

Georgetown University Law Center CLE and ALI-ABA Present a New Program for Employment Lawyers

Evidence Issues and Jury Instructions in Employment Cases

Thursday - Saturday, February 10 - 12, 2005
Georgetown University Law Center
Washington, DC

17.0 CLE credit hours
(including 1.0 hour ethics)

11 JUDGES

HON. JAMES E. BOASBERG

HON. DEBORAH K. CHASANOW

HON. CHARLES B. DAY

HON. T.S. ELLIS III

HON. JOHN M. FACCIOLA

HON. JACOB B. HART

HON. RONALD J. HEDGES

HON. JOSEPH E. IRENAS

HON. DEBORAH A. ROBINSON

HON. EDUARDO C. ROBRENO

HON. JERRY E. SMITH

Why You Should Attend:

Lawyers' ability to get their cases into evidence frequently determines the outcome. Since passage of the Civil Rights Act of 1991, courts have more carefully scrutinized the evidence proffered by each side.

In the wake of the Supreme Court's blockbuster *Desert Palace* opinion, more cases and more issues may go to juries. Faulty jury instructions may result in a loss of all gains derived in the trial court. The drafting of jury instructions, however, continues to bedevil practitioners and judges. As too many have learned the hard way, missteps in drafting instructions can cause lawyers to snatch defeat from the jaws of victory.

This new program focuses on critical evidence and jury instruction issues that arise in employment cases. Chaired by U.S. Magistrate Judge Paul Grimm, a jurist known for his mastery of evidence issues, and by Robert Fitzpatrick and Paul Mickey, two lawyers with a combined 70 years of employment law practice, this course provides a practical, real-world oriented plan for addressing vexing evidence and jury instruction problems confronting lawyers before and during trial.

Program Highlights:

On Thursday morning, Judge Paul Grimm and Professors Paul Rothstein and Stephen Saltzburg present a tutorial on using the Federal Rules of Evidence. This session is *not* a 101-to-1103 trip through the Rules, but a guide to using the rules to admit or exclude material, to get it to or keep it from the jury's eyes and ears. Judge Grimm is known

throughout the country and the judiciary as a renowned teacher of evidence to new judges, to practitioners, and to law students. Professors Rothstein and Saltzburg are acclaimed teachers and well-recognized evidence authorities.

Starting with the afternoon session on Thursday, demonstration arguments and judicial analysis focus on evidence issues. Lawyers raise the issues through hypothetical *motions in limine* or objections to trial testimony. After each motion or objection, the judges analyze the issues. Similarly, the sessions on jury instructions are presented through the medium of mock negotiations and judicial analysis of the language of instructions.

Electronic evidence is important not just because of admissibility or exclusion. Electronic files can tell an adversary far more than the party turning them over knows they contain or wants revealed.

The recent *Desert Palace* decision may have a significant effect on the quantum and type of evidence that goes into an employment case, and we will look at how that decision may affect what lawyers need to present to juries and how to frame instructions.

Finding potential model jury instructions acceptable in a particular case is a "hit or miss" proposition. Some courts have model employment instructions, but most do not. Moreover some of the models may not be up to date. We will walk you through the resources available to help find appropriate instructions.

The program also includes a full hour on ethics and professional responsibility issues. Time is reserved to address questions presented before and during the course.

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MONEY-BACK GUARANTEE:

We are confident that you will leave this conference with more than enough ideas and insights to make your investment pay off. However, if you feel you have not received your money's worth by the end of the program, simply contact a member of our registration team at the conference or call (202) 662-9890 and we will process a 100% refund of your registration fee!

PROGRAM AGENDA - EVIDENCE ISSUES AND JURY INSTRUCTIONS IN EMPLO

Thursday, February 10

8:00 - 9:00 am

Registration and Continental Breakfast

9:00 - 10:30 am

Using the Federal Rules of Evidence to Get Your Case to the Jury

Hon. Paul B. Grimm

Prof. Paul F. Rothstein

Prof. Stephen A. Saltzburg

- Making and meeting objections
- Conditional relevancy
- Refreshed and recorded recollection
- The seven categories of impeachment
- Prior inconsistent statements
- Prior bad acts
- Hearsay, exemptions, exceptions
- Admissions
- Character evidence
- Demonstrative evidence, authentication and the original writing rule
- Opinion and expert testimony

10:30 - 10:45 am

Refreshment Break

10:45 am - 12:00 pm

Using the Federal Rules of Evidence (continued)

12:00 - 1:30 pm

Lunch (on your own)

1:30 - 3:00 pm

Evidence Issues in Harassment and Retaliation Cases

Pl.: *Debra S. Katz*

Def.: *Mary E. Pivec*

Judges:

Hon. James E. Boasberg

Hon. Jacob B. Hart

- Evidence of corporate culture and the use of experts
- Sexual conduct of the plaintiff inside and outside the workplace
- Evidence Rule 412 in harassment cases
- Sexual conduct of the accused
- "Me too" evidence
- Evidence of similar acts in the workplace, pattern and practice evidence
- Experts on the *Faragher* and *Ellerth* affirmative defense
- Importance of temporal proximity
- Stereotypes
- Uses of lay opinion testimony
- Surreptitious tape recording

3:00 - 3:15 pm

Questions and Answers

3:15 - 3:30 pm

Refreshment Break

3:30 - 4:45 pm

Evidence Issues in Statutory Discrimination Cases

Pl.: *Meredith S. Francis*

Def.: *Douglas B. Mishkin*

Judges:

