Trials and Tribulations

Spring 2009

The newsletter of the DRI Trial Tactics Committee

DRI™ The Voice of the Defense Bar

In This Issue…

Asserting Contrary Policy Arguments in "Public Policy" Litigation

Michael J. Mazzone and Kelli Stephenson

In the last decade or so, lawyers and others have tried to make public policy through litigation. With tort lawsuits about tobacco, guns, fast food, and carbon dioxide emissions, among other things, many are using the courtroom in an attempt to create rules that these self-appointed policymakers have determined are good and necessary. Defense lawyers representing industry in these cases are faced with a somewhat difficult choice: to assert, or not, a public policy argument that is contrary to the plaintiff's policy agenda. In some cases, defendants have succeeded by asserting public policies contrary to the plaintiffs' views. In others, defendants have failed to assert truly contrary policy arguments. In still other cases, the plaintiffs' public policy agenda is not always clear. Although asserting a contrary policy argument is not without risk, defense lawyers should, in every case in which they suspect a policy agenda, identify the particular public policy trying to be created and then consult with their clients about identifying and asserting contrary policy arguments – in addition to asserting the relevant legal arguments. This may take the moral "high ground" from plaintiffs and help persuade courts that the creation of public policy is for the legislative branch of government, not the judicial branch.

Michael J. Mazzone (michael.mazzone@haynesboone.com) is a partner in Haynes & Boone, L.L.P. (www.haynesboone.com). Mr. Mazzone is in the firm's Houston, Texas office. He represents energy companies in contamination, toxic tort, and indemnity cases. He also represents parties in construction litigation and arbitration.

Kelli Stephenson (kelli.stephenson@gmail.com) is a third-year law student at the American University Washington College of Law. She will join the Houston office of Haynes and Boone, L.L.P. as an Associate in the Fall of 2009. She is currently the Associate Executive Editor of the American University International Law Review.

continued on page 7

Chair
Sidney Kanazawa
McGuire Woods
1800 Century Park E
8th *Floor*
Los Angeles, CA 90067
(310) 315-8238
(310) 315-8210 – fax
skanazawa@mcguirewoods.com

Vice Chair
Tammy J. Meyer
Lewis, Wagner LLP
501 Indiana Avenue, Suite 200
Indianapolis, IN 46202
(317) 237-0500
(317) 630-2790 – fax
tmeyer@lewiswagner.com

Membership/ Marketing Chair
Chris Bottcher
Sirote & Permutt, P.C.
2311 Highland Avenue
Birmingham, AL 35205
(205) 930-5100
(205) 930-5101 – fax
cbottcher@sirote.com

Publications Chair
John C.S. Pierce
Butler Pappas, P.C.
Post Office Box 16328
Mobile, Alabama 36616
(251) 338-3801
(251) 338-3805
jpierce@butlerpappas.com

Vice Chair
Jonathan S. Hickey
Burden Gulisano & Hickey
403 Main St., Ste. 320
Buffalo, NY 14203
(716) 849-6800
(716) 849-6806 [fax]
jsh@bghattorneys.com

Program Chairs

Complex Medicine
TBD

Vice Chair
Denise M. Smith
Ulmer & Berne LLP
600 Vine Street, Suite 2800
Cincinnati, OH 45202-2409
(513) 698-5054
(513) 698-5055 – fax
dsmith@ulmer.com

Chair Damages 2009
Chris Bottcher
Sirote & Permutt, P.C.
2311 Highland Avenue
Birmingham, AL 35205
(205) 930-5100
(205) 930-5101
cbottcher@sirote.com

Vice-Chair Damages 2009
Robin Pittman
Baldwin Haspel Burke
1100 Poydras St., Ste. 2200
New Orleans, LA 70163-2200
(504) 585-7711
(504) 585-7751 [fax]
pittman@baldwinhaspel.com

State Liaison Chair
Lee Ayres
Ayres Warren Shelton
333 Texas St., Ste. 1400
Shreveport, LA 71101
(318) 227-3500
(318) 673-8462 [fax]
leeayres@ayreswarren.com

Diversity Liaison
Renee Little
Carlock Copeland & Stair
285 Peachtree Ctr. Ave., Ste. 2600
Atlanta, GA 30303-1235
(404) 221-2235
(404) 523-2345 [fax]
rlittle@carlockcopeland.com

Vice Chair
Doris L. Sweetin
Tyra Sweetin & Bleeke, P.C.
8470 Allison Pointe Boulevard, Suite 420
Indianapolis, IN 46250-4365
(317) 567-2222
(317) 567-2220 – fax
doris.sweetin@tycolaw.com

Web Page Chair
Jonathan Judge
Schiff Hardin
6600 Sears Tower
Chicago, IL 60606-6473
(312) 258-5500
(312) 258-5600 [fax]
jjudge@schiffhardin.com

Vice Chair
Fred Goldsmith
Goldsmith & Ogrodowski
247 Fort Pitt Blvd., 4th Fl.
Pittsburgh, PA 15222
(412) 281-4340
(412) 281-4347 [fax]
fbg@golawllc.com

E-Discovery Liaison
Lee A. Ayres
Cook, Yancey, King & Galloway
333 Texas St, Ste 1700
Shreveport, LA 71120-2260
(318) 227-7733
(318) 227-7850 – fax
ayres@cykg.com

Vice Chair
Michelle Cauley
Mitchell Williams
425 West Capitol, Suite 1800
Little Rock, AR 72201
(501) 688-8800
(501) 688-8807 – fax
mcauley@mwsgw.com

Public Relations Contacts

East
Maria Ruiz
Clarke Silverglate & Campbell, P.A.
799 Brickell Plaza, Suite 900
Miami, FL 33131
(305) 347-3120
(305) 377-3001 [fax]
mruiz@csclawfirm.com

Central
Tammy J. Meyer
Lewis, Wagner LLP
501 Indiana Avenue, Suite 200
Indianapolis, IN 46202
(317) 237-0500
(317) 630-2790 – fax
tmeyer@lewiswagner.co

West
Sidney Kanazawa
McGuire Woods
1800 Century Park E
8th *Floor*
Los Angeles, CA 90067
(310) 315-8238
(310) 315-8210 – fax
skanazawa@mcguirewoods.com

Commmittee Liasion to Young Lawyer Committee
James L. Pattillo
Norman, Wood, Kendrick
505 20th *Street North, Suite 1600*
Birmingham, AL 35203
(205) 328-6643
(205) 251-5479 – fax
jpattillo@nwkt.com

Vice Chair
Kyle Lansbury
Lewis Wagner, LLP
501 Indiana Avenue, Suite 200
Indianapolis, IN 46202
(317) 237-0500
(317) 630-2790 – fax
klansberry@lewiswagner.com

Young Lawyer Liaison
Robert B. Stock
Vogel Law Firm
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
(701) 356-6316
(701) 237-0847 [fax]
rstock@vogellaw.com

Vice Liaison
Jeffrey D. Bradford
Ellis & Winters LLP
1100 Crescent Green Dr., Ste. 200
Cary, NC 27518
(919) 865-7092
(919) 865-7010 [fax]
jeff.bradford@elliswinters.com

Electronic Discovery / Technology Liaison Chair
Esther Holm
Lewis Brisbois Bisgaard & Smith LLP
650 Town Center Drive
Suite 1400
Costa Mesa, CA 92626-1925
(714) 668-5510
(714) 850-1030 [fax]
holm@lbbslaw.com

Vice Chair
Esther Holm
Lewis Brisbois Bisgaard & Smith LLP
650 Town Center Drive
Suite 1400
Costa Mesa, CA 92626-1925
(714) 668-5510
(714) 850-1030 [fax]
holm@lbbslaw.com

Expert Witness Database Liaison
Evan Nelson
Tucker Ellis & West
135 Main St., Ste. 700
San Francisco, CA 94105
(415) 617-2400
(415) 617-2409 [fax]
evancnelson@comcast.net

Legislative/Rulemaking Liaison
TBD

Annual Meeting Chair 2009
Guy E. Hughes
Woodward, Hobson & Fulton, LLP
200 West Vine Street, Fifth Floor
PO Box 1720
Lexington, KY 40588-1720
(859) 244-7117
(859) 244-7111 [fax]
GHughes@WHF-law.com

Vice Chairs
Maria Ruiz
Clarke Silverglate & Campbell, P.A.
799 Brickell Plaza, Suite 900
Miami, FL 33131
(305) 347-3120
(305) 377-3001 [fax]
mruiz@csclawfirm.com
John Morrow
Burr & Forman
420 N. 20th St., Ste. 3400
Birmingham, AL 35203-5206
(205) 251-3000
(205) 244-5740 [fax]
jmorrow@burr.com

Steering Committee
Margaret Fonshell Ward (Peggy)
Moore & Jackson
305 Washington Avenue, Suite 401
Baltimore, MD 21204
(410) 583-5241
(410) 583-7519 – fax
ward@moorejackson.com

Lynn M. Roberson
Swift, Currie, McGhee
1355 Peachtree St. N.E., Suite 300
Atlanta, GA 30309-3238
(404) 888-6146
(404) 888-6199 – fax
lynn.roberson@swiftcurrie.com

Rodney L. Umberger, Jr.
Williams, Kastner & Gibbs
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-2421
(206) 628-6611 – fax
rumberger@wkg.com

Fredrick Baer. Goldsmith
Goldsmith & Ogrodowski, LLC
247 Fort Pitt Boulevard, 45h Floor
Pittsburgh, PA 15222
(412) 281-4340
(412) 281-4347 – fax
fbg@golawllc.com

Sherri K. McElroy
Sedgwick, Detert, Moran & Arnold
One Embarcadero Ctr., 16th Floor
San Francisco, CA 94111-3765
(415) 781-7900
(415) 781-2635 – fax
sherri.mcelroy@sdma.com

Roy A. Nowell, Jr.
Copeland, Cook, Taylor & Bush, P.A.
1062 Highland Colony Parkway, Ste 200
PO Box 6020
Ridgeland, MS 39158
(601) 856-7200
(610) 856-7626 – fax
rnowell@cctb.com

George E. Lieberman
Vetter & White
20 Washington Place
Providence, RI 02903
(401) 421-3060, ext. 112
(401) 272-6803 – fax
glieberman@vetterandwhite.com

Esther Holm
Lewis Brisbois Bisgaard
650 Town Center Drive
Suite 1400
Costa Mesa, CA 92626-1925
(714) 668-5510
(714) 850-1030 – fax
holm@lbbslaw.com

Kevin C. Schiferl
Locke Reynolds
201 N Illinois St.
Indianapolis, IN 46204
(317) 237-3819
(317) 237-3900 – fax
kschiferl@locke.com

Thomas R. Schultz
Schultz & Pogue
520 Indiana Avenue
Indianapolis, IN 46202
(317) 569-2570
(317) 262-9000 – fax
tschultz@schultzpoguelaw.com

Kerry P. McInerney
Sirote & Permutt
2311 Highland Avenue South
Birmingham, AL 35205
(205) 930-5388
(205) 930-5101 – fax
kmcinerney@sirote.com

Daniel J. Arnett
Tribler Orpett Meyer
225 W. Washington St. Ste 1300
Chicago, IL 60606
(312) 201-6446
(312) 201-6401 – fax
djarnett@tribler.com

Richard B. Collins
The Collins Firm
2804 Remington Green Circle, Suite. 4
Tallahasse, FL 32309
(850) 386-8160
(850) 386-6062 – fax
dcollins@Collinsfirm.com

Robert T. Veon
Veon & England
117 East Broad Street
Texarkana, AR 71854
(870) 774-7390
(870) 773-3690 – fax
Robert.veon@veonengland.com

Larry D. Langley
Law Offices of Larry D. Langley
8170 North 86th Place, Suite 202
Scottsdale, AZ 85258
(480) 609-9616
(480) 609-9620 – fax
ldlangley@langleyazlaw.com

Clarence T. Gutherie, III
Phelps Dunbar
111 E. Capitol St. Ste 600
Jackson, MS 39225
(601) 360-9743
(601) 360-9777 – fax
cguthrie@dg-law.com

State Liaison Chair

Lee H. Ayers
Cook, Yancey, King & Galloway, APLC
333 Texas Street, Suite 1700
Post Office Box 22260
Shreveport, LA 71120-2260
(318) 227-7733
(318) 227-7850 [fax]
lee.ayres@cookyancy.com

Charles H. Abbott
Abbott, Simses & Kuchler
400 Lafayette Street
Suite 200
New Orleans, LA 70130
(504) 568-9393
(504) 524-1933-fax
cabbott@abbott-simses.com

Rick D. Norris
Lamar Miller 501 Riverchase Parkway E.,Suite 100
Birmingham, AL 35244
(205) 326-0000
(205) 323-2945 – fax
rnorris@lmnflaw.com

Jonathan Judge
Schiff Hardin LLP
6600 Sears Tower
Chicago, IL 60606
(312) 258-5500
(312) 258-5600 – fax
jjudge@schiffhardin.com

Stephen L. Titzer
Pyatt Silvestri Hanlon
701 Bridger Av. Ste 600
Las Vegas, NV 89101
(702) 383-6000
(702) 383-0088 – fax
stitzer@psh-law.com

Tiffany Reece Clark
Ulmer & Berne LLP
600 Vine Street, Suite 2800
Cincinnati, OH 45202-2409
(513) 698-5028
(513) 698-5029 – fax
tclark@ulmer.com

Guy E. Hughes
Woodward, Hobson & Fulton, LLP
200 West Vine Street, Fifth Floor
P.O. Box 1720
Lexington, KY 40588-1720
(859) 244-7117
(859) 244-7111 – fax
GHughes@WHF-Law.com

Monte Williams
Steptoe & Johnson
1085 Van Voorhis Road, Ste 400
Morgantown, WV 26507-1616
(304) 598-8000
(304) 598-8142 – fax
William@steptoe-johnson.com

Emily Turner Landry
Baker, Donelson, Bearman,
165 Madison Avenue, Ste 2000
Memphis, TN 38103
(901) 577-2261
(901) 577-0849 – fax
elandry@bakerdonelson.com

David J. Williams
Stoel Rives
201 South Main Street, Suite 1100
Salt Lake City, UT 84111
(801) 578-6963
dwilliams@stoel.com

Law Institute Liaisons- Damages Seminar

Mark A Solheim
Larson King, LLP
30 East Seventh St., Ste. 2800
St. Paul, MN 55101
(651) 312-6503
(651) 312-6618 [fax]
msolheim@larsonking.com

Board Liaison

Patrick J. Sweeney
Sweeney & Sheehan
1515 Market St., 19th Fl.
Philadelphia, PA 19102-1983
Tel: (215) 563-9811
Fax: (215) 557-0999
patrick.sweeney@sweeneyfirm.com

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Europe Liaison

Santiago Nadal
Socoro & Auto
Muntaner 454
Barcelona 08006
SPAIN
34 93 209-0765
34 93 414-4450
sandal@socoro-auto.com

Rod Freeman
Lovells LLP
50 Holborn Viaduct
London EC1A 2FG
ENGLAND
44 207 296-5256
44 207 296-2001
rod.freeman@lovels.com

Committe members are encouraged to submit articles for future issues of *Trials and Tribulations*. For more information, please contact Publications Chair John C.S. Pierce, (251) 338-3801 jpierce@butlerpappas.com.

FROM THE CHAIR AND VICE CHAIR

Sidney S. Kanazawa

Helping the Defense Lawyer Explore and Perfect Skills

The Trial Tactics Committee is one of DRI's largest committees. This committee is dedicated to helping the defense lawyer explore and perfect the skills required to excel as a trial lawyer, advocate, speaker and writer. The committee focuses on the critical tools you need to sharpen your skills as an advocate, negotiator and communicator in all settings, whether at deposition, trial, mediation or oral argument.

The focus of the committee is to reach out to all substantive areas of DRI's membership, to transfer those skills and knowledge that work well in the courtroom to the myriad other areas of defense law where the arts of effective communication and persuasion can lead to the successful resolution of disputes. The efforts of the committee will be led by Tammy J. Meyer (Vice Chair, Public Relations Chair - MidWest), Chris Bottcher (Program Chair Damages 2009, Webinar Chair), Robin Pittman (Program Vice Chair Damages 2009), Doris Sweetin (Program Vice Chair Damages 2009, Membership Chair), Guy E. Hughes (Annual Meeting Chair 2009), Maria Ruiz (Annual Meeting Vice Chair 2009, Public Relations Chair - East), John Pierce (Publications Chair), Jonathan Hickey (Publications Vice Chair), Jonathan Judge (Web Page Chair), Frederick Goldsmith (Web Page Vice Chair), Steve Pasarow (Webinar Vice Chair), Kyle Lansberry (Membership Vice Chair), Lee Ayers (State Liaison Chair), Todd Millar (State Liaison Vice Chair), Eric J. Renee Little (Diversity Liaison Chair), Abbey Scholl (Young Lawyer Committee Liaison Chair), Esther Holm (Electronic Discovery/Technology Liaison Chair), and Evan Nelson (Expert Witness Database Liaison).

There are many opportunities for members to speak and write through our programs and publications and we welcome everyone, from all diverse backgrounds, to get involved with our committee, for example:

For The Defense September 2009

Newsletter *Trials and Tribulations (monthly)*

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McGuireWoods LLP
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FROM THE PUBLICATIONS VICE CHAIR

Fresh and Helpful Topics

There was no Holiday break for the many active members of the Trial Tactics Committee, that's for sure! Opening 2009 with authority, this issue of *Trial and Tribulations* is filled with fresh and helpful topics that are well worth your time. We cannot thank our authors enough for helping us assemble such a strong and useful first edition this year.

Of course, there is always more work to do. With that, please note the following deadline for submission of our next newsletter: August 3, 2009 (Summer edition). Also, July 20, 2009 is the deadline for you to submit an article for our dedicated *For The Defense* issue. With a readership and committee that is growing by the day, having an article published is a wonderful way to meet new folks and broaden your network.

Your work should be rewarded, of course! Please mark your calenders and plan to attend The DRI Annual Meeting in Chicago on October 7-11 and the Trial Tactics Committee meeting from 3:30 to 5:30 on Thursday, October 8. Hope to see you all there!

Jonathan S. Hickey

Asserting Contrary Policy, from page 1

Hand Gun Litigation

One of the best examples of identifying and asserting contrary policy arguments occurred in the litigation brought by several cities nationwide against gun manufacturers. The public policy the cities sought to create: ban hand guns. The most obvious policy argument against this policy agenda is that people have an individual right to own guns, which is enshrined in the Second Amendment of the U.S. Constitution as the U. S. Supreme Court recently confirmed in *District of Columbia v. Heller,* (128 S. Ct., 2783 (2008). In the Indiana "gun" case, that public policy argument was made. In *City of Gary v. Smith & Wesson Corp.* (No. 45D05-005-CT-243, 2001 WL 333111 (Ind. Super. Jan. 11, 2001)), the gun manufacturers asserted that "Indiana public policy supports the lawful ownership and distribution of firearms." (Memorandum in Support of Manufacturer Defendants' Motion to Dismiss, *City of Gary*, 2001 WL 333111, 2000 WL 34017055.) The Indiana Superior Court agreed and dismissed the case. (*City of Gary*, 2001 WL 333111, at *5.)

Lead Paint Litigation

In the lead paint cases, plaintiffs sought to punish paint manufacturers for products that they had placed into the stream of commerce which, many years later, were deemed to be harmful if misused. The policy sought to be created: "cradle to grave" responsibility for products. The contrary policy argument would be that manufacturers of products that are properly made and sold (at the time they are made and sold) should not be punished for another's misuse of those products. In the consolidated New Jersey lead paint cases, the defendant paint manufacturers argued that lead paint is only injurious in dwellings that have been poorly maintained by their owners and that lead paint, in and of itself, is not harmful. (*In re Lead Paint Litigation*, No. MID-L-2754-01, 2002 WL 31474528, at *6 (N.J. Super. Ct. Law Div. Nov. 4, 2002), *rev'd*, 2005 WL 1994172 (N.J. Super. Ct. App. Div. Aug. 17,2005), *rev'd*, 924 A.2d 484 (N.J. 2007).) The trial court agreed with the paint manufacturers, and although an appellate court reversed the decision, the New Jersey Supreme Court ultimately vindicated the paint manufacturers, finding that "plaintiffs ignore the fact that the conduct that created the health crisis is the conduct of the premises owner." (924 A.2d at 501.) Similarly, the Rhode Island Supreme Court, in reversing the trial court's order imposing abatement on lead paint manufacturers, explained that expanding the law of public nuisance to product-based claims would allow a flood of claims for alleged harms of otherwise legal products. (*State v. Lead Indus. Ass'n,* 951 A.2d 428, 454-55 (R.I. 2008) (quoting *City of Chicago v. Beretta U.S.A.Corp.,* 821 N.E.2d 1099 (Ill. 2005)).)

