One, Chapter Two comes to life through the anecdotes and stories of various disadvantaged defendants and their relationships with their attorneys. These anecdotes will be resoundingly familiar to any public defender. Perhaps less familiar though are the cultural reasons that might explain why disadvantaged defendants tend to distrust their attorneys.

In contrast, as explained in Chapter Three, the relationship that privileged defendants had with their attorneys was one based in trust. Interestingly, privileged defendants reported trusting their attorneys regardless of whether they had court-appointed or privately retained counsel. Clair posits that these defendants’ “privileged backgrounds had afforded them positive prior experiences with the police and enabled them to share cultural commonalities

with most attorneys.” *Id.* at 104.

As a result of their trusting relationship, the privileged defendant felt comfortable delegating to their attorney. Clair explains, “Delegation unfolds through three processes: recognition that you are inexperienced with the law and legal concepts; engagement with your lawyer (who is viewed as a professional with legal expertise);

and deference to your lawyer’s recommendations.” *Id.* At bottom, the privileged defendant has had less experience with the criminal justice system and so has not become jaded or distrustful of the system itself. But the privileged defendant also benefits from his or her own cultural experiences and societal interactions. They simply seem more comfortable engaging with and deferring to their attorney because they are so much more used to interacting with professionals in their daily lives.

In Chapter Four, Clair analyzes the various outcomes of the cases he studied. He concludes, “The resistance and resignation characteristic of disadvantage is punished, whereas the delegation characteristic of privilege is rewarded.” *Id.* at 141. But unlike the previous chapters, the anecdotes Clair describes in Chapter Four seemed less supportive of his conclusion. In fact, for me, most of what Clair spent the previous three chapters building came unraveled in the final chapter. It seemed

***Privilege and Punishment:  
How Race and Class Matter  
in Criminal Court***

**by Matthew Clair**

**Publisher: Princeton University Press  
(2020)**

**Pages: 320**

**Available in hardcover and digital formats.**



like the first three chapters recognized all the unique and complicating factors indicative of each case and each attorney-client relationship. Where Clair's earlier use of anecdotes served to illustrate and support their corresponding chapters' main arguments, the anecdotes in the final chapter seemed to undermine rather than support Clair's conclusion. For example, in Chapter Four, Clair describes an attorney-client relationship marked by distrust and withdrawal where the disadvantaged defendant actively resisted his public defender's advice and expertise. Pre-trial, the client complained his attorney was not filing enough motions. At trial, the defendant "kept questioning" his attorney's strategy and complained that his attorney was not delving into matters the defendant felt were important. *Id.* at 157. But after closing arguments and about five minutes of deliberation, the jury acquitted. After the verdict, the attorney recalled, "I don't think [the client] even shook my hand." *Id.* While no question exists that this anecdote illustrates the distrustful sort of relationship that a disadvantaged defendant might have with an attorney, I failed to see how it supports the conclusion that disadvantaged defendants face punishment as a result of their withdrawal from, or resistance to, their attorney. While the public defender in this case "insisted that his frustration" with this client "did not affect his effectiveness in representation[,]," Clair's point was that in another case, the distrustful nature of the attorney-client

relationship might affect the quality of representation and hence the outcome. But even if that might be true, I think any attorney who does not have the luxury of picking their clients has a professional obligation to rise above any attorney-client rancor, unless, of course, the discordance rises to the level of an actual ethical or legal conflict. In the end though, this anecdote seemed to show what I felt Clair's book had been illustrating all along – even if he did not expressly say as much: These things are complicated.

After finishing Clair's book, I remain skeptical that the quality of the attorney-client relationship is necessarily as determinative as he suggests. While I agree that an attorney-client relationship defined by trust and delegation is preferred to one defined by distrust and withdrawal, I do not agree that the quality of the relationship necessarily impacts the outcome. Rather, I think the attorney-client relationship represents a single variable in any given criminal case, and that the outcome of most cases hinges not on any single variable but on a constellation of them. In short, the defendants, their cases, and their relationships with their attorneys are all multifaceted and complicated. But I still recommend Clair's book because it reminds us of the importance of trying to build trust with our clients, and more importantly it illustrates the importance of recognizing the humanity in each of our clients.

### FOR FURTHER READING...

Readers may find this list of trial-related books and other resources helpful.

*Cross-Examination: Science and Techniques*  
by Larry S. Pozner & Roger Dodd

*Goldstein Trial Technique* by Lane Goldstein

*In the Interest of Justice: Great Opening & Closing Arguments of the Last 100 Years* by Joel Seidemann

*Making Your Case: The Art of Persuading Judges*  
by Justice Antonin Scalia & Bryan A. Garner

*Mangrum and Benson on Utah Evidence*  
by Dee Benson and Richard Mangrum

*McElhaney's Trial Notebook* by James W. McElhaney

*Modern Trial Advocacy* by Steven Lubet

*Pretrial* by Thomas Mauet and David Marcus

*The Devil's Advocate* by Iain Morley

*The Tools of Argument: How the Best Lawyers Think, Argue, and Win* by Joel P. Trachtman

*Trial Evidence* by Thomas A. Mauet

*Trial Objections Handbook* by Roger C. Park

*Trial Techniques* by Thomas Mauet

# Advocating “Truth” at Trial

by Keith A. Call

*“To say of what is that it is not, or of what is not that it is, is false, while to say of what is that it is, and of what is not that it is not, is true.”*

— Aristotle

Ethical trial work encompasses nearly the entire body of legal ethics and ethical rules. Trials present especially difficult challenges because the lawyer does not get to parse through ethical dilemmas in the deliberate and detached comfort of a law office or library. He or she must instead face them under the intense pressure of litigation combat, where quick instincts often rule the moment. Another difficulty is that the black letter rules leave vast areas where lawyers can (and do) disagree about what is and what is not ethically appropriate.

Ideas about trial lawyer ethics could fill a book; such ideas already fill at least chapters in books. *See, e.g.*, Peter Murray, BASIC TRIAL ADVOCACY, ch. 3 (2003). For this short article, let’s focus on “advocating truth.”

## The Trial Lawyer’s Truth Dilemma

As a young associate lawyer in Arizona, I once faced a situation where I seriously doubted the truth of what my client was saying. I could not prove he was lying, and the story he told was at least possible, but it seemed so strange I could hardly believe it. I expressed my doubts to my supervising partner. I don’t recall his exact words, but his message was, in essence, “Keith, it is not your job to advocate against our client. It is your job to advocate for our client.” We ended up winning the case. I hoped then and I still hope that the facts I advocated were true!