Hon. Jacob B. Hart

Hon. Ronald J. Hedges

- Evidence of possible discrimination against other employees
- Pattern and practice evidence
- Statistical evidence
- Stray remarks after *Desert Palace*
- Evidence of prior conduct (good and bad) and prior or subsequent disciplinary problems
- Prior acts, good and bad
- Admissibility of EEOC determinations

- Evidence of corporate culture
- Expert testimony that plaintiff employee was meeting expectations (*King v. Rumsfeld*, 4th Cir. 2003)
- Comparable cases/comparator evidence

4:45 - 5:00 pm

Questions and Answers

Friday, February 11

8:00 - 8:30 am

Continental Breakfast

8:30 - 9:45 am

Electronic Evidence

Pl.: *Adam L. Rosman*

Def.: *Connie N. Bertram*

Judges:

Hon. Ronald J. Hedges

Hon. Deborah A. Robinson

- Voice mail and e-mail
- Computer-modified evidence and *Swinton*
- Spoliation
- When are adverse inference instructions given?

9:45 - 10:00 am

Questions and Answers

10:00 - 10:15 am

Refreshment Break

10:15 - 11:30 am

Electronic Evidence: A Practicum

Paul Neale

Richard T. Seymour

Hon. Jerry E. Smith

- Technological groundwork
- Constructing a game plan: How do you collect, process, filter, review, and produce computer-based material; the production of "accessible" and "inaccessible" data

- The lawyers' interactions with and the role of the trial court in the collection of electronic evidence
- Allocating the costs of processing and production
- Employer e-record retention/destruction policies vs. the need to preserve litigation-related material
- Proposed amendments to the Federal Rules of Civil Procedure

11:30 - 11:45 am

Questions and Answers

11:45 am - 1:15 pm

Lunch (on your own)

1:15 - 1:45 pm

Implications of Desert Palace

Robert B. Fitzpatrick

- Stray remarks redux
- Motivating factor or substantial motivating factor
- Demise of the direct/circumstantial evidence dichotomy

1:45 - 2:15 pm

Resources for Obtaining Jury Instructions

Paul F. Mickey, Jr.

- Where to find standard instructions issued by state and federal courts
- Where to find instructions approved by bar associations, by published court opinion and by a judge in a particular case
- Additional audience suggestions

2:15 - 3:30 pm

Jury Instructions I: Harassment and Retaliation Claims

Pl.: *Eric Siegel*

Def.: *Edward T. Ellis*

Judges:

Hon. T.S. Ellis III

Hon. Eduardo C. Robreno

- Definition of sexual harassment and racial discrimination
- Hostile environment and retaliation
- Absence of temporal proximity
- Protected activity
- Constructive discharge after *Suders*
- Proof of protected status

3:30 - 3:45 pm

Questions and Answers

3:45 - 4:00 pm

Refreshment Break

4:00 - 5:15 pm

Jury Instructions II: Statutory Discrimination Claims

Pl.: *Stephen Z. Chertkof*

Def.: *Deborah P. Kelly*

Judges:

Hon. John M. Facciola

Hon. Eduardo C. Robreno

- Statutory discrimination after *Desert Palace*
- Disparate treatment
- Reasonable accommodation
- Pretext and "but for" instructions
- Issues peculiar to class and multidistrict cases
- Burden shifting instructions
- Business judgment rule

5:15 - 5:30 pm

Questions and Answers

Saturday, February 12

8:00 - 8:30 am

Continental Breakfast

8:30 - 9:45 am

Jury Instructions III: Common Law Claims

Pl.: *Jonathan C. Puth*

Def.: *Abbey G. Hairston*

Judges:

Hon. Charles B. Day

Hon. Joseph E. Irenas

- Cases arising under an employee handbook
- Intentional infliction of emotional distress
- Constructive discharge
- Wrongful termination: the public policy tort claim
- Negligent retention

9:45 - 10:00 am

Questions and Answers

10:00 - 10:15 am

Refreshment Break

10:15 - 11:30 am

Jury Instructions and Evidence Issues: Damages

Pl.: *Joel P. Bennett*

Def.: *Roxane Sokolove Marenberg*

Judges:

Hon. Deborah K. Chasanow

Hon. Joseph E. Irenas

- Present value instructions
- Compensatory and punitive damages
- Back pay and front pay instructions
- Valuing lost compensation and benefits as well as future earnings and other losses
- The role of judge and jury
- Tax bump relief
- Tax returns
- Medical records
- Net worth
- Necessity of expert testimony
- Discount rate
- Mitigation

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Georgetown CLE is a State Bar of California approved MCLE provider.

11:30 - 11:45 am

Questions and Answers

11:45 am - 12:00 pm

Refreshment Break

12:00 - 1:00 pm

Final Roundup: Ethics in Employment Law Cases

Robert B. Fitzpatrick

Hon. Paul B. Grimm

Paul F. Mickey, Jr.

Prof. Paul F. Rothstein

- Disclosing privileged information to an expert
- Expert's drafts and notes
- Lawyer's role in drafting the expert's report
- Supplementing the expert's report
- Inadvertent disclosure during discovery
- Spoliation
- Lying witnesses
- Honesty in settlement negotiations
- Gag orders on employees of the defendants
- