Civil Trial From Start to Finish

For information on how to become a faculty member for one of our seminars, contact the Planning Department at the address below, by calling **(800) 777-8707,** or emailing us at speakerinfo@nbi-sems.com.

NBI, Inc.
PO Box 3067
Eau Claire, WI 54702

82984

IN-HOUSE TRAINING

Can training your staff be easy **and** individualized?

It can be with NBI.

Your company is unique, and so are your training needs. Let NBI tailor the content of a training program to address the topics and challenges that are relevant to you.

With customized in-house training we will work with you to create a program that helps you meet your particular training objectives. For maximum convenience we will bring the training session right where you need it…to your office. Whether you need to train 5 or 500 employees, we'll help you get everyone up to speed on the topics that impact your organization most!

Spend your valuable time and money on the information and skills you really need! Call us today and we will begin putting our training solutions to work for you.

800.930.6182

Jim Lau | Laurie Johnston

Legal Product Specialists
jim.lau@nbi-sems.com
laurie.johnston@nbi-sems.com

NBI | NATIONAL BUSINESS INSTITUTE

www.nbi-sems.com

Civil Trial From Start to Finish

Authors

Nichole S. Bogen
Sattler & Bogen LLP
Lincoln, NE

Charles M. Bressman
Anderson, Bressman, Hoffman & Jacobs P.C., L.L.O.
Omaha, NE

Jason Bruno
Sherrets Bruno & Vogt LLC
Omaha, NE

David A. Castello
Brundo, Testan, Novell & Jimenez
Omaha, NE

Timothy J. Mudd
Mudd Law Firm
Kansas City, MO

Jared Charles Olson
Sherrets Bruno & Vogt LLC
Omaha, NE

Presenters

CHARLES M. BRESSMAN is a partner with Anderson, Bressman, Hoffman & Jacobs P.C., L.L.O., in Omaha, Nebraska. He practices school law, business law, estate planning, and divorce. Mr. Bressman is a past president of the Douglas County Historical Society, the Douglas-Sarpy Counties Mormon Trails Association and Pacific Hills Lutheran Church. He is admitted to practice in the state of Nebraska, the Federal District Court of the state of Nebraska, and the Fifth and Eighth Circuit Courts of Appeals. Mr. Bressman earned his B.A. degree from Saint Olaf College; studied at Oxford University, England; and then obtained his J.D. degree from the University of Nebraska.

JASON BRUNO is a partner at the law firm of Sherrets Bruno & Vogt LLC. He is an experienced multi-jurisdictional trial and appellate attorney focusing on business litigation, real estate litigation, construction litigation, personal injury, legal malpractice, and eminent domain. Mr. Bruno has been retained by other lawyers to serve as an expert witness in litigation and has written articles in the areas of legal malpractice and construction law. He is a member of the American (Litigation Section; Advisory Panel) and Omaha bar associations, State Bar of Arizona and the Association of Trial Lawyers of America. He is named a Top 40 Lawyer Under 40 by the American Society of Legal Advocates. Mr. Bruno earned his B.A. degree, magna cum laude, at Saint Leo University, Saint Leo, Florida; and his J.D. degree, cum laude, at Creighton University School of Law, Omaha, Nebraska.

DAVID A. CASTELLO is the managing attorney of Adelson, Testan, Brundo, Novell & Jimenez, A PROFESSIONAL CORPORATION, where he practices in the areas of business law, workers' compensation, personal injury, corporate law, and tort and trial practice litigation. Mr. Castello is a frequent presenter on these areas of law. He is admitted to practice in Nebraska; the U.S. District Court, District of Nebraska; the U.S. Court of Appeals, Eighth Circuit; and is also admitted in Missouri and Iowa. He is a member of the Omaha, Nebraska State and American bar associations. Mr. Castello attended the University of London-England and he earned his B.A. degree from Grinnell College and his J.D. degree from George Washington University Law School. He was a member of the U.S. Army Reserves and the author of *Law and the Martial Arts.*

ROBERT S. SHERRETS is an attorney with Sherrets Bruno & Vogt LLC, where he has extensive experience in complex commercial litigation, and has tried numerous cases before juries, judges, and arbitrators. Mr. Sherrets is a member of the Kansas Bar Association, Nebraska State Bar Association, The Missouri Bar, U.S. District Court District of Kansas, U.S. Court of Appeals 8th Circuit, and the U.S. District Court District of Nebraska. He has also taught seminars on advanced trial tactics and has participated in litigation in multiple state and federal courts. Mr. Sherrets has argued cases against before the Court of Appeals of Nebraska, the Supreme Court of Nebraska, and the United States Court of Appeals, Eighth Circuit. He is admitted to practice in Kansas and Nebraska. Mr. Sherrets earned his B.G.S. degree from University of Kansas and his J.D. degree from University of Nebraska College of Law.

Table Of Contents

Jury Analysis and Selection – Choose the Right Audience

Submitted by Robert S. Sherrtets

I. Voir Dire and Jury Selection: Research, Precise Juror Questions and Strategic Use of Challenges

What is Voir Dire? This is an expression originally taken from the French, literally translating as: *Voir = To See; Dire = To say*. Roughly translating as: to say what is true.

Before the days of William Blackstone, when a challenge was raised to a juror, the juror would take an oath of *voir dire*, meaning to tell the truth and the other members of the jury panel would rule on the challenge to the prospective juror. This responsibility was eventually passed to the Judge.

Voir dire is an opportunity for the parties to question the prospective juror to determine if the juror can sit as an impartial judge of the facts in the case. More specifically, the Supreme Court of Nebraska has described the purpose of voir dire as follows:

> The principal purpose of the voir dire examination is to ascertain whether the proposed juror is free from bias or prejudice, and whether he is in such attitude of mind with respect to the case in hand that he would be a fair and impartial juror. With this end in view, it is the policy of the law to give to the parties ample opportunity to question the venireman upon matters bearing upon his competency, and questions which tend to show his attitude of mind and feelings should not be unreasonably abridged. And as each party has the right to exercise a certain number of peremptory challenges, it is proper, within reasonable limits, to propound questions which, in the judgment of the respective parties, may assist them in the exercise of that right. The extent to which the examination may be carried rests in the sound discretion of the trial court, and its ruling will not be disturbed unless there has been an abuse of discretion to the prejudice of the party complaining.

Strong v. State, 106 Neb. 339, 183 N.W. 559, 559–60 (1921).

It is important to know the typical practice for your jurisdiction before the trial on how to handle the voir dire. In Arizona, for example, the questions are written out in advance and read by the Court. In Nebraska, the typical practice will be for the judge to ask some general questions then turn it over to the attorneys to ask more specific questions. At the conclusion of the voir dire, the bailiff will ask the attorneys to each strike one juror at a time for a total of three jurors each. The remaining jurors, and potentially an alternate, will be your jury.

While people debate the effectiveness and value of voir dire, it should not be overlooked for several reasons. 1) You can develop a rapport with the jury; 2) You can test your themes on the jury; 3) You can create unintentional experts; 4) Eliminate hostile or potentially predisposed individuals.

1. Developing a rapport with the Jury.

In a practical sense, voir dire is important as it is the only time you can speak **with** the jury. The remainder of the case, you are either talking at the jury (i.e. opening / closing statements), or you are talking near the jury (i.e. direct and cross examination, in which you are not actually speaking to the jurors).

This makes it an important time as you can develop an early relationship with the jury through your tone, your demeanor, and how you work through questions with various people. This does not mean that you need to have a detailed conversation with everyone. Some people will not want to talk and you should not push them unnecessarily. Remember, most people are afraid of public speaking. A survey conducted by R.H. Bruskin Associates from July 1973 found that 41% were afraid of public speaking, while only **19%** of people stated that they **were afraid of death**. That means over two times the number of people are more afraid of public speaking than dying. This is a remarkable statistic but important to remember.

Another theory to remember is one of Group Dynamics. When you take twelve unrelated, unfamiliar individuals, they are all separate and unique. However, when you put them on a jury, they all become one group who start to act and think as a collective and will defend their members against an attack. See "All Together Now: Using Principles of Group Dynamics to Train Better Jurors" Sara Gordon, Indiana Law Review, Vol. 48:415, 2015. If you were foolish enough to come off as overly aggressive towards one prospective juror, you will be viewed as attacking the group as a whole.

2. Testing your theories on the jury.

Most attorneys will use voir dire to test out the theories of their case through their questions to the jury. This is important because you may be able to plant some early seeds in the jury's mind about the themes of your case, some issues that you will be bringing up, and measure how receptive potential jurors are. It is also important that you do not go too far. If a juror is responsive and favorable early, move on to someone else so that you do not tip your hand to the other side who could strike a favorable juror.

One thing to look out for is going "too far" with setting up your case during voir dire. The standard of review on a request for a mistrial is abuse of discretion. In *State v. Shipps*, the case dealt with a charge of sexual assault. The Defendant asked for a new trial when the following exchange took place. The prosecutor stated:

> The evidence, I think, is going to show, ladies and gentlemen, that when the defendant, Kelly Shipps, was having-he had a relationship with an individual named [D.H.,] who is the victim. At the time that Mr. Shipps and [D.H.] were having the relationship, Mr. Shipps was still married. Do any of you feel that the fact that-

At that point, defense counsel objected, and a sidebar conference was held. Defense counsel's motion for a mistrial was overruled.

The prosecutor then asked,

> "Do any of you feel that if a woman is engaged in a relationship with a married guy, that means she deserves whatever she gets? In other words, it's okay to sexually assault somebody if they've been having an affair?" The defense raised no objection to these questions. The State continued its line of questioning about sexual relationships and sexual assault without objection.

During defense counsel's questioning on voir dire, he stated:

> [Y]ou heard statements before that Mr. Shipps was married, and the testimony will come out that Mr. Shipps indeed was married. Mr. Shipps had had a long-time relationship with the complaining witness, [D.H.,] and that this-that Mr. Shipps spending the night with [D.H.] was a frequent event despite the fact he was married, and does the fact-well, does the fact that this information will come out, will this cause you to be prejudiced to Mr. Shipps so that you wouldn't be able to provide a fair verdict for him? And that means following the judge's instructions?

Counsel continued:

> This is a case involving a married man who's had a relationship. I think the term of art is a meretricious relationship with another woman, and now he's accused of having sex with this other woman without her consent. Would this cause you any problems in judging this case and following the judge's instructions?

At one point, the trial court intervened and stated:

> Whether or not the victim or the defendant was married is not an element of [the] crime, so it is not relevant to the proof in this case. So given that, do you think you would be able to fairly judge it, knowing that the defendant was or was not a married man, and simply stick to what I tell you the State has to prove?

The Court held that "the questions asked by the prosecutor during voir dire can be interpreted as an attempt to determine the "attitude of mind and feelings" of the jurors. The State has the right within reasonable limits to ask questions which will assist it in exercising its peremptory challenges." *State v. Shipps*, 265 Neb. 342, 350, 656 N.W.2d 622, 630 (2003).

3. Create unintentional experts.

This will not work in every situation. However, often times you will have a juror who works in the same field as a witness or expert in the case to be tried. There are opportunities to question the potential juror in a way to give some friendly 'testimony' in support of your case. Under the doctrine of Group Dynamics, the other jurors will automatically give some credibility to the potential juror's viewpoints. Tread lightly here, as there is always the potential that this could backfire.

4. Eliminate hostile jurors.

Obviously the underlying purpose is to eliminate jurors with a bias against your client. Equally as important, is protecting favorable jurors. For example, I had a jury trial where I represented a contractor to collect an unpaid bill in Sarpy County, Nebraska. Half the panel were either some form of contractor or married to a contractor. That made things pretty easy as we were able to keep enough of the contractors that the other side did not stand a chance. Remarkably they did not try to settle and ended up getting buried by a stacked jury.

Jurors will not always admit their bias or prejudice. In a trial in Missouri, the issue was a fight involving the construction of a new development. The jury awarded our client $500,000.00. After the case was over and the award was issued, we had an opportunity to talk to one of the jurors. He told us that the jury wanted to award $1,000,000, however, there was one hold out juror who was mad at our client because the development put in a stop sign that he has to drive by every day. Of course, he should have disclosed this bias when asked if he was familiar with the development during voir dire but he did not. That shows that the jurors will not always telegraph who is hostile and who is not. This results in a lot of guesswork from the attorneys.

The Art of Opening Statements – Tell a Compelling Story

Submitted by Charles M. Bressman

The Opening Statement

1. What the Statistics Tell Us.

2. To Give, or not to Give, an Opening Statement.

   A. Rural v. City.

   B. Ring generalship: punishment for not giving.

3. Are Modern Lawyers Able to Speak?

4. Practice, Practice, Practice! But what is to be Practiced?

   A. Acoustics.

   B. Tempo.

   C. Other Arts of the speaker:

      i. When to begin.

      ii. Dramatic pauses.

      iii. Gesticulation.

      iv. Repeated phrases.

   D. How does one practice?

      i. Reading correspondence and obituaries . . . aloud.

      ii. Reading at Church, with dramatic effect.

      iii. Telling a story:

         a. John R.

b. Abraham Lincoln.

E. Are lawyers overeducated? How does a lawyer learn to speak plain, simple English?

F. The Inevitable Word.

G. The Forceful Word.

5. **How Long Should it Be**:

A. "I'll be brief Your Honor."

6. **Oral and Visual**:

A. Use of props, visual aids, or other tools in the Modern Era.

7. **Poor Verbal Habits**.

A. **Examples**:

i. Uhh.

ii. Ok.

B. **Wiggle Wwords or Phrases**:

i. Attorney P. Gaultner in Eberspacher:

a. Not brief.

b. Theme firmly established.

c. All from memory.

C. **The Tyro**:

i. "Hi, Y'all, my name is Ryan."

D. **An Audience or Videotape**.

8. **Story-telling**:

A. **Live audience**: The Lizard.

B. **No audience**:

i. Tree stumps.

ii. The Sea.

iii. Pebbles.

iv. Tongue-twisters.

9. **Memorization**:

A. Cicero and his columns.

10. **Contents of the Opening Statement**.

How to Get Your Evidence Admitted (and Keep Theirs Out)

Submitted by Nichole S. Bogen

Nichole Bogen

How to Get Your Evidence Admitted (and Keep Theirs Out)

Getting Evidence Admitted: Identification, Preservation, and Foundation

What is evidence? Any fact, document, photo, object, place, testimony, etc. can be evidence. Only *relevant* evidence is admissible. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." FRE 401.

What evidence do I need? It depends. First, on what issues do you bear the burden of proof? The plaintiff bears the burden of proving the elements of her claims and damages. (She might also have to prove affirmative defenses to counterclaims.) The defendant bears the burden of proving the elements of his defenses. (He might also have the burden of proving the elements of his counterclaims, crossclaims, and third party claims.) For any issue on which you bear the burden of proof, you must obtain and offer evidence in support.

Second, on what issues do you want to have evidence to rebut the opposing party's evidence? For example, the defendant may have evidence that the plaintiff assumed the risk of the activity in which she was hurt. The plaintiff may then want to have evidence to rebut the defense such as a lack of understanding the risk.

Third, on what pieces of evidence or with which witnesses do you need or want to challenge credibility? For example, you may not have evidence contradicting a witness's testimony, but you might have evidence that the witness previously lied under oath which tends to show that the witness is not credible and should not be believed. It's a kind of evidence on evidence.

At the very beginning of your case, start to think about the evidence you need to prove your claims and/or defenses. Going to the jury instructions is a handy and efficient

way to identify the relevant evidence you need. For example, the 8th Circuit Court of Appeals Model Civil Jury Instructions on a harassment claim requires the plaintiff to prove the harassing conduct, the conduct was unwelcome, and the conduct was based on the plaintiff's sex or gender, the plaintiff suffered an adverse employment action, and the plaintiff's rejection of or failure to submit to the sexual harassment was a motivating factor in the adverse employment action. Once you identify the nature of the evidence you need for trial, you can draft discovery requests, take depositions, interview witnesses, and review documents with it in mind.

What rules apply to evidence? For federal court, the Federal Rules of Evidence, and how they have been interpreted by the federal courts, apply to the admission of evidence. Look to your state rules and decisions for the admission of evidence in state court. For this presentation, I will focus only on the federal rules. Read the rules often and especially before taking depositions or talking to witnesses—and again, well in advance of trial. Understanding the rules of evidence will allow you to ask the right questions to get evidence later admitted. For example, if you know a witness will not be available to testify at trial and you will have to use their deposition testimony, you will want to make sure any evidence you intend to offer through that witness is admissible at the time of the deposition as you will not get a second chance at trial.

How do I get the evidence admitted? In other words, who will tell the jury about the evidence? Most evidence comes in via witnesses—either by a sworn statement (e.g., affidavit, deposition, or declaration), or live testimony. Very little evidence is allowed in without a witness attesting to the evidence. *See e.g.,* FRE 902, Evidence that is Self-Authenticating.

The witness you admit the evidence through must be competent—able to *identify* the evidence and lay the foundation for its admission. Identification, also referred to as authentication, means the witness can show that "the item is what the proponent claims it is." FRE 901(a). Identification is made through having your witness demonstrate familiarity with or recognition of the evidence. The process of identification can range

from the simple—that's my car—to the complex—I designed and developed this computer simulation program. As another example, a witness may be familiar with the location and objects depicted in a photograph because they have been to the location depicted several times before and are able to identify everything shown in the photograph. They may be familiar with the photograph because they took the photograph and recognize it as one of their own. FRE 901(b) provides several examples of identifying and authenticating evidence.

To admit the evidence, the witness must have the ability to *lay the foundation* for the admission of the evidence. Foundation means the witness has the personal knowledge, or requisite qualifications, expertise, experience, or training necessary to testify that the evidence is what the proponent says it is. For example, in order for a fact witness to testify that the light was red at the time of the accident, the witness has to lay a proper foundation—namely, he was present at the time of the accident, he was in a position to see the color of the light, he was looking at the light at the right time, he observed the color of the light, and he remembered the color of the light.

The foundation necessary to admit a piece of evidence depends on the type of evidence offered and the rules regarding its admissibility—either under federal or state rules of evidence and case law.