Every experienced trial lawyer has faced this dilemma. As lawyers, we have a solemn obligation to zealously advocate for our clients. *See, e.g.*, Utah R. Prof. Cond., pmbl. [2] (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”); *id.* R. 1.3, cmt. [1] (“A lawyer must act with commitment and dedication to the interests of the client and with a zeal in advocacy upon the client’s behalf.”).

This advocacy role is critical because competing versions of “truth” lay at the foundation of our adversary system.

Advocacy is the most familiar and probably the most ancient of lawyers’ roles. The adversary system is characterized by independent and contentious presentation of evidence and legal argument to establish a version of the events and a characterization of law that is favorable to the advocate’s client. It is thought that through such advocacy the natural human tendency of a deciding judge or jury to arrive too quickly at decision can be avoided.

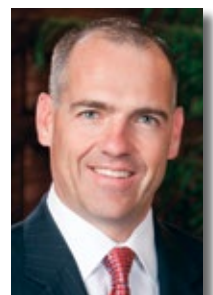
Restatement (Third) of the Law Governing Lawyers, ch. 7, Introductory Note (2000).

In a lawyer’s zeal to advocate facts and law in a light most favorable to the client – in other words, to *win* the case – does the lawyer have any duty to the concept of *objective truth*? Or is the trial lawyer free (or perhaps even duty-bound) to present anything he or she can get away with, leaving it to the skill of the opposing lawyer to uncover any falsehood?

## Some Black Letter Rules

One black (or at least gray) letter rule is found in Utah Rule of Professional Conduct 3.1. Under that rule, a lawyer can ethically advocate any position so long as there is a basis in law and fact for doing so that is not frivolous. But lawyers must actively “inform themselves about the facts of their clients’ cases and the applicable law” and “determine that they can make good faith arguments in support of their clients’ positions.” Utah R. Prof. Cond. 3.1, cmt. [2].

*KEITH A. CALL is a shareholder at Snow, Christensen & Martineau. His practice includes professional liability defense, IP and technology litigation, and general commercial litigation.*



The most pertinent rule is Rule 3.3. It uses three important standards: “knowing,” “reckless,” and “reasonably believes.” With respect to the presentation of facts, the rule states, in part:

(a) A lawyer shall not **knowingly** or **recklessly**:

(a)(1) make a *false statement of fact* or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. . . .

(b) A lawyer *shall not offer evidence* that the lawyer **knows** to be false. If a lawyer, the lawyer’s client or a witness called by the lawyer has offered material evidence and the lawyer comes to **know** of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer *may refuse* to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer **reasonably believes is false**.

Utah R. Prof. Cond. 3.3 (emphases added).

Notably, the use of a “reckless” standard in Rule 3.3(a) differs from the ABA rule. It was added after the Utah Supreme Court held that the former rule’s plain language required actual knowledge before an attorney could be found to have violated the rule. *See In re Larsen*, 2016 UT 26, ¶¶ 24–27, 379 P.3d 1209. Under the current version of Utah’s Rule 3.3, a lawyer violates the rule if he or she knowingly or recklessly makes a false statement of fact to a court. “Reckless” denotes a “conscious indifference to the truth.” Utah R. Prof. Cond. 1.0(o).

Thus, you cannot knowingly make a false statement of fact to a judge or jury, and you cannot be consciously indifferent about statements of fact you make that turn out to be untrue. To do any of this violates the rule.

Similarly, you cannot offer evidence (through a witness or otherwise) that you “know” is false. If your client or a witness you call at trial offers evidence that you come to “know” is false, you have to take corrective action. This includes, if necessary, informing the tribunal of the false evidence.

If you “know” that your client or witness intends to present false testimony, you must refuse to offer the false evidence. You may call the witness to testify, but you may not elicit or otherwise permit the witness to present the testimony you know is false. *See id.* R. 3.3, cmt. [6].

What if you don’t “know” the evidence is false but you “reasonably believe” it is false? Rule 3.3(b) leaves room for the civil trial lawyer to exercise his or her best judgment. It does not directly prohibit the lawyer from presenting the evidence. On the other hand, by expressly stating that the lawyer “may refuse to offer [the] evidence,” it provides a disciplinary safe harbor for the trial lawyer who elects not to present evidence he or she reasonably believes is false. Comment [8] to Rule 3.3 advises, “Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.” Ultimately, your personal barometer may be the best available guide – and usually the only guide in the midst of trial.

In any *ex parte* proceeding, the lawyer has less advocacy leeway and must “inform the tribunal of all material facts known to the lawyer,” whether or not the facts are adverse. *Id.* R. 3.3(e). On the other hand, a criminal defense lawyer may be afforded some additional leeway. Criminal lawyers are permitted to defend a matter so as to require the government to prove every element of a crime. *Id.* R. 3.1. Rule 3.3(b) at least implies that a criminal defense lawyer should allow his client to present evidence the lawyer reasonably believes is false. A comment to Utah’s Rule 3.3 acknowledges that some jurisdictions require criminal defense counsel to allow clients to provide narrative testimony, even when the lawyer “knows” all or part of the narrative is false. *Id.* R. 3.3, cmt. [7].

## Conclusion

Perhaps Aristotle thought he had figured out the meaning of “truth.” But Aristotle was not a lawyer, and he was certainly not a trial lawyer. Zealously advocating truth at trial is a very nuanced endeavor. In general, lawyers cannot *knowingly* or *recklessly* make false statements of fact at trial, they may not *knowingly* present false evidence, and they must use judgment if they *reasonably believe* the evidence is false.

These can be tough decisions to make on the fly, in the heat of battle. The best thing a trial lawyer can do to prepare to make sound decisions at trial is to study and practice ethical conduct day in and day out, long before the trial begins.

*Every case is different. This article should not be construed to state enforceable legal standards or to provide guidance for any particular case. The views expressed in this article are solely those of the author.*

## 2021 Fall Forum Awards

Nominations will be accepted until Friday, September 24 for awards to be presented at the 2021 Fall Forum. We invite you to nominate a peer who epitomizes excellence in the work they do and sets a higher standard, making the Utah legal community and our society a better place.

“No one who achieves success does so without acknowledging the help of others. The wise and confident acknowledge this help with gratitude.”

The Fall Forum Awards include:

**The James Lee, Charlotte Miller, and Paul Moxley Outstanding Mentor Awards.** These awards are designed in the fashion of their namesakes, honoring special individuals who care enough to share their wisdom and guide attorneys along their personal and professional journeys. Nominate your mentor and thank them for what they have given you.

**The Distinguished Community Member Award.** This award celebrates outstanding service provided by a member of our community toward the creation of a better public understanding of the legal profession and the administration of justice, the judiciary, or the legislative process.

