TRIAL PRACTICE No. 321 – SPRING 2016

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General Instructions

1. General Information. The class will meet every Tuesday and Friday. There will be a one (1) hour lecture, sometimes accompanied by demonstrations or drills each Tuesday from 1:40 – 2:40 pm. The Friday sessions will be for student performances of assigned problems and will last at least three (3) hours each. On Friday Section 1 will meet from 9:10 am – 12:10 pm, and Section 2 will meet from 1:40 – 4:40 pm.

   Trial Practice is primarily a course designed to teach courtroom advocacy skills but it is also an integrative experience, combining new skills with your existing analytical prowess and general knowledge of the law, particularly procedure and evidence. The course emphasizes experiential learning with feedback as a methodology for teaching lawyering skills. This methodology is similar to that used at skills seminars for practicing lawyers offered by the National Institute for Trial Advocacy (NITA) whose materials are used in the course. Beyond learning from performing assigned exercises yourself, you will learn from watching others in your class performing the assigned problems and receiving feedback, assigned readings and lecture/demonstrations.

   THE GOAL OF THIS COURSE IS TO DEVELOP EACH STUDENT’S SKILLS SO THAT HE OR SHE COULD TRY A REAL CASE WHICH HAS SOME COMPLICATIONS.

   You are encouraged to work with a partner and in groups while doing your work for this course. In preparing any exercise for a class or for your trial, you may work with as many others in your class as you like. Your collaborative efforts may continue until you are ready to write or outline the actual questions you will ask, or jury speech you will give. From that point on your! work must be your own.

   Grading is on a letter grade (A – F) basis. With one exception, your work during the final trial (including pretrial conference), like a final exam, counts for 100% of your grade. Whether you win or lose makes no difference. How well the other member of your trial team performs makes no difference. The only thing that makes a difference is your work. The complete reliance on the final trial for grading is intended to encourage risk-taking and experimentation during the semester when your work is not being graded. The exception is that final grades may be adjusted based upon your effort (not results) during the semester. So, if you are repeatedly unprepared during the semester,

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1 This is remarkably different from the real world, however, where the client will not particularly care whether, for example, your closing argument was a masterpiece if you lose.
your grade could be adjusted downward. Conversely, it could be adjusted upward if you were always prepared and put forth significant effort during the semester.  


3. **Assignments.** Your reading and performance assignments for each class are found in a later section of this syllabus. Unless the schedule says otherwise, every student is to prepare both sides of every problem assigned. Everyone will perform at every class. Any problem referred to in an assignment, e.g., Problem 1, can be found in *Problems in Trial Advocacy*.  

4. **Witness Roles.** Except for the final trial, witnesses will be provided by the Law School. As in a real case, if you are unprepared, they will hand you your head.  

5. **Writing Assignments.** At the conclusion of every class, for each simulation exercise assigned, you must turn in the original or a copy of all materials you created in preparing for and conducting the examination or other portion of the trial assigned. I will review all of these and return some of them. The materials may be handwritten (if legible); complete sentences are not required. The materials should simply reflect your thought processes in preparing the problem.  

6. **Reading Assignments.** Reading the suggested portions of the Rules of Evidence and *Modern Trial Advocacy* before class will improve your preparation and performances of the various trial skills. Please allow sufficient time to complete the reading assignments before beginning your class preparation.  

7. **NITA Conventions.** The NITA materials use the designations YR-0, YR-2 and the like. YR-0 is the current year (2016), YR-2 would be two years ago (2014), and so on. When performing as counsel, please state the year, e.g. 2014 instead of "YR-2". Also, NITA materials set various cases in Nita City or the State of Nita. Nita is correctly pronounced "knee-ta.".  

8. **Objections.** During all classes, the "all object" rule will be in effect. That means all students should make all appropriate objections. **BEWARE: CHOOSING NOT TO MAKE ANY OBJECTIONS IN THE HOPE THAT NOBODY WILL MAKE ANY DURING YOUR PERFORMANCE IS MISGUIDED - I AM PREPARED TO MAKE OBJECTIONS IF YOU DO NOT.**  

9. **Grades.** As stated previously, with one exception, grading in this course is based upon your final trial – which includes a pretrial conference. Your level of effort throughout the semester can increase or reduce your final grade if it is exceptional (either way). However, unexcused absences will result in a lower grade. Due to relatively few class meetings, ordinarily no more than one absence will be excused.  