Photographs, videos, computer animations and simulations. You will need a witness who took the photographs and can describe them or who recognizes the relevant location, objects or people depicted in the photographs. If there is a question about the accuracy of what is depicted—*e.g.,* it was taken at a skewed angle or does not fairly show the entire scene—you'll need a witness who can explain how the photograph was taken. Someone who can testify to the type of camera used for the photograph; the lack of filters or editing changes to the photograph (or that such changes enhanced the accuracy of the photograph); and the photograph's accurate and fair portrayal of the location and objects shown. For example, in grade crossing collision cases, we often want to show the sight lines available to the driver as they approach the railroad crossing. When taking a

photograph or video of the view for the driver, we ideally want to take the photographs or video from a substantially similar view—at the same eye-height between driver and photographer, same type of vehicle for windows sizes and the presence of metal bars or other objects within the car blocking the view, and similar conditions at the crossing, *e.g.,* same time of year, crops or vegetation in the same condition, and similar lighting conditions.

Photos and video can also be used in computer animations and computer simulations that further assist the jury in understanding the dynamics of an accident. Generally, animations refer to demonstrative evidence used to assist in explaining a witnesses testimony and are not admitted as substantive evidence. They are similar to a graph or drawing to explain the witness's testimony. The foundation for an animation is simply that it accurately and fairly reflects the testimony the witness provided orally and will assist the jury in understanding the testimony.

In contrast, a computer simulation utilizes both photographic or video evidence as well as computer programming calculations, equations and principles to predict or depict, for example, an accident or the effect of an event on the human body. To admit the computer simulation as substantive evidence, you will need to lay the foundation for the computer program that performs the calculations, equations and principles that make up the computer simulation. If the computer program is one of long standing and generally accepted in the field of the witness, then it is more likely to be admitted into evidence. The witness should still be able to explain how the computer program works and what makes the simulation reliable. If the computer program is relatively new to the scientific community, you should be prepared to have the witness (or multiple witnesses) explain its creation, how it works, and why it is reliable.

If possible and as an added precaution, it's good to have more than one witness able to identify and lay foundation for the exhibits you need to use at trial. From our crossing accident example, both the train crew and the photographer could probably identify and lay foundation for a photograph of the accident location. Any other witnesses

with familiarity of the crossing at or near the time of the accident could also lay foundation for accident location photographs. Law enforcement officers usually take a number of photographs at accident scenes and are able to lay the foundation for admission of photos. On more sophisticated computer simulations, you may need to have one witness lay the foundation for the reliability of the computer program, another for the data inputted into the program, and a third for interpreting the results and presenting the opinions reached by reviewing the simulation. Taking the time necessary to understand the evidence you need and want to use at trial is crucial to be adequately prepared with your witnesses and overcome all objections to the admission of your evidence.

Once an exhibit is admitted through one witness, it can be used with any other witness regardless of their familiarity with the exhibit or their ability to lay foundation for its admission. This is an important consideration when determining the order of your witnesses for trial, because you may want to use the exhibit with a witness through whom you cannot get the exhibit admitted. For example, you may want to use a photograph from the crossing accident with a family member of the deceased driver, but the family member is not familiar with the crossing and did not go to the scene of the accident. You would then want to make sure the photograph was admitted with a witness that testifies prior to the family member. I've often seen plaintiff's put a corporate defendant on the stand as the first witness in their case simply to lay the foundation for corporate document exhibits they want to use with other witnesses in their case. In practice, you might be able to stipulate with the opposing counsel on the admissibility of many exhibits in advance of trial, which I'm certain judges appreciate, however you cannot count on it. Be sure to identify and disclose all exhibits and witnesses according to the court's progression order and discovery rules to avoid having your exhibits excluded at trial.

Overcoming hearsay. Anticipating objections is essential to getting your evidence admitted. A common objection you will face is hearsay. "Hearsay means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." FRE

801(c). Statements include oral, written, or nonverbal conduct, if intended as an assertion. FRE 801(a).

Some out of court statements are not hearsay. A declarant-witness's prior statement is not hearsay if it meets the requirements of FRE 801(d)(1). The declarant is testifying and subject to cross-examination and the statement is offered for impeachment (prior inconsistent statement under oath), rehabilitation (prior consistent statement after implication of lying), or identifying a person as someone the declarant perceived earlier. FRE 801(d)(1)(A)-(C). For example, a witness you deposed for trial testifies differently than he did during his deposition, you are then allowed to use the deposition testimony at trial to impeach the witness. Typically I do this by asking the witness to follow along as I read their prior testimony and then only ask them if I read it correctly.

Likewise, an opposing party's statement is not hearsay. FRE 801(d)(2). These include—

- Statements made by a party as an individual or in a representative capacity;
- Statements a party adopted or believed to be true;
- Statements made by someone authorized by a party to make;
- Statements made by the party's agent or employee on a matter within the scope of that relationship while it existed; or
- Statements made by a coconspirator during and in furtherance of the conspiracy.

When the party is a corporate entity, it can be difficult to establish which statements are considered statements of the corporation. Special attention must be given to the declarant, their relationship with the corporation, and the scope of their authority to speak on the corporation's behalf. You can secure the foundation necessary to get corporate party statements admissible for trial through Rule 30(b)(6) depositions of a corporate designee, requests for admission, interrogatories, and depositions of corporate officers.

Other statements—whether oral or in writing—are likely admissible through one of the many hearsay exceptions, FRE 803(1)-(23):

- Present sense impression is describing or explaining an event while or immediately after it happened.
- Excited utterance is when a declarant is under the stress of excitement and responding to a startling event or condition.
- A statement made for medical diagnosis or treatment may include medical history, past or present symptoms, their inception, or their general cause.
- Recorded recollection is regarding a matter the witness once knew, but now cannot recall well enough to testify; the statement was made or adopted by the witness when it was fresh in the witness's memory; and the statement accurately reflects the witness's knowledge.
- Records of a regularly conducted activity require a foundation by the witness establishing that the record was made at or near the time—or from information transmitted by—someone with knowledge; kept in the ordinary course of business; and the making the record was a regular practice of that activity. The testimony is by a competent witness, record custodian, or certification. And neither the source nor the method or circumstances indicate a lack of trustworthiness.
- Absence of a record of a regularly conducted activity is the converse of the previous. And neither the source nor the method or circumstances indicate a lack of trustworthiness.
- Public records set out the office's activities; a matter observed while under a legal duty to report; or factual findings from a legally authorized investigation. And neither the source nor the method or circumstances indicate a lack of trustworthiness.
- Public records of vital statistics, *i.e.,* birth, death, or marriage.
- Absence of a public record after a diligent search to show the event or activity did not occur.

- Records of religious organizations concerning personal or family history, *i.e.,* birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of a personal or family history, contained in a regularly kept record.
- Certificates of marriage, baptism, and similar ceremonies.
- Family records showing personal or family history and contained in a family record such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on a urn or burial marker.
- Records of documents that affect an interest in property.
- Statements in documents that affect an interest in property
- Statements in ancient documents, *i.e.,* prior to 1998, and whose authenticity is established.
- Market reports and similar commercial publications showing market quotations, lists, directories or other compilations that are generally relied on by the public or by persons in particular occupations or industries.
- Statements in learned treatises, periodicals, or pamphlets, when used and relied upon by an expert witness.
- Reputation concerning personal or family history, *i.e.,* marital status, parentage, relationships, etc.
- Reputation concerning boundaries or general history occurring prior to the controversy regarding boundaries, customs that affect the land, or concerning general historical events important to that community, state or nation.
- Reputation concerning character.
- Judgment of a previous conviction if the statement is a judgment or guilty plea, a felony, and admitted to prove any fact essential to the judgment.
- Judgments involving personal, family, or general history, or a boundary.

Hearsay within hearsay. If each portion of the hearsay within hearsay statements meet an exception, the statement may still be admissible, FRE 805.

Remainder of writings or statements. FRE 106 provides that if a party introduces all or part of a writing or recorded statement, an adverse party may require—at that time—the remainder or any other writing or recorded statement that ought to be considered at the same time be read to the jury. If the opposing party offers only a portion of a statement by your client and you'd like to have the remainder read at the same time to provide context for your client's statement or further explanation, you can move under this rule to have it offered. Otherwise, the jury may be left with a poor impression of your client and trying to offer your own client's prior statement while he is on the stand will be excluded as hearsay.

Habit or routine practice. Oftentimes the events at issue in the case occurred several years prior to the time the witness is testifying at a deposition or at trial. Many of us cannot remember what we ate for dinner last Wednesday night, let alone what happened on a particular day one, five or ten years ago. A witness may not remember exactly what they did on a specific date, because the events were not significant to the witness at the time or the witness simply does not remember the details of the event. In those situations, a witness may be able to testify to their habit and practice under FRE 406. For example, in employee/employer litigation the training provided to the employee is often an important piece of evidence. Because a trainer provided numerous training presentations to many employees over several years, they may not remember specifically training a particular employee. In that situation, the trainer can testify to their habit and practice of providing the training, and the content of that training which they showed employees during the relevant timeframe.

Opinion testimony. Different rules apply to lay witness and expert witness opinion testimony. A lay witness can provide opinion testimony based on the witness's perception, that is helpful, and not based on scientific, technical, or other specialized knowledge within the scope of expert witness testimony. FRE 701. For example, if the

witness was working with a fellow employee when the accident occurred, observed their coworker working and responded to instructions from a supervisor, the witness may be able to give an opinion as to whether the coworker appeared to understand the tasks assigned at the time the accident occurred.

An expert witness properly qualified by knowledge, skill, experience, training, or education may provide expert opinions. FRE 702. The expert's knowledge must be helpful to the trier of fact, based upon sufficient facts or data, and the product of a reliable methodology that is reliably applied to the facts of the case. Unlike other fact witnesses in the case, an expert witness can rely not only on facts and data personally observed but also on facts and data the expert has been made aware of, *e.g.*, hearsay. FRE 703. The facts and data need not be independently admissible for the expert's opinion to be admitted. FRE 703 & 705.

To get the opinions of your expert admitted at trial requires significant effort on your part to understand your expert's expertise, the application of that expertise to the subject matter, their methodology of evaluating the evidence, and evaluating the reliability of their conclusions in light of their expertise and methodology. You should be your expert's worst critic to ensure your expert is prepared to provide adequate foundation for their opinions to overcome a motion *in limine* by opposing counsel to exclude them as well as getting their opinions admitted at trial. An expert's qualifications is only part of the basis for the admissibility of their opinions. They also have to apply a reliable methodology. If your expert is utilizing any tool, computer program, modeling software, or other technical equipment to form the basis of their opinions, make sure you understand enough about how it works to explain its reliability and accuracy to the court. From a practical standpoint, the more your expert is a natural teacher in explaining their expertise, methodology, and opinions, the more likely you'll be successful in getting the evidence admitted by the court and understood by the jury.

Keeping Theirs Out: Motions to Exclude and Objections

Preliminary findings. The court must determine preliminary questions on the admissibility of evidence, whether a privilege exists, and whether a witness is qualified. FRE 104(a). "When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist." FRE 104(b). Hearings are held outside the presence of a jury if justice so requires. FRE 104(c). And evidence relevant to weight or credibility of other evidence is not prohibited by FRE 104. FRE 104(e).

Irrelevant evidence. The test for relevant evidence is whether it has any tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action. Determining whether evidence is relevant depends on why it is being offered. For example, a witness in a negligence case who seeks to testify that the plaintiff is a mean and vindictive person is likely not relevant to determining any fact at issue in a negligence case. If however, the plaintiff is claiming that the traumatic brain injury she received in the accident caused her personality to change from pleasant and kind to mean and vindictive, then the witnesses testimony is relevant to a fact at issue and likely admissible.

Unduly prejudicial, confusing, misleading, undue delay, wasting time, or cumulative. Evidence may be relevant to a fact at issue in the case, but its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, causing undue delay, wasting time, or needlessly presenting cumulative evidence. FRE 403. For example, in negligence actions a plaintiff may want to offer evidence of other accidents or incidents involving the same corporate defendant. This evidence may have the effect of misleading the jury on the issue before it, namely whether the defendant was negligence in this particular case, not other cases. Unduly prejudicial evidence may include embarrassing facts about your client or others, their behavior or relationships that have nothing to do the case before the jury. *See e.g., Scott*

v. City of Sioux City, Iowa, 96 F.Supp.3d 876 (N.D. Iowa 2015) (rumors of affairs and sexual misconduct by officials was not admissible in sexual harassment case).

Improper opinion testimony. If a lay or expert witness does not meet the requirements of FRE 701, 702 and/or 703, the opinion testimony is objectionable and should be excluded. *See also, Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786 (1993); *Kuhmo Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167 (1999). An expert's opinions may be excluded for failure to properly apply the science to the facts, use a reliable methodology to form their opinions, or rely upon insufficient facts for their conclusions. The party seeking to exclude expert testimony should move in advance of trial to exclude the evidence rather than waiting until the time of trial. Most judges will enter a progression order setting a deadline for motions to exclude opinion testimony.

Moving to exclude expert testimony can have the effect of defeating the opposing party's claim or defense. For example, if the medical malpractice plaintiff does not have a competent expert to provide opinion testimony that the surgeon defendant committed malpractice, the defendant can move for summary judgment on the claim. Likewise, if a plaintiff successfully excludes the defendant's expert that sought to provide the opinion that the plaintiff was contributorily negligent in the car accident, the plaintiff might obtain summary judgment on liability.

Hearsay. Any out of court statement offered at trial for the truth of the statement is hearsay. While most hearsay is objectionable, most can be admissible through one of the exceptions to hearsay. Continuously objecting to testimony based on hearsay is likely to irritate the judge and the jury. Instead, pick your battles and determine in advance of trial what testimony you are likely to keep excluded based on a hearsay objection. For example, when a witness attributes negative statements to an unidentified employee of a corporate defendant, allowing the statement to go to the jury will prohibit the defendant from challenging the truth of the statement. The defendant can assert that because the speaker is unidentified, the hearsay exception for statements of a party opponent cannot

be met. For specific testimony that you know will include hearsay statements, move in advance of trial to keep the testimony from being heard by the jury. Even if the judge chooses to wait to hear the evidence at trial before ruling, you will have alerted the judge to an important evidentiary issue for trial.

Improper character evidence. Evidence of a person's character is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait. FRE 404(1). Objecting to improper character evidence comes up often for corporate defendants that have previously been involved in litigation, fined, sanctioned, or otherwise criticized for its decisions or conduct.

Subsequent remedial measures. FRE 407 precludes the admission of subsequent remedial measures. The rule provides, "When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: negligence, culpable conduct, a defect in a product or its design, or a need for a warning or instruction." The evidence may be admissible for other purposes, *e.g.,* impeachment, and "if disputed, proving ownership, control, or the feasibility of precautionary measures."

Motions in limine ("at the threshold"). A pretrial motion *in limine* asks the court to limit the admission of evidence or testimony. The motion might be very specific or more general in referring to categories of evidence. I've seen some motions focus on a lawyer's propensity for using colorful language at trial or violating the rules of the courtroom. The purpose of a motion *in limine* is to prevent the jury from hearing inadmissible evidence, streamline the case for trial, and provide guidance to counsel regarding evidentiary issues. *See e.g., Jonasson v. Lutheran Child and Family Services,* 115 F.3d 436, 440 (7th Cir. 1997); *Luce v. United States,* 469 U.S. 38, 41 n. 4, 105 S.Ct. 460 (1984). "The prudent use of the *in limine* motion sharpens the focus of later trial proceedings and permits the parties to focus their preparation on those matters that will be considered by the jury." *Jonasson,* 115 F.3d at 440.

The substance of a motion *in limine* should include important evidentiary issues that you anticipate coming up at trial which require a ruling from the court. Also, the motion should include any evidentiary issue that you want heard by the court outside the presence of the jury. For example, plaintiffs typically moved to exclude any evidence of the plaintiff's receipt of disability or medical benefits as a result of the injury. They do not want the jury to award a lower amount of damages, because the plaintiff already received benefits from other sources. Likewise, defendants may move to exclude any evidence that they are defended by insurance, because they do not want the jury awarding damages because an insurance company will pay the judgment. Corporate defendants move to exclude any evidence of prior incidents or accidents without a prior showing outside the presence of the jury that the previous incident or accident was substantially similar to the present case. Even if you are not successful in excluding the evidence in advance of trial, preparing the motion will help you prepare for trial and be prepared to object to the evidence when it comes up during trial. You will also assist the court in anticipating potential rulings during the trial.

Objections. Evidence or testimony not objected to will definitely go to the jury. While plain error is reviewable on appeal, it is usually not successful. Prior to trial or a deposition for use at trial, review all the available objections to the evidence and testimony that you anticipate arising. Possible objections include relevancy, materiality, privileged communications, best evidence rule, parole evidence rule, insufficient foundation, hearsay, leading, narrative, improper opinion testimony, repetition, cumulative, assumes facts not in evidence, misstates the evidence/misquotes the witness, improper characterization, form of the question (confusing, misleading, ambiguous, overbroad, vague, unintelligible), speculative, compound, argumentative, non-responsive, beyond the scope of direct/cross examination, and improper impeachment. If you need to approach the bench during trial to be heard on an objection, be prepared to explain why the question or line of questioning is improper and is going to lead to the admission of evidence that should not go to the jury. Judges are not mind readers and they do not know the case as well as you do.

Court's Limiting Instruction. If objectionable evidence does come in during trial, you may be successful in asking the court to instruct the jury to limit the use of the evidence for a specific purpose and not for other objectionable purposes. It is a last ditch effort to limit the damage done by prejudicial evidence.

The Art of Civil Trial Objections (and Responses)

Submitted by Jared Charles Olson

THE ART OF CIVIL TRIAL OBJECTIONS (AND RESPONSES)

I. What Can you Object to During Trial

Many people underestimate the number and variety of things that occur during trial that may warrant objection. Objectionable issues may include:

1. Objections to Voir Dire
   a. Questions misstating the law;
   b. Questions that may embarrass jurors;
   c. Hypothetical questions;
   d. Conflicting answers by jurors; and
   e. Objections to the composition of the jury.

2. Objections to Opening Statements
   a. Statements ultimately unsupported by evidence;
   b. Argumentative statements;
   c. Improper statements of personal belief;
   d. Misstatements of law;
   e. Improperly anticipating objections; and
   f. References to inadmissible evidence.

3. Objections During Case
   a. Questions beyond the scope of direct or cross-examination;
   b. Questions or evidence without proper foundation;
   c. Leading questions;
   d. Compound questions;
   e. Questions already asked and answered;
   f. Ambiguous questions;
   g. Questions calling for speculation;
   h. Unresponsive answers;
   i. Argumentative questions;
   j. Questions calling for narrative;
   k. Questions that are collateral as impeachment or other matters;
   l. Asking one witness if other witnesses are lying.