**The Professionalism Award.** The Professionalism Award recognizes a lawyer or judge whose deportment in the practice of law represents the highest standards of fairness, integrity, and civility.

Please use the Award Nomination Form at <https://www.utahbar.org/award-nominations> to submit your entry.

## Notice of Petition for Reinstatement to the Utah State Bar by Harold W. Stone III

Pursuant to Rule 11-591(d), Rules of Discipline, Disability, and Sanctions, the Office of Professional Conduct hereby publishes notice of the Verified Petition for Reinstatement (Petition) filed by Harold W. Stone III, in *In the Matter of the Discipline of Harold Stone III*, Third Judicial District Court, Civil No. 140905074. Any individuals wishing to oppose or concur with the Petition are requested to do so within twenty-eight days of the date of this publication by filing notice with the district court.

## Annual Online Licensing

The annual Bar licensing renewal process has begun and can be done online only. An email containing the necessary steps to re-license online at <https://services.utahbar.org> was sent on June 7th. **Online renewals and fees must be submitted by July 1st and will be late August 1st. Your license will be suspended unless the online renewal is completed and payment received by September 1st.** Upon completion of the online renewal process, you will receive a licensing confirmation email.

To receive support for your online licensing transaction, please contact us either by email to [onlinesupport@utahbar.org](mailto:onlinesupport@utahbar.org) or, call 801-297-7021. Additional information on licensing policies, procedures, and guidelines can be found at <http://www.utahbar.org/licensing>.

USB Pro Bono Commission

CHECK  
**YES**  
for Pro Bono Service

## Check Yes for Pro Bono!

When doing your online licensing this year, please remember to “check YES” to receive occasional communication from the Pro Bono Commission about ongoing pro bono projects.



UTAH STATE BAR.

# 2021 SUMMER CONVENTION AWARDS

During the Utah State Bar's  
2021 Summer Convention in Sun Valley, Idaho  
the following awards will be presented:



**Joni J. Jones**  
Lawyer of the Year



**Hon. Brendan P. McCullagh**  
Judge of the Year

**Intellectual Property Law Section**  
**Section of the Year**  
Catherine Parrish Lake, Chair

**Governmental Relations Committee**  
**Committee of the Year**  
Sara Bouley, Co-chair  
Jaqualin Friend Peterson, Co-chair

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Utah Bar Foundation

# Amendments to MCLE Rules Effective May 1, 2021

<http://www.utcourts.gov/utc/rules-approved/>



## 1. CLE COMPLIANCE WILL CHANGE FROM A TWO-YEAR REPORTING PERIOD TO AN ANNUAL REPORTING PERIOD

### July 1, 2019 – June 30, 2021 Reporting Period –

The CLE requirement is 24 hours of accredited CLE, to include 2 hours of legal ethics and 1 hour of professionalism and civility. The traditional in-person credit requirement has been suspended for this reporting period. Lawyers will have through June 30, 2021, to complete required CLE hours without paying late filing fees and through July 31, 2021, to file Certificate of Compliance reports without paying late filing fees. **PLEASE NOTE: Lawyers that comply with the 2021 reporting period will be required to change from a two-year CLE reporting period to an annual CLE reporting period.**

### July 1, 2021 – June 30, 2022 Reporting Period –

The CLE requirement is 12 hours of accredited CLE, to include 1 hour of legal ethics and 1 hour of professionalism and civility. At least 6 hours must be live, which may include in-person, remote group CLE, or verified e-CLE. The remaining hours may include self-study or live CLE.

### July 1, 2020 – June 30, 2022

#### Reporting Period –

The CLE requirement is 24 hours of accredited CLE, to include 2 hours of legal ethics and 1 hour of professionalism and civility. The traditional in-person credit requirement has been suspended for this reporting period. Lawyers will have through June 30, 2022, to complete required CLE hours without paying late filing fees and through July 31, 2022, to file Certificate of Compliance reports without paying late filing fees. **PLEASE NOTE: Lawyers that comply with the 2022 reporting period will be required to change from a two-year CLE reporting period to an annual CLE reporting period.**

### July 1, 2022 – June 30, 2023 Reporting Period –

The CLE requirement is 12 hours of accredited CLE, to include 1 hour of legal ethics and 1 hour of professionalism and civility. At least 6 hours must be live, which may include in-person, remote group CLE, or verified e-CLE. The remaining hours may include self-study or live CLE.

## 2. OTHER RELEVANT CHANGES

- Streamlining rules to make them more understandable and consistent with current Bar regulations.
- Allowing for self-study credits for lawyers participating as presenters in a CLE panel presentation.
- Allowing more flexibility in broadcast CLE programming.
- Clarifying and expanding the types of programs that qualify for ethics and professionalism and civility CLE.
- Allowing for legal specialty groups to earn some credits by attending CLE programs designed specifically for and limited to those group members.

## 3. LICENSED PARALEGAL PRACTITIONER RULES HAVE BEEN INCORPORATED WITHIN MCLE RULES

## The End of an Era – John Baldwin’s 30+ Years at the Utah State Bar

The year was 1990. The top songs in the land were “Hold On” by Wilson Phillips, “It Must Have Been Love” by Roxette, and Madonna’s “Vogue.” Kevin Costner’s “Dances with Wolves” led the box office, and that Christmas we all laughed at “Home Alone.” George H.W. Bush had just completed his first year in office. In the legal world, William Rehnquist led the U.S. Supreme Court, and in Utah, John Baldwin was appointed Executive Director of the Utah State Bar by Bar President Pam Greenwood.

The nation’s taste in music and movies aren’t the only things that have changed over the past thirty years. During John’s tenure, he’s watched the Bar grow from 5,500 attorneys to more than 13,000, with all the challenges that accompany such growth.

“One of the things that made John such a strong candidate for the position was his integrity,” remembered Randy Dryer, the Bar president-elect when John was hired and a member of the hiring committee. “He had all the qualifications we were looking for, and there was never a question about his ethics. He embodies all a good lawyer should be – honest, ethical, and concerned about both the legal profession and the public.”

John has supervised the Bar through recessions, tough financial times, and, to wrap up his career, a pandemic. During his tenure the Bar implemented its New Lawyer Training Program, expanded its Access to Justice program, created the award-winning Licensed Lawyer attorney referral service, and instituted an online legal clinic under John’s direction.

“I’ve been fortunate to work with such dedicated and talented Bar leaders and staff,” John said. “And I’ve been able to be a part of the vision and development of some great benefit programs for both the public and for attorneys.”



*John Baldwin ended his tenure as the Utah State Bar’s Executive Director at the end of June 2021.*

“One of the things about John is he has the ability to give credit to others even on occasions when he did the lion’s share of the work,” noted Dryer.