Tobacco Litigation

Defendants do not always assert contrary public policy arguments. For example, in the tort cases against tobacco companies, in which the plaintiffs ultimately wanted to make selling tobacco illegal, the tobacco companies did not assert the most obvious contrary policy argument: that people should be free to use tobacco if they so choose. The cases were further complicated by state statutes that eliminated the defenses of comparative fault and assumption of risk, and the tobacco companies usually fought these statutes rather than asserting that people should be free to use tobacco. (See Defendants' Memorandum in Opposition to Plaintiffs' Motion for Judgment on the Pleadings, Minnesota v. Philip Morris, 1995 WL 1937124 (Minn. Dist. Ct. May 19, 1995) (No. C1-94-8565), available at http://www.library.ucsf.edu/tobacco/litigation/mn/2mndefop.html). The tobacco litigation brought by state governments ended when the states and the tobacco companies reached the Master Settlement Agreement in 1998. (See National Association of Attorneys General, Master Settlement Agreement, http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/ (last visited October 11, 2008).)

New York's highest court recently identified – and rejected – plaintiffs' efforts to obtain a "judicial ban" on tobacco. In *Adamo v. Brown & Williamson Tobacco Corp*. (http://www.courts.state.ny.us/ctapps/decisions/dec08/205opn08.pdf), plaintiffs claimed that cigarette companies should have used lower levels of tar and nicotine in their regular cigarettes, because lower levels would make a "safer" cigarette. The court rejected the claim stating that "the function of a cigarette is to give pleasure to a smoker. . . . Plaintiffs made no attempt to prove that smokers find light cigarettes as satisfying as regular cigarettes". The court read plaintiffs' claim as a claim that all cigarettes should be "light" cigarettes and an attempt to ban regular cigarettes. The court concluded, "it is still lawful for people to buy and

smoke regular cigarettes. To hold . . . that every sale of regular cigarettes exposes the manufacturer to tort liability would amount to a judicial ban on the product. If regular cigarettes are to be banned, that should be done by legislative bodies, not by courts."

Fast Food Litigation

In the obesity lawsuit against McDonald's, where the policy agenda was to ban the sale of fast foods, McDonald's failed to fully assert a contrary public policy argument. McDonald's could have asserted the argument that people are free to eat whatever they choose. Instead, McDonald's asserted a narrower argument that it had no duty to warn consumers about matters of common knowledge, such as eating too much can make you fat and be bad for your health. (Defendants' Consolidated Opposition to Plaintiffs' Motion to Remand and Reply in Support of Defendants' Motion to Dismiss, *Pelman v. McDonald's Corp.*, 452 F. Supp. 2d 320 (S.D.N.Y. 2006) (No. 02 Civ. 7821 (RWS)).) Although the court initially agreed with McDonald's that it had no duty to warn consumers (*Pelman*, 237 F. Supp. 2d 512), the case nevertheless went forward on issues of deceptive advertising. (*Pelman*, 452 F. Supp. 2d 320.) Of course, arguing that people should be free to eat what they want will not help against any misrepresentations about the product.

"Global Warming" Litigation

Another example of defendants' failure to assert contrary public policy arguments in the face of a clear policy agenda is the global warming litigation. Plaintiffs in these cases are, essentially, trying to ban fire by forcing oil and gas producers, electric power providers, automobile manufacturers, coal companies, and others to eliminate carbon dioxide emissions (which result from burning carbon). So far in these cases defendants have not attempted to assert the contrary public policy: that industrialization is fueled by carbon, that industrialization is the reason for our current high standard of living including longer life spans, low infant mortality, and all of the other objective measures of a healthy, wealthy society, and that, therefore, any policy that attempts to undermine our way of life should be rejected. Moreover, the defendants in these "global warming policy" cases have not even challenged the theory that human action is causing "global warming". In *Massachusetts v. EPA*, for example, the EPA did not argue that the theory of human-caused global warming was without merit. Instead, it argued that it was uncertain. (Brief for the Federal Respondent, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), 2006 WL 3043970.). In fact, EPA virtually admitted that the theory was sound by not controverting the affidavits given in support of Massachusetts and its allies in the litigation. (127 S. Ct. at 1463). In *California v. General Motors*, General Motors has argued simply that the issue of responsibility for global warming is a nonjusticiable political question best left to the political branches of government to answer. (Defendants' Notice of Motion and Motion to Dismiss Second Amended Complaint for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Upon which Relief may be Granted, *California v. General Motors*, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (No. C06-05755 MJJ), 2006 WL 3747438. This is a fine argument that should be made, and it is typical of the kind of arguments defendants usually make in "public policy" litigation. But, it leaves plaintiffs' proposed public policy unchallenged.

"Privacy" Litigation

Plaintiff's policy agenda may not always be completely clear. Several privacy groups have sued telecoms like Verizon and AT&T for their cooperation with government officials requesting call records to monitor terrorism suspects. In a recently passed amendment to the Foreign Intelligence Surveillance Act ("FISA"), telecoms have been granted immunity from such suits (FISA Amendments Act of 2008, Pub. L. No. 110-261, § 201, 122 Stat. 2436, 2467-70 (to be codified at 50 U.S.C. § 1855)). This has created a firestorm of protest among commentators on the political Left who have reserved their harshest commentary for the immunity to telecoms rather that the underlying conduct with which they disagree – alleged invasions of privacy. However, it is unclear what specific public policy activists seek to advance in this litigation (is it to protect privacy? to protest the so-called "war on terror"? to indirectly attack the Bush Administration?). Verizon has aggressively asserted the contrary public policy argument that its disclosure of call records was to protect Americans from harm, which it has explicitly reserved the right to do in its agreements with its customers. (Memorandum in Support of Verizon's Motion to Dismiss Plaintiffs' Master Consolidated Complaint, *In re National Security Agency Telecommunications Records Litigation*, 2007 WL 2127345 (N.D. Cal. Jul. 24, 2007) (No. 06-1791 VRW), *available at* http://www.eff.org/files/filenode/att/verizonmemmtd.pdf.) Moreover, throughout its brief, Verizon gave

a narrative of the events of September 11 and continually emphasized the need for the government to protect Americans from terrorism. As noted, the telecom cases are likely to be cut off by the amendment to FISA, which grants retroactive immunity to the telephone companies for their cooperation in the government's wiretapping program. (Eric Lichtblau, *Congress Strikes Deal to Overhaul Wiretap Law*, N.Y. Times, June 20, 2008, http://www.nytimes.com/2008/06/20/washington/20fisa.html?hp.)

Conclusion

If a party decides to assert a contrary policy, it needs to identify the correct contrary policy. How to do that is beyond the scope of this paper. Do policy arguments really belong in cases? Policy arguments do not belong in cases, but without question plaintiffs are trying to create public policy with litigation. At the very least, the defense should suggest to the court that plaintiff's policy ought not be adopted because there are contrary policies that may be better public policies than the one plaintiff is trying to impose through litigation. The point is not: in policy cases, let's get the court to make policy – a policy suggested by the defense. Instead, the point is: the defense needs to persuade the court not to make policy, and suggesting other policies that may be better than the one plaintiff seeks to impose may be reason enough to not adopt plaintiff's public policy.

The increasing use of litigation to create public policy poses challenges to industries sued in these cases. Defense lawyers should recognize these cases and identify the public policies sought to be created by them. Additionally, defense lawyers should work with their clients to identify possible contrary policy arguments. The identification of contrary public policies may take the moral "high ground" away from plaintiffs and help persuade the court that the creation of public policy is for the legislature, not the courts.

Innovative Voir Dire Techniques for Defense Counsel

Kevin M. Reynolds

"As long as I'm counting the votes, what are you going to do about it?"

William M. "Boss" Tweed, Tammany Hall

INTRODUCTION

With the advent of ADR, mediations and arbitrations, and relatively few numbers of cases going to jury trial, it is easy for defense counsel to fall out of practice with good, solid jury selection techniques. This article will touch upon some traditional methods, but will emphasize some innovative approaches that may seem counterintuitive yet can be extremely effective in an appropriate case.

THE PURPOSE OF *VOIR DIRE*

Contrary to law school teachings, the purpose of voir dire is not to select a "fair and impartial jury." That goal is impossible to achieve. Instead, defense counsel should focus the voir dire effort on de-selecting any and all "poison apple" jurors from the panel. In every trial you will identify jurors that would make excellent defense jurors. The only problem is, those "dream" defense jurors will be the first peremptory challenges made by plaintiff. And this assumes that plaintiff's counsel cannot artfully exclude those "defense" jurors from the panel on a challenge for cause. The advantage to striking a juror for cause is it allows you to "bank" your peremptory challenges that you may to use later to strike "borderline" jurors.

FORM OVER SUBSTANCE?

Although the substantive purpose for *voir dire* is important, defense counsel must not lose sight of the "form" element of jury selection. In valid scientific studies going back to at least 1966, when Kalven and Zeisel's seminal work, *The American Jury* was published, and perhaps even earlier, we have known that juries tend to make up their minds very early on in the trial of a case; if not in *voir dire*, then by opening statement. *Voir dire* is the opening stage of the case. This is the only time you will be permitted to speak with the jurors directly during the entire trial. How many times have we heard the old adage "you have only one chance to make a good first impression." The effects of primacy and recency are important. Take advantage of these studies and carefully choreograph and plan your *voir dire* in every case. The time immediately before trial is typically marked by a flurry of activity: *Daubert* motions, motions *in limine*, detailed and extensive proposed final pretrial orders, exhibit lists, witness lists, *subpoenas* and the like. It is easy to overlook your preparation for *voir dire*, but you should not to do so. You are engaged in the critical enterprise of selecting the judges that will hear and decide your case. We have all heard of seemingly "defensible" cases that, for some reason, "went south" and result in a tremendously surprising large adverse verdict. I would posit that in more cases than not, the cause of such a surprise was inadequate or ineffective jury selection, which allowed a "poison apple" juror to get onto the jury by "stealth" and push that decision-making body forcefully in the wrong direction.