4. Objections During Closing Arguments
   a. Arguments asking jurors to put themselves in someone else's shoes;
   b. Arguments appealing to morality or religious beliefs;
   c. Attacks on opposing counsel;
   d. Misstatements of law;
   e. Comments on witness credibility;
   f. References to insurance coverage;
   g. References to financial ability to pay damages.

5. Objections to Jury Instructions
    a. Argumentative instructions;
    b. Technical imperfections in instructions; and
    c. Misstatements of law.

6. Objections to Conduct by the Judge
    a. Facial expressions that are distracting or prejudicial; or
    b. Making improper commentary on credibility of witnesses or evidence.

These are just examples of the many objections available during trial. It is up to you, however, to decide which ones are worth making and which are not.

II. Remember your Motions in Limine

As discussed in my previous section, you have worked long and hard to draft and argue your motions in limine. As the result of your hard work and brilliant arguments, the Court granted your motions and has ordered certain evidence be excluded at trial. Your job is not done yet. In fact, now comes the hardest part of your job – enforcing the Court's order. Throughout the trial, you must keep those orders in limine firmly in mind, because it will be your responsibility to make sure opposing counsel does not step out of line. This is one of the most important functions of your trial objections.

The other attorneys will probably not be foolish enough to directly violate the order, but you should keep an eye out for this. The larger risk is that opposing counsel will try every means available to skirt the edge of the order and try to get the information out anyway. If an attorney cannot offer evidence directly, they may try to bring it in indirectly. For example:

> Say the Court has barred witnesses from testifying about hearsay statements he or she read in a patient's medical records. An attorney may try to skirt this by asking general questions to their expert, such as "are _____'s medical records consistent with their claim that _____cause their injuries?"

Such indirect methods are certainly objectionable, but you must be vigilant and make your objections quickly to prevent the offensive content from being brought to the jury's attention.

In addition to being vigilant yourself, you should also make sure that the judge is vigilant and looking out for violations of his or her orders. One good way to accomplish this is by asking for a side bar or private conference with the judge on the day that you expect certain issues will arise. During this conference, you can tell the judge that you expect that XYZ issue may be discussed during today's trial and you may ask the judge to keep a close watch to ensure that neither party violates the orders in limine on that issue.

You must also remain aware of the issues to avoid during trial. If you succeed in excluding an issue in limine, but you touch on the issue during your case, you may "open the door" for opposing counsel to discuss that issue.

Keep a list of all orders in limine and be prepared to object to them again. Luck favors the prepared.

III. Preserve Any Issues for Appeal

The second important function of trial objections is to preserve issues for appeal. Even if your motion in limine was denied by the Court, that denial alone is not sufficient grounds for appeal. In order to preserve the issue for appeal, you must make an objection on the record during the trial. *Thrift Mart v. State Farm Fire & Cas. Co.*, 251 Neb. 448 (1997). In those cases, you will want to ask to make a record away from the jury. Be prepared to offer the same authorities and arguments you made on the motion in limine again, on the record. This record is what the appellate court will see, so make things as clear and concise as possible to make it easier on appeal.

IV. Keep Your Objections Brief

When objecting during trial, you should always defer to the judge's preferences on how objections are made. This is one of the many things you will want to discuss with the judge before trial or at the pretrial conference. Generally, you will only say "objection" and then state, in a couple words, the grounds for your objection. For example, if opposing counsel asks a witness a question without first laying proper foundation, you simply state "Objection. Foundation." At that point, the judge will either rule on the objection or ask for a side bar. The side bar will be your opportunity to discuss the details of your objection with the judge, out of the jury's earshot. NEVER try to argue your objections in front of the jury. Doing so will only make you look bad to the jury and upset the judge.

V. Be Judicious About Your Objections

It is also important to pick your battles. Just as you don't want to swamp the judge with too many motions in limine, you don't want to make too many objections during trial. Each time you make an objection in front of the jury, you throw off the rhythm of the witness's testimony, and you instantly draw the jury's attention to the issue at hand. If you make a lot of objections to a witness's testimony, the jury may start to think that you are afraid of what the witness is saying or that the objectionable testimony is more important. Judges typically advise jurors not to consider any matters once an objection is sustained, but you can't stop the unconscious biases and judgments that they will undoubtedly make.

For this reason, it is sometimes best to avoid the issue altogether, which may mean letting somewhat objectionably testimony slide if it is not central to your case. Make sure that any objection you make is important or necessary for your case.

Getting the Best Out of Witness Examination

Submitted by Robert S. Sherrtets

V. GETTING THE BEST OUT OF WITNESS EXAMINATION

Effective witness examination starts many months or even years before the trial through detailed and effective discovery. Before a witness testifies at trial, you should already know what that witness will say through the discovery you have conducted. This is accomplished by starting with specific and detailed written discovery requests. Too often attorneys will send their "stock" discovery requests with little to no specificity surrounding their requests. In responding, attorney's will often object or give partial responses subject to objections. These answers are insufficient. When you get to trial you will not be able to box in the opposing party based on their discovery responses if the answer is subject to an objection.

Your written discovery should include a first set of discovery requests, a second and more detailed set of discovery requests based on the answer you receive, and often times a motion to compel to resolve any lingering disputes over outstanding discovery issues. Written discovery is followed with a detailed deposition. The purpose of the deposition is to pin down the witness on all areas that he or she will testify.

Proper discovery is essential before an attorney ever attempts to try a case.

A. Direct Examination

An effective direct examination requires detail, organization, structure, and practice. Each direct examination should be rehearsed in some capacity prior to the presentation before the Court. This means you should have an outline drafted with the necessary exhibits marked and numbered on your outline for easy access.

a. Witness Introduction, Establish Credibility and Qualifications

You will start your examination by introducing the witness and establishing credibility. This is done by introducing the witness, giving their name, their educational background, talking

about their family, where there from, etc. Especially when you are dealing with the Plaintiff or Defendant, their names will be used routinely throughout the trial. Attorneys and witnesses will be talking about these individuals, often times in a negative way. It is important to establish that the Plaintiff/Defendant is just an individual, similar to those in the jury panel.

The following is an excerpt from a jury trial with the first page of questions to the plaintiff. The names have been changed:

Q. Ms. Smith, would you please state your full name, please.
A. Jane Smith.
Q. I hate to ask this, but I have to. How old are you?
A. 38.
Q. And where do you presently reside?
A. 100 South 1st Street in Omaha, Nebraska.
Q. Are you currently married?
A. I am.
Q. To whom?
A. John Smith.
Q. And is Mr. Smith here in the Courtroom?
A. He is.
Q. How long have you and John been married?
A. It will be ten years this Friday.
Q. Do you and John have any children together?
A. We do. We have two children: A six-year-old boy named James, and Mary, who is eight.
Q. Are you from Omaha?
A. I was born here, yes.

The above shows the simple guideline to introduce a witness to the jury, establish who she is, that she is married with children, and that she is from Omaha. The next line of questions established her educational background, her work history, and then led into the facts which related to the case. The background will also depend on the facts of the case, however, you should not go

into too much detail. You need to give the jurors a screenshot of who your client is but you do not want to bore them with superfluous details.

b. Making the Testimony Clear – Organization and Conversational Manner

Your outline should be organized so that you can tell the story to the jury in a clear and concise way. This may seem obvious, but often times you will be involved in a case for multiple years and you will have detailed information about every aspect of the case. The jury is hearing about this case for the first time so you will need to narrow the flow of information in a way that is both easy to understand as well tells the full story that you need to tell.

When drafting your outline, you should start by listing out what the critical issues are that you will have to address. For example, in a case involving the sale of a business, the issues were: (1) the negotiation; (2) the Asset Purchase Agreement; (3) the Closing documents. You need to organize what exhibits you must get into evidence to prove your case. Often times you can get a majority of these documents into evidence before trial. However, there will still be several exhibits you need to get in during trial. After you have your topics and your exhibits, you can draft your outline fairly easily from that point forward.

c. Making the Testimony Persuasive

The testimony is only effective if it is persuasive. If it comes off as forced, insincere, or overly scripted then it will lose credibility. Often times attorneys will tell their client to "look at the jury" while testifying. I have found that looking directly at the jury comes off as overly rehearsed. By way of example, during a jury trial recently, the Defendant representative stared

directly at the jury during his entire presentation. This appeared to make the jury uncomfortable and he did not appear credible.

d. Special Considerations in Direct Examination of Expert Witnesses

Direct examination of an expert witness is important. You need to establish the expert's credibility, knowledge, what examination or inspection he/she conducted, and (most importantly) the witness must be persuasive. First, you need to establish the expert's credibility and qualifications for how he or she is qualified to provide the testimony in this case. Next, go through his or her familiarity with the case. If it is a medical case, establish the expert's knowledge with the specific plaintiff, the review conducted, the examination performed, etc. If there are potential issues with the analysis performed, bring this up in direct. For example, if the expert did not personally examine the plaintiff but instead relied upon medical records, bring this up and have the expert explain why this is not an issue. You need to lay foundation for the expert's opinion, go through how the expert reached the opinion, and ask if the expert reached the opinion to a reasonable degree of professional certainty. While the Nebraska Supreme Court has stated that you do not have to ask this "magic language" it does not hurt to include it in your examination.

e. Redirect Examination

During cross-examination, opposing counsel will seek to score points with the jury/judge by knocking down credibility to various points of your case. Your redirect examination is extremely important to rehabilitate your witnesses. In the below example, a point of contention was what took place at a disciplinary meeting between the student and the school. The Defendant school had tried to trip-up the Plaintiff with an Exhibit purporting to show what took place during the meeting. The Exhibit opposing counsel relied on did not actually reflect what took place at the

meeting, so redirect examination was needed to rehabilitate the Plaintiff and establish why our version of events was accurate.

Q. Ms. Smith, do you remember your discussion with counsel about Exhibit 129?
A. Yes.
Q. Exhibit 129 was something that was prepared by the Defendant, wasn't it?
A. Yes.
Q. Did you have any input in the preparation of this document?
A. No.
Q. And there's actually a separate document that actually has the notes of what was said during that meeting; isn't that correct?
A. Yes.
Q. And that would be Exhibit 128 that references what actually was discussed during the meeting on April 24th of 2013; correct?
A. Yes.
Q. And what -- And who prepared Exhibit 128?
A. [A representative of the Defendant].
Q. Okay. And what does it say under Scenarios under this document that were prepared?
A. Improvement and done with probation, continued probation, termination, option will be given to withdraw, that option remains open until you are terminated.
Q. Okay. Does it include any of these provisions in paragraph 1 or 2 about the Code of Ethics?
A. No.
Q. So is that consistent with your recollection that none of that was discussed during this meeting?
A. Yes.
COUNSEL: Your Honor, may I publish Exhibit 128, please.
THE COURT: You may.
COUNSEL: Thank you.

B. Cross-Examination Methods

a. How to Prepare for Witnesses' Testimony and Potential Objections

As mentioned above, the real preparation for cross-examination takes place during written discovery and through depositions. An effective, detailed, and clean deposition is critical to locking a witness into specific testimony. By a clean deposition I mean one that has concise questions with a clear indication of the topic and a clear answer from the witness. This also means, do not ask compound questions or overly lengthy or complex questions.

The following is an example taken from a deposition of something you should avoid when trying to make a clean record.

Q. How do you know that? This letter
says --
A. Because it says --
Q. Wait, [Witness], one second please.
A. Sorry.
Q. I know you're saying what would have
happened. I am asking you only about what
happened in this letter. And this letter says,
"As such, we are billing you" -- we are billing
you -- "directly for the hospital services." And
it says earlier and we expect payment in full.
So I understand that it says you can
go off and make a claim with [Defendant]. I'm just
asking you that you concede that a member
received a letter in which they were told you
have to pay [_____]?
[Defendant 1 Counsel]: Form and foundation.
A. But in that letter --
[Defendant 2 Counsel]: Is there a question
there or is that just a declarative statement?
[Plaintiff's Counsel]: Is that an
objection?
[Defendant 2 Counsel]: Yes. Form. It's
a -- you just made a declarative statement with
no question.
[Plaintiff's Counsel]:
Q. Go ahead, [Witness].
A. On there it says, "[_____] claim form
is included with this letter to submit to [Defendant]."
Regardless of the amount [Defendant] pays, you -- you
know, for your services rendered -- I mean, I
know it does say they're still going to bill them

14 on the back end, but it's providing them with a
15 claim to send to [Defendant] which we would then handle.

In this example, Plaintiff's counsel was asking objectionable, long-winded, compound questions and was not receiving concise or clear answers. This type of transcript would be extremely difficult to use during the trial particularly for purposes of impeachment.

b. Organization

Cross-examination should be approximately 20% to 30% of the length of the opposing party's direct examination. Obviously this is an overly generalized statement that depends on a variety of factors. However, your cross-examination should be short, clean, and designed around scoring some major points and getting out unscathed. While an effective cross-examination can severely cut down the credibility of an opposing witness, an ineffective cross-examination can cause you to lose the case.

An example from a recent trial, based on transcript pages, our direct examination of the Plaintiff was 56 pages of testimony. The cross-examination was 72 pages long. This was a very ineffective cross-examination which covered too many topics, had too many open-ended questions, and defense counsel ended up arguing with the Plaintiff at time over inconsequential issues.

The old adage is "you never ask a question you don't know the answer to." That is true in theory. However, in practice, there will be times when you're forced to ask a question without having the answer. You should not shy away from a question simply because you do not know the answer. You should, however, know how you will proceed regardless of the answer.

c. Framing the Questions and Limiting the Response

Your cross-examination should use leading questions which require a yes or no response. You should limit the witnesses' ability to explain their answers, get the answers you need quickly and efficiently and move on.

d. Prior Inconsistent Statements – The What-fors and How-Tos

The most useful tool in a cross-examination is the witnesses' deposition. You should use the deposition to assist you with writing out your questions based on the questions and answers asked during the deposition. To impeach a witness on a prior inconsistent statement, you need to ask the same question during the trial that was asked during the deposition. This ties back in to the importance of a clear and concise deposition.

When drafting an outline you should make a note of the expected answers and the line/page of the deposition where the exchange took place. This way, when the witness answers incorrectly you can immediately impeach the witness based on their prior statement. By way of example, below is an excerpt from a cross examination of an expert who was being deliberately evasive throughout the examination. This set him up for getting exposed on something that should not have been a major issue yet it was highlighted by his attempt to change deliver the least favorable testimony possible:

9 Q. Stab-Lok electrical panels, they are known
10 to cause fires. And if you come across one in one
11 of your property condition, you point that out and
12 recommend replacement, don't you?
13 A. We have had various recommendations over
14 the years on what to do. The industry has not come
15 to a conclusion as an industry and what to do.
16 Q. Well, that wasn't exactly my question.
17 But you would agree with me that Stab-Lok
18 panels are known to cause fires, right --
19 A. Yes.
20 Q. -- because they didn't go through the
21 proper laboratory underwriting process?
22 A. That's right.

23 Q. And, in fact,
1 Q. And if you come across a Stab-Lok panel,
2 you're going to recommend that it be replaced,
3 aren't you?
4 A. We have varying degrees in our company of
5 opinions on that.
6 [COUNSEL]: Geoff, could you play
7 [THE WITNESSES'] deposition testimony on Page 37,
8 Lines 3 through 6?
9 (Video testimony of THE
10 WITNESS played from
11 7/15/16.)
12 "BY [COUNSEL]:
13 "Q. So if you come across a Stab-Lok
14 panel in your course of business, are you going
15 to recommend that it be replaced?
16 "A. Yes.
17 "Q. Okay."
18 (Video testimony concluded.)

e. Specific Techniques for Cross-Examining Expert Witnesses

Effective cross-examination of an expert witness requires hours of analysis and understanding of the expert's report, his/her credentials, the methodology used, and whether that methodology is accepted in their profession. You need to understand not only the methodology that the expert used in this case, but you need to gain an understanding of how a typical expert would have used. If the opposing expert is not using the proper methodology you can get his/her testimony thrown out or at a minimum use that in closing to discuss why the opposing expert is not credible.

Often times, the opposing expert will be a knowledgeable, skilled expert with an opinion based on an approved methodology. In that case, get a series of smaller admissions and move on. You need to take what you can get from the opposing expert. If the expert is a skilled witness, the expert will be prepared for your attempts to undermine his/her opinion. There is no reason to try

and hit a grand slam with every expert. If you can get a series of singles on minor issues that will be far better than striking out going for a major win.

By way of example, if you are dealing with an appraiser. You will not get the opposing expert to admit that your valuation is correct so do not try. Instead, poke holes in their valuation where you can. The appraiser will make adjustments from various comparable properties. You can get admissions that the 60% adjustment could have been 55% or 65%, which would result in an increase or decrease in the value they obtained. Also, you can point out issues with the comparable properties they relied on. Those properties were superior (or inferior) based on X, Y, Z.

Standing on Ethical Ground

Submitted by David A. Castello

IV. Standing on Ethical Ground

11:30 – 12:30

A. Rules of Professional Conduct

A. RULES OF PROFESSIONAL CONDUCT

-Read them repeatedly

-"BE ACCOUNTABLE TO THE PUBLIC"

-Article 5 Nebraska Rules of Professional Conduct

- -Client Lawyer Relationship
- -Counselor
- -Advocate
- -Transactions with Persons other than Clients
- -Law Firms and Associations
- -Public Service
- -Maintaining Integrity of Profession
- -Gut Check Reaction to Situation

B. ATTORNEY'S OBLIGATION TO KEEP CLIENT INFORMED

-Always put everything in writing to your client. This is to protect you. When it is your word against your client's, you will lose. In addition, if they client makes a Complaint with the Counsel for Discipline, you can respond within the ten days with detailed writings that show that you did keep the client informed and that you were organized.

-Keep detailed time entries on ALL cases. Of course, you need detailed time for billing purposes. But, you also need detailed time in plaintiff's cases to show that you have performed the work. If you are ever sued for malpractice, your attorney will request the time entries and it will make his or her job defending you much easier.

-Always get a client's input and approval for all settlements. I tell my clients that they are the boss when it comes to the number. I tell them that they will know every number and will approve every response to every offer. During the settlement negotiations, the client must be kept informed and be a part of the process. You cannot call a client and tell them that you settled for a number that they didn't approve. And, they need to be a part of the process, especially in mediations.