John also supervised the creation of the Practice Portal and an updated website. Most recently, he supported efforts of the Bar and the Supreme Court in the creation of the Licensed Paralegal Practitioner program and the implementation of the Bar’s attorney well-being program. In addition, he began the process of navigating the Bar through the waters of regulatory reform.

“John is an institution,” said immediate past president Herm Olsen. “He had superb qualifications to lead the Bar, and he only became better over time.

He deserves a long rest on a warm sandy beach somewhere. He is a consummate gentleman.”

That seems a common sentiment among those who worked with, and for, John as well.

“He really cares about the people that work for him,” said a Bar employee, echoing a common theme among Bar staff members. “He makes you feel like you’re important, no matter what your job is,” said another. “He helped make this a great place to work.”

In addition to his duties at the Bar, John served as a committee chair for Utah Center for Legal Inclusion, and taught business law to undergraduates and MBA students at the University of Utah and at the Gore School of Business at Westminster College. He also served on the Board of Directors of the University of Utah Alumni Association and as President of the Beehive Honor Society at the University of Utah.

“I don’t know if we were lucky or smart when we hired John,” said Dryer. “All I know is I’m glad we hired him!”

## Pro Bono Honor Roll

The Utah State Bar and Utah Legal Services wish to thank these volunteers for accepting a pro bono case or helping at a free legal clinic during April and May. To volunteer, call the Utah State Bar Access to Justice Department at (801) 297-7049.

### Family Justice Center

Steve Averett  
James Backman  
Charles Carlston  
Dave Duncan  
Michael Harrison  
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Babata Sonnenberg  
Nancy Van Slooten  
Rachel Whipple

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J. Ladd Johnson  
Chase Kimball  
Allison Librett  
Sherri Walton  
Amy Williamson

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Mark Baer  
Pamela Beatse  
Ted Cundick  
Jeff Daybell  
Lauren DiFrancesco  
John Francis  
Leslie Francis  
Annemarie Garrett  
Gregory Gunn  
Aro Han  
Britten Hepworth  
Annie Keller-Miguel  
Zachary Lindley  
Amy McDonald  
Chase Nielsen  
Brian Rothschild  
Chris Sanders  
Cami Schiel  
Zachary Shields  
George Sutton  
Austin Westerberg

### Pro Se Family Law Calendar

Camille Buhman  
Brent Chipman  
Stephen Clark  
Jared Hales  
Kim Hansen  
Danielle Hawkes  
Jim Hunicutt  
Jay Kessler  
Allison Librett  
Orlando Luna  
Albert Pranno  
Spencer Ricks  
Linda Smith  
Chad Steur  
Virginia Sudbury  
Reid Tateoka  
Diana Telfer  
Michael Thornock  
Staci Visser  
Orson West  
Leilani Whitmer

### Pro Se Immediate Occupancy Calendar

Pamela Beatse  
Daniel Boyer  
Jeffrey Daybell  
Marcus Degen  
Lauren DiFrancesco  
Leslie Francis  
Sagen Gearhart  
Steven Gray  
Aro Han  
Carson Henringer  
Lauren Scholnick

### SUBA Talk to a Lawyer Legal Clinic

Jenny Jones  
J Robert Latham  
Zach Lindley  
Aaron Randall  
Chase Van Oostendorp  
Robert Winson  
Kristin "Katie" Woods

### Timpanogos Legal Center

McKenzie Armstrong  
Bryan Baron  
Dave Duncan  
Janet Peterson  
Katherine Secrest  
Babata Sonnenberg

### Utah Legal Services Pro Bono case

Ciera Archuleta  
Connor Arrington  
Celeste Canning  
James Cannon  
John Cooper  
Connor Cottle  
Craig Day  
Shawn Farris  
Logan Finlay  
Adam Forsyth  
Darin Hammond  
Marji Hanson  
Adam Hensley  
Heather Hess-Lindquist  
Alan Hurst  
Linzi Labrum  
Shirl LeBaron  
Erin Locke  
Joshua Lucherini  
William Morrison  
Nicholle Pitt White  
Aaron Randall  
Helen Redd  
Katrina Redd  
Jason Richards  
Micah Scholes  
Martin Stolz  
Patrick Stubblefield  
Daniel Van Beuge  
Christian West  
Jennie Wingad  
Marshall Witt

### Utah Bar's Virtual Legal Clinic

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Pamela Beatse  
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Mike Black  
Adam Clark  
Jill Coil  
Kimberly Coleman  
John Cooper  
Robert Coursey  
Jessica Couser  
Matthew Earl  
Craig Ebert  
Jonathan Ence  
Rebecca Evans  
Thom Gover  
Robert Harrison  
Aaron Hart  
Rosemary Hollinger  
Tyson Horrocks  
Robert Hughes  
Michael Hutchings  
Bethany Jennings  
Annie Keller-Miguel  
Suzanne Marelius  
Travis Marker  
Gabriela Mena  
Tyler Needham  
Sterling Olander  
Chase Olsen  
Jacob Ong  
Ellen Ostrow  
McKay Ozuna  
Steven Park  
Clifford Parkinson  
Katherine Pepin  
Cecilee Price-Huish  
Jessica Read  
Brian Rothschild  
Chris Sanders  
Alison Satterlee  
Kent Scott  
Thomas Seiler  
Luke Shaw  
Kimberly Sherwin  
Peter Shiozawa  
Farrah Spencer  
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Brandon Stone  
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Mike Studebaker  
George Sutton  
Alex Vandiver  
Jason Velez  
Kregg Wallace



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Effective December 15, 2020, the Utah Supreme Court re-numbered and made changes to the Rules of Lawyer and LPP Discipline and Disability and the Standards for Imposing Sanctions. The new rules will be in Chapter 11, Article 5 of the Supreme Court Rules of Professional Practice. The final rule changes reflect the recommended reforms to lawyer discipline and disability proceedings and sanctions contained in the American Bar Association/Office of Professional Conduct Committee's Summary of Recommendations (October 2018).

## ADMONITION

On February 25, 2021, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rule 1.15(a) (Safekeeping Property) of the Rules of Professional Conduct.

### *In summary:*

The OPC received notification from a bank that the attorney's trust account had insufficient funds. The attorney operated a law firm where he had two banking accounts, an operating account and a client trust account. On two separate occasions the attorney took funds from a client trust account and comingled them with his operating account. Further, the attorney paid third-party liabilities through that operating account and not the client trust account.

### *Mitigating Factors:*

Absence of dishonest or selfish motive; personal or emotional problems; remorse; and remoteness of prior discipline.