BASIC TECHNIQUES

The time-honored techniques used by successful defense lawyers are well known and beyond the central theme of this article. One of my personal favorites is called "the Rule of P: If you are defending a personal injury case, then no priests, plumbers, prostitutes or postal workers." Most courts will allow juror questionnaires to be obtained a few days before trial. Particular issues of interest are: prior jury duty; prior service as a jury foreperson; any claims or lawsuits filed by that person; their age; education; and occupation. If the questionnaires can be obtained a few days before, you can review these in detail and separate them into three groups: "the good, the bad and the ugly." Sometimes it helps to formulate a "model juror" for your case. During *voir dire*, make sure you pay attention to plaintiff's counsel's questions, as she will ask many of yours and you can cross those off. In the author's experience, brevity at this stage is welcome, both by

Kevin M. Reynolds is a member of Whitfield & Eddy in Des Moines. His practice areas include product liability, aviation and insurance litigation and appellate practice. He is a former chair of the DRI Product Liability Committee. He can be reached at reynolds@whitfieldlaw.com.

the jurors and the Court. "Good morning, ladies and gentlemen, my name is Mr. Reynolds. I represent the Defendant. By my watch we've been here discussing things for over two hours. In my book, that's about an hour and 45 minutes too long. So let's get right to it." Then spend 15 minutes on good, solid questions and sit down. I even heard of one case where the plaintiff's attorney took so ridiculously long in *voir dire*, that defense counsel stood up and said "Your Honor, we've been here a long time. I've paid attention to this and these folks look just fine and dandy to me. We pass these jurors for causes" whereupon he sat down. Although it was pretty "gutsy," judicial observers felt that the defense attorney "won" that case at that precise moment in time.

Here is a sampling of some basic techniques that can be used effectively by defense counsel in trying a personal injury or product liability case.

A. "Tit for tat"

For every "thrust" of the plaintiff, there should be a consequent "parry." A defendant must keep the case on an even "keel" throughout the first several days of trial when plaintiff is presenting their case. "Steam-rolling" or "freight-training" by the plaintiff, where the case builds so much momentum that it is difficult if not impossible to arrest, must be avoided at all costs.

Here are two examples:

1. The "million dollar verdict."

Plaintiff's question ("tit"): "Is there anyone on the panel that, for whatever reason, believes they could not return a verdict in seven figures, i.e., over one million dollars, if the evidence in fact supported that result?"

Defense question ("tat"): "It is my pleasure and honor to represent the good folks, the women and men of ABC Corp. We have come to Court this day because we honestly believe that we did nothing wrong to cause this accident. Let me ask you this: if, at the end of day, you believed that Plaintiffs did not meet their burden of proof under the law, would any one here, have any hesitation at all, to find in favor of ABC Corp. And send this Plaintiff home with a $0 verdict? If that gives anyone substantial heartburn, please speak up and let's discuss that, everyone here will respect your forthrightness."

"Okay, let me ask the question this way. Suppose you are in the deliberations room. Assume further that the discussion reveals that everyone thinks the Plaintiffs have not met their burden of proof. But suppose one juror says "heh, this guy was injured, he deserves something." If that happened, would you have the constitution to speak up and say "but that's not what we are supposed to do, according to the instructions. The instructions say that if he doesn't meet the burden of proof, then Defendant wins."

2. The "scales of justice."

Plaintiff's question (the 'thrust'): "The burden of proof in this case is by a "preponderance of the evidence." It is not 'guilt beyond a reasonable doubt.' That standard is for criminal cases. The standard in this civil case is much, much lower. To illustrate, consider the scales of justice. If those scales of justice are tipped ever so slightly in favor of the Plaintiff, then under the law your verdict must be in favor of the Plaintiff. Is there any one on this jury panel that, for whatever reason, feels that they could not follow the law in this respect? Could you find a substantial verdict in my client's favor, even though the scales of justice were tipped ever so slightly in favor of my client?"

Defense counsel's questions (the 'parry'):' "Plaintiff's counsel talked with you a little bit about the burden of proof. The burden of proof is critical in a court of law; otherwise, cases would be decided by speculation and conjecture. Plaintiffs are required under the law to prove their case to a legal certainty. Opposing counsel used an example of the scale of justice. I'd like to use the same example. Picture in your mind's eye the scales of justice being in exactly an even balance. Picture in your mind the scales perfectly even, perfectly horizontal. If, at the end of this case and at the end of all the evidence, those scales of justice are evenly balanced, then under the law as it will be instructed to you by this Honorable Court, that your verdict must be for the Defendant. Why is this? It is simply because this means that Plaintiffs have not carried their burden of proof as required by law. They have not proven their claims to a legal certainty. Is there anyone on the panel that, for whatever reason, believes that they could not follow to the letter this aspect of the jury instructions?

INNOVATIVE TECHNIQUES

Plaintiff's counsel are constantly implementing new and innovative trial techniques. But there is no reason why plaintiffs should have a "monopoly" on innovation. One purpose of this article is to highlight some more innovative approaches to *voir dire* that the *Defendant* can use. Just because time-honored techniques have worked over the years for defendants, does not mean that defendants should cease thinking of

new and unusual ways to gain a tactical advantage early-on in the case. In some respects it is "high time" that defense counsel consider thinking "outside the box" during *voir dire*. The undersigned has employed some of these techniques over the past several years. It has been observed that these techniques can be very effective at: 1) locating the "poison apple" juror(s); and 2) in keeping the case on an even keel during its early days, so that when it is time to present the defense case, the defense witnesses will "clean up" and the trial will be best postured for entry of a defense verdict.

A. "Stealing Plaintiff's Thunder"

It has long been known that an effective way in which to "blunt" a potentially-effective cross examination of your witness by your opponent, is to cover those areas that are problematic *first*, before your opponent, and therefore "steal the thunder" of the opponent's anticipated cross. The undersigned has also found this tactic to be effective in *voir dire* to the extent that the potential harmful information was not even discussed by the other side!. If you know there will be a particularly damaging piece of evidence proffered by the other side, this matter can be broached in jury selection in attempt to "steal plaintiff's thunder" and de-sensitize the potential jurors with regard to that piece of evidence.

Let's take a common example. Most personal injury or product liability cases involve severe and grievous injury to bones, tissues and flesh. Treating surgeons often take graphic pre- and post-operative photographs of the injury for purposes of medical student training. Lay person jurors are not use to such graphic presentations. As a result, they can have an emotional impact that is very harmful to the defense case. Even in cases with solid liability defenses, the bloody photographs may give the plaintiff an unfair emotional appeal that can seem nearly impossible to overcome. Unbridled, raw emotion by a lay person jury is likely one component of a "run away" adverse verdict. Although Rule 403 and pretrial motions *in limine* will be filed in an attempt to exclude this unfairly prejudicial evidence with minimally probative value, more often than not at least some of the gory, bloody, trauma injury photographs will find their way into evidence.

Here is suggested line of inquiry during *voir dire* which has proven to be effective:

> Defense counsel questioning:"Does anyone on the jury panel have any medical education, experience, background or training? On a related issue, does anyone here get a little bit 'queasy' or lightheaded at the sight of blood? I wanted to ask you these questions for a specific reason. In this case, the Plaintiff's have listed as exhibits some blow-ups and enlargements of trauma injury photographs that were taken by the EMTs who responded to the accident scene. Other operative photographs were taken later by the surgeons. Some of them show the decedent's body at the scene. I did not want you to be frightened or become sick at the sight of this evidence. The decedent, Mr. Johnson, died of mechanical asphyxiation. His body was crushed between the front body of the machine and cross member for the lift arms. One such photograph is a close up of decedent's face. His face and entire head are bright bluish purple, and that is because he had a lack of oxygen in his blood. The same photograph depicts a bloody mucosal discharge from his left nostril. I apologize for going into this specific detail, but I feel that I have to represent the legal interests of my client. Now, having heard about this, is there anyone on the jury panel, that, for whatever reason, believes that they could not be fair to my client given that this type of evidence may be presented in this case? If so, please speak up and we'll discuss it a little further."

During these questions, defense counsel (and the client representative) should monitor the jury closely for non-verbal cues. Follow-up questions may be directed to jurors who appear to be "bothered" by this type of evidence. Persons who might have trouble with this type of evidence will have: flushed red face; on the contrary, white or pasty complexion; rubbing their head or chin; or looking around nervously, or putting their head down, as if they are light-headed or going to faint. Be aware of these non-verbal cues. But if this line of questioning is carried out effectively, is serves two purposes: 1) it steal's Plaintiff's thunder; and 2) it renders their "smoking gun" emotional evidence less impactful. At the very least a powerful, emotional issue has been identified and its ability to push the jury to a certain result (in favor or plaintiff, based on emotion) has been reduced.

B. Dealing with "sympathy"

Virtually every civil jury case involving a personal injury carries with it a significant sympathy component. The issue of sympathy must be confronted forcefully and artfully in *voir dire.*

One way in which this can be done, is by: 1) highlighting for the jury the sympathetic issues in the case; and 2) comparing to this "evidence" the "law," i.e., the jury instruction that will be

given by the Court that states in clear terms that "sympathy cannot be considered This kind of questioning is totally counterintuitive. "Conventional wisdom" dictates that defense counsel is to avoid, at all costs, talking about or addressing plaintiff's injury. Using this counterintuitive approach requires that defense counsel actually spend a portion of the limited time allotted for *voir dire* actually "highlighting" the sympathy aspects of the case. However, in the author's view it is more effective for defense counsel to explain and discuss this aspect of the case, in lieu of leaving it totally up to Plaintiff's counsel alone to talk about damages with no meaningful rebuttal from the defendants.

This can be done as illustrated below: Defense counsel questioning: "At the end of this case, the Court will give you the instructions. The instructions are the law that you are duty-bound as jurors, under your oath, to follow in reaching your verdict in this case. All of the instructions are equally important, but I want to take a moment to speak with you about a very important jury instruction and aspect of Iowa law. You will be instructed as follows: "You are the judges of the facts. The Court is the judge of the law. *You are not to decide this case based on bias, sympathy, passion or prejudice.*" In this case you will hear evidence that will tug on your heart strings. Plaintiff's decedent, Mr. Johnson, was survived by two daughters, Mary and Susan. Mary is 14 years old and Susan is 21. Both Mary and Susan have "special needs," and are considered to be mentally retarded. I believe that you will meet both of them, and they will either testify rather briefly or be introduced to you in person. They are beautiful girls. You will love them. You will feel sorry for them. Your heart will go out to them. And you know what, there's nothing at all wrong with those feelings That's human nature. But, you know what? This case is not about that. Instead, this case is about two things: 1) what happened at the time of this unfortunate accident; and 2) who is legally responsible for this accident. Now, having heard this, is there anyone on the panel that, given what I've outlined here, could not follow the Court's instruction that *"you are not to decide this case based on bias, sympathy, passion or prejudice?* Please raise your hand if you have a concern with that, and we'll discuss it a little bit further. Everyone here will respect you for your candor."

In a recent trial in which this strategy was employed, counsel for co-defendant remarked later to the manufacturer's defense counsel that: "the issue of emotion and sympathy has just been taken right out of this case." Despite the significant sympathy aspects involved in the case, the jury assessed 100% of the causative fault to Plaintiff's decedent, and a defense verdict was entered. There were no post trial motions and there was no appeal.

C. Recalls.

Some products cases involve recall evidence that may, at first blush, appear to be impossible to overcome. After all, if the product was not initially "defective," then why would the manufacturer recall it? In the right kind of case, it may be wise to broach this subject in jury selection, in order to see whether this kind of evidence is so overwhelming as to prevent a putative juror from being selected to fairly hear and decide the case.

For example, suppose your product is an electrical toy that is subject to a CPSC-ordered recall. The recall was instituted because the toy had been implicated in causing fires while it was plugged into a re-charger. The recall itself was designed to address the possibility of frayed wiring or bad fuses. All pre-trial efforts by the defense on motions *in limine* and under rule 403 to keep this recall out evidence have failed. A fire has occurred and your toy is being blamed in a fire and property damage, product-liability subrogation action by the homeowner's fire insurance carrier. Your defense to the case is that the fire's cause and origin was somewhere else in the home, and that the problems intended to be fixed by the recall were never seen in this toy. Defense counsel might ask some questions generally regarding "recalls" in the following fashion, during *voir dire*:

Defense counsel's questions: "Does everyone on the panel drive a car? Does anyone own a car? As an owner of a car, have you ever received, through the mail, a recall notice? What did you do? Did you immediately make an appointment with a dealer to get the recall work done? Has there ever been a situation when you may have waited some period of time before getting that work done? For example, just wait until the next scheduled service date or oil change? What if your car, although it was subject to a recall, did not actually have that problem? Do you think that, in general terms, it is the good, responsible thing for manufacturer to do, and that is, to do a recall if they think there may be a problem? To err on the conservative side? Ladies and gentlemen, we don't come into court and spend a bunch of money

to defend a case, without having a defense to present to you. *In this case, although the product that was involved in the accident was technically subject to a recall, it is our position that the subject product did not show the signs or symptoms of a product that actually had the problem covered by the recall or "fix." Although the recall was designed to fix frayed wiring and bad fuses, we believe that the evidence will show that the wiring on this toy was not frayed and there was no problem with the fuses.* We are not looking for any commitment on any issue that would be involved in this case. That would not be proper. However, would all of you pledge to do your level best to listen to the evidence on this recall issue?"

D. A Good Closing Question in *Voir Dire*.

At the end of your *voir dire*, on more than one occasion I have seen this general question yield truly fruitful information. Thus, it is advisable to ask the jury panel a question similar to this:

> Defense counsel questioning: "Both parties and the Court have asked a great many questions of you this morning. Nevertheless, it may not be possible to ask every single question that should be asked. So please allow me to ask one final question: *does anyone on the jury panel know of any reason why it would not be proper, or why they should not be selected to sit as a juror in this case?"*

In over 27 years of practice, it is amazing as to how many times this "generic" question raises a hand or two, identifying issues and concerns that had not been previously identified. On even a few occasions, grounds for *challenges for cause* have been revealed. Quite obviously, if this question is not asked, then this information may be missed, to the potential detriment of your case.

CONCLUSION

There are as many ways to select a jury and conduct *voir dire* from the defense side of the table as there are defense lawyers. Carefully planning and strategizing your defense *voir dire* will get you off to a fast start and give you the best chance of choosing those jurors who will be at least amenable to a defense verdict in the case.

Handling Witnesses with Prior Convictions for Crimen Falsi

Robert T. Horst & Christopher DiIenno

The Federal Rules of Evidence allow for the impeachment of any witness by the introduction of evidence of prior convictions for crimes involving dishonesty or false statement, referred to as *crimen falsi*. In an effort to clarify the convictions included in F.R.E. 609(a)(2)'s term "dishonesty or false statement," Congress amended the rule in 2006, which now provides "(a) For the purpose of attacking the character for truthfulness of a witness, (2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness." F.R.E. 609(a)(2). While there have been no significant published decisions based on this latest amendment, the likely tendency of the amendment to narrow the range of admissible convictions may alter the practice surrounding this impeachment tool. The purpose of this brief article will be to address the historical use of this Rule in litigation and trial practice, and to consider the future of that practice.

What is *Crimen Falsi*?

The historical context out of which the rule emerged shows that it was introduced not to discourage testimony, but to facilitate it. At common law, witnesses with prior convictions for crimes involving fraud or dishonesty were absolutely prohibited from testifying, deemed unreliable as a matter of law. 2 Wigmore, Evidence § 520 (3d ed. 1940). In the latter half of the nineteenth century, this prohibition gave way to the practice of allowing testimony from these witnesses, but only if the prior conviction was admitted into evidence, thereby allowing a fact-finder to determine the overall credibility of the testimony. Against this backdrop, Congress enacted Federal Rule of Evidence 609(a)(2).

After debate in both the House and Senate, Rule 609 was ultimately crafted for its enactment In 1974, the Conference Committee stated that "[b]y the phrase 'dishonesty and false statement' the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." H.R. Conf. Rpt. No. 1597, 93d Cong., 2d Sess. 9, (1974). The text of the rule prior to the 2006 amendment simply provided that "evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement." Litigators and courts extended the limits of this language beyond the elements of an offense to the manner in which the crime was committed, arguing that any crime purposely creating deception or a misleading result, should be admissible. Theft crimes, in particular, provided fertile ground for admissibility contests. In *U.S. v. Del Toro Soto*, the First Circuit held that a grand larceny conviction "could certainly have been introduced under F.R.E. 609(a)(2)." *U.S. v. Del Toro Soto*, 676 F.2d 13 (1st Cir. 1982). However, the consensus among the courts is that "generally, theft crimes do not involve dishonesty or false statement within the meaning of Rule 609(a)(2)." *U.S. v. Givens*, 767 F.2d 574, 579 (9th Cir. 1985)(*additional citations omitted*).

In *Cree v. Hatcher*, the Third Circuit stated that the rule "focuses on the witness's propensity for falsehood, deceit, or deception" and explained that "what matters is whether dishonesty or false statement is an element of the statutory offense." *Cree v. Hatcher*, 969 F.2d 34 (3rd Cir.1992), *cert. dismissed*, 506 U.S. 1017 (1992). When deciding whether the admission of a particular conviction will benefit the fact finder in weighing the veracity of testimony, the courts that seem to understand Congress' original intent behind F.R.E. 609(a)(2) first look to the specific elements of the offense, and then to the necessity of dishonesty or false statement in the perpetration of the offense. For example, when deciding that drug smuggling was not *crimen falsi*, the Ninth Circuit noted that the statute only required proof that the perpetrator introduces the drugs sur-

Robert T. Horst is a parter and Christopher J. DiIenno an associate with Nelson Levine deLuca & Horst in Blue Bell, Pennsylvania. They concentrate their practices in complex insurance coverage disputes, bad faith litigation and investigation of suspected fraud.

reptitiously. They stated that "surreptitious activity, not necessarily involving misrepresentations or falsification, does not bear directly on the likelihood that the defendant will testify truthfully." *U.S. v. Mehrmanesh*, 689 F.2d 822 (9th Cir. 1982).

Presumably, this type of strict and narrow application of the rule and the meaning of *crimen falsi* is what prompted Congress to enact the 2006 amendment. Convictions that once may have been admissible if they "involved […] dishonesty or false statement" may now be admitted only "if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement." Moreover, the introduction of the term "ready determination" should limit the degree to which crimes on the border of *crimen falsi* are even given consideration.

Limitations in F.R.E. 609

The reason the courts have come to be more restrained when defining crimes as *crimen falsi* for purposes of the rule is that such crimes "shall be admitted" without any balancing of probative value against the harm to the opponent's case. Further, the rule does not treat a defendant witness any differently than other witnesses. And further still, the conviction must be admitted regardless of whether it was a felony or misdemeanor. If a prior conviction requires proof or admission of an act of dishonesty or false statement, it must be allowed in. These permissive provisions are in contrast with the first prong of the Rule 609 which provides for the admission of prior felony convictions only "if the court determines that the probative value of admitting this evidence outweighs its prejudicial impact on the accused." F.R.E. 609(a)(1). So for prior felony convictions that are not *crimen falsi*, despite impeachment value, the court may exclude the evidence against any witness if there is a danger of unfair prejudice to the defendant, confusion of issues, a danger of misleading the jury, or undue delay. None of these concerns or limitations may enter into an analysis of whether to include convictions for *crimen falsi*.

However, the rule does place a ten-year time limit on whether *crimen falsi* convictions may be admitted. The ten-year time period begins running "the date of the conviction or […] the release of the witness from the confinement imposed for that conviction, whichever is the later date." F.R.E. 609(b). The conviction is obviously the later date in cases where the witness is sentenced to time served, or no time at all. If there are post-trial motions, the date judgment is entered should still be used. The rule also provides that "[t]he pendency of an appeal does not render evidence of a conviction inadmissible." F.R.E. 609(e). However, "[e]vidence of the pendency of an appeal is admissible."

When a prison term is imposed, the date of release from confinement begins the running of the ten-year period. In cases where a witness is released on parole for the *crimen falsi* conviction, and then reconfined for a parole violation, the final release date may be used. (*See U.S. v. McClintock*, 748 F.2d 1278, 1288 (9th Cir. 1984) where the court stated that the witness' "probation was revoked for violation of a substantive condition [of his parole] that directly paralleled his original crime-engaging professionally in fraudulent charitable fund raising.") However, the type of parole violation and the reason for the reconfinement play a role in determining whether the later release date is a final release date on the original *crimen falsi* conviction. If reconfinement is imposed for some technical breach of the conditions of parole, or for the commission of some other offense unrelated to the *crimen falsi* offense, then the reconfinement is not part of the punishment for that offense and the prior release date must be used. *See U.S. v. Wallace*, 848 F.2d 1464 (9th Cir. 1988).

The end of the ten-year period has most often been found to be the date the action is instituted, the date the trial begins, or the date the witness is to testify. Only the Third Circuit and the Eighth Circuit have definitively addressed this issue and both have stated that the date of trial should be used. *See U.S. v. Williams*, 892 F.2d 296, 301, (3rd Cir. 1989); *U.S. v. Watler*, 461 F.3d 1005, 1008, (8th Cir. 2006).