-Always let your client know if there are negatives aspects to their case. That is how

you manage expectations.

-Never tell your client what their case is worth - you don't know for certain. Only the court can determine that value.

-Document everything.

-Post representation - Remember they have two years to sue you. So, while you shouldn't extend that statute with continuing representation, staying on good terms with a client can be beneficial.

C. MERITORIOUS CLAIMS AND CONTENTIONS

-Only advocate meritorious claims and contentions. Just filing suit to force a settlement can get you into trouble.

-In one case the attorney sent a letter to the insurance company stating that the case was worth $300,000.00. Fast forward a few years and that attorney is being sued for malpractice and is on the stand. He is asked what the case was worth and is presented with his letter stating that it was worth $300,000.00. The jury returned a verdict against that attorney for – $300,000.00.

-You can send a demand for $300,000.00. However, when you send a copy of that demand to your client, spell out in your letter to your client that this amount is merely a demand and not a reflection of the value of the case or what they can expect to recover from a suit or settlement.

D. CANDOR TOWARD TRIBUNAL

-Be honest with the judge and/or jury.

-You WILL be in front of that judge again.

E. ETHICS IN PRACTICE

1. Rules of Professional Conduct

2. Code of Professional Responsibility

3. Disciplinary Rules

4. Case Examples:

    a. Motorcycle - Chiropractor Case

    b. Rooftop Liability Divorce Case

    c. Floating exhibit case

    d. We don't Coast discovery

    e. Marriott fire case example

B. The Tripartite Relationship Among Insured, Insurer and Counsel

You represent the client if you are plaintiff's counsel.

If you are defense counsel you still represent the client and not the insurance company that hired you and is paying your fees. That means a number of things:

-You cannot and should not disclose any information to the insurance company that would or could or might jeopardize the insured's coverage.

-You cannot and should not give your client any advice with regard to coverage issues.

-You must endeavor to settle a case within the policy limits so that your client is not hit with an excess judgment. (U-case example)

-You need to copy your client on all reports to the insurance company regarding the case.

-Under reservation of rights letter – your representation of the insured is no different. Insurance company still owes a defense and you are it.

-In professional malpractice defense, most times you will require the approval of the professional client to settle a case.

-In sum, it is not a tripartite relationship - that was Octavian, Mark Antony and C - it is a bilateral relationship and you are on the side of the client.

C. Conflicts of Interest

When you are on the defense and you receive an assignment of a file, you must conduct a conflicts check to make certain that you and your office do not have a conflict of interest.

-You should not have previously represented the other party.

-You should no have previously been involved in an ongoing case in a position adverse to your client.

-You have a conflict of interest if you attempt to represent two parties to an action that have or could have conflicting interests.

-You should not represent your client against his or her insurance company where that insurance company assigned the file and has paid your fees.

-You shouldn't try to represent both parties to a contract.

-You shouldn't try to represent both sides in a divorce.

-You shouldn't represent a company and one of its directors or officers if their positions could be adverse.

D. Attorneys' Fees and Charges

-If you represent the plaintiff, you will probably charge a contingency fee.

-How much do you charge. I have charged my sister, my cousin, my best friends the exact same as I have charged clients off of the street for plaintiff's cases – 33%. My brother had a $2k case and my cousin had a $700k case and both were charged 1/3. (Remember 1/3 is not the same as 33% when dealing with large numbers).

-Some contingency fee agreements have provisions for graduated fees. Some charge 25% before suit and 33% after suit. Some even charge 40% for appeals. I would not recommend doing so, as there is a built in conflict of interest in such a fee schedule.

-Keep accurate track of all of your time, even in plaintiff's cases.

-Never take money from a retainer until and unless you have earned it and can document your time.

-You can always cut your fees at the end, but you should never attempt to raise your fees. The contract with your client is carefully viewed as a one sided contract and you are the lawyer giving them advice. You always want to be more than fair and document that fact.

E. Dealing with the "Excess Claim"

-We have dealt with this previously. If you represent an insured and the case could be made and tried for an amount that is in excess of your client's coverage, you should do everything you can to attempt to settle the matter within the coverage. (Dog bite example)

Strong Closing Statements and Jury Instructions

Submitted by Timothy J. Mudd

VII. STRONG CLOSING ARGUMENTS & JURY INSTRUCTIONS

A. Goals Of Closing Argument
B. Using Body Language to Make Your Point
C. General Rules of Kansas Law Relating To Closing Argument
D. Problem Solving With Your Closing Argument
E. Effective Use of Analogies, Fables, Metaphors and the Like
F. Pitfalls to Avoid When Making Closing Arguments
G. Four Closing Arguments From One, And A Lifetime Of Free Lessons For Others

*****

"I believe that next to the luck or instinct experienced by the lawyer during jury selection, the most important time of the trial occurs during the final summation, and particularly during the final five minutes of the last rebuttal argument."

-Bill Colson

A. Goals Of Closing Argument

1. Identify And Stick To Your Goals

Results and goals are two different animals. The result is the final consequence of a sequence of actions or events. For example, the jury verdict is our result from a trial. Goals, on the other hand, are the systematic steps and decisions we make in an effort to achieve a desired result. In the general context of a trial, goals are the specific actions and events we as lawyers attempt to complete in front of the jury in an effort influence the jury's verdict.

Under that framework, the issue regarding the content of our closing argument is always something along the lines of, "What are the specific goals that I want to complete with my closing argument?" The goals for each closing argument are case-specific and fact-specific. Likewise, more often than not the goals we had targeted for closing argument prior to the start of trial are substantially different from the goals we have in place by the time the judge looks at us and says, "Counsel, you may proceed with your closing argument."

What are some examples of fact-specific goals for closing argument? Here are three examples, from three different trials:

Example 1: While defending a man being charged with aggravated battery and facing a potential life sentence in a shaken-baby-syndrome case, during cross-examination one of the state's medical experts admitted that the location of the head bruising and underlying subdural hematoma were entirely consistent with an accident fall - which was the theme of our defense. In fact, that particular medical expert years earlier had written a peer-reviewed article, explaining how accidental head injuries could objectively be identified from non-accidental head injuries. The state never mentioned the article during its direct examination of that expert. The expert on cross-examination further admitted the state was aware of her article, because she had told the prosecutor's about her article prior to trial.

Our goals for that closing argument did not include assassinating the credibility of that particular expert witness - she had actually turned into one of the defense's best witnesses. Instead, one of our goals during closing argument was to utilize the testimony of that medical expert [along with the oath to tell the truth, the whole truth, and nothing but the truth] to assassinate the believability and trustworthiness of the prosecutors in an effort to convince the jury to reject all of the state's evidence – the state had introduced testimony from a number of other medical experts asserting that the involved injuries were non-accidental in nature. The result was the jury found the defendant not guilty.

Example 2: While defending the plaintiff's driver in a personal injury lawsuit where the plaintiff was ejected from the vehicle during a roll-over, the co-defendant made a really stupid comment while testifying, and even chuckled when he said it. My client had pulled out

from the median in front of the approaching co-defendant on the highway, causing the co-defendant to rear-end at high speed the vehicle occupied by the plaintiff, my client, and the plaintiff's two young sons. At the scene, thinking that one of the two boys had been killed in the wreck, my client cradled the boy in his arms and took off running up the hill back to the highway in an effort to flag someone down to help him get the boy to the hospital. The co-defendant at trial admitted seeing my client running up the hill with the child in his arms, screaming for help.

One of our goals during that closing argument was to utilize the mental image of my client running up the hill, in an effort to make my client seem like something of a hero [my client had seven criminal convictions, which the jury had heard about during trial]. Another one of our goals during that closing argument was to use the co-defendant's stupid comment and smirk to assassinate any potential likeability and trust-ability he might otherwise have with the jury. The result was the jury assessed 90% of the fault against the co-defendant - even though I was convinced my client had essentially cut-off the co-defendant by pulling out in front of him from the median.

Example 3: As part of a military court martial, our client had been charged with aggravated sexual contact with a female under the age of 16; wrongful use of a controlled substance; attempted abusive sexual contact with a female under the age of 16; and multiple counts of indecent acts upon a female under the age of 16. He was facing more than 45 years in confinement. Prior to retaining counsel, the defendant waived in writing his Constitutional rights and provided the government's investigators with a statement that was more than just a little incriminating. He also permitted the government's investigators to search the text messages and digital images stored on his cell phone, which likewise were highly incriminatory. Because of

his statement, his text messages and the photos on his cell phone, the defendant was essentially toast on the indecent acts charges.

Part of the government's timeline for the aggravated sexual contact and attempted abusive sexual contact charges involved a rented DVD. The government alleged the purported victim had gone over to the defendant's home at night to return to him a rented DVD, that some of the alleged conduct then occurred inside the house, and that the purported victim then ran from the house, leaving the DVD behind inside the defendant's house. The defendant did not testify at trial.

On cross-examination, the investigators admitted that when they responded to the scene the following morning, they found the involved DVD and case inside the victim's residence. I thought that admission was made "reluctantly" by the investigator who admitted being the one who found the DVD. Likewise, that investigator during cross-examination admitted the involved DVD and case were still sitting back in the evidence locker at his department, that he knew the location where he had found the DVD and case was entirely inconsistent with the purported victim's claims, and that he never intended to bring the DVD or case with him to trial – even though he knew it was exculpatory.

One of our goals during that closing argument was to assassinate the believability and trustworthiness of the government's case surrounding the aggravated sexual contact and attempted abusive sexual contact charges. It worked – to such a degree that the defendant was found not guilty on the wrongful use of a controlled substance charge as well as the aggravated sexual contact and attempted abusive sexual contact charges. With respect to the charges of indecent acts upon a female under the age of 16, don't talk to the police and don't consent to

them searching your phone. Don't talk to the police and don't consent to them searching your phone. Don't talk to the police and…

2. Mesh Your Trial Theme With The Factual/Legal Theory

Throughout the trial you have been building upon a trial theme that you most likely began establishing with the jury during voir dire. While you have been laying the factual bricks and mortar throughout the evidence, those bricks have been laid out piecemeal and oftentimes out of sequence. Despite our best efforts, due to the adversarial nature of jury trials, the facts haven't been 'coded' for the jury prior to closing argument. Consequently, at the close of the evidence there is the real potential that the jury may be interpreting the evidence and the significance of certain evidence in a fashion entirely different from what we envisioned or intended.

Another goal for closing argument is to bring clarity. With closing argument, the artisan/lawyer has the ability to hone and shine the intricacies and breadth of the final piece of work - it is the final stage where the lawyer ties together with the jury the trial theme, the legal/factual theory, and the evidence.

Regardless of whether your theme is something along the lines of "individual responsibility," "the other dude did it," "corporate greed," or "Dozer was a good dog," closing argument is the one and only time you will have during trial where you as the lawyer are allowed to stand in front of the jury and mesh together the evidence with the compelling reasoning of your theme.

3. Utilize Your Visual Evidence During Closing Argument

171.44 PUNITIVE DAMAGES

In this case the plaintiff claims the defendant acted in a *(willful) (wanton) (fraudulent) (malicious)* manner toward plaintiff. If you award the plaintiff actual damages, then you may consider whether punitive damages should be allowed. Punitive damages may be

allowed in the jury's discretion to punish a defendant and to deter others from like conduct.

The burden is on the plaintiff to prove by clear and convincing evidence the defendant acted as claimed. Clear and convincing evidence means evidence that is certain, unambiguous and plain to the understanding and so reasonable and persuasive as to cause you to believe it.

If you find the defendant did one or more of the acts claimed by the plaintiff you should then determine whether clear and convincing evidence has been presented that the defendant acted in *a (willful) (wanton) (fraudulent) (malicious)* manner. If you determine punitive damages should be allowed, your finding should be entered in the verdict form. After the trial the court will conduct a separate hearing to determine the amount of punitive damages to be allowed.

4. Embracing The Burden Of Proof Must Always Be One Of The Goals For Closing

As a plaintiff, in a vast number of civil cases you will carry the burden of proof on all issues. You are aware of that fact well before trial ever begins, and the jury will probably learn about your burden during jury selection at the earliest, or when the court's instructions are read aloud in open court at the latest. There is no hiding from the jury the issue of who carries the burden of proof. As a trial attorney, you cannot afford to ever appear to blink when facing the burden of proof – you can't be shy or timid when dealing with that issue.

As a plaintiff's attorney, I believe you figuratively must grab the burden of proof by the horns during the first portion of your closing argument, and embrace the burden of proof as an ally. It is through the burden of proof that you get to present your witnesses, testimony and exhibits first, and because of the burden of proof you also are permitted to speak first during summation. Through the burden of proof, you the plaintiff are allowed to ensure that the jury hears the truth first.

If you as a plaintiff's attorney have left the burden of proof untouched and lying in the weeds following the first portion of your closing argument, you should probably count on your adversary picking it up and swinging it at the heart of your case during his summation.

As a defendant, the burden of proof instruction is often a great thunderbolt of righteousness – and one that lawyers love to wield without mercy. Defense attorneys often swing the burden of proof instruction like a saber, shredding the plaintiff's credibility and the plaintiff's case, all the while riding atop the white horse of truth and decency. Over the years, we have all witnessed it in one form or another:

> "Instruction Number 8 is what we call the burden of proof instruction. This burden of proof instruction has been included in the PIK book for decades – it wasn't written just for this case – this instruction has been used in thousands of lawsuits all over the state for years and years and years. This plaintiff's lawyer knew long before ever arriving at the courthouse for trial that he and his client bore the burden of providing you with and convincing you of the truth. And if Mr. Plaintiff and his lawyer would have done that during trial, you would never have heard a word uttered from my lips. Because if Mr. Plaintiff had given you the whole truth, my client and I wouldn't have had anything else to add during trial.
>
> But even though Mr. Plaintiff's lawyer knew that he and his client not only had the first chance to provide you with the truth, but actually bore the burden of proving the truth, they didn't do it, did they? Despite their burden of truth, Mr. Plaintiff and his lawyer didn't tell you about those pre-existing bulging discs in Mr. Plaintiff's neck, did they? They left that part out, didn't they? And if Mr. Defendant and I had not put in the preparation, the effort and the time to learn about and be able to discuss those degenerative problems in Mr. Plaintiff's neck and what really caused those problems, do you think you ever would have heard

about any of those matters, or how Dr. Smith believe those degenerative changes are the real source of plaintiff's current complaints?"

The burden of proof must be effectively and convincingly addressed in closing argument – because if you don't do it, the other side certainly will. Based on my experiences, effectively addressing the burden of proof includes the following elements, at a minimum:

1. Explaining to the jury what the burden of proof means;
2. Arguing the evidence which demonstrates that you have met the burden of proof;
3. Arguing to the jury with conviction that you have not only met the burden of proof, but that you have surpassed it.

5. Expose The Injustice

Whether you are representing the plaintiff or defendant in a civil lawsuit, one of your mandatory goals for closing argument is to convince the jury of the injustice/immorality that would be worked in the event the jury was to adopt the position being sponsored by your adversary. As the trial attorney, you must make a committed effort to convince the jury that your opponent's position is an unjust position – and not simply that your position is just. I still believe in the notion that the overwhelming number of jurors want to do what is "right." The converse of that is that most jurors don't want to perpetuate a "wrong." A lot of commentators have suggested that the impulse to prevent a "wrong" is much more basic and much stronger than the impulse to do what is "right." Perhaps one of the most important accomplishments we lawyers can obtain during closing argument is to demonstrate the immorality/injustice of our adversary's position.

Set forth below is a portion of a closing argument that was delivered by Steve Gorny in a trucking collision case which involved multiple fatalities. This short passage contains the very

first words uttered by plaintiffs' during closing argument, and it effectively sets forth the injustice the plaintiffs were campaigning against:

> Over the last eight days, you have witnessed the final efforts by Consolidated Freightways to deny the fact that tractor number 101947 ran into and over the Nissan Altima, igniting a large rapid fire that killed Ana and Jose Silva. CF's corporate denial began almost four years ago, May 18, 2002, out on Interstate 44 near Joplin, Missouri. You have seen the efforts that this company has undertaken in order to avoid responsibility for its conduct and to avoid doing what is fair and just for the Silva and Rodriguez families. I suspect you now realize that CF simply will not accept the consequences of its actions, and that, ladies and gentlemen, is why we're here today.

6. Adopt the Mindset Of Teaching The Jury To Achieve Your Goals With Closing

Teach, don't lecture. Objectively offer guidance and direction, rather than emotionally railing against your adversary. I think most trial lawyers will agree that they achieve better results and more favorable verdicts when they assume the role as the jury's teacher/educator rather than playing the role of an advocate. While it is our ethical obligation as attorneys to zealously advocate our client's best interests, sometimes we best serve our client's interest by not appearing so zealous in front of a jury.

How do we objectively teach rather than blindly advocate in closing? Below is an example of maybe how plaintiff's counsel during his summation in a personal injury action might suggest

to a jury a novel notion - that there is nothing sinister or to be despised about our civil justice system:

> "The social purpose of tort law is accident and injury prevention. It is only when we fail in our initial purpose that we move to the secondary purpose, compensation for the victim."
>
> Tag line to Richard Miller's e-mails.

7. Work With The Jury Through The Verdict Form And The Instructions

From a purely procedural point of view, the verdict form is likely to be the end-all, be-all of your case. And while we trial lawyers are abundantly familiar with the pattern instructions and the uniform verdict forms recommended in the pattern instructions, most jurors will have never laid eyes or hands on a verdict form prior to the closing argument in your case. While verdict forms are essentially old-hat to us, they can appear somewhat confusing and maybe even overwhelming to some lay jurors. During closing argument, we can attempt to cement our role as a credible teacher/advisor by spending a few moments explaining the various portions of the verdict form.

If an overhead projector or ELMO is available at trial (incorporating visuals into your closing argument) take advantage of that equipment and project a copy of the verdict form onto the screen so that <u>all</u> the jurors can view the verdict form with you as you walk them through it. Depending upon the customs of each particular court, this may be the only time that a number of the jurors will have the opportunity to review the verdict form until after the deliberations have been well under way. Teaching the jury as to what the verdict form involves on the front-end – before they begin their deliberations – probably helps the jury focus more clearly on the remaining instructions and facts during deliberations.