## INTERIM SUSPENSION

On April 14, 2021, the Honorable Royal I. Hansen, Third Judicial District Court, entered an Order of Interim Suspension, pursuant to Rule 11-564 of the Rules of Lawyer Discipline, Disability and Sanctions against Amanda L. Ulland, pending resolution of the disciplinary matter against her.

### *In summary:*

Ms. Ulland was placed on interim suspension based upon the following criminal pleas:

One count of False Information to a Law Enforcement Officer, Government Agencies or Specified Professionals, a Class B Misdemeanor;

One count of Emergency Reporting Abuse, a Class B Misdemeanor.

## SUSPENSION

On, April 28, 2021 the Honorable Amber Mettler, Third Judicial District, entered an Order of Suspension against Ryan M. Springer, suspending his license to practice law for a period of one year. The court determined that Mr. Springer violated Rule 8.4(b) (Misconduct) of the Rules of Professional Conduct.

### *In summary:*

Mr. Springer was suspended based upon the following criminal convictions:

Interference with Arresting Officer, a Class B Misdemeanor;

Criminal Mischief, a Class B Misdemeanor, Interrupt Communication Device, a Class B Misdemeanor;

Driving Under the Influence of Alcohol/Drugs, a Class A Misdemeanor;

Driving Under the Influence of Alcohol/Drugs, A Third Degree Felony;

Disorderly Conduct, a Class C Misdemeanor.



## DISCIPLINE PROCESS INFORMATION OFFICE

The Disciplinary Process Information Office is available to all attorneys who find themselves the subject of a Bar complaint, and Jeannine Timothy is the person to contact. Jeannine will answer all your questions about the disciplinary process, reinstatement, and readmission. Jeannine is happy to be of service to you.

**801-257-5518 • [DisciplineInfo@UtahBar.org](mailto:DisciplineInfo@UtahBar.org)**



## RESIGNATION WITH DISCIPLINE PENDING

On March 22, 2021, the Utah Supreme Court entered an Order Accepting Resignation with Discipline Pending concerning Abraham C. Bates, for violation of Rule 1.15(d) (Safekeeping Property), Rule 3.4(c) (Fairness to Opposing Party and Counsel), Rule 8.1(b) (Bar Admission and Disciplinary Matters), Rule 8.4(b) (Misconduct) (2 counts), and Rule 8.4(c) (Misconduct) (2 counts) of the Rules of Professional Conduct.

*In summary:*

### Trust matter:

A relative of Mr. Bates established an irrevocable trust naming the relative's daughter as the primary beneficiary (the Trust). Mr. Bates was named trustee of the Trust. Mr. Bates applied for an account with a brokerage firm (Brokerage Firm) on behalf of the Trust (the Account). The Account was initially funded with money from the relative, who subsequently deposited additional funds into the Account.

Approximately two years later, the relative deposited money into the Account. A few days later, Mr. Bates notified the Brokerage Firm that the money was deposited in error and requested that the amount be refunded to him. In response, the Brokerage Firm issued a check to Mr. Bates. During this time period, Mr. Bates also wrote a check to either himself or his law firm from the Account. To create cash for the check, Mr. Bates sold stock.

Approximately a year later, Mr. Bates requested that money be transferred from the Account to a bank account (Bank Account) in his name. The funds were transferred. To create cash for the withdrawal, Mr. Bates sold shares and stock.

Mr. Bates requested that money be transferred from the Account to the Bank Account. The funds were transferred. To create cash for the withdrawal, Mr. Bates sold stock.

On three subsequent occasions, Mr. Bates requested that money be transferred from the Account to the Bank Account and the funds were transferred.

Thereafter, Mr. Bates requested that money be transferred from the Account to another bank account in his name. The funds were transferred. To create cash for the withdrawals, Mr. Bates sold stock on two separate occasions.

Previously, Mr. Bates had shown the relative documentation indicating the balance of the Account had increased. Despite multiple requests, the relative received no other information regarding the Trust. Mr. Bates never divulged the withdrawals he made or the stock he sold from the Account.

The relative filed a petition in Third District Court to have Mr. Bates removed as trustee of the Trust. The court granted the relative's petition and entered a judgment against Mr. Bates for the fees and costs associated with the Petition and for any enforcement of the Order. The judgment was later amended. The Order also removed Mr. Bates as the Trustee and required Mr. Bates to provide an accounting. The monetary portion of the judgment was satisfied after Mr. Bates' bank account was garnished; however, there is no evidence he provided the accounting as ordered.

After subpoenaing records from the Brokerage Firm, the relative filed a complaint against Mr. Bates in Fourth District Court for conversion, legal malpractice, breach of trust, breach of fiduciary duty, and RICO. A default judgment was entered against Mr. Bates and subsequently a satisfaction of judgment was filed.

### Criminal Matters:

Criminal Matter #1. Mr. Bates pled guilty to Driving on Suspension, a Class C Misdemeanor.

Criminal Matter #2. Mr. Bates was convicted of Driving with a Measurable Controlled Substance, a Class B Misdemeanor.

Criminal Matter #3. Mr. Bates pled guilty to Possession of a Controlled Substance-Marijuana/Spice, a Class B Misdemeanor.

Criminal Matter #4. Mr. Bates entered a plea of guilty to two counts of Possession with Intent to Distribute a Controlled Substance, Second Degree Felonies.

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# Preparing for Your First Trial as a New Attorney

by Jacob K. Arijanto

I took a lot of comfort in the partner's advice to me during my first trial as a summer law clerk, which was to "keep quiet and manage the slide deck." These words brought some assurance that my only responsibility for a while would be to push the button to advance the PowerPoint and I would have no opportunity to mangle the law in a shaky voice during oral argument.

After a firm and practice change and one year graduated, I inherited a divorce case, with a substantial estate, that was destined for trial. As reality set in at the final pretrial conference, I looked to fill the practical holes of trial that I did not learn in school. I learned a great deal in preparing for my first trial and found that load management, structured timeline, good witness preparation, and an ability to be flexible were key to effective trial presentation.

## Load Management

My most important takeaway from my first trial was learning to manage time so that I could dedicate enough time to prepare while tending to my other cases. I knew that my knack for procrastination no longer served me well, so I made sure to allocate more than enough time. All cases are different, but I generally set aside three hours to prepare for each hour in trial. This allowed me to stagger the time in the preceding months so that I could service my other clients' needs while devoting the proper attention to the case.

## Structured Timeline

I was told by the client's previous attorney that this case was going to settle. It did not, which left me behind. I spent the weeks before frantically doing the things I wish I had done months earlier. I now know that not every case will end in trial, but I still prepare as if it were so that I do not find myself in the same position. I start early and calendar dates to reach certain milestones, like the completion of a trial outline, witness interviews, and a trial brief. This provides me with much needed structure and promotes efficient use of my time.