A conviction older than ten years may still be brought in if "the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence." F.R.E. 609(b). In such cases, the court must balance probative value against prejudicial impact. The record must reflect the court's thoughtful analysis, since the admission of the prior conviction is no longer automatic. In *U.S. v. Beahm*, the Fourth Circuit found an abuse of discretion and reversed the admission of an eleven-year old conviction because they were unsatisfied by the record that the district court had thoroughly considered the issue. *U.S. v. Beahm*, 664 F.2d 414 (4th Cir. 1981).

However, the admission of prior convictions is not always so difficult to obtain. In *U.S. v. Sloman*, the Sixth

Circuit upheld the admission of a prior conviction for knowingly transporting stolen vehicles (an offense that since the 2006 amendment would not likely be considered *crimen falsi*), despite the fact that the government did not provide notice of its intention to use the prior conviction. *U.S. v. Sloman*, 909 F.2d 176, 180 (6th Cir. 1990). The court stated that "[t]he purpose of the notice provision is to prevent surprise. Since defense counsel was aware of the conviction and knew that Sloman would be subject to cross-examination if he waived his constitutional right to not testify, the defendant was not prejudiced by the late notice."

In cases where the prior conviction is older than ten years, the proponent has the burden of proving that the probative value of the conviction outweighs its prejudicial effect. *U.S. v. Cavender*, 578 F.2d 528 (4th Cir. 1978). In all cases, whether older than ten years or not, the proponent must be prepared to authenticate the conviction. In *Commonwealth of Pennsylvania v. Boyd*, the Pennsylvania Supreme Court stated that "the Commonwealth failed to carry its burden of establishing identity and thus, the criminal record was erroneously admitted" because the identity of the witness testifying and the identity of the person named in the prior conviction were only linked by sharing the same name. *Commonwealth of Pennsylvania v. Boyd*, 463 Pa. 343, 344 A.2d 864 (Pa. 1975). The identity of the witness must also be directly connected to the prior conviction. A corporate conviction may not be used to impeach the credibility of an employee witness who was not directly connected to the offense. *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506 (3rd Cir. 1997). It is the specific act of dishonesty or false statement that bears on the character of the witness' testimony, and therefore, such convictions may not be automatically admitted without consideration by the court.

The rule also prohibits the introduction of a prior conviction when "the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure." F.R.E. 609(c). In the case of a pardon issued because of a finding of innocence, this limitation makes perfect sense. However, because of the automatic admissibility of *crimen falsi* convictions and the extremely damaging nature of such evidence, the rule extends this protection to cases where the pardon is issued based on a certificate of rehabilitation. The reason for this is that the rehabilitation obviates the tendency of the prior conviction evidence to reveal the witness' present character for truthfulness.

For policy reasons similar to those which require the exclusion of adult convictions after rehabilitation, *crimen falsi* convictions against juveniles may not be admitted. F.R.E. 609(d). In addition to such policy considerations, juvenile adjudications often lack the formality or the higher standards of proof normally required in criminal trials, and so the majority view has been to exclude all such prior convictions.

In Practice

In 1974, when the original federal rule was enacted, evidence of prior convictions could only be introduced on cross-examination, thus showing the historical prejudice against such witness testimony. The intent behind this limitation was to balance the admission of the witness testimony on direct, with the admission of the prior conviction for impeachment purposes on cross-examination. However, the courts often found this limitation inapplicable, and in 1990 Congress removed the limitation allowing the prior conviction to be introduced at any time. In 1977, the Eighth Circuit stated in *U.S. v. Bad Cobb* that "[t]he introduction by a witness himself, on his direct, of a prior conviction is a common trial tactic, recommended by textwriters on trial practice. There is a paucity of authority justifying in theory this well accepted practice, but it has been justified on the ground that it serves a twofold purpose: (a) to bring out the witness' 'real character,' the whole person, particularly his credibility, and (b) to draw the teeth out of the adversary's probable use of the same evidence on cross-examination." 560 F.2d 877 (8th Cir. 1977).

Cross-examiners should consider whether introduction of the prior *crimen falsi* conviction is actually going to assist them in their attempts to impeach witnesses. There will be circumstances in which the prior *crimen falsi* conviction may prove of little value, or actually harm the proponent's position in the eyes of the jury. For instance, knowledge that a witness while working as a bus boy nine years prior was caught eating his employer's food leading to a conviction for petty embezzlement, though likely admissible under the Rule, could mean nothing to a jury regarding the witness' reliability today. Although the courts may not have to weigh the value of the prior conviction evidence against its prejudicial effect, examiners are well-advised to practice this balancing test.

Similarly, direct-examiners should not assume evidence of the prior conviction can always best be controlled and the harm limited by introduction on direct. If the prior conviction is clearly

something that will damage the witness' reliability, such as a prior conviction for perjury, then it may make sense to take the shock-value away from the cross-examiner and introduce the conviction on direct. However, offering such evidence may be fraught with peril, and may prove to be an open door for an able cross examiner. Any sort of denial of the offense, or its elements, on direct may allow the cross-examiner to rebut with more than the prior conviction. For instance, in the petty embezzlement example above, by downplaying his intent the witness may open a door to the underlying facts and the possible implication that the witness is less than honest as he testifies. The prior conviction, that may have had little impact if introduced on cross, may be exaggerated and a focal point of the testimony.

As with the admission of any prior bad acts, the substance of the act may not be made known to the jury in order to show a propensity to commit the offense. Another change to Rule 609 brought about by the recent amendment is the substitution of "credibility" with the term "character for truthfulness." Prior convictions for *crimen falsi* are not automatically brought in for any purpose, and now specifically, may only be brought in to show the witness' propensity to give truthful testimony. Therefore, proponents of the prior conviction evidence must frame (and limit) the offer of proof carefully. Trial lawyers must likewise specifically examine the witness, utilizing the conviction with attention to this purpose. In short, despite Congress' recent limitation of F.R.E. 609(a), the rule remains a powerful litigation tool.

Preparing Your Client for a Deposition: Practical Tips and Essential Rules

June M. Sullivan

Defending a deposition is more than just a four hour nap. It takes preparation to have the deposition go smoothly. Have you ever defended a deposition during which you learn certain facts from your client for the very first time? For instance, he or she testifies about the surveillance camera that recorded the entire incident that is the basis for the lawsuit, but your client *forgot* to tell you about it beforehand? Or how about a client who feels that he or she can say just about anything at a deposition? For example, when asked by the opposing attorney how decisions are made in health plans, your client (the medical director) testifies that "We use the golden Rule; he who has the gold, rules." Ouch. That is going to hurt the defense of the case.

Preparing your witness to testify at a deposition is one of the most important tasks you do before trial. One of the biggest mistakes a defense counsel makes is not properly preparing the client to testify at a deposition. There is a list of things that you can do to make your client's deposition more effective – things you never learned in law school or from your senior partner. Whether you are a seasoned litigator or a first year associate, these practical tips and essential rules are invaluable for witness preparation.

Practical Tips

First, understand your client's perspective. Is this your client's first deposition or has your client testified several times before? Most clients are in unchartered territory when it comes to depositions. After all, this is generally not what they do for a living. The deposition will not be easy or pleasant for your client, but knowing what to expect during the deposition will decrease your client's anxiety. The first time your client is deposed, he or she will need to know step-by-step what to anticipate during the deposition. A client who has been deposed several times may already know the basics, but may need to be reminded of them as well as the impact the testimony will make on the outcome of the case.

Second, remind your client that your discussion during deposition preparation is privileged and confidential. Reassure your client that any information or documents that could potentially surface during the deposition should be discussed now, not later when you will have little or no control over its disclosure during the deposition. Also, inform your client that you will have a limited role during the deposition. The purpose of the deposition is for the opposing counsel to discover information, not for you to divulge all aspects of your side of the case. Because of this, you will have little or no questions for your client.

Third, tell your client that the opposing counsel is not a friend. He or she may appear cordial and friendly, but oftentimes this is intentional to gain the deponent's trust. Although the attorneys may engage in an amicable conversation and exchange welcoming gestures, the client should not be lulled into engaging in conversations, jokes, or any other type of casual or everyday expressions on the record. In the same respect, the client should not allow an aggressive attorney to trap the client into an argument or fluster the client's composure. It can be unnerving for the client to sit through a hostile deposition session, but your client should maintain his or her composure, respond professionally and with respect. Your client's performance as a witness is being evaluated by the opposing party to determine how effective he or she will be in court. Your client should dress neatly and wear what he or she would normally wear. Remind your client that there is a court reporter taking down a word-for-word transcript of what is said, which may later be used during trial or in a court document. Pauses are not usually reflected in the deposition transcript, so your client should take as much time as he or she feels necessary to think carefully about the response.

Fourth, your client should not bring anything into the deposition that you do not approve of beforehand. If the opposing party questions your client with regard to any documents, your client should review the document silently and completely before answering the questions. Your client should have the document in front of him or her while

June M. Sullivan practices with Halloran & Sage in Hartford. She practices health care law, including medical malpractice litigation. She can be reached at sullivan@halloran-sage.com.

responding. In the same respect, if the client believes that he or she needs to review a document before responding to a specific question, your client should ask to look at the document to refresh his or her recollection.

Fifth, you and our client should not be eager to leave the deposition. If the defense team, including your client, is relaxed and not in a rush to leave, you both will send a message that you and your client are sure and definite of your position and are willing to participate as long as necessary. It gives an air of confidence. If the opposing counsel senses that there is hidden information that needs to be dug-up, he or she is likely to prolong the deposition.

The following Essential Rules should be reviewed with the client well before the deposition:

1. **Listen to the question.** Do not anticipate what the question will be. Oftentimes, the question will be different from what you think will be asked. Listen to the entire question before responding to it. Be patient and wait until the attorney is done asking the entire question without interrupting the attorney. Do not begin to formulate your response until you have heard the entire question.
2. **Understand the question.** This is not as easy as it sounds. Oftentimes people feel compelled to provide an answer, even if the deponent does not understand the question. Do not attempt to answer a question that you do not understand. Do not answer a compound question unless you are sure that your response properly addresses all parts of the question. Pause before you begin your response in order to allow yourself time to think about what question is being asked and whether you understand the question. If the attorney asks more than one question at a time or if the question seems ambiguous as to time, place, person, or event, do not feel embarrassed to tell the attorney that you do not understand the question. To be sure that you are clear as to what is being asked, tell the attorney to rephrase the question before responding to it.
3. **Answer only the question that is being asked.** Listen to the question carefully and only provide the information required to answer the question. If the question can be answered as "yes" or "no", then answer either "yes" or "no". If the question does not call for a narrative response, do not give one. If a narrative response is necessary, keep your answer as short as possible and limit your answer to only the question that is asked. If the question is "Do you know what time it is?" the answer should be "yes" or "no". The question did not call for the time, but whether the deponent was aware of the time. Do not volunteer other information. Do not get ahead of the attorney or give the attorney other avenues to explore by trying to guess as to the line of questioning. There may be times when a longer response may prove beneficial, but in general, use common sense and limit your response to only the question being asked.
4. **Do not guess.** Do not feel that you need to provide a factual response to every question. If you do not know or cannot recall the answer, then that *is* the answer. You are under an oath to tell the truth and there is nothing wrong with saying "I don't know" or "I don't remember". You are not telling the truth if you guess or speculate. Attorneys do not expect that you will remember every detail of what happened. Your memory is the only reliable source of what you observed and witnessed. Let your memory be your guide. If you feel that you made an error during the deposition, tell the attorney taking the deposition and ask that you be allowed to clarify your statement.
5. **Tell the truth.** At the beginning of the deposition, the court reporter will swear you in and your testimony will be under an oath to tell the truth. It is absolutely vital for you to tell the truth about what you know and to the best of your ability. However, always remember that the truth is never based on speculation, surmise, or guessing.
6. **Maintain your composure.** The record will reflect all of the words being exchanged during the deposition. Your demeanor should be polite, respectful, and courteous. Even if the opposing attorney is aggressive or arrogant, there is no reason to taint your testimony with words said in the heat of the moment that may come back to haunt you. Some lawyers intentionally use these tactics to provoke the deponent into a combative mood or to lose composure. Do not take the bait. Do not lose your temper or argue with the opposing counsel. As much as you may be tempted to do so, it will only hurt your case. The opposing counsel will know what your weakness is and will use this tactic again at trial.
7. **Ask to take a break when needed.** Always ask to take a break when you feel tired, overwhelmed or need to speak with your attorney. The opposing counsel should accommodate your request as often as nec-

essary. However, if there is a question pending, you may be asked to answer the question before taking the break. The break serves many purposes: it will give you time to think; it will give you time to discuss things with your attorney; and it interrupts the opposing counsel's train of thought, pace, and momentum. Oftentimes, your responses will be better after a break because when a person is tired, the responses tend to be careless.

8. Do not answer a question that calls for you to state facts that support your defense. If the attorney asks you to state facts that support your answer to the complaint or your defenses, you should simply state that you discussed the information with your attorney. What you discussed is protected under the attorney / client privilege. More importantly, no one expects you to know the factual basis for your response to the complaint or the defenses. That is your attorney's responsibility. Along this same line of questioning, if the attorney asks you to elaborate on your written interrogatory responses, you may simply state that those responses were prepared during discussions with your attorney.

9. Listen to any objections or statements your attorney makes and follow your attorney's instructions. Unless waived beforehand, your attorney will object and instruct you not to respond to any questions that seek responses that are protected under privileges such as attorney/client; doctor/patient; psychotherapist/patient; husband/wife; clergy/penitent; and Constitutional grounds such as self-incrimination. If your attorney speaks at any time during the deposition, you should stop talking immediately and listen. What your attorney says may have a direct impact on whether you will respond to the question. Your attorney may also object as to the "form" of the question on the basis that the question is ambiguous, unclear, or vague. If your attorney does not understand the question, it is likely that you do not understand the question. Take the lead from your attorney and ask the opposing counsel to rephrase the question. Occasionally, your attorney may object as to the form of the question, but instruct you to answer the question if you understand it. Listen and follow your attorney's instructions.

10. Pause before you respond to a question. You should wait a couple of moments after the question is asked in order to: a) be sure the opposing counsel has finished asking the question; b) give yourself time to be sure that you understand the question; and c) give your attorney time to object to the question, if necessary. This will also demonstrate to the opposing counsel that you are providing a thoughtful, reflective response.

11. Be mindful of your public conversations during a break. If there is a break in the deposition, do not discuss any information with anyone other than your attorney. Any information that is divulged is fair game to inquiry by the opposing counsel when the deposition resumes. I recall one deposition I conducted during which there was a fire drill. As we stood outside, the deponent struck up a conversation with the person next to her about her time in prison. This topic became my next line of questioning when the deposition recommenced.

12. Speak loudly and clearly. The court reporter is taking down everything that you say in a transcript that will later be used for various purposes. To be sure that she correctly records all of your testimony, she needs to hear it accurately. Your testimony is not gestures. The court reporter is not able to record a nod of the head, a shrug of the shoulders, or an "uh-huh". Respond with words and speak loudly and clearly so that the court reporter will not have difficulty recording your response.

13. Do not go off point or go on a tangent. This cannot be emphasized enough: when you have finished answering the question, stop talking. Be concise, brief and to the point with your response. Do not give additional information. Answer only the question that was asked. In the same respect, do not feel obligated to fill awkward moments of silence in the examination with additional details and an elaboration of your answers. Give a short, concise answer to the question and then remain silent for however long it takes until the next question.

14. Do not over-exaggerate. Oftentimes, the deponent will be asked to estimate speed, length, time, etc. It is rare for a witness to accurately estimate time, speed, distance, etc. for an event that happened briefly. If you are able to estimate, your estimate should be reasonable. An over-exaggerated estimate will derail your credibility. If you cannot make an estimate, say so. A bad estimate will work against you.

15. Unless you are quoting exactly, indicate that you are paraphrasing. Unless you know the exact

words someone used, do not put words in the other person's mouth. You should indicate that "the gist of the conversation was …" instead of saying that it is a direct quote. Bear in mind that other people may have been privy to the same conversation. Your credibility will be blemished if you provide self-serving statements from others.

16. Reread these Essential Rules. These practical tips and essential rules provide the basic groundwork for deposition preparation. You should know when to supplement this information with case-specific details. Practice these techniques with your witness to ensure a positive experience. Remember to protect your witness from opposing counsel's misleading questions and bullying tactics by raising objections during the examination. After the deposition, promptly provide a copy of the transcript to your witness with instructions on reading the transcript, making corrections, and signing the transcript. Be sure to have the witness return the jurat and errata sheets to you within the appropriate time frame. The time and effort that you spend preparing your witness is well worth it.

The Emergency Room Doctor Witness

James H. Milstone

Several years ago, I tried a case in which I cross-examined a treating emergency room doctor. I share this experience because after this time, I recognize the impact that this experience has had on my trials going forward.

Our local practice sometimes involves cases where witnesses too numerous to properly depose are listed as potential witnesses at trial. Thus, frequently at trial the defense counsel is unaware of which doctors will actually be called at trial. That is what happened in my case.

The case involved three claimants (all family members) who were in a dramatic rollover accident on an interstate highway in Northern Indiana. Each of the claimants asserted serious and grave injuries and each was seeking more than a million dollars in compensation.

One of the three claimants, the daughter, who was a passenger in the rear seat, told a dramatic story about how, after the vehicle rolled over eight times, she was trapped in the vehicle by a seatbelt, hanging upside down. She was substantially overweight, and maintained that this condition and her injuries did not allow her to remove her seatbelt to get out of the vehicle. When rescuers were ultimately able to remove her by using the "Jaws of Life", she was transported by helicopter to a hospital where she was seen at an emergency room. She maintained numerous orthopedic injuries, head trauma, vision trouble and psychological issues.

At trial, one of the 40 medical providers listed as a potential witness in the case was the doctor who treated her at the emergency room. Plaintiffs' counsel was being difficult at trial, and refused to identify, even for the judge, what witnesses he would call and in what order. Thus, on the third morning of trial, despite indications by Plaintiffs' counsel that he would be calling his clients as witnesses, he instead called the emergency room doctor.

On direct exam by a very experienced plaintiff's counsel, this doctor clearly testified to recount the significant factors of the daughter being air-lifted to the hospital, to the eight to ten sets of x-rays that were taken while the claimant was in the emergency room, and then her admission into the hospital where she spent two days.

At this point, I turned to an associate who was trying the case with me and identified two things for her benefit: (1) that I thought this witness was going to be key to the entire trial and recounted that we had not deposed him; and (2) that she should never do what I was going to be doing with my cross-examination.

I had a sense that this doctor was not happy about being called to trial. His demeanor during direct exam as well as some of his responses to Plaintiffs' counsel's questions led me to conclude that he was not particularly sympathetic to the Plaintiff.

I proceeded by asking some leading questions as well as some open-ended questions and, as I progressed, to wade out into what I recognized could be a very dangerous situation. However, the further I went, the more cooperative the doctor was. As it turned out, the doctor initially recounted that he did not have any knowledge of what occurred at the scene, so could not identify whether the claimant's condition was serious at that time. He also volunteered that just because the claimant was airlifted to the hospital was not a sign of serious injury, but rather was a rule that was required when a person was trapped within a vehicle for more than thirty minutes. (This turned out to be very helpful, as the claimant was trapped not so much because of her condition but because of her obesity).

As we reviewed his treatment at the hospital, he confirmed that his initial evaluations were very positive. He went through the "ABC" assessment that hospital personnel generally go through, and found that she was not in major distress. He then proceeded, in light of her complaints, to run x-rays upon every significant portion of her body. We examined the x-ray results, which all showed no fracture or other deformity. Then, we proceeded to review a second set of x-rays which were taken which only re-confirmed that there were no fractures or deformity. The second set was a precaution which he took when he began to question whether the patient's complaints were justified. When asked why he ultimately admitted her to the hospital, the doctor clarified that he did not admit her but simply kept her in the hospital for observation for two days.

By the conclusion of the testimony, it was generally agreed that: (1) there was no indication of any serious injury; (2) that she did not require hospitalization;

James H. Milstone is a member of Kopka Pinkus Dolan & Eads in its Mishawaka, Indiana office. His primary focus is in civil litigation and appellate advocacy. He can be reached at jhmilstone@kopkalaw.com.

and (3) that she had no fractured bones. In fact, he was wondering why she was making the complaints that she was as there was no objective basis for the complaints.

At the conclusion of trial, a very successful verdict was entered for the defense.

In thinking about it since, it is clear that emergency room doctors are used to dealing with very serious and difficult injuries in the emergency room. They are used to talking about even graphic injuries in a clear calm manner. Thus, their demeanor generally is to handle these things without drama, and not to unduly sympathize with their patients. I imagine it would be very difficult to remain an emergency room doctor in a busy hospital where you had deep sympathy for each and every patient.

Defense lawyers should not overlook the value they may gain from cross-examining emergency room doctors.

The Top Ten Ways to Ruin Your Closing Argument

Bradley C. Nahrstadt

The closing argument is the only real opportunity a defense lawyer gets to speak to the jury using his or her own terms and style. The facts come from the witnesses, but the closing argument belongs entirely to the lawyer. It is the time to summarize the case and explain to the jury in carefully selected words precisely why the defendant deserves to win the case. A lot is riding on the closing argument and, for that reason, defense counsel will want to make sure that he or she avoids some of the more common pitfalls that undermine a good closing argument. With all due respect to David Letterman, what follows, in no particular order, is my list of the Top Ten Ways to Ruin Your Closing Argument.

1. Refuse to Share Your Passion About the Case with the Jury

You must share your own passion for the case with the jury. If you are not engaged in the case, then you cannot expect the jury to be moved to decide the case in your favor. You cannot fake passion—it has to come from the heart. Recognize what drew you to the case, to the client, or to the issues in the first place and turn that recognition into passion for the client and the cause. When jurors see, hear and feel passion, they cannot help but be moved, impressed and excited—reaching the jury on an emotional level can make all the difference between success and failure, or between spectacular success and partial success. Remember, the jury is more likely to care about your case, and about your client, if they see that you care. Ask yourself, would you rather be like Demosthenes, of whom people said, "How well he speaks," or would you rather be like Cicero, who when people heard him said, "Let us march!"

2. Fail to Deal with the Facts Thoroughly and Methodically

You have to give the jury a solid basis for accepting your case or doubting the other side's case. Many trial lawyers build a good case by means of thorough direct examinations of their own witnesses or killer cross-examinations of the opponent's witnesses, but then fail to remind the jury of exactly what they accomplished. The principle of restraint on cross-examination (be brief and avoid that one question too many) is premised on the fact that you will drive the important points home during closing argument. Do not forget to do so when the closing argument finally arrives!

3. Misstate the Evidence

In order to win, you must maintain your credibility—with the witnesses and the client, to be sure, but most importantly with the jury. A big part of the trial lawyer's job is to argue the implications and conclusions to be drawn from the evidence. However, when doing so, the defense attorney must avoid the misstatement of evidence. That line can never be crossed. When you cross that line and misstate the evidence, you will have destroyed your credibility with the jury and, along with it, any chance you may have had to win over the jury to your side. As one pair of commentators has noted, "[m]ost jurors will give you a great deal of leeway in arguing the conclusions and implications from the evidence. However, most jurors intuitively know when you cross the line and misstate the evidence. Certainly, at least some jurors will have a clear recollection of what the witness actually said and that you have stated it wrongly. At that point, you likely have lost the case, because your credibility will have been seriously damaged." Andrew D. Ness and Louis Bagwell, *Closing Arguments: The Law and Practical Considerations*, 24 Construction Lawyer 29, 34 (Summer 2004).

4. Refuse to be Brief

When asked for his advice about what makes a good speech, Franklin D. Roosevelt had the following to say: "Be brief; be sincere; be seated." Roosevelt, himself a lawyer, could just as easily have been talking about a closing argument.

At the beginning of the closing argument, the jury will be completely focused on you. However, this total concentration and attention does not last very long. As a result, using those

Bradley C. Nahrstadt is a partner with Williams Montgomery & John Ltd. in Chicago. His areas of practice include product liability, insurance coverage, labor and employment, class action and MDL litigation. He can be reached at bcn@willmont.com.

precious early moments effectively is extremely important. Structure your closing argument to ensure that your most persuasive points are made as quickly as possible. You cannot do this if your argument is lengthy and complicated. Accordingly, your closing argument needs to be short, simple and logical. Striving for the goal of brevity should and will lead to simplicity, and simplicity is much to be desired when it comes to closing arguments. Ness and Bagwell, *supra*, p. 35.

5. Refuse to Face Bad Evidence Head On

You cannot afford to ignore bad evidence in your closing argument. The jury knows what that evidence is, will certainly hear about it from your opponent, and will certainly notice if you fail to address it. Undoubtedly, your opponent will bring your failure to deal with bad evidence to the front and center during his or her rebuttal, so you need to face any bad evidence head on and explain to the jury why this evidence does not militate in favor of a finding for the plaintiff.

Address any bad facts or evidence in the middle of the closing argument, when the attention level of the jury tends to be at its lowest. You do not want to address troublesome evidence at the beginning of the closing argument since that is when you want to lay out the strength of your case. Likewise, you do not want to wait until the end of your closing argument to address bad facts, since you want to close on a strong and positive note, returning to your themes one last time.

6. Don't Give the Jury a Suggested Damages Figure

There are those who suggest that the defense attorney should never address the issue of damages in the closing argument, especially in a case where it seems apparent that the defense is going to win on the issue of liability. This author is not one of those people. The case books abound with examples of cases where the defense was murdered because no effort was made to address the issue of damages in the closing argument. Take the case of *Pennzoil v. Texaco*, which involved a claim by Pennzoil that Texaco interfered with an agreement that Pennzoil had to acquire Getty Oil. Texaco's counsel did not argue damages in the closing argument; Pennzoil's attorney devoted a substantial portion of his summation arguing for an award of significant damages. The jury returned a verdict of $10 billion dollars.

In some surveys, one of the most frequent complaints registered by jurors was the insufficient guidance they received regarding the awarding of damages. *See,* Green & Bornstein, *Precious Little Guidance: Jury Instruction on Damages Awards*, 6 Psychology, Public Policy & Law 743 (2000); Vidmar, *The Performance of the American Civil Jury*, 40 Ariz. L. Rev. 849 (1998). Researchers have noted that jurors seek anchors, i.e., amounts or information they can use as reference points in determining an appropriate amount for damages awards. Dorothy K. Kagehiro, *Factors Affecting Jury Damages Awards Decisions*, 45 For the Defense 18, 19 (Aug. 2003). As a result, defense counsel must confront the damages aspect of the case head on and provide the jurors with a figure. The anchor provided to the jury simply cannot be the figure suggested by the plaintiff's attorney. To those who say that defense counsel's figures will serve as a floor for the damages to be awarded, I say it is much better to concede a floor than to be at the mercy of the jury who has only the plaintiff's numbers for consideration.

7. Don't Take Care to Explain and Support the Recommended Verdict

Defense counsel's closing argument should tie together the defendant's liability and damages theories in a coherent, persuasive manner that supports the recommended verdict. The defendant's liability and damages theories should be stated early in the closing argument and repeated as often as possible throughout it. The liability and damages themes should be phrased (and reiterated) so that they are the most memorable sentences of defense counsel's address to the jury. If the jury is to retain only one kernel of information from the closing argument, that kernel must be the defense theory of liability and damages.

8. Fail to Use Demonstrative Aids

Study after study has confirmed that people process visually presented information very effectively and a combination of orally and visually presented information works best of all. Although "a picture is worth a thousand words" is an overworked cliché, in this television age, it remains an important truth. You used visual aids and graphic exhibits during the course of trial-- don't forget to use them during the closing argument. Demonstrative exhibits can convey considerable information or a big concept in a very efficient and simple way. Directing the jury to a few chosen words from a vital document that has been highlighted and enlarged or show-

ing a computer animation about how the accident likely occurred can have a tremendous impact on the jury. Develop at least one good exhibit to illustrate the central theme of your case and use it throughout the closing argument.

9. Don't Personalize Your Client

In order to find in favor of a particular defendant, the jury must relate to that defendant; the jurors must believe that the defendant is in the right. In order to help the jurors reach that decision, you have to personalize the defendant. This is especially true in the case of a corporate defendant. Explain to the jurors that the corporate defendant is composed of people just like them—people who are trying to do the right thing. Have a personable corporate representative sit with you at counsel table. Stand next to this person as you begin your closing argument, reintroduce him to the jurors and thank the jury for their service on behalf of that individual and the company that he or she represents. When making your closing argument, identify with the client by saying "we" and "us" throughout the course of your summation.

10. Don't Pay Attention to the Arguments Made by the Plaintiff's Counsel

Don't use the plaintiff's closing argument as the time for a mental break. Pay careful attention to what plaintiff's counsel says during his or her closing argument. Asking the jury to put itself in the place of an injured party and award an amount commensurate with what they would charge to undergo the disability, pain and suffering experienced by the plaintiff, also known as the "Golden Rule" argument, is improper and should draw an objection. *See, e.g., Brant v. Wabash R. Co.,* 31 Ill. App.2d 337, 176 N.E.2d 13 (4th Dist. 1961); *Brokopp v. Ford Motor Co.*, 71 Cal.App.3d 841, 139 Cal. Rptr. 888 (1977); *Cox v. Valley Fair Corp.,* 83 N.J. 381, 416 A.2d 809 (1980); *World Wide Tire Co. v. Brown*, 644 S.W.2d 144 (1982). "*Per diem*" arguments—asking the jury to use a mathematical formula to calculate an amount for each day of pain and suffering—are likewise inappropriate. *Per diem* arguments are objectionable because of the speculative nature of such mathematical formulas and because they are not based on facts presented in evidence. *See, e.g., Caley v. Manicke*, 24 Ill.2d 390, 182 N.E.2d 206 (1962); *Boop v. Baltimore and Ohio R. Co.*, 118 Ohio App. 171, 193 N.E.2d 714 (1963); *Grossnickle v. Germantown*, 3 Ohio St. 2d 96, 209 N.E.2d 442 (1965).

And remember, as a general rule, when opposing counsel makes an improper argument, an objection must be made at the time of the improper statement in order to preserve the issue for appeal. In addition, making a timely objection provides the attorney who made the statement and the court an opportunity to rectify the damage, either through an admonition to counsel or an instruction to the jury to disregard the statement. *See, e.g., Houston Lighting & Power Co. v. Fisher*, 559 S.W.2d 689 (1977); *Azile v. King Motor Center, Inc.,* 407 So.2d 1096 (1982); *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

Closing argument is a skill that lawyers do not use every day. In this respect, it is much like the police officer who fires his gun: it's not done much, but, when needed, it had better be done right! Following this Top Ten list will hopefully allow defense counsel to craft and present a closing argument that will serve the client well and result in a favorable verdict.