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2 To borrow a phrase from Justice Potter Stewart, I know lack of preparation when I see it.
10. **Trials.** Instructions regarding your pretrial conference and your trial can be found at the end of this syllabus. PLEASE READ THEM CAREFULLY BEFORE YOU START PREPARING FOR YOUR TRIAL.

**CLASS ASSIGNMENTS**

**Lecture:** Tuesday, January 12  
**Performances:** Friday, January 15

**Introduction and Theory of the Case**

**Reading Assignment** - Lubet, Chapters 1, 2 & 3

This class will cover preliminary matters. IT IS ESSENTIAL THAT YOU ATTEND THIS CLASS AND HAVE READ PROBLEM 1 CAREFULLY BEFORE THE LECTURE.

Come to class on Friday prepared to describe the following as to each side of Problem 1:

1. Your legal theory of the case (why the law allows you to win);
2. Your factual theory of the case (what you will say really happened and why you know that is so); and
3. Your persuasive theory of the case (why it is fair and equitable for your client to win).

In addition to a "brainstorming" exercise on the facts and theory of the NITA Liquor Commission case, there will be a set of exercises on open-ended and leading questions. No preparation is necessary for this portion of the class.

**Lecture:** Tuesday, January 19  
**Performances:** Friday, January 22

**Direct, Cross and Redirect Examination of Lay Witnesses I**

**Reading Assignment** - Lubet, Chapters 4, 5 & 7

**Performance Assignment** –

Problem 1: Direct, cross, and redirect examination of James Bier;

Problem 2: Direct, cross and redirect of Robert Byrd.
Feel free to use any testimonial aids, e.g., diagrams drawn by the witness at trial or prepared by you or the witness before trial, on direct and cross examination.

Lecture: Tuesday, January 26
Performances: Friday, January 29

Lay Witness Examination II

Reading Assignment – Lubet, Chapter 9

Performance Assignment –

Problem 3: State v. Lawrence – Direct, cross and redirect examination of Witness Gail Fitzgerald

Problem 6: State v. Carroll - Direct, cross and redirect examination of Witness Paul O'Rourke

Feel free to use any testimonial aids you choose.

Lecture: Tuesday, February 2
Performances: Friday, February 5

Exhibits I – Documents

Reading Assignment - Lubet, Chapters 10 & 11; Federal Rules of Evidence 104, 401-403, 803(6) and (8), 901, and 1001-1008.

Performance Assignment - Offer and oppose the admission of the exhibits identified in Problems 23 and 25. You will need to become familiar with the basic facts of the problems as well as the exhibit aspect of the problems.

Your preparation for this class should equip you to:

1. Make a statement of the purpose for which you would offer the exhibit at trial;

2. Lay a persuasive foundation for the exhibit (showing through questioning why the jury should give weight to the exhibit);

3. Lay a legal foundation (showing through questioning a proper legal foundation so the judge will allow the exhibit in evidence);

4. Make use of the exhibit after it has been introduced in the way you would in an actual trial; and
5. Consider how the exhibit might be made more persuasive by creative use of
graphics, highlighting, demonstrative aids, etc.

Lecture: Tuesday, February 9
Performances: Friday, February 12

Exhibits II – Photos, Testimonial Aids and Tangible Objects

Reading Assignment - Same as for last week. Work on your performances.

Performance Assignment -

Problem 1: Nita Liquor Commission v. Cut-Rate Liquor
Everyone should prepare to introduce and then use the diagram. You
can use an enlargement or technological aids in the courtroom
to project the diagram.