## Witness Preparation

Luckily for me, my client was ideal as he was sharp and honest and he presented well. He had also been subject to litigation before, so he understood how to conduct himself. Unfortunately, that is not always the case. I have not found a universal method for preparing witnesses, but I generally start the process early in the case by gathering their factual knowledge, developing the narrative, and covering the "do's and don'ts." Closer to trial, I spend a significant amount of time reviewing my question outline with witnesses as I find it builds rapport, irons out inefficiencies, and eases anxiety.

## Flexibility

I can be rigid to a fault at times, which no doubt can be a weakness in my practice. I spent months thinking that the trial would occur in a certain manner and was thrown a curve ball when issues were bifurcated so that the trial would occur in two different phases. I was so shellshocked by the bifurcation that my wheels began to spin, but after a brief recess I was able to regroup and soldier on. This was invaluable because I learned to compartmentalize the issues and modified the way I prepare trial outlines. That way I can argue issues discretely and would not be forced to throw off of the back foot if something does not go according to plan.

## Conclusion

Trial, and the associated stress, is a significant rite of passage in every litigation attorney's career. Part of the growth as a new attorney is to figure out a system that works for you and learn how to prepare for trial. Implementing this structure will save you the late nights and weekends in the months before trial, help you see the issues clearly, develop the narrative, and ultimately present the most effective argument possible.

*JACOB K. ARIJANTO is an attorney at Carr Woodall in South Jordan, where his practice is primarily focused on family law.*





## Paralegal Tips for Effective Trial Preparation

by Tonya Wright

Chances are, if you are an attorney and have been to trial, you have benefited from your paralegal's skills during trial preparation, the pendency of the trial proceedings, and after the trial has concluded. If you are a litigation paralegal who has been to trial, you probably have your first trial experience permanently ingrained in your brain. If you are a litigation paralegal who has not yet been to trial, you are probably thinking about when you might get the opportunity, and are likely wondering how you will get through it.

The November/December 2016 *Utah Bar Journal* featured an article written by our own Greg Wayment, titled "The Litigation Paralegal's Role at Trial." His is a tough act to follow, and touches on most of the bases, such as forming a trial team and delegating responsibilities, creating master task lists which include all applicable deadlines, organizing trial exhibits, marshalling deposition testimony, drafting jury instructions, preparing demonstratives, overseeing electronic presentation, assisting during jury selection, keeping witness schedules organized, and helping identify rebuttal issues and evidence.

I won't re-hash Greg's work here. Instead, I would encourage you to revisit his article in the *Bar Journal* archives. As I revisited the same, I took note of things Greg does that I do similarly during trial preparation. I also took note of a few tips and tricks I utilize that he may not have mentioned. The process is helpful, because we all do things differently. I have always found the evaluation of others' methods to be a useful educational tool. So think of this as an addendum of sorts.

Having been to trial many times in the last decade, I am of the opinion that every case file, starting with inception, should be built as if the case will eventually proceed to trial. When documents and things come in from the opposing side, they are reviewed, indexed and tracked in a form that can be easily converted to a trial tool. The index is designed to make the documents and things easier to find as the case is proceeding through discovery, and also later, as the items become potential trial exhibits. The same goes for outgoing discovery. I prefer to organize things produced in a certain way, with an eye toward trial organization. Everything from the way documents are Bates-numbered, to the order they are produced, is evaluated with regard to sequence, chronology, and ease of organization. Of course, once trial

preparations begin, and attorney preference rules the day, some reorganization might occur. But with good planning, it won't be a big deal. A well indexed and organized spreadsheet can be quickly reordered in Excel, and converted into a nice exhibit list for use at trial. If you are really lucky, the lead attorney on the case might be an excellent communicator, which naturally reduces the amount of last-minute reorganization.

In the past few years, I have become a huge fan of marking exhibits in Adobe before printing multiple copies for binders. Whether you have trial software that does this for you, or are using Adobe, it's an excellent trial tool. Before going down that road, however, it's good practice to check with the clerk to find out what their preference is. It also depends on whether you are in state or federal court. If the judge and clerk have specific preferences for exhibit marking, you want to find out what those preferences are before placing an electronic marker on exhibits. It is also a good idea, once you have determined that the court allows pre-marking of exhibits, to make sure the lead attorney has approved of the order of the exhibits before pre-marking them. Otherwise, you may just create a lot of extra work for yourself in the event of a re-do.

As Greg points out, trial schedule, witnesses, and witness subpoenas are common paralegal pre-trial tasks. If there are a lot of witnesses, this can be quite daunting. I like to create a multi-tab index containing relevant contact information for each witness, and the dates and times of each witness's expected appearance; estimated length of time of appearance; whether or not they require a subpoena and, if so, whether or not the subpoena has been served (or indicate if the witness will accept service); whether or not the witness fee (and mileage, if applicable) has been paid; and if the witness requires travel accommodations and/or reimbursement for travel. The index can be constantly updated as trial preparation

*TONYA WRIGHT is a Licensed Paralegal Practitioner and litigation paralegal at Peck Hadfield Baxter & Moore in Logan, Utah. She is currently the chair of the Paralegal Division of the Utah State Bar.*



continues, and easily formatted and printed for the trial binder.

If there is an unavailable witness, oftentimes counsel will stipulate to a reading of that witness's testimony at trial by a third-party. Common paralegal tasks might be to help find a third-party to read the deposition testimony and also to assist the attorneys in designating and reaching an agreement with regard to the portions of the deposition testimony to be read. Color-coding fans will find this experience super fulfilling. Pick your favorite colors and highlight in Adobe the following: plaintiff's proposed questions and answers (two colors, one for question, one for answer); defendant's proposed questions and answers (two more colors), and the parties, stipulated questions and answers (two more). All that color-coding goodness will come in handy when counsel is asking the judge to approve of the portions of the deposition to be read. With the disputed portions in different colors, the judge and attorneys can quickly identify, discuss, argue, and reach resolution on the testimony to be read. After the portions to be read have been finalized, condense it to two colors (one for questions, one for answers), so the third-party reader can easily follow along at trial.

The trial binder is definitely an area where lead attorney preference will always rule the day. Experience has taught me the common items needed for the trial binder: exhibit lists, witness lists, juror seating chart, jury, voir dire outline (if attorney-conducted voir dire is permitted), pretrial disclosures for all parties and objections thereto, jury instructions and objections, motion in limine briefing and rulings, expert witness reports and information, key rulings on summary judgment, and opening and closing outlines. Step one is and always should be to check with the lead trial attorney about what they would like in the trial binder. Some prefer to have all of the above. Others might prefer standalone binders for some of the above, such as motion in limine briefing, key rulings on summary judgment, or jury instructions. Once again, good communication with lawyers will eliminate extra work later.

If the judge in your case allows, there may be juror questionnaires to contend with before trial. If allowed, the questionnaires are typically prepared by counsel for all parties, stipulated to, approved by the judge, and then sent out with the jury summons and returned to the court a week or so before trial. Trial paralegals are often utilized in the drafting and revising of juror questionnaires. Some jurisdictions allow pre-release of the completed questionnaires to all counsel in the case. If allowed, a good practice is to organize the questionnaires in a binder, sorted according to attorney preference. This allows the attorney(s) to review them in an order that helps to refresh their memory regarding the potential juror. If the questionnaires are not provided to counsel until the morning of trial, a common trial paralegal role will be to quickly organize the questionnaires and help review them in a very short amount of time before jury selection begins.

As for attendance at trial, some attorneys like their paralegal to be in the courtroom during trial. Others prefer the paralegal be outside the courtroom, or even back at the office. My experience has been that I am most effective in the courtroom seeing the proceedings first-hand. It is, in my opinion, the most effective and efficient way to establish needs, because the paralegal is constantly aware of what is going on and isn't relying on the information second-hand. As Greg points out, a trial paralegal will literally assist the trial team in every way possible. Experienced trial paralegals are essential before, during, and after trial. Trial is, by nature, stressful and unpredictable. The paralegal role is an important one to help promote the smooth progression through trial, hopefully without surprise, and is a very rewarding experience.

As you review Greg's original writing and this addition, create your own addenda. It's impossible to make a list of every single pre-trial task a paralegal might encounter during trial preparation and/or trial. The list is literally infinite.

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# 2021 Utah Paralegal of the Year Award: Congratulations Jennifer Hunter!

by Greg Wayment

On Thursday, May 20, 2021, the Paralegal Division of the Utah State Bar and the Utah Paralegal Association held the Annual Paralegal Day celebration online with a live video broadcast. Retired Judge Thomas Willmore was the keynote speaker and talked about how the Utah Judicial Branch was able to pivot to a mostly online presence during the pandemic. The Division would like to heartily thank all those who organized and hosted this event, especially David Clark for providing technical support.

One of the highlights of this event is the opportunity to recognize individuals who have achieved their national certification through NAIA. This year there were eight new individuals: Angela Willoughby, Soile Häkkinen, Tris Baker, Angelica Torres, Pauline Koranicki, Becky Voight, Susan Astle, and Nellie Doornbos. Well done!

Paralegal Day is also the day to recognize the Distinguished Paralegal of the Year Award. The purpose of this award is to honor a Utah paralegal who, over a long and distinguished career, has by their ethical and personal conduct, commitment and activities, rendered extraordinary contributions and service to the paralegal profession.

This was again an outstanding year for nominations. Typically, the Paralegal Division will get four or five nominations, with maybe a couple of them being complete. This year, we ended up with ten complete nominations and all of them were very strong candidates. I would like to thank all those that nominated a paralegal that was not chosen. Please don't be discouraged; we'd love to see your nomination again next year.

The hard-working individuals on the selection committee this year include: Judge Shaughnessy, Christopher Von Maack, Jennifer Fraser Parrish, Sarah Baldwin, and Patty Allred. We are pleased to announce that the winner of the 2021 Utah Distinguished Paralegal of the Year Award is Jennifer Hunter. Jennifer was nominated by a peer, Chantel Rhodes of Sumsion Steele & Crandall.

Jennifer has more than fifteen years of experience as a litigation paralegal in civil and commercial litigation and white-collar defense. Jennifer has extensive experience managing cases with high-volume document productions. She regularly attends and participates in hearings and trials as well as managing all aspects of case workup.

Jennifer obtained a bachelor's degree in Sociology and Criminology





from the University of Utah in 2011. She went on to receive a master's degree in Paralegal Studies from George Washington University in 2015. She received both of her degrees while working full time and raising two daughters as a single mother.

She has worked as a paralegal for the Utah Education Association; Skordas, Caston & Morgan; Ballard Spahr; and Clyde Snow & Sessions. In 2017, she joined Workman Nydegger. She has been an active member of the Paralegal Division of the Utah State Bar.

Jennifer has volunteered for the Boys & Girls Club of Greater Salt Lake and the Utah Refugee Justice League and has been a volunteer, mentor, and coach for People Helping People. She has also volunteered at the Sundance Festival, at the Utah Arts Festival, and for the Susan G. Komen Foundation. Until recently, she served as the Home Owners' Association president of a forty-three-unit, eight-story condo building in Salt Lake City.

In recognition of Jennifer's dedication to the paralegal profession and her outstanding involvement with the community, we are honored to recognize her as the Utah Paralegal of the Year. Congratulations, Jennifer Hunter!

The Paralegal Division would also like to especially thank Judge Todd Shaughnessy, Christopher Von Maack, Jennifer Fraser Parrish, Sarah Baldwin, and Patty Allred for their work on the Paralegal of the Year Selection Committee. We would also like to thank Workman Nydegger for their support of Jennifer.

**From Brent Lorimer, President of Workman Nydegger:**

Professionally, Jennifer is a stellar paralegal. She is bright, responsible, and a self-starter. A task given to Jennifer is a task completed and well done. I rely upon Jennifer to investigate and solve complex legal and logistical issues, and she returns results, not excuses. She

knows how to work hard, often working nights and weekends to meet the needs of our litigation department. She cultivates a good working relationship with the clerks of court in districts across the country, working through issues so I do not have to. She understands that clerks, staff, and other sometimes-ignored personnel can be the most important people at the courthouse.

**From Jennifer:**

I'd like to take just a minute to say thank you for this great honor. We all hope our attorneys appreciate what we do, and I'm fortunate to work for a fabulous law firm, with some great attorneys who are really good at expressing their gratitude for what I do for them. But a nomination coming from a peer means the world to me, and I so appreciate Chantel and the friendship we've developed in working as co-plaintiff paralegals the last couple of years.

My friends and family, and most of my co-workers know I own the phrase, "I'm not the nice one." But I think we can all acknowledge many times over, that we know who's important in our work lives, those we can lean and rely on when we need an assist or a little guidance.

I love being a paralegal. It allows me to do all the work and get none of the glory. Or in other words, to quietly sit in the background and watch everything fall into place. And I couldn't do it without the great paralegals and attorneys I've met over the nearly twenty years here in Utah working in an amazing legal community. I've made some wonderful life-long friends, and I have to say, the outpouring of congratulations the last couple of weeks has been overwhelming for this loud-mouthed introvert. Thank you to the Bar for continuing to recognize all the hard work paralegals do, for giving me my fifteen seconds of fame, and to you all for this honor. I hope to not let my work slip in the sixteenth second.

*Jennifer (center)  
with her colleagues  
at Workman  
Nydegger.*





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**Snow Jensen & Reece (St. George, Utah), is seeking an associate with 1–3 years' experience in commercial litigation and other civil matters.** Applicant should have excellent academic credentials, writing and communication skills and admitted in Utah State and Federal Courts. Full benefits with salary commensurate with experience. Please submit resumes to Curtis M Jensen at 912 West 1600 South, Suite B-200, St. George, Utah 84770 or e-mail [sjlaw@snowjensen.com](mailto:sjlaw@snowjensen.com).

**Small family law firm is looking for a licensed paralegal practitioner** or a paralegal in process of becoming a licensed paralegal practitioner. Contact Victoria at 801-209-0618.

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**CHILD SEXUAL ABUSE – SPECIALIZED SERVICES.** Court Testimony: interviewer bias, ineffective questioning procedures, leading or missing statement evidence, effects of poor standards. Consulting: assess for false, fabricated, misleading information/allegations; assist in relevant motions; determine reliability/validity, relevance of charges; evaluate state's expert for admissibility. Meets all Rimmasch/Daubert standards. B.M. Giffen, Psy.D. Evidence Specialist 801-485-4011.

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**GRAPHIC DESIGN & COPYWRITING SERVICES.** The graphic designer for the Utah State Bar and the *Utah Bar Journal* for 20+ years, as well as the layout editor for the *Utah Trial Journal* for 12+ years; Laniece Roberts can assist you with: logo design and rebranding, print or online advertisements, invitations, announcements, brochures, books, newsletters, magazines, etc. Professional or personal projects are welcome. For examples of her work, see the ads on pages 3, 8, 17, 21, 23, 35, 53, 57, 63, and 66 of this *Bar Journal*. Email: [LanieceRoberts@gmail.com](mailto:LanieceRoberts@gmail.com).

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## ***Certificate of Compliance***

**UTAH STATE BOARD OF CONTINUING LEGAL EDUCATION**  
Utah State Bar | 645 South 200 East | Salt Lake City, Utah 84111  
Phone: 801-531-9077 | Fax: 801-531-0660 | Email: [mcle@utahbar.org](mailto:mcle@utahbar.org)

For July 1 \_\_\_\_\_ through June 30 \_\_\_\_\_

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Address: \_\_\_\_\_ Telephone Number: \_\_\_\_\_

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| Date of Activity | Sponsor Name/<br>Program Title | Activity Type     | Regular Hours | Ethics Hours | Professionalism & Civility Hours | Total Hours |
|------------------|--------------------------------|-------------------|---------------|--------------|----------------------------------|-------------|
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|                  |                                |                   |               |              |                                  |             |
|                  |                                | <b>Total Hrs.</b> |               |              |                                  |             |

- 1. Active Status Lawyer** – Lawyers on active status are required to complete, during each two year fiscal period (July 1–June 30), a minimum of 24 hours of Utah accredited CLE, which shall include a minimum of three hours of accredited ethics or professional responsibility. One of the three hours of the ethics or professional responsibility shall be in the area of professionalism and civility. Please visit [www.utahmcle.org](http://www.utahmcle.org) for a complete explanation of Rule 14-404.
- 2. New Lawyer CLE requirement** – Lawyers newly admitted under the Bar's full exam need to complete the following requirements during their first reporting period:
  - Complete the NLTP Program during their first year of admission to the Bar, unless NLTP exemption applies.
  - Attend one New Lawyer Ethics program during their first year of admission to the Bar. This requirement can be waived if the lawyer resides out-of-state.
  - Complete 12 hours of Utah accredited CLE.
- 3. House Counsel** – House Counsel Lawyers must file with the MCLE Board by July 31 of each year a Certificate of Compliance from the jurisdiction where House Counsel maintains an active license establishing that he or she has completed the hours of continuing legal education required of active attorneys in the jurisdiction where House Counsel is licensed.

## EXPLANATION OF TYPE OF ACTIVITY

**Rule 14-413. MCLE credit for qualified audio and video presentations; computer interactive telephonic programs; writing; lecturing; teaching; live attendance.**

- 1. Self-Study CLE:** No more than 12 hours of credit may be obtained through qualified audio/video presentations, computer interactive telephonic programs; writing; lecturing and teaching credit. Please visit [www.utahmcle.org](http://www.utahmcle.org) for a complete explanation of Rule 14-413 (a), (b), (c) and (d).
- 2. Live CLE Program:** There is no restriction on the percentage of the credit hour requirement which may be obtained through attendance at a Utah accredited CLE program. **A minimum of 12 hours must be obtained through attendance at live CLE programs during a reporting period.**

THE ABOVE IS ONLY A SUMMARY. FOR A FULL EXPLANATION, SEE RULE 14-409 OF THE RULES GOVERNING MANDATORY CONTINUING LEGAL EDUCATION FOR THE STATE OF UTAH.

**Rule 14-414 (a)** – On or before July 31 of alternate years, each lawyer subject to MCLE requirements shall file a certificate of compliance with the Board, evidencing the lawyer's completion of accredited CLE courses or activities ending the preceding 30th day of June.

**Rule 14-414 (b)** – Each lawyer shall pay a filing fee in the amount of \$15.00 at the time of filing the certificate of compliance. Any lawyer who fails to complete the MCLE requirement by the June 30 deadline shall be assessed a \$100.00 late fee. Lawyers who fail to comply with the MCLE requirements and file within a reasonable time, as determined by the Board in its discretion, and who are subject to an administrative suspension pursuant to Rule 14-415, after the late fee has been assessed shall be assessed a \$200.00 reinstatement fee, plus an additional \$500.00 fee if the failure to comply is a repeat violation within the past five years.

**Rule 14-414 (c)** – Each lawyer shall maintain proof to substantiate the information provided on the certificate 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 related to credit. The lawyer shall retain this proof for a period of four years from the end of the period for which the Certificate of Compliance is filed. Proof shall be submitted to the Board upon written request.

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 Rule 14-414.

A copy of the Supreme Court Board of Continuing Education Rules and Regulation may be viewed at [www.utahmcle.org](http://www.utahmcle.org).

Date: \_\_\_\_/\_\_\_\_/\_\_\_\_ Signature: \_\_\_\_\_

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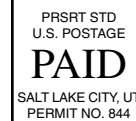
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