Because of the relatively inexpensive access to photocopies and photocopying equipment, an increasing number of the trial courts are providing each juror with their own individual copy of the written instructions at the beginning of deliberations. The rationale behind that practice is that it allows each juror to more quickly and fairly work through the instructions, and more openly discuss the law as explained through those instructions. However, to avoid potential problems that might otherwise accompany having multiple copies of the instructions, an increasing number of those same judges are providing only one verdict form to the jury during deliberations. Consequently, working the jury through the verdict form during closing arguments should remain standard practice.

Depending upon the facts of the case and the law set forth in the jury instructions, closing argument might also be the only chance we as lawyers will have to convince the jury to follow the law as set forth in the instructions. Whether your case is a soft-tissue automobile injury case or a wrongful death trial, the law set forth in some jury instructions can put jurors in what they might view as a precarious position. Presuming the language of the jury instructions are favorable to our client, closing argument is our only real opportunity to effectively remind the jury why they must follow that law:

> "How do I know you are going to apply the law? Two reasons: First, you know an absolute travesty, what an absolute waste of our democratic process, what an absolute waste of everyone's time and efforts it would be if you were to try this case other than on the law that has been set before you? And second, because all of you swore under oath that you would follow the law."

8. One Of Your Goals For Closing Must Be To Empower The Jury

Having already identified the immorality/injustice for the jury, we can also take advantage of closing argument so as to convince the jury that it collectively has the power to stop that

injustice/immoral result from occurring. Maybe part of obtaining the verdict you and your client seek is by educating the jury to understand they have the power and authority to return the verdict that you are seeking. For example:

> When we vote in elections, we are one of millions. When we write our Congressmen or Senators, we are one of thousands. When we attend a town hall meeting or a session of the county committee, we are probably one of hundreds. But when we serve on a jury, we are one of 12 who will ultimately decide the outcome of the case. And that outcome will make a lifetime of difference.

9. Making The Call To Arms Is Another Goal In Closing Argument

With the injustice having been identified and the jury having been assured of its power to do good/justice, now comes the time to call the jury collectively into action to use its power to prevent an injustice. Now is the time to use your closing argument to motivate the jury to embrace and defend your position, and to strike against any counter position. The call to arms during closing argument is something akin to the last-second timeout speech the old football coach gave to his players – or the sermon the pastor gave when trying to gather contributions for hurricane relief: It is sincere, it is unapologetic, it is genuine, and it is to the point. And it leaves no confusion as to what the jury is being asked to do.

10. Goals Are Met Through Tireless Preparation, Preparation, Preparation

Just as a successful cross-examination of a key witness requires hours of preparation, a convincing and effective closing argument requires a considerable investment of thought, effort and time. As closing argument represents our last opportunity to address the jury and occurs immediately before the jury retires to deliberate, a number of "experts" have suggested that no

time should be spent more by an attorney in trial preparation than in the preparation of her closing argument. Closing argument is the final opportunity for us to convince the jury of the righteousness and fairness our case, and because it is likely to be the last words the jury hears from any outsiders about the case, the words and images and notions which make up our closing argument must be meticulously chosen and carefully crafted. The only way to do that is through preparation.

While some authors claim that they begin writing their closing argument as soon as they accept the case, I am not sure that approach is entirely believable or practical. But I do believe that every closing argument should be written out or typed by the attorney as part of the preparation process. Certainly, a lawyer will never consider standing in front of a jury and reading that transcript aloud, and she won't have to. By its very nature, the process of writing out the closing argument embeds the arguments, points and thoughts in our heads. While we will undoubtedly make a number of revisions and edits before we stand before the jury and deliver our summation, by having written out our closing in advance, the thoughts and messages of our closing argument will flow more easily while we are in the heat of trial.

One caveat for this approach is worth noting: From the amount of time you expect to be given by the court for your closing argument, allot to yourself some "spare time" to address issues and tactics utilized by your adversary during his/her closing. There almost always will be something that has been said or done by your adversary that you will want to address during your closing argument, and you should craft your closing argument in such as a fashion as to leave yourself some "spare time" in which to address those matters. By incorporating that cushion into your closing argument in advance, you can hopefully counter in an effective manner the critical

arguments made by your adversary, while at the same time having the freedom and time to make the powerful arguments you honing for months.

B. Addressing The Other Side's Case Along With The Weak Points In Your Theory

1. Addressing the other side's case.

We have already discussed in Section A some approaches and techniques for undermining the adversary's case during closing argument. We have set out below a few more ideas on how to address the other side's case in closing:

a. Make the jury instructions your friends – somewhere within the instructions you should be able to find an enemy to one or more portions of your adversary's case. And because the jury believes those instructions came directly and solely from the court, those enemies to your adversary's case will resonate with the jury.

b. Rebut your opponent's allegations while holding in your hands one or more exhibits which support your case and are damaging to your adversary's case.

c. Point out the discrepancies in the other side's theory, and make those discrepancies unforgivable and unforgettable. "If the gloves don't fit, you must acquit."

d. Suggest specific ways for the jury to resolve conflicting evidence in your favor - both affirmative reasons why your position is right, and negative reasons why your opponent's position is wrong.

2. Bad evidence and weak points in your theory.

In virtually every jury trial, each side typically must deal with "bad" pieces of evidence/weaknesses in their theory. It's those competing pieces of "bad evidence" that ordinarily lead us to having a jury trial in the first place – rarely would we have jury trials if everyone agreed upon the facts. But lawyer can't afford to ignore the bad facts or weaknesses in our evidence during closing argument. The jury isn't going to simply forget the evidence that is bad to our case, and quite often jurors look forward to closing argument in order for us to guide and rationally explain to them why the jury should return a verdict in our favor despite that bad evidence. And you can be sure that opposing counsel in her closing argument is not going to overlook that brutal testimony or incriminating exhibit.

There is an old saying that a trial lawyer must embrace not only the strengths of his case, but the warts of his case as well. The 'wart rule' applies all the way through trial – particularly during closing argument.

We certainly do not want to make our bad evidence/weak points of our case the main focus of our closing argument, but by embracing (and addressing) the warts of our case, we can maybe cause the warts to look a little less offensive. In most cases, if we haven't been able to dispose of the warts during the presentation of the evidence we probably won't be able to cause the warts to disappear during closing. But by addressing and embracing them in closing argument, we can enhance our chances of making those warts look a little smaller and a little less significant in the overall picture.

But "wart reduction" doesn't occur off the cuff or by osmosis. It requires careful consideration and hours of preparation.

C. Using Body Language To Make Your Point

Words of Suggestion/Caution – With body language in the courtroom, for most of us a little goes a long way. During summation you look like a giant in front of the jury – everything about you – your height, your voice, your mannerisms - is magnified. Consequently, every one of your movements, every shift of your eyes, every little gesture you make during closing is probably being amplified to the jury. A little truly goes a long way.

- **Use of your eyes**. You should make deliberate eye contact with the jurors during closing. "Deliberate eye contact." Avoid every temptation to use the worn-out and insincere tricks of looking jurors "in the face" or looking at their foreheads – look 'em in the eyes. The jurors want to see if you *really* mean what you are saying and doing, and they are going to try to look in your eyes for the answer. And you must communicate the jury to know that you mean Every. Single. Word.

  I think the rule against glancing at the floor or looking at the front of the jury box is based on common sense and common experience. The eyes remain the windows to the soul, and the eye contact between you and the jurors is a powerful, direct form of communication in the courtroom.

- **Use your feet to get out from behind the lectern**. While each individual judge has their own specific rules about how far you are permitted to stray from the lectern, make use of the privilege in those courtrooms where you are permitted to walk out from behind the lectern. Recognize and understand the purpose the lectern serves during a jury trial – it's a physical place of reference for the jurors and the lawyers; it's a symbol of orderliness and decorum; it's even a place where lawyers put their notes. But the lectern was <u>not</u> put in that courtroom for lawyers to hide behind.

Some people simply aren't comfortable stepping out from behind the lectern. After all, the area behind the lectern generally is a safe place - the judge, bailiff and court reporter typically get quiet and will look to you when you walk up to the lectern, and in most instances the jurors will give their attention when someone is standing at the lectern. Up to this 23rd year of my career, I personally have not seen any lawyers get shackled by a deputy or get chewed out by their client while the lawyer was standing at the lectern. Standing immediately behind the lectern truly is a safe place. And for some folks it simply doesn't fit who they are or how they carry themselves to move away from the lectern. But if you *are* going to stay behind the lectern, certainly do not lean your weight on or slouch against the lectern.

- **The use of your hips and rump - don't lean against or sit on opposing counsel's table**. I know - it's *supposed* to show that you are in control of the courtroom. It's *supposed* to show that you are dominating the proceedings as well as your opponent. But from what I have witnessed with lawyers leaning against or sitting on opposing counsel's table, I think a lot of jurors take it to mean that the offending attorney is simply an arrogant jerk. Maybe he/she is truly a nice person, but I think a lot of jurors interpret that type of act as demonstrative proof that the offending attorney is a jerk.
- **Make use of your hands, fingers and thumbs – but don't point your finger at the jury**.

  There aren't many jurors out there who are going to overlook being "scolded" with a pointed finger, so be careful what you do with *that* finger during closing argument. But to my knowledge there is no rule of decorum or rule of law that prohibits a lawyer from making convincing and purposeful use of his fingers and thumbs during closing argument.

For fans of high school or college football, the "Fourth Quarter" brings an immediate vision to mind that involves outstretched fingers and some undeniable and nonsensical feeling of valor. The "Thumbs Up" sign still evokes in my mind a vision of the grit and determination of an injured football player being carted off the field. And if you've ever read out-loud "Five Little Monkeys Jumping On The Bed" to your son or daughter, then you probably have some images and emotions that come almost immediately to mind when you see someone hold up five outstretched digits.

Your fingers, hands and thumbs can be utilized as effective tools during closing argument. Counting off "Mississippi's" in front of a jury with my hand was a lot of fun and maybe even effective, but it likely won't ever happen again. While not every closing argument lends itself to the deliberate display of your fingers, hands or thumbs, sometimes a good old-fashioned hand gesture can be more convincing and trustworthy than any enlarged exhibit or anatomical model.

- **Use cautious, measured and deliberate steps when approaching the jury box during closing**. I suggest taking small, metered steps, at a slow deliberate pace – you are getting ready to invade their "bubble". If your case or your client has not been the most sympathetic up until now, you might even want to have an exhibit in your hand (maybe a small photograph) or be holding one of the jury instructions as you make your way up to the jury box – even if the jury doesn't care for you or your case, they will most likely lean in towards you to see what it is that you have in your hands.
- **Use your hands, but make your hand movements have a purpose**. Try as best you can to make your hand gestures have some purpose. Some of us just naturally "talk" with our hands – and some of us are better suited for it than others. But some jurors can be distracted and

even annoyed by excessive hand motions and movements – and if the jurors in closing argument are paying more attention to our hands than our words, we're probably not making an effective presentation with our closing.

C. General Rules From Missouri & Kansas Law Relating To Closing

The court has the discretion to limit or apportion the time for the parties to give their closing summation. *Floyd v. General Motors*, 960 P.2d 763 (Kan.App. 1998).

While it is a paramount rule of the law that the parties in closing argument are not permitted to argue facts or evidence outside the record, the trial court is to afford the parties wide latitude in arguing the facts in evidence and drawing inferences from those facts.

The trial court can have the parties give closing argument and allow the jury to begin its deliberations, before taking up arguments on motions for directed verdict. *Worley v. Bradford Pointe*, 73 P.3d 149 (Kan.App. 2003).

It is improper to argue a negative inference for an adversary's failure to call a witness who is equally available. *Skelly v. Urban Renewal*, 508 P.2d 954 (Kan. 1973).

Per diem arguments are permissible under Kansas law.

Arguments regarding the statutory caps on non-economic damages are improper.

Lawyer-bashing during closing argument is generally improper. *Yingling v. Hartwig*, 925 S.W.2d 952 (Mo.App. W.D. 1996).

Kansas District Court Rule 168: CLOSING ARGUMENTS TO JURY

> In the final portion of his or her argument to the jury, counsel for plaintiff should not be permitted to use more than one-half the aggregate time allotted for plaintiff's argument nor more than the time used in the opening argument. Plaintiff's counsel shall not be permitted to argue general issues not discussed in the opening portion of plaintiff's argument unless in rebuttal. If, after plaintiff has made an argument, defendant waives argument, then no further argument shall be permitted.

K.S.A. 60-251: Jury to be instructed before closing arguments

(a) *When made.* At the close of the evidence or at such earlier time during the trial as the judge reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. **The judge shall instruct the jury at the close of the evidence before argument** and the *judge may, in his or her discretion, after the opening statements, instruct the jury on such matters as in the judge's opinion will assist the jury in considering the evidence as it is presented.*

D. Problem Solving With Your Closing Argument

Problem: The Measure Of Damages

"The damages in this lawsuit, the court has told you, must be fair and just. Long before you became jurors and officers of the court, the word "fair" did not mean in the middle. The word "fair" did not mean half. The word "fair" did not mean mediocre. You might have heard the expression, "He is a 'fair' infielder." That's not what we are talking about. Or "He is a fair three-point shooter, but he can't play defense." That's not what we are talking about.

Suppose a sculpture by Picasso was razed to the ground tomorrow by a bunch of vandals, and they were caught and sued, and the art dealer and museum curators came in and said, "That Picasso sculpture was worth $10 million." You might say to yourself, "A hunk of metal, $10 million? Picasso isn't even alive anymore. Let's give $5 million." That wouldn't be fair, and it wouldn't be justice. Even though you might not particularly like Picasso or his work, you would be required to be fair under the law. And if the appraisers and curators said it was fair, it would mean that the award would be $10 million."

Problem: Defending Against Punitive Damages

"The State of Kansas has had their punishment against Mr. Tortfeasor. The State of Missouri has had their punishment against Mr. Tortfeasor. And I guess the question, the issue on punitive damages, comes down to two questions. The first being: Does society recognize

that somewhere out there, after a person engages in wrongful conduct or criminal conduct, is there a point out there where society accepts that there has been an appropriate punishment levied against that wrongdoer?

And certainly, the answer to that question is "yes." Somewhere out there, after some point society recognizes that a person has been punished sufficiently for their bad judgment, their bad decisions, for their wrongdoing.

So the second question I guess, regarding Mr. Tortfeasor, is: Has society reached that point for November 22? With those convictions, with his incarceration, with his probations, has Mr. Tortfeasor been sufficiently punished by society for his involvement in this party, in this bad decision, for his involvement in this motor vehicle accident?"

E. Effective Use Of Analogies, Metaphors And The Like

Analogies, fables, metaphors and even poetry can all have their place in a well-honed closing argument. But like most everything else done during trial, preparation is the key to the effective use of analogies, metaphors and the like.

One of the most effective closing arguments I have ever sat through had this little gem utilized by plaintiff's counsel. It was a personal injury case where the defense admitted negligence but contested the nature and extent of plaintiff's claimed injuries. Plaintiff claimed his injuries from the collision forced him to retire two years early from his job as a railroad engineer, and during his rebuttal plaintiff's counsel delivered this nugget with the finest Arkansas drawl that I've ever heard:

> *Laugh, and the world laughs with you;*
>
> *Weep, and you weep alone.*
>
> *For the sad old earth must borrow its mirth,*
>
> *But has trouble enough of its own.*

That little snippet flowed very well with the overall theme of plaintiff's closing argument, and the jury loved this guy. That little piece of work didn't just come off the cuff – it came as the result of meticulous preparation.

Use of Trilogies

Quoting from scripture is often tempting, but be very, very careful if you are considering making reference to or quoting any scripture during your closing argument. Not only do you run the real risk of offending any number of jurors by simply invoking scripture as part of your closing [you're in a *courtroom*, not a house of worship] but you also run the risk of encountering

an opposing counsel who is equally adept at citing scripture. As an example, there has been more than one personal injury lawyer who has been all but too anxious to incorporate this passage into her closing argument:

"An eye for an eye and a tooth for a tooth."

It's catchy. It's from the Book of Matthew. And the words can sound powerful as part of a plaintiff's summation. However, a more thorough reading of that passage reveals that it might not be the type of passage a plaintiff's lawyer wants to cite to a jury as part of her closing argument – particularly if opposing counsel or one of your jurors is well-versed on that passage:

'You have heard that it was said, "An eye for an eye and a tooth for a tooth." But I say to you, Do not resist an evildoer. But if anyone strikes you on the right cheek, turn the other also; and if anyone wants to sue you and take your coat, give your cloak as well; and if anyone forces you to go one mile, go also the second mile. Give to everyone who begs from you, and do not refuse anyone who wants to borrow from you."

Matthew 5.38-42.

***

A couple of other examples:

"The only man who never makes a mistake is the man who never does anything."

Theodore Roosevelt

***

"You may ask, 'Why did I get picked on this jury? Why was I chosen?

One cold afternoon a preacher walked past a tiny, crippled woman huddled in a doorway, trying to stay warm. 'God', the preacher shouted, 'How can you do this? Why don't you do something?" The voice of God came down and said, 'I have done something. I have created you.'

Ladies and gentlemen, now is your chance, your opportunity. Do something. Bring back the verdict you know should be given to this man who has been robbed of his health and happiness."

***

F. 10 Pitfalls To Avoid When Making Closing Arguments

1. Failing to seize the opening moment Time and time again we see lawyers who fail to seize the opening moment of summation. The next time you try a case, force yourself to open your argument with an *attention arresting* sentence or two – any you will never go back to doing things the old way.

The idea is to say something that fixes the jury's full attention on what you have to say next. The tool you utilize to grab and captivate the jury's attention can vary, e.g., a question (one which will be answered through the evidence), an analogy, a compelling fact, an interesting paradox, a quote, a short anecdote, a concession made by the opposition (maybe through a deposition), a very short narrative story, etc.

2. Regurgitating the evidence Closing argument wasn't meant for the lawyers to simply regurgitate what each witness has said. When closing argument arrives, the jury has already heard what every witness had to say and sat through every videotaped deposition – sometimes much to their chagrin. Having heard the testimony once, the jury isn't going to be interested in having you narrate it to them again. One of the quickest ways to kill any momentum that you have developed in trial is by simply regurgitating evidence during closing.