Problem 12: Brown v. Byrd (photos)

Problem 19: Ciprano v. Byrne (Actual Beer Bottle, Similar Beer Bottle and
Baseball Bat)

Your preparation for this class should equip you to do the same five items listed
for the prior class on documents for each of the items noted for this week's
performances:

Lecture: Tuesday, February 16
Performances: Friday, February 19

Impeachment & Rehabilitation

Reading Assignment - Lubet, Chapter 6

Performance Assignment - Problems 28 and 31. For both problems be
prepared to conduct both the impeachment portion of the cross and
redirect (rehabilitation) examinations. The main purpose of this class is
the impeachment. However, we will also do some redirects to
demonstrate how you attempt rehabilitation on re-direct.
Lecture: Tuesday, February 23  
Performances: Friday, February 26

**Lay Witness Examination III**

**Reading Assignment** - none

**Performance Assignment** - Problem 9. Half the class will be preparing a direct of plaintiff and cross of defendant. The other half will prepare a direct of defendant and cross of plaintiff. Before the performances begin, each student must give me a sheet of paper on which appears his or her theme of the case. A prudent student will give this to me before the day of your performance because I might change it. This will help you appreciate how the theme of the case guides your direct and cross examinations.

**Note:**

*At this class, we will discuss pretrial and trial assignments for the final trials. Please come to class having already identified the other person with whom you would like to be teamed for your trial and on which of the available dates (to be announced) you prefer to try your case.*

Lecture: Tuesday, March 1  
Performances: Friday, March 4

**Expert Witnesses**

**Reading Assignment** - Lubet, Chapter 8

**Performance Assignment** – Problem 40. Prepare the direct and cross examination of both Mr. Winer and Mr. Christenson. Each student will do the direct of one and cross-examination of the other.

**Note:**

*The final pretrial and trial schedule will be announced at this class.*
**Lecture:**
Tuesday, March 8

**Performances:**
Friday, March 11

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**Opening Statement**

**Reading Assignment** - Lubet, Chapter 12

**Performance Assignment** – Class will meet in two groups on Friday. Plaintiff's counsel in the final trial will meet from 9:10 – 10:40 am (Section 1) and 1:40 – 3:10 pm (Section 2). Defense counsel will meet from 10:40 am – 12:10 pm (Section 1) and 3:10 – 4:40 pm (Section 2). Give the opening statement for the opposing party in your full trial (7 minute maximum). Don't prepare a 10 minute opening and try and squeeze it into 7; instead, prepare a 5 minute opening and allow it to expand to 7.

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**Lecture:**
Tuesday, March 15

**Performances:**
Friday, March 18

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**Closing Argument**

**Reading Assignment** - Lubet, Chapter 13

**Performance Assignment** – Class will meet in two groups on Friday. Plaintiff's counsel in the final trial will meet from 9:10 - 10:40 am (Section 1) and 1:40 – 3:10 pm (Section 2). Defense counsel will meet from 10:40 am - 12:10 pm (Section 1) and 3:10 pm – 4:40 pm (Section 2). Your assignment is to give the closing argument for the party you represent in your full trial. (15 minute maximum). Don't prepare a 20 minute closing and try and squeeze it into 15; instead, prepare a 10 minute closing and allow it to expand to 15.

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**Week of March 21, 2015 – Spring Break – NO CLASSES**
Lecture: Performances: Tuesday, March 29

Jury Selection

Reading Assignment - Lubet, Chapter 14

MARCH 30 through APRIL 8 - Pretrials and Final Trials

NOTE: SPECIFIC PRETRIAL AND TRIAL DATES WILL BE ANNOUNCED IN CLASS.
Pretrials and trials will be governed by the rules provided below.

LOCAL RULES OF COURT

RULE 100: GENERAL INFORMATION

101 Philosophy of Rules. These rules will be construed to avoid delay and permit fair trials. The rules are stated in regular type. Advisory comments are in italics.

102 Citation. These rules should be cited as Local Rules [insert number], Willamette.

103 Pretrial Discovery. No interrogatories or other formal discovery devices may be utilized. You may, subject to normal ethical limitations, interview opposing witnesses who are willing to talk to you.

RULE 200: FINAL PRETRIAL CONFERENCE

201 Purpose. The purpose of the pretrial conference is to consider and resolve legal and procedural matters that can be determined before trial, and to resolve any other matters that will expedite the trial.

202 General Information. Pretrial conferences must be scheduled before the trials. All counsel must attend the Pretrial Conference. The work must be evenly divided between team members. These conferences last anywhere from 1/2 half hour to three (3) hours. Counsel are required to wear courtroom attire.

202 Required Exchange of Information Between Counsel Before Pretrial Conference. At least twenty-four hours before the pretrial conference, each party shall provide every other party:

1. Witness lists.

2. Exhibit lists.

3. Proposed fact stipulations.

4. Requested jury instructions. Specific jury instructions relating to the law and facts of each particular case are with the trial materials for that case. Ask me for additional preliminary and general jury instructions such as credibility of witnesses, burden of proof, preponderance of the evidence, etc.

5. Proposed verdict form.

6. Any motions for determination at pretrial. Motions must include a list of all Rules of Evidence that will be argued as authority. Motions not exchanged will not be ruled on at the pretrial conference.

7. Any charts, blow-ups or other items to be used as evidence which are not exact copies of items in your trial materials. This requirement does not apply to items to be used solely in closing argument.
203 Preliminary Pretrial Conference Between Counsel. After the exchange of information required by Rule 202 and before the Pretrial Conference, all counsel shall meet to resolve the following matters:

1. Factual Stipulations.
2. Stipulations as to exhibits.
4. Motions. Counsel are encouraged to anticipate and to attempt to resolve evidentiary motions before the Pretrial Conference.

Stipulations and agreements on jury instruction, verdict form, and motions are not required. If counsel cannot agree on instructions, the verdict form and motions, the Court will rule on these matters at the Pretrial Conference.

204 Conduct of the Pretrial Conference. The conference will consider the following matters, typically in the order shown below:

1. Stipulations. Inform the judge of any stipulations of facts or other stipulations reached between the parties relating to any aspect of the case other than exhibits which are considered later in the conference. There is no requirement, however, that the parties make any stipulations.

2. List of Witnesses. Each side must prepare before the pretrial conference a list of their witnesses in the order they will be called at trial. Only the witnesses listed in the trial materials may be called at trial. Prudence dictates that each party add a note at the bottom of their witness list saying, "All witnesses listed by the opposing party;" and, that any party with a burden of proof add: "All witnesses necessary for rebuttal." Next to each witness, each side should estimate the time necessary for direct and cross-examination of that witness. These estimates are not binding.

3. List of Exhibits. The parties shall present at the pretrial conference a list of all documents, charts, and exhibits of any kind that will be offered in evidence at the trial. All exhibits must be marked for identification before the conference: plaintiffs use 1, 2, 3, etc. and defendants use A, B, C, etc. You need not pre-mark items that will be used only to refresh recollection or to impeach, or for closing arguments. No exhibit may be offered in evidence by a party on whose list the exhibit does not appear. As a result, prudence dictates that the exhibit list include catch-all language such as "any items listed by the [opposing party], or necessary for refreshing recollection or impeachment.

4. Stipulations Regarding Exhibits. The parties shall present at the pretrial conference a list of stipulations (if any) reached as to the authenticity or admissibility of exhibits. No stipulations, other than those contained in the case materials, are required.

There are two basic stipulations pertaining to exhibits -- admissibility and authenticity. A stipulation to the admissibility of an exhibit means that it
will automatically be received into evidence if it is offered at trial. The fact that it will be admitted does not mean that it has been admitted. In order for the exhibit to be received in evidence, the proponent of the exhibit must offer it on the record at the trial. To do so at trial, the proponent need merely say, "Your Honor, we offer Exhibit 1 which the parties agree is admissible."

The other common stipulation on an exhibit is a stipulation to its authenticity. A stipulation to the authenticity of an exhibit means that the document is genuine and authenticity need not be established at trial. Even with such a stipulation, counsel must lay any other necessary foundation (e.g. hearsay, relevance, etc.).

5. **Motions in limine.** At the Pretrial Conference, the Court will rule on timely made and exchanged motions in limine. Motions must be in writing and must state any Rules of Evidence on which they are based. No authority other than the Rules of Evidence and their comments will be considered in ruling on the motions. No motion regarding judicial notice will be entertained.

   *The emphasis of this course is on trial litigation, not motions practice. If in doubt, please put your emphasis on trial preparation. Think carefully about your motions and make the ones that are tactically advisable, but do not turn this into a legal research and writing exercise.*

6. **Jury Instructions.** If the parties have not agreed on jury instructions, at the Pretrial Conference the Court will decide what instructions will be given. No jury instructions other than those included with your case file or obtained from me will be considered unless opposing counsel received notice under Rule 202 of the request. [I strongly suggest you read aloud the jury instructions you are considering before you decide which ones to request.]

7. **Any Other Matters Which Would Expedite The Trial.** At the Pretrial Conference, counsel should bring to the attention of the judge and attempt to resolve any matters which would expedite the trial. *Any matters relating to the mock nature of the trial or the trial materials should be raised at this point. If counsel have a problem or foresee any difficulties relating to the mock nature of the trial, it should be discussed at the pretrial conference so that the trial runs smoothly and in a realistic fashion.*
205 **Pretrial Order.** After the Pretrial Conference, the Plaintiff shall prepare for signature of all parties a Pretrial Order. A sample pretrial order is attached as Appendix A to these Rules. The purpose of this Order is to provide the trial judge with the information necessary to judge the trial. The pretrial order must be signed by all counsel and presented to the trial judge before the trial begins. If the parties cannot agree on the contents of the Pretrial Order, notify the judge who presided at the Pretrial Conference immediately.

**RULE 300: TRIAL**

301 **Jurors.** The Law School will provide the jurors.

302 **Length of Trial.** Trials will begin on time and last no longer than six hours. Counsel's commitment will be a maximum of seven hours. After the jurors depart, you will receive a critique from me, which will last no more than an hour.

303 **Witnesses.** Each side must provide people to play the witnesses designated for their side; however, you need not call every witness for your side and you are free to call any of the other side's witnesses. Witnesses may be law students, but you will probably prefer to have the roles played by lay people who better fit the descriptions of the witnesses. In fact, the learning experience is greatly enhanced when roles are played by people in those same roles in real life.

The quality of the trial depends to a large extent on how well the witnesses know their roles. Witnesses should testify without notes unless use of notes is consistent with the part they are playing, i.e., police officers and doctors. Please explain to your witnesses what YR-1, YR-2, etc. mean. Also, tell them how to pronounce Nita and the names of other witnesses. It is your responsibility to make sure the witness knows his or her part.

304 **When Witnesses Must Arrive At Trial.** Witnesses should be advised of the time they are to testify. If a witness does not appear on time, even if it is because the trial is running ahead of schedule, you will be asked to call another witness. If you have no other witnesses, you will rest your case without calling that witness. The burden is on you to make sure your witnesses are there.

305 **Parties.** The trial works better if witnesses who are parties attend the entire trial.
306 Order of Trial. The order of trial will be as follows:

1. The Court will conduct a brief voir dire of jurors. No juror may be challenged.
2. Opening statements.
3. Presentation of the case-in-chief for plaintiff.
4. Mid-trial motions, if any.
5. Presentation of the case-in-chief for the defendant.
6. Mid-trial motions, if any.
7. Rebuttal case, if any. Rebuttal usually is not necessary in mock trials.
8. Closing argument will begin with the party with the burden of proof. Then the other side will close next. Finally, the party that began the closing arguments will have an opportunity for rebuttal.
9. Jury instructions and charge to the jury.

307 Examination of Witnesses. Only one counsel per party may examine any witness. Additionally, the counsel for each side who will examine the witness is the only counsel for that party who can object during that witness' testimony.

308 Division of Labor Between Counsel. The person who gives the opening statement should not give the closing argument. Allocation of the work is up to each team with the goal being to make it as even (50/50) as possible.

309 Time Limits. The time limits for the trial are:

1. Opening Statements 10 minutes per side maximum
2. Closing Arguments 25 minutes per side maximum
3. Witness Examinations 120 minutes per side maximum

The 25 minute limit for closing includes the first and last closing for the side with the burden of proof. The 120 minutes limit for each party's witness examinations include direct and cross examinations conducted by that party. THESE TIME LIMITS ARE MANDATORY. Rather than rush, cover the most important points well and skip those points that are less important. The time limit is also meant to force the parties to agree to as many facts as feasible. Put another way, the mock trial, as with all trials, should only focus on what is really in dispute.

310 Facts Not in the Case File. If the case file does not include a fact that a witness would be expected to know, he or she may make it up, but the created fact must be one that neither helps your case nor harms your opponent's.
311 **Objections.** No objections may be made that "those facts are not within the materials." If you believe that the witness has gone outside the trial materials, then impeach the witness on cross-examination by using his or her statement or deposition.

312 **Attending Other Trials.** You may, and in fact are encouraged to, attend other trials after your own; i.e. you may not attend a trial before your case is heard.

313 **Cameras In The Courtroom.** I am told we can record your trial if you like. Tell me at the pretrial conference.

314 **Ex Parte Conferences.** Although it is normally improper to have an ex parte conference with the Court, if you have questions about your trial, you are free to contact me without notifying the other side. *If the matter you raise is one that requires that opposing counsel be contacted, the Court will ask you to arrange a conference call or meeting.*

**RULE 400: COURTROOM DECORUM**

401 **Attire.** For trials, counsel will wear suitable courtroom attire.

402 **Leave of Court.** Leave of Court must be obtained before approaching the witness or the bench, asking a witness to approach an exhibit, or publishing an exhibit to the jury.

403 **Addressing the Court.** When addressing the Court for any purpose, including making objections, counsel will first rise.

405 **Exhibits.** Unless directed otherwise by the Court, before showing an exhibit to a witness, counsel will show it to opposing counsel or identify for the record the exhibit being shown.

406 **Impeachment by Prior Inconsistent Statement.** Before counsel reads from or asks a witness to read from a prior inconsistent statement, he or she should identify to the Court and opposing counsel the document, page and line or paragraph number.

404 **Position In The Courtroom.** When delivering an opening statement or closing argument and when examining witnesses, counsel may sit at counsel table or stand in any reasonable place in the courtroom. Counsel is not required to use a lectern in addressing the jurors or witnesses.
APPENDIX A: SAMPLE PRETRIAL ORDER

CIRCUIT COURT, STATE OF OREGON
COUNTY OF NITA

JOSEPH NONAME,
Plaintiff,

v.

HARRY WHOMEVER,
Defendant.

The parties, pursuant to Local Rule 205, Willamette, file this Pretrial Order:

1. Stipulations
   A. Stipulations Required By The Case File
   B. Additional Fact Stipulations

2. Witnesses
   A. Witnesses for the Plaintiff
      John Smith  20 minutes
      Mary Jones  5 minutes
      Dr. Jane Doe 30 minutes
   B. Witnesses for the Defendant
      (See format for plaintiff's witnesses)
Exhibit lists and Stipulations as to Exhibits

C. Exhibits for the Plaintiff

<table>
<thead>
<tr>
<th>No.</th>
<th>Title</th>
<th>Stipulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Insurance Policy</td>
<td>Admissible</td>
</tr>
<tr>
<td>2</td>
<td>Letter to John Smith</td>
<td>Authentic</td>
</tr>
<tr>
<td>3</td>
<td>Deposition of Richard Jones</td>
<td>Authentic</td>
</tr>
<tr>
<td>4</td>
<td>Statement by Mary Williams</td>
<td>None</td>
</tr>
</tbody>
</table>

D. Exhibits for the Defendant

(See format for plaintiff's exhibits. Defendant's exhibits are marked, A, B, etc.)

3. Jury Instructions. Include the verbatim text of all Jury Instructions agreed to by the parties in the order the parties want them given. If there were disputes, include only the text of those instructions selected by the judge at the Pretrial Conference. This section can be a "cut and paste" of photocopied instructions.

4. Proposed verdict form. Include the Verdict form agreed to by the parties or, if the parties did not agree, the verdict form selected by the judge at the Pretrial Conference.