3. Beginning your summation by "thanking" the jury or by 'winding up' You waste some of the most effective and precious time of your entire summation by launching into a stale and rote "thank you" right at the outset of your argument. Starting your summation with the canned "thank you for your time and attention" schmooze always works against you and your client. Not only does it typically look rehearsed and obligatory, but you run the real risk of coming across to some of the jurors as pandering and insincere. By the time closing argument

rolls around, you, opposing counsel and the court have probably already thanked the members of the jury either at the beginning or end of voir dire, or at the beginning of opening statement. The jurors certainly deserved to be thanked again for their efforts, but the beginning of your summation is not the place to do it.

Starting your closing argument with the standard "thank you" is really just another form of a lawyer "winding up." We tell our clients not to begin there testimonial answers by "winding up" and that rule equally applies to trial lawyers during closing argument.

Rather than gushing over the jury at the outset of your closing argument, consider these two potential tactics instead: 1.) Commend the jurors for their hard work and careful attention up through this point in trial, as well as the upcoming work and thought they are going to invest into their deliberations, and 2.) Offer those words of appreciation just before you begin the final 20% of your closing.

4. "What I say isn't evidence" Do not tell the jury during closing, "What I say is not evidence." It doesn't make you very credible if you do it during opening statement, and it surely doesn't cause the jury to have confidence in you or what you say if you make that statement during closing argument. Why even give a closing argument if you are going to undermine yourself in that fashion?

5. The temptation to sound like a lawyer "Legalese" and legal terms of art are meant for the ears attached to other lawyers and judges – but not those of the jurors. "Lawyer speak" typically does not serve you or your client well during closing argument – you run the risk of either confusing the jury, or looking like a show-off. When writing our book reports in elementary school and junior high, our English teachers told us time and again to avoid using a

$10 word when a 10¢ word would do. That old rule is all the more true with our word selection for closing argument.

Our former teachers and coaches likewise tried to teach us to avoid patting ourselves on the back too much in those moments where we had some moments of success. That rule of humility continues to apply to us as lawyers in our professional endeavors, and certainly applies in the courtroom during closing argument. The excerpt below probably exemplifies an episode where a lawyer lost sight of that rule during his closing argument:

> "They don't like some of the opinions they get from the doctors. Let's talk about the procedure of how this case went. They designated Dr. Jumanji as their expert. They deposed him. I cross-examined him. When I cross-examined him, I shredded him. I will tell you in my 15 years I've never had a doctor fall apart like that during a deposition. He didn't know what PTSD was. He didn't know what Axis I was, he didn't know what Axis II was, he didn't know what Axis III was, Axis IV under the DSM, the Diagnostic Statistical Manual. Their other expert, Dr. Whatshisname, said it's the bible, it's the book we turn to. That's the one that was used to diagnose."

6. Stretching or mis-stating the facts during closing argument Twelve separate individuals listened to and learned the facts (and maybe even took written notes reflecting those facts) and those same twelve people are ultimately going to decide your client's fate. If you mis-state the facts during closing argument, the other side may lodge an objection and that objection might be sustained by the court (bad). Even worse, if you mis-state the facts during closing argument, there is a pretty good chance that at least one or more of your 12 jurors may catch your misstatement, and adjust his verdict vote accordingly (really bad). The evidence was cast before you ever began your closing argument, and closing argument certainly isn't the place to try to change that evidence.

7. M**aking your closing simply a replay of your opening statement**. While a number of us attempt as best we can to "put on" our case through our opening statements, our closing argument should never be simply a repeat of our opening statement. We are typically limited by the court in opening statement to providing a statement/description of what we believe the trial evidence will be. Hardly ever are we able in opening statement to offer the jury suggestions or guidance as to what they should do about the evidence. Opening statement is normally an introduction or indoctrination to the evidence. With closing argument, we are trying to make a call to arms. These two phases of trial aren't similar – not even close.

8. **Humor during summation?** Closing argument is your last opportunity to address the jurors before they begin their deliberations, and with very rare exception, closing argument is neither the time nor the place for humorous comments or jokes. By the time of closing argument, the jurors are well aware that *they* will be getting down to serious work very shortly, and in most instances they are looking and listening to the attorneys' closing arguments for some guidance. While humor often helps break the ice during jury selection, it hardly ever has a place in closing argument.

9. Sitting down on a weak note. Always start strong and finish strong! In preparing your closing argument, pick a strong point as your ending note and stick with that part of the plan. Trials are fluid and always changing, and it is routine and normal that we will change/reorganize a portion of our closing argument based upon what our adversary does with his closing. But we must end our closing argument on a strong note, and that is best achieved by selecting and planning that resounding note well in advance. Regardless of what our adversary does in her closing argument, don't abandon the plan! Speak with conviction, and end on a strong note.

10. It ain't over 'til the fat lady sings. Never allow yourself to fall into the mentality that the jury has already made up its mind on the case prior to closing argument. Closing argument is the final battleground, and it is a battle that we can never afford to give up without our best fight:

A trial is still an ordeal by battle.
For the broadsword there is the weight of evidence;
for the sharp spear, the blazing gleam of truth;
for the rapier, the quick and flashing knife of wit.

Lloyd Paul Stryker

Victory comes from closing argument; victory comes when your closing argument helps you persuade, convince and influence the jury to think something you want them to *think* and *do* something you want them to do.

G. Four Closing Arguments From One, and A Lifetime of Lessons For Others

Lioce v. Cohen, 122 Nev. Adv. Op. No. 115; 149 P.3d 916 (December 2006)

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 44458

GREGORY J. LIOCE, Appellant,

vs.

DANA S. COHEN; MORRY COHEN; AND JOHN C. WILSON, Respondents.

No. 44823

TIFFANY LANG, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF ALICIA P. LANG, A MINOR; AND JOSEPH LANG, INDIVIDUALLY, Appellants,

vs.

JENNIFER KNIPPENBERG, Respondent.

No. 45331

LUIS CASTRO, Appellant,

vs.

VANESSA CABRERA; AND SYLVIA CABRERA, AS THE NATURAL PARENT AND LEGAL GUARDIAN OF GABRIEL CABRERA, A MINOR, AND NICHOLAS CABRERA, A MINOR, Respondents.

No. 45405

JAMES SEASHOLTZ, Appellant,

vs.

LINDSAY WHEELER, Respondent.

Consolidated appeals from district court orders denying new trials because of attorney misconduct (Docket Nos. 44458 and 44823) and granting new trials, based on similar allegations of attorney misconduct (Docket Nos. 45331 and 45405). Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge (Docket No. 44458); Mark R. Denton, Judge (Docket No. 44823); Nancy M. Saitta, Judge (Docket No. 45331). Second Judicial District Court, Washoe County; Janet J. Berry, Judge (Docket No. 45405).

Vacated and remanded (Docket Nos. 44458 and 44823); affirmed and remanded (Docket Nos. 45331 and 45405); attorney Phillip Emerson referred to the State Bar of Nevada.

PARRAGUIRRE, J., dissented in part.

George T. Bochanis, Las Vegas, for Appellants Tiffany and Joseph Lang.

Edward S. Coleman, Henderson, for Appellant Lioce.

Emerson & Manke, LLP, and Phillip R. Emerson, Henderson; Lemons Grundy & Eisenberg and Robert L. Eisenberg, Reno, for Appellants Castro and Seasholtz and for Respondents Wilson and Knippenberg.

Dennett & Winspear, LLP, and Ryan L. Dennett, Las Vegas, for Respondents Dana and Morry Cohen.

Chad M. Golightly, Las Vegas; Andrew M. Leavitt, Las Vegas, for Respondents Vanessa and Sylvia Cabrera.

John F. Kirsch, Reno, for Respondent Wheeler.

Burris, Thomas & Springberg and Andrew J. Thomas, Las Vegas, for Amicus Curiae Nevada Trial Lawyers Association.

BEFORE THE COURT EN BANC.

OPINION

By the Court, HARDESTY, J.:

The defendants in each of the four underlying personal injury cases were represented by the same attorney, who gave substantially the same closing argument on behalf of his clients at each trial. Asserting that defense counsel's closing arguments constituted misconduct, the plaintiffs in each case sought new trials, with varying success. These consolidated appeals from the district court orders granting or denying new trials followed.

Because defense counsel's closing arguments encouraged the jurors to look beyond the law and the relevant facts in deciding the cases before them, we agree that they amounted to misconduct. In determining whether the district courts properly decided that this misconduct warranted new trials or not, we take the opportunity to revise our attorney misconduct jurisprudence. New trial requests based on attorney misconduct must be evaluated differently depending upon whether counsel objected to the misconduct during trial. When a party successfully objects to the misconduct, the district court may grant a subsequent motion for a new trial if the moving party demonstrates that the misconduct's harmful effect could not be removed through any sustained objection and admonishment. With respect to unobjected-to misconduct, we conclude that the district court may grant a motion for a new trial only if the misconduct amounted to plain error, so that absent the misconduct, the verdict would have been different. When ruling on a motion for a new trial based on attorney misconduct, district courts must make express factual findings, applying the above standards.

In these consolidated appeals, we conclude that in Castro v. Cabrera and Seasholtz v. Wheeler, the district courts did not abuse their discretion by granting the plaintiffs' motions for a new trial. In Lang v. Knippenberg and Lioce v. Cohen, however, we are unable to ascertain from the record whether the district courts abused their discretion in denying the plaintiffs' motions for a new trial. Accordingly, we vacate those orders and remand those two matters for a new decision on the new trial motions, based on the standards announced today.

Finally, we also remand Castro and Seasholtz to the district court to calculate the monetary sanctions we impose on the defendants' attorney and his clients for attorney misconduct, and we refer the defendants' attorney to the State Bar of Nevada for disciplinary proceedings, for his misconduct in these cases.

FACTS

These four appeals involve substantially the same closing argument given in each case by Phillip Emerson, the defendants' attorney. The cases are presented below in chronological order based on the date of the jury trial: (1) Castro (July 2004), (2) Lioce (September 2004), (3) Lang (October 2004), and (4) Seasholtz (November 2004). This chronology shows how Emerson's closing argument developed over time.

Castro v. Cabrera (Docket No. 45331)

This case arose from an automobile accident, in which appellant Luis Castro rear-ended respondents Gabriel and Nicholas Cabrera's vehicle. Police cited Castro for causing the accident. The

Cabreras then sued Castro, alleging that they were injured in the accident. Castro retained Emerson to defend against the Cabreras' claims.

The parties attended the court-annexed mandatory nonbinding arbitration program, and because Castro paid his citation without protest, he informally stipulated to his liability for the accident.[1] The arbitrator found in the Cabreras' favor and awarded them damages.

After the arbitration award was rendered, Castro sought a trial de novo, arguing that he was not liable for the accident because the sudden emergency doctrine applied. Castro contended that, under that doctrine, he was not negligent because another vehicle suddenly entered his traffic lane, which caused him to then veer into the Cabreras' traffic lane to avoid being hit.

At trial, during closing argument, Emerson argued that the Cabreras had wasted the jurors' time and the taxpayers' money. Emerson said, "Ladies and gentlemen, at some time, at some point we must say, enough is enough. People must take responsibility for their lives and not blame others for challenges and setbacks. People must stop wasting taxpayers' money and jurors' valuable time on cases like this." Emerson also stated that the Cabreras' case was frivolous and that cases like the Cabreras' were responsible for the decline of the legal profession's reputation. Specifically, Emerson argued:

I also want to apologize if any of you thought that I was overzealous at times during this trial or if any of my remarks or examinations of the witnesses offended. If I offended you, I sincerely apologize. That was not my intention. But, you see, this is a case where the plaintiffs are trying to get something for nothing. You're probably wondering why I've spent so much time and energy on defending this case. It's not a big case. It's not a million-dollar case. You're not going to hear about this in the paper.

But, you see, I have a real passion for this kind of case. It's cases like this that make people skeptical and distrustful of lawyers and their clients who bring these type of lawsuits. It's a big factor as to why our profession is not as honorable in the eyes of the public as it once was. But the only way that people and their chiropractors will stop bringing these cases is if juries start saying no, enough is enough. Our legal process is meant to justly compensate and make one whole, not to make them rich.

The Cabreras did not object to the above statements. Following trial, the jury found in Castro's favor. The Cabreras moved for a new trial, arguing that Castro's attorney, Emerson, had committed attorney misconduct during his closing argument.

When addressing the Cabreras' motion for a new trial, the district court found that Emerson's closing argument constituted misconduct and that, cumulatively, the misconduct permeated the entire proceedings, requiring a new trial. In discussing Emerson's misconduct, the district court specifically referenced Emerson's statements regarding "these type of cases" and the fact that Emerson gave a "personal opinion as to the justness of the case." Castro appeals, arguing that the district court abused its discretion by granting a new trial.

Lioce v. Cohen (Docket No. 44458)

This case involved a multi-vehicle traffic accident, after which appellant Gregory Lioce sued respondents Dana Cohen and John Wilson for injuries he sustained in the accident. Wilson retained Emerson to defend him against Lioce's suit.

At trial, the parties disputed how the accident occurred and who was at fault. Lioce stated that he was traveling eastbound down a Las Vegas street when respondent Dana Cohen turned left into his vehicle. Cohen, however, testified that Lioce changed lanes and hit her vehicle. According to Cohen, when Lioce's vehicle came to rest following the collision with her vehicle, Lioce was then rear-ended by Wilson. Wilson testified that he was not negligent because another vehicle cut in front of him and he swerved, hitting Lioce's vehicle.

During closing argument, Emerson argued, as he did in Castro, that Lioce was wasting taxpayers' money and jurors' valuable time. Emerson expanded that argument, however, and said:

Ladies and gentlemen, at some time, at some point in time, we must say enough is enough. People must accept responsibility for their lives and their actions and not blame others for life's challenges and setbacks.

. . . .

You see, under our system of justice, each plaintiff must prove that he or she is injured. They cannot just say it and receive money. The buck stops here with you, ladies and gentlemen. You are in the position to say enough is enough.

Emerson later continued with his Castro argument, discussing frivolous lawsuits and the public's dim view of the legal profession. Emerson again expanded the argument, saying:

You are probably wondering why I spent so much time and energy defending this case. It's not a high profile case. You are not going to see it on the news. You are not even going to see it in the paper.

But, you see, I have a real passion for cases like this, because it's cases like this that make people skeptical and distrustful of lawyers and their clients who bring personal injury lawsuits. And it's a big factor as to why our profession is not as honorable a profession as it once was in the eyes of the public.

But the only way that people and their lawyers will stop bringing cases like this is if juries start saying: No. Enough is enough.

It has always been said that the American jury system is the conscience of our society; that when a jury speaks through its verdict, it's a reflection of society's values and beliefs and what justice is or should be.

This jury, you, have a tremendous responsibility here. Like I said, it's not a high profile case, but your responsibility here is no less. You have the opportunity here with your verdict to say enough is enough.

Lioce did not object to the above statements.

Following a two-day trial, the jury found for Cohen and Wilson. Lioce moved for a directed verdict or, in the alternative, a new trial based on attorney misconduct. The district court denied both motions, without providing any reasons for the order, and the hearing on the motions was not reported. Lioce appeals, arguing that a new trial was warranted because of Emerson's misconduct during closing argument.

Lang v. Knippenberg (Docket No. 44823)

This case arose when appellants Tiffany and Joseph Lang's nine-month-old daughter's facial area was injured by respondent Jennifer Knippenberg's large dog while she was under Knippenberg's care. After their daughter underwent surgery to repair her tear duct, the Langs sued Knippenberg, alleging that she was negligent. Knippenberg hired Emerson to defend her and argued that she was not negligent because the dog attack was an accident. At trial, the parties submitted evidence supporting their respective views, which indicated that the Lang's daughter was either bitten or scratched by Knippenberg's dog.

During closing argument, Knippenberg's attorney, Emerson, argued that the Langs' case wasted taxpayer and juror resources. He said, "At some point in time we must say enough is enough. People must stop wasting taxpayer's money and jurors['] valuable time on cases like this one." The Langs objected to this statement, and the district court sustained the objection but made no specific admonishment concerning the misconduct.

Continuing with his theory from Castro and Lioce that personal injury cases are generally frivolous, however, Emerson then said:

I must confess, this case, you know, you're probably wondering why I spent so much time and energy defending this case. I mean, it's not a high-profile case. You're not going to see this on the 6:00 o'clock news. You're not going to read about it in the paper. But you see, I have a real passion for this case and cases like it, because it's cases like this that make people skeptical and distrustful of lawyers and their clients who bring legitimate personal injury lawsuits.

And it's a big factor as to why our profession is not as honorable a profession as it once was in the eyes of the public.

The Langs again objected to Emerson's comments, and the district court sustained their objection but made no specific admonishment concerning the misconduct.

Nevertheless, Emerson continued with his Castro and Lioce arguments, further expanding them. He said:

Ladies and gentlemen, life for all of us is full of ups and downs, successes and failures, achievements and setbacks, the difference is that most of us, most of us accept our problems, without trying to blame someone else.

Accidents, things just happen, TMJ [Temporomandibular Joint Dysfunction], growth disturbance, hereditary issues, we take responsibility for our own lives instead of looking for an excuse to sue someone at the drop of a hat. There is a conventional school of thought prevalent now that Americans have become a society of blamers.

Once again, the Langs objected, and the district court sustained the objection, without any additional admonishment.

Emerson then argued:

You send your son or your daughter over to a slumber party and they're running around, maybe there's a pool in the backyard, running around, opening closing the slider, playing tag, something happens. One of them runs into the slider or shut[s] the door and hurts one of the other boy's fingers, is that an opportunity, does that mean you just go out and sue—negligence. It's an accident. If this is not an incident [sic], what is[?]

The Langs did not object after this comment.

After the closing argument concluded, the Langs moved for a mistrial, asserting that Emerson's closing argument on behalf of Knippenberg was prejudicial misconduct. The district court denied their request, finding that because the Langs had objected to Emerson's improper statements and their objections were sustained, a mistrial was unwarranted.

The jury found in Knippenberg's favor. The Langs then moved for a new trial, arguing again that Emerson had committed misconduct during his closing argument that resulted in a jury verdict based on passion or prejudice. The district court denied the Langs' motion, stating that it was "unable to discern from the few portions of the transcript of argument provided that the improprieties reflected therein permeated the proceedings to the extent that a new trial would be warranted under . . . Barrett v. Baird[[2]] and DeJesus v. Flick.[[3]]" The Langs appeal.

Seasholtz v. Wheeler (Docket No. 45405)

This case involved a motor vehicle accident in Reno, Nevada. Appellant James Seasholtz was driving, and respondent Lindsay Wheeler was his passenger, when the front of Seasholtz's vehicle collided with another vehicle. As a result of the accident, Wheeler reported feeling immediate pain in her arm, shoulder, hand, and neck, and she eventually sought medical treatment with two physiatrists,[4] two chiropractors, and a physical therapist. In all, Wheeler incurred approximately $13,632 in medical bills, $9,598 of which was from her chiropractic treatment.

Wheeler eventually filed suit against Seasholtz, alleging that her injuries were the result of Seasholtz's negligence in operating the vehicle and requesting damages for past and future medical expenses. Seasholtz retained Emerson as counsel and argued that Wheeler had been treated excessively and that her current complaints were related to past injuries.[5] Seasholtz's expert, however, connected Wheeler's current injuries to the accident, agreeing with Wheeler that her treatment with

the physiatrists was warranted but disputing the extent to which her chiropractic treatment was necessary and effective.

During closing argument, Emerson admitted Seasholtz's liability for the accident, stating that the parties had stipulated to liability and that Seasholtz had accepted his responsibility for causing the accident. Emerson then argued, as he had in Castro, Lioce, and Lang, that Wheeler's case was frivolous and contributed to the decline of the legal profession and legal system. Again, he delivered substantially the same argument, while expanding on it, stating:

You're probably wondering why I spent so much time and energy defending this case. It's not a high-profile case; you are not going to see it on the evening news; it's not a multi-million dollars [sic]—they are not asking for a million dollars. But you see, I have a real passion for cases like this. Because it's cases like this that make people skeptical and distrustful of lawyers and their clients who bring legitimate personal injury suits. And it's a big factor as to why our profession is not as honorable a professional as it once was in the eyes of the public.

But the only way that people and their lawyers and their chiropractors will stop bringing these cases is if juries start saying no: enough is enough. When there is no harm, no foul will be called.

You know, life for all of us is full of its ups and downs, successes and failures, achievements and setbacks. The difference is that most of us accept our problems without trying to blame someone else. We take responsibility for our own lives instead of looking to someone else or looking for an excuse to sue at the drop of a hat.

There's a conventional school of thought prevalent now that Americans have become a society of blamers and excuse makers, that we are unable to accept responsibility for our own lives or the choices that we make and that we now draw our lawyers like gunfighters in the old west, six-shooters; that is often and without hesitation. We call fouls where there is no harm.

I think we have to ask ourselves what has happened to our society when neighbor now sues neighbor over some minor disagreement. Do you honestly think a case like this would have found itself inside of a courtroom 30 to 40 years ago? I think we have to ask ourselves that question. Where has the fundamental values our society has always been known by gone; like honesty, integrity, honor? It's always been said that the American jury system is the conscience of our society; that when a jury speaks through its verdict it's a reflection of our society views and beliefs and values as to what justice is or should be.

This jury, you, have a tremendous responsibility here today. Like I said, this is not a high-profile case, you're not going to see it on the six o'clock news, you're not going to read about it in the newspaper. But your responsibility is no less. You have an opportunity right here today to say that enough is enough and come back here after your deliberation—you're going to receive two verdict forms. This is one of them.

. . . .

. . . We, the jury in the above-entitled action, find for the defendant and against the plaintiff. Date it today's date, . . . and then sign it; and you can go home and rest easy knowing that you did the right thing. Thank you very much, ladies and gentlemen.

Wheeler did not object.

The jury found in Seasholtz's favor. Wheeler moved for judgment notwithstanding the verdict or, in the alternative, a new trial. The district court granted the new trial, finding that Emerson's arguments amounted to misconduct, which had denied Wheeler a fair trial. In rendering its decision, the district court explained that "[t]he pandering committed by [Emerson] was inflammatory and prejudicial. Although Wheeler did not object to the alleged misconduct, the Court finds [Emerson's] comments were of such sinister influence as to constitute irreparable error." Seasholtz appeals, arguing that the district court abused its discretion by granting a new trial.[6]

DISCUSSION

In these appeals, we revisit the standards that the district courts are to apply when deciding a motion for a new trial based on attorney misconduct. We also clarify the proper appellate standards for reviewing the district court's order. Then, we determine whether Emerson's arguments amounted to misconduct and, if so, whether the district courts abused their discretion in granting or denying the new trial motions because of the misconduct.

Attorney misconduct jurisprudence and the standards utilized by the district court for a new trial based on attorney misconduct

As noted, these appeals raise the issue of which standards district courts are to apply when deciding motions for a new trial based on attorney misconduct. These standards should vary depending on whether the purported misconduct was objected to and admonished, objected to and unadmonished, i.e., the objection was overruled, or sustained but not admonished, repeated or persistent, or unobjected to. But in the past, we have not always differentiated between these types of factual circumstances. Thus, in discussing the standards, we examine Nevada's attorney misconduct jurisprudence historically.

Our attorney misconduct jurisprudence begins with Barrett v. Baird, in which we adopted the Ninth Circuit Court of Appeals' rule that, "'[t]o warrant [a new trial] on grounds of attorney misconduct, the flavor of misconduct must sufficiently permeate an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict.'"[7] However, in Barrett, we did not state whether the moving party had objected to the misconduct, and we did not address whether a party must object to alleged attorney misconduct to preserve the issue as a ground for a new trial. Thus, Barrett's permeation rule implicitly applied to both objected-to and unobjected-to misconduct and is unclear in its application. It is not clear whether the permeation rule requires the misconduct to occur throughout the proceeding or whether a single act of misconduct can infect the proceeding to provide a basis for a new trial.

More recently, in DeJesus v. Flick, we addressed whether a party's failure to object to improper argument during trial foreclosed that party from raising the issue in the context of an appeal from an order denying a new trial, and we cited Barrett in reviewing the attorney's unobjected-to misconduct.[8] While recognizing that "[g]enerally, a failure to object to attorney misconduct precludes review," the majority of this court concluded that an exception to the general rule should apply to prevent the "plain error" that resulted from the "inflammatory quality and sheer quantity of misconduct" by the opposing party's attorney.[9] Underlying the majority's "plain error" determination was its conclusion that the verdict was unsupported by the evidence, which indicated that the cumulative effect of the attorney's improper arguments must have "so thoroughly permeated the proceeding that . . . they tainted the entire trial and resulted in a jury verdict that was the product of passion and prejudice," thereby denying the appealing party a fair trial.[10] Thus, DeJesus created a rule that unobjected-to misconduct would be reviewed only for plain error based on the "inflammatory quality and sheer quantity of misconduct."[11]

The dissent in DeJesus offered a different test for resolving new trial motions for unobjected-to misconduct. Noting the importance of making objections in the advocacy system, the dissent urged that claims of misconduct are generally entitled to no consideration unless a timely and proper objection and a request for admonishment has been made.[12] The rationale for this rule is to provide the court with an opportunity to instruct counsel, admonish the jury, and prevent additional prejudice through repeated misconduct, thus avoiding a mistrial or appeal. Referring to this purpose, the dissent quoted Horn v. Atchison, Topeka and Santa Fe Railway Co.,[13] saying, "'It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have.'"[14] In this, the dissent reasoned that appellate review would not be necessary in most cases where misconduct occurred because the trial court would have the opportunity to immediately remedy any prejudice. However, the DeJesus dissent recognized that in rare circumstances, unobjected-to misconduct may be so sinister as to amount to irreparable and fundamental error.[15]

After DeJesus, we again examined unobjected-to misconduct in Ringle v. Bruton, and a majority of this court attempted to clarify that case.[16] The Ringle court first recognized the two salutary purposes of objections: (1) "[o]bjections demonstrate that the objecting party takes issue with the conduct,"[17] and (2) "[t]imely objections . . . conserve judicial resources" by allowing the trial court the "opportunity to correct any potential prejudice and to avoid a retrial," which "may also obviate the need for an appeal."[18] We therefore "reiterate[d] the requirement in civil cases that counsel timely and specifically object to instances of improper argument in order to preserve an issue for appeal."[19] We then stated that we would consider "egregious but unobjected-to misconduct . . . 'only in those rare circumstances where the comments are of such sinister influence as to constitute irreparable and fundamental error.'"[20] We noted that "irreparable and fundamental error" is such that, if left uncorrected, "would result in a substantial miscarriage of justice or denial of fundamental rights," and we pointed out that this error occurs only when "it is plain and clear that no other reasonable

explanation for the verdict exists."[21] However, this plain error rule was not enunciated in DeJesus, and the Ringle court's reliance on DeJesus as authority for the rule was improper.

Applying the "clarified" rule to the facts presented in Ringle, we concluded that because Ringle's counsel failed to object to the purported misconduct, "any error resulting from the misconduct [was] deemed waived," and unless Ringle could show that the verdict was "unreliable," he was precluded from arguing that issue on appeal.[22] But we then noted that it was unnecessary for us to review the verdict's reliability because Ringle had not shown misconduct so permeating the record as to support the need for a new trial in the first place.[23] Thus, in Ringle, the application of the plain error test suggested that the complaining party must demonstrate that the misconduct permeated the proceedings before this court will consider the reliability of the verdict. However, the scope, nature, and quantity of misconduct are themselves relevant to whether the verdict is reliable. The Ringle court therefore misapplied the rule that it adopted for plain error, which requires an examination of whether there is no other reasonable explanation for the verdict.

After reviewing our prior jurisprudence, we conclude that Barrett's permeation rule is incomplete and that DeJesus's "inflammatory quality and sheer quantity" test is unworkable. Accordingly, the rule and test in those opinions are overruled. While we approve of Ringle's "plain error" test for unobjected-to misconduct, its application is limited to an examination of whether "no other reasonable explanation for the verdict exists" except for the misconduct. Accordingly, we take this opportunity to revise our attorney misconduct jurisprudence and outline the proper standards for granting or denying a new trial based on attorney misconduct.

Objected-to and admonished misconduct and objected-to and unadmonished misconduct

As Ringle dealt with unobjected-to misconduct, Barrett's rule, that a new trial is proper when attorney misconduct sufficiently permeates the proceedings, still applies to objected-to misconduct. However, Barrett's standard for objected-to misconduct does not sufficiently consider and apply the salutary purposes of objection, and we therefore overrule Barrett. We restate the requirement that in our advocacy system, the parties' attorneys are required to competently and timely state their objections. And in cases in which an objection has been made to attorney misconduct, the district court should not only sustain the objection but admonish the jury and counsel.

In the event of a new trial motion, the better standard for reviewing objected-to and admonished misconduct was a standard presented in DeJesus's dissenting opinion. The DeJesus dissenting opinion precluded any review on appeal for attorney misconduct unless the record showed a timely and proper objection and a request that the jury be admonished.[24] We agree and conclude that for objected-to and admonished misconduct, a party moving for a new trial bears the burden of demonstrating that the misconduct is so extreme that the objection and admonishment could not remove the misconduct's effect. When the district court finds that the objection and admonishment were insufficient to remove the attorney misconduct's effect, a new trial is warranted.

When a party objects to purported attorney misconduct but the district court overrules the objection and the jury is not admonished, the party moving for a new trial based on that purported

attorney misconduct must first demonstrate that the district court erred by overruling the party's objection. If the district court concludes that it erred by overruling the objection, the district court must then consider whether an admonition to the jury would likely have affected the verdict in favor of the moving party. In this, the court must evaluate the evidence and the parties' and the attorneys' demeanor to determine whether a party's substantial rights were affected by the court's failure to sustain the objection and admonish the jury.[25]

Repeated or continued objected-to misconduct

As demonstrated in Lang, the proper standard for considering objected-to persistent or repeated attorney misconduct presents a more complex issue. The plaintiffs argue that when the misconduct continues after a sustained objection, the "simple sustained objection does little to erase such improper and emotional arguments and pandering to [the jury's] passion and prejudice, especially when such comments are the last thing a jury hears about a case." The defendants argue that when an argument is objected to and the objection is sustained, any prejudice from the allegedly improper argument is thereby sufficiently cured.

As we stated above, when a party's objection to an improper argument is sustained and the jury is admonished regarding the argument, that party bears the burden of demonstrating that the objection and admonishment could not cure the misconduct's effect. However, when, as in Lang, an attorney must continuously object to repeated or persistent misconduct, the nonoffending attorney is placed in the difficult position of having to make repeated objections before the trier of fact, which might cast a negative impression on the attorney and the party the attorney represents, emphasizing the improper point.[26]

We therefore conclude that when the district court decides a motion for a new trial based on repeated or persistent objected-to misconduct, the district court shall factor into its analysis the notion that, by engaging in continued misconduct, the offending attorney has accepted the risk that the jury will be influenced by his misconduct. Therefore, the district court shall give great weight to the fact that single instances of improper conduct that could have been cured by objection and admonishment might not be curable when that improper conduct is repeated or persistent.

Unobjected-to misconduct

Ringle stated that a party must object to purportedly improper argument to preserve this issue for appeal.[27] We reapprove this requirement, and we note that it is also necessary that a party object in order to preserve this issue in the district court for motions for a new trial. When the party has not objected to the complained-of conduct, the district court should generally deem this issue to be waived.

In cases of plain error, however, we, and the district courts, may still review allegations of unobjected-to attorney misconduct. As we stated in Ringle, plain error requires a party to show "that no other reasonable explanation for the verdict exists."[28] This standard addresses the rare circumstance in which the attorney misconduct offsets the evidence adduced at trial in support of the verdict.

Accordingly, the proper standard for the district courts to use when deciding a motion for a new trial based on unobjected-to attorney misconduct is as follows: (1) the district court shall first conclude that the failure to object is critical and the district court must treat the attorney misconduct issue as having been waived, unless plain error exists. In deciding whether there is plain error, the district court must then determine (2) whether the complaining party met its burden of demonstrating that its case is a rare circumstance in which the attorney misconduct amounted to irreparable and fundamental error. In the context of unobjected-to attorney misconduct, irreparable and fundamental error is error that results in a substantial impairment of justice or denial of fundamental rights such that, but for the misconduct, the verdict would have been different.[29]

Requirements for the district court

Additionally, we now require that, when deciding a motion for a new trial, the district court must make specific findings, both on the record during oral proceedings and in its order, with regard to its application of the standards described above to the facts of the cases before it. In doing so, the court enables our review of its exercise of discretion in denying or granting a motion for a new trial.

Appellate standards of review of motions for a new trial based on attorney misconduct

On appeal, we review orders denying or granting motions for a new trial for an abuse of discretion.[30] Whether an attorney's comments are misconduct is a question of law, which we review de novo;[31] however, we will give deference to the district court's factual findings and application of the standards to the facts.[32] Our review in the instant appeals involves questions of law and fact; therefore, we review the district courts' decisions regarding whether Emerson's comments were misconduct de novo, and we give deference to the district courts' factual findings and their application of the standards to the facts.

Impropriety of Emerson's arguments

We next address whether Emerson's arguments were improper. The challenged arguments can be classified into three types of alleged

misconduct: (1) jury nullification; (2) statements of personal opinion; and

(3) golden rule arguments, which occurred only in the Lang case. We describe each type of misconduct below, and we conclude that all of Emerson's challenged closing arguments were improper.

Jury nullification

Jury nullification has been defined as,

[a] jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness.[33]

As set forth above, Emerson made arguments that these cases wasted taxpayers' money and jurors' time. Emerson also argued that the cases were examples of people "looking for an excuse to sue someone at the drop of a hat" and that society now believed that "Americans have become a society of blamers." Defendants contend that these arguments are not misconduct and, instead, that the arguments implied that it was a waste of time and resources to bring cases that do not have an adequate basis in fact and law to prevail. Th[e] comment[s] w[ere] supported by the evidence that showed that [the defendant] was not negligent in this case and was affirmed when the jury reached a defense verdict in this case.

We disagree and conclude that Emerson's arguments amounted to impermissible jury nullification.

Emerson's arguments suggested to the jurors that, regardless of the evidence, if the jury found in the defendants' favors, the jury could remedy the social ills of frivolous lawsuits. Essentially, Emerson asked the jury to "send a message" about frivolous lawsuits. His arguments were directed at causing the jurors to harbor disdain for the civil jury process—a defining, foundational characteristic of our legal system—and at perpetuating a misconception that most personal injury cases are unfounded and brought in bad faith by unscrupulous lawyers. These arguments were irrelevant to the cases at hand and improper in a court of law and constitute a clear attempt at jury nullification.

Personal opinion regarding the justness of the plaintiffs' causes

Under Nevada Rule of Professional Conduct (RPC) 3.4(e), an attorney shall not state to the jury a personal opinion as to the justness of a cause, the credibility of a witness, or the culpability of a civil litigant.[34] As an example, we have held in criminal cases that prejudicial misconduct occurred when an attorney provided the jury with his personal opinion on an expert witness's credibility and a defendant's character.[35] Although criminal cases involve constitutional issues, requiring heavy scrutinization of improper comments, an attorney's statements of personal opinion as to the justness of a cause, the credibility of a witness, or the culpability of a litigant is nonetheless improper in civil cases and may amount to prejudicial misconduct necessitating a new trial.

Plaintiffs contend that Emerson impermissibly injected his personal opinion about the justness of their causes when he said that he had "a real passion for [these] case[s] and cases like [them]," because these were the types of cases that cause people to be distrustful of lawyers and legitimate plaintiffs and lead to what Emerson argued was the public's negative perception of the legal system.

Defendants counter that Emerson's comments were simply "setting the stage" for their request that the jury "let the truth speak through its verdict" and reflect "society's values and beliefs of what justice is or should be." They argue that Emerson was urging the juries to fulfill their responsibility even though the cases were "not high profile." According to defendants, because the cases were not high profile, it would be illogical that Emerson would assert that the cases had an effect on the diminution of the legal profession in the public's eyes; Emerson was merely "trying to remind the jury of their duty to follow the law, ignore what others may think[,] and make a decision based on the evidence that had been presented." Accordingly, defendants assert that Emerson's arguments were appropriate. We disagree.

The comments noted above reflect Emerson's personal opinion about the justness of personal injury litigants' causes and the defendants' culpability. Emerson stated that because of the sheer frivolity of these cases, it was his personal crusade to defend his clients. He also indicated that these types of cases directly contributed to the decline of the public's perception of the legal profession and to the widespread impression that personal injury cases are meritless. By representing to the jury his personal opinion that the plaintiffs' cases were worthless, Emerson not only violated his ethical duties, he also prejudiced the jury against the plaintiffs.[36]

The Golden Rule argument

An attorney may not make a golden rule argument, which is an argument asking jurors to place themselves in the position of one of the parties.[37] Golden rule arguments are improper because they infect the jury's objectivity.[38]

Only the Langs argued that Emerson made a golden rule argument. In Lang, Emerson asked the jury to consider whether, if the jurors' children were injured at a slumber party, they would merely consider that an accident or see it as an opportunity to sue. Emerson impliedly asked the jurors to consider what remedies the jurors would pursue for the accident and inferred that the jurors would not consider litigation.

Emerson's client in the Lang case, Knippenberg, first argues that the Langs waived their challenge by failing to object to this comment. She also argues that the comment is not a golden rule argument because the comment did not place jurors in either the Langs' or Knippenberg's position. Knippenberg contends that the purpose of the comment was "to provide a hypothetical situation involving an accident that occurred absent any negligence." We disagree.

Regarding the Langs' failure to object, we conclude that, because of the persistent nature of Emerson's misconduct, the Langs' objections to Emerson's other improper arguments sufficiently preserved this issue for appeal. During his closing argument, Emerson plainly stated to the jurors, "You send your son or daughter" to a friend's house, where he or she was injured, and questioned, "[D]oes that mean you just go out and sue[?]" (Emphasis added.) He invited the jurors to make a decision as if they and their children were involved in his hypothetical situation—a situation that somewhat paralleled the scenario of the Langs' daughter's injuries. This question indicated that the jury could make a decision based on the personal hypothetical designed to trivialize the daughter's injuries instead of deciding the case on negligence law and the evidence that the Langs and Knippenberg presented. Thus, Emerson's comment amounted to an impermissible golden rule argument.

Review of the district courts' orders in the instant cases

As we have concluded that Emerson's arguments are misconduct, we must next decide whether the district courts abused their discretion in deciding the motions for new trial.

In the Castro case, Castro was cited for causing the accident, and he paid the fine without protest. Castro informally stipulated to liability for arbitration, and the arbitrator found against him. However,

after a trial de novo, the jury found against the Cabreras and in Castro's favor. The district court, who witnessed the parties' and their attorneys' demeanor and the effect of Emerson's improper closing argument on the jurors, found that a new trial was warranted, even absent objection. In ordering a new trial, the district court specifically referenced Emerson's improper arguments.

Although the district court applied Barrett's "sufficiently permeated the proceedings" standard when granting the new trial, based on the facts of this case and because the district court concluded that Emerson's arguments amounted to repeated misconduct egregious enough to require a new trial, we conclude that the district court did not abuse its discretion in granting the Cabreras' motion for a new trial. We affirm the district court's order.[39]

In the Seasholtz case, Seasholtz admitted liability for the accident and only disputed Wheeler's injuries. Seasholtz's expert agreed that the majority of Wheeler's medical treatment was necessary, and he only disputed her chiropractic treatment. Yet the jury found against Wheeler entirely and denied her any recovery—even for her undisputed medical expenses. In granting Wheeler's motion for a new trial, the district court concluded that notwithstanding Wheeler's failure to object, Emerson's arguments amounted to irreparable and fundamental error.

Again, as with the Castro case, the district court in the Seasholtz matter employed the former standard, commenting that Emerson's "comments were of such sinister influence as to constitute irreparable error." Although an improper standard was used, we give deference to the district court's conclusion that Emerson's comments amounted to irreparable error, and based on the facts, we conclude that the district court did not abuse its discretion by granting Wheeler's motion for a new trial. We therefore affirm the district court's order.[40]

In the Lang case, when denying the Langs' motion for a new trial, the district court relied on Barrett and DeJesus. As we have overruled Barrett and DeJesus did not apply because it addressed unobjected-to misconduct and the Langs objected to Emerson's misconduct, the district court employed incorrect standards when deciding whether the Langs' motion for a new trial should be granted. Therefore, we vacate the district court's order, and we remand the Lang matter to the district court for it to apply the correct standards and to determine whether Emerson's misconduct requires a new trial.

Finally, in the Lioce case, the order denying Lioce's motion for a new trial is summary, only stating that the motion was denied without providing any reasoning. As there is no reasoning for the district court's decision, we are unable to decide whether it abused its discretion in denying Lioce's motion for a new trial. Accordingly, we vacate the district court's order and remand this case for a decision on the motion based on the standards discussed in this opinion.[41]

Deliberate misconduct

In support of their positions on appeal, defendants assert two arguments that warrant further discussion. First, they argue that Emerson's comments did not amount to prejudicial misconduct and new trials are not required because Emerson did not deliberately engage in the misconduct. Second,

they argue that the plaintiffs' attorneys also engaged in misconduct during the respective trials, which this court must consider when deciding these appeals. Both of these positions are without merit.

A claim of misconduct cannot be defended with an argument that the misconduct was unintentional. Either deliberate or unintentional misconduct can require that a party receive a new trial. The relevant inquiry is what impact the misconduct had on the trial, not whether the attorney intended the misconduct. Even so, we reject defendants' argument that Emerson's misconduct here was unintentional. In each case, Emerson delivered nearly the same closing argument, just expanding on the argument and adding additional improper material as the cases progressed. Therefore, we are unpersuaded by the assertion that Emerson's continued use and expansion of the improper arguments was not deliberate.

We also reject defendants' proffered justification that we must consider the plaintiffs' attorneys' purported misconduct when addressing Emerson's unethical conduct. Defendants did not object below to the majority of the statements they now argue are misconduct, and we conclude that defendants have not overcome their failure to object by demonstrating irreparable and fundamental error. Nevertheless, the majority of defendants' contentions regarding the plaintiffs' attorneys' purported misconduct are without merit and do not amount to misconduct. And in many instances, defendants' arguments regarding plaintiffs' attorneys' purported misconduct are founded upon misrepresentations of the plaintiffs' attorneys' conduct.

More importantly, a court of law is no place to resort to the argument of "he said it first" or "he did it too." Opposing counsel's violations of professional standards should never be the basis for engaging in professional misconduct. Merely because another lawyer allegedly disregards the ethical rules does not give the opposing lawyer the right to also disregard the rules. Further, asserting that engaging in misconduct is proper because another lawyer is also engaging in misconduct is in and of itself misconduct.

Sanctions

Finally, we conclude that Emerson's misconduct in Castro and Seasholtz warrants monetary sanctions. In those cases, Emerson and his clients shall pay each respective plaintiff's reasonable attorney fees and costs incurred for the first trial and this appeal.[42] We remand Castro and Seasholtz to the district courts to determine this amount by applying the factors in Brunzell v. Golden Gate National Bank[43] and also to determine Emerson's and his clients' deadline for paying this sanction. Finally, in all four cases, we refer Emerson to the State Bar of Nevada for disciplinary proceedings.[44]

CONCLUSION

Today we revise and clarify our attorney misconduct jurisprudence and provide different standards for the district courts depending on whether the purported attorney misconduct was objected to or not. We also impose on the district courts the requirement to make specific findings on the record and in their orders regarding these standards. In the instant cases, we conclude that the district courts did not abuse their discretion in granting the Cabreras' and Wheeler's motions for a new trial, and we

affirm the orders in Castro and Seasholtz. In Lang and Lioce, we are unable to evaluate whether the district courts abused their discretion in denying the motions for a new trial, and we vacate those orders and remand those cases to the district courts for new decisions under the standards set forth in this opinion. Finally, we remand Castro and Seasholtz to the district courts to calculate and impose monetary sanctions on Emerson and his clients, and we refer Emerson to the State Bar of Nevada, in all four cases, for disciplinary proceedings.

ROSE, C.J., BECKER, MAUPIN, GIBBONS and DOUGLAS, JJ., concur.

**********FOOTNOTES**********

[1] Payment of a misdemeanor traffic citation is not conclusive evidence of civil liability. See Langon v. Matamoros, 121 Nev. 142, 144-45, 111 P.3d 1077, 1078-79 (2005) (concluding that NRS 41.133, which allows a judgment of conviction to conclusively establish civil liability for a crime, does not apply to misdemeanor traffic offenses).

[2] 111 Nev. 1496, 908 P.2d 689 (1995).

[3] 116 Nev. 812, 7 P.3d 459 (2000).

[4] A physiatrist is "a physician who specializes in physical medicine." Webster's New Collegiate Dictionary 887 (9th ed. 1985). Physical medicine is a branch of medicine that diagnoses and treats disease using physical methods like radiation, heat, and electricity. Id.

[5] Before the accident, Wheeler had been very active in sports and other activities, from which she had previously sustained several injuries.

[6] In the discussion section, we refer to the Cabreras, Lioce, the Langs, and Wheeler collectively as "plaintiffs." We refer to Castro, the Cohens and Wilson, Knippenberg, and Seasholtz collectively as "defendants."

[7] 111 Nev. 1496, 1515, 908 P.2d 689, 702 (1995) (quoting Kehr v. Smith Barney, Harris Upham & Co., Inc., 736 F.2d 1283, 1286 (9th Cir. 1984)).

[8] 116 Nev. 812, 815-16, 7 P.3d 459, 462 (2000) (plurality opinion).

[9] Id. at 816, 7 P.3d at 462.

[10] Id. at 820, 7 P.3d at 464.

[11] Id. at 816, 7 P.3d at 462.

[12] Id. at 826, 7 P.3d at 468-69 (Rose, C.J., dissenting).

[13] 394 P.2d 561 (Cal. 1964).

[14] DeJesus, 116 Nev. at 826, 7 P.3d at 468-69 (Rose, C.J., dissenting) (quoting Horn, 394 P.2d at 565).

[15] Id. at 827, 7 P.3d at 469.

[16] 120 Nev. 82, 95-96, 86 P.3d 1032, 1040 (2004).

[17] Id. at 94-95, 86 P.3d at 1040.

[18] Id. at 95, 86 P.3d at 1040.

[19] Id.

[20] Id. at 96, 86 P.3d at 1041 (quoting Budget Rent A Car Systems, Inc. v. Jana, 600 So. 2d 466, 467 (Fla. Dist. Ct. App. 1992)).

[21] Id.

[22] Ringle, 120 Nev. at 96, 86 P.3d at 1040.

[23] Id. at 96, 86 P.3d at 1041.

[24] DeJesus v. Flick, 116 Nev. 812, 826, 7 P.3d 459, 468-69 (2000) (Rose, C.J., dissenting).

[25] NRCP 59(a)(2) (providing that a new trial may be granted when a party's substantial rights have been affected by misconduct).

[26] Leathers v. General Motors Corp., 546 F.2d 1083, 1086 (4th Cir. 1976).

[27] Ringle, 120 Nev. at 95, 86 P.3d at 1040.

[28] Id. at 96, 86 P.3d at 1041.

[29] See id. at 95, 86 P.3d at 1040 ("Irreparable and fundamental error . . . is only present when it is plain and clear that no other reasonable explanation for the verdict exists."); Parodi v. Washoe Medical Ctr., 111 Nev. 365, 368, 892 P.2d 588, 590 (1995) ("plain error is error which . . . 'had a prejudicial impact on the verdict when viewed in context of the trial as a whole'" (quoting Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993))).

[30] Langon v. Matamoros, 121 Nev. 142, 143, 111 P.3d 1077, 1078 (2005).

[31] See Bronneke v. Rutherford, 120 Nev. 230, 232, 89 P.3d 40, 42

(2004) (applying de novo review in an appeal involving a motion for a new trial because the appeal primarily concerned a legal issue).

[32] See D.R. Horton, Inc. v. Green, 120 Nev. 549, 553, 96 P.3d 1159,

1162 (2004) (applying de novo review to legal issues and leaving the factual application of the issue to the district court's discretion).

[33] Black's Law Dictionary 875 (8th ed. 2004).

[34] At the time of trial, this ethical duty was set forth in SCR 173(5).

[35] Yates v. State, 103 Nev. 200, 204, 734 P.2d 1252, 1255 (1987) (holding that reversible misconduct occurred when an attorney called the expert witness's testimony "'m[a]larkey'" and "'outright fraud'"); Sipsas v. State, 102 Nev. 119, 125, 716 P.2d 231, 234 (1986) (holding similarly when an attorney called an expert witness a "'hired gun from Hot Tub Country'").

[36] The third comment also amounts to jury nullification because it asserted that the jury should accept an attorney's personal opinion on a public policy debate as a substitute for the evidence and law that should decide the case.

[37] Boyd v. Pernicano, 79 Nev. 356, 358-59, 385 P.2d 342, 343 (1963).

[38] Id. at 358, 385 P.2d at 343.

[39] We will affirm the district court's order when it reaches the right decision, even if for the wrong reason. Albios v. Horizon Communities, Inc., 122 Nev. ___, ___ n.40, 132 P.3d 1022, 1033 n.40 (2006).

[40] Id.

[41] Lioce argues that, should we decide a new trial is warranted, his

case must be remanded to a different district court judge because Judge Bell was biased toward him. We conclude that this argument is without merit, and we also direct Lioce to NRS 1.235(1), which states that a party desiring to disqualify a judge in district court "must file an affidavit specifying the facts upon which the disqualification is sought." See also Towbin Dodge, LLC v. Dist. Ct., 121 Nev. 251, 112 P.3d 1063 (2005).

[42] See Greene v. State, 113 Nev. 157, 170, 931 P.2d 54, 62 (1997) (issuing monetary sanctions, on appeal, against trial counsel for an improper opening statement and the failure to observe the district court's admonitions); McGuire v. State, 100 Nev. 153, 159-60, 677 P.2d 1060, 1065 (1984) (issuing monetary sanctions, on appeal, against trial counsel for attorney misconduct during trial); see also Randolph v. State, 117 Nev. 970, 982 n.16, 36 P.3d 424, 432 n.16 (2001) (ordering trial counsel to show cause why we should not sanction him, on appeal, for misconduct during trial); Williams v. State, 103 Nev. 106, 112 n.6, 734 P.2d 700, 704 n.6 (1987) (stating that we will impose sanctions on attorneys who "cannot conform to the proper norms of professional behavior, whether inside or outside the courtroom").

[43] 85 Nev. 345, 349-50, 455 P.2d 31, 33 (1969).

[44] We have carefully considered the parties' other arguments and conclude that they are without merit.

****

PARRAGUIRRE, J., concurring in part and dissenting in part:

I concur with the majority's analysis and conclusions relating to attorney misconduct jurisprudence. I disagree, however, with the scope of sanctions imposed in the Castro and Seasholtz cases.

The district court judges have the benefit of evaluating all conduct during the course of trial, and are in a superior position to determine and impose appropriate sanctions for attorney misconduct. It does not appear from the record that the district court chose to impose sanctions in either case. In fact, it is not clear that sanctions were even requested. Before imposing sanctions of the nature ordered by the majority, I would prefer to have additional information. I, therefore, would order trial counsel to show cause why sanctions should not be imposed.

C. Last Words and Rebuttal

1. Scope of Rebuttal

Generally speaking, during rebuttal the plaintiff may cover any subject which was discussed during the defendant's closing argument. Warren Davis Properties v. United Fire, 111 S.W.3d 515, 528 (Mo.App.S.D. 2003). During rebuttal, the plaintiff likewise may cover any topic originally discussed during the plaintiff's initial closing argument. Id. However, under Missouri law the plaintiff may not ask for a specific amount of damages for the first time in the rebuttal portion of her closing argument. Id.

2. Finish Strong

As we have previously discussed, the conclusion of closing argument/rebuttal must be a strong finish! It will be the last thing the jury hears from you before they retire to deliberate. Whether they want to or not, the jury is going to remember your final, closing words. Consequently, the must be empowering. And those final words must echo for hours in the jury room.

Below is a 'call to arms' made by Jim Frickleton at the end of his rebuttal in a personal injury case:

> [Defense counsel] mentioned his favorite tie and the scales of justice. Lady liberty does in fact hold the scales of justice in one hand. What a lot of people don't know, in the other hand she holds the sword of retribution. And on those verdict forms I ask you to consider them to be stone, and use that sword to carve your verdict deep and make it last. Thank you.

Make the final words of your closing/rebuttal empowering. And make them echo.

D. Crash Course On Jury Instructions

1. The Pattern Instructions And Their Annotations Are Your Friends

Before thinking great thoughts, consult the pattern jury instructions and their annotations. Your case has probably been tried dozens if not hundreds of times before, which means the pattern instructions for your fact-pattern probably already exist. There will always be exceptional cases that do not fit within the pattern jury instructions, but your jury instruction preparation should begin with the pattern instructions.

2. Start Early And Update Often

If you have done yourself and your client a huge favor, you put together an initial set of anticipated jury instructions long before the start of trial, and you have continued to hone the proposed instructions as the case has developed. Preparing jury instructions is seldom easy, and preparing the instructions is harder in some jurisdictions than others. But one of the best pieces of advice to follow for preparing jury instructions is to start early and update often.

3. Recognize The Importance Of The Instruction Conference – It Is Something Of A Bench Trial Within A Jury Trial

Instructional error is probably the most common basis of error asserted on appeal in civil proceedings. But the ability to prevail on a claim of instructional error nearly always hinges on what did or did not happen during the instruction conference. Did the appellant make the proper and timely objection during the instruction conference? Were the objections made specific and explicit? Were the objections recorded on the record? If the law so required, did the appellant tender proper alternative instructions? If so, were the appellant's tendered alternative instructions properly marked and included as part of the record?

4. Counsel Must Utilize The Instructions During Closing Argument To Effectively Steer The Jury To Complete The Verdict Form In A Fashion That Is As Favorable As Possible For The Client

Blow them up onto large pieces of foam boards that you can show to the jury. Use power point slides to project the instructions onto a screen. Copy them onto plastic transparencies and use an overhead projector (and a thick-tipped marker) to display them onto a screen or onto a wall in the courtroom. But whatever you do, counsel during closing argument must engage the jury in an active [albeit one-sided] discussion on the jury instructions and the manner in which the verdict form should be filled out. Simply reading aloud the jury instructions to the jury during closing argument won't cut it – they gotta see 'em, they gotta be able to read 'em, and they gotta be convinced of your interpretation of what they mean under the facts of your case.

Then you gotta walk 'em through, with a thick-tipped marker, how the verdict form should be completed. And you don't turn off the projector when you go to sit down.

THANK YOU

for choosing NBI for your
continuing education needs.

Please visit our website at
www.nbi-sems.com
for a complete list of
upcoming learning opportunities.

NBI | NATIONAL BUSINESS INSTITUTE ™