5. Motion Rulings. Briefly state any motions considered by the judge at the Pretrial Conference and the rulings, if any, made. For example:

A. Plaintiff's motion to exclude any mention of liability insurance. Granted.

B. Plaintiff's motion to exclude any mention of plaintiff's conviction for tax evasion. Denied.

C. Defendant's motion to be allowed to use learned treatise. Ruling deferred until trial.

This _____ day of April, 2015.

Counsel For The Plaintiff: ____________________________  Counsel for the Defendant: ____________________________

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__________________________

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APPENDIX B: MOTIONS IN LIMINE

Motions in limine are usually made for evidence which is clearly inadmissible or for evidence which is of such a nature that once the jury has heard it the cautionary or limiting instruction will not be effective (often characterized as "you cannot un-ring a bell"). However, many jurisdictions allow an affirmative motion in limine seeking a pretrial ruling that evidence will be admissible.

The judge at the pretrial conference will either rule on the motion at that time or reserve the matter to be handled at trial. The judge will rule on the motion at the pretrial conference when the evidence is such that even at this preliminary stage of the proceeding the law is clear that it is either inadmissible or admissible. That is, no matter what foundation is laid or how the evidence comes out at trial, the evidence is clearly either inadmissible or admissible. The judge will reserve the matter for trial when the evidentiary point is one that the admissibility of the evidence depends on how the facts are developed at trial. That is, a foundation for its admissibility must be laid at trial, the relevance of the evidence may or may not outweigh the prejudicial impact depending on what facts are developed at trial or, broadly speaking, the judge determines that the evidentiary point is such that it is best determined within the context of the facts as they are developed at trial.

If the judge grants the motion in limine to exclude evidence, the evidence, of course, may not be mentioned in the opening statements or otherwise brought to the attention of the jury by the counsel who opposed the motion. Many lawyers do not consider this sufficient protection since a witness may "inadvertently" blurt out the evidence at trial. Unfortunately, some lawyers play a part in this "inadvertence" during the trial preparation -- "I can't ask you about this information, but ____________.") The "blurtting out" of the evidence totally circumvents the motion in limine and forces the lawyer to choose between requesting a mistrial and gambling on the jury verdict, a poor choice under any circumstance. To prevent this, many lawyers who are successful on a motion in limine then request the Court to order opposing counsel to instruct their witnesses not to blurt out the evidence or in any way bring it to the attention of the jury. Most judges will also add that they are holding counsel responsible for the conduct of their witnesses in this regard.

If the motion in limine is reserved for trial, attention should be given to the use of the evidence in the opening statements. The proponent of the evidence should consider that mentioning the evidence in the opening statement may be sufficient grounds for a mistrial if the evidence is later ruled inadmissible. However, the enticement to get the evidence out early and up front in the minds of the jury is often so great that counsel will gamble that it is admissible or not sufficiently inflammatory for a mistrial. Unfortunately, some lawyers do it intentionally either as a delaying tactic or when their client can afford protracted litigation. Therefore many counsel, as a matter of practice when a motion in limine is reserved, make a motion requesting that the evidence not be mentioned in the opening statement or otherwise brought to the attention of the jury until the Court has had an opportunity to rule on the admissibility of the evidence. It is an eminently fair request and is usually granted. If this request is granted, again many counsel request the Court to order opposing counsel to instruct their witnesses not to blurt out the evidence and that they are not permitted to testify about that evidence unless they are specifically asked about it.
If a motion in limine has been reserved for trial and counsel has been instructed not to bring the evidence to the attention of the jury until the court has ruled, the proper procedure is for counsel, at the appropriate time during the trial (the foundation has been laid or the facts are fully developed), to approach the bench and request a ruling on the admissibility of the evidence that was the subject of the motion in limine.

The rulings of the judge at the pretrial conference shall not be re-litigated at trial. However, to preserve your record for appeal, if important evidence was excluded, you must make an offer of proof at trial (outside of the jury’s hearing) so the appellate court knows what was excluded. If evidence you believe is objectionable was ruled admissible before trial, to preserve the point for appeal, renew your objection when your opposition offers the evidence at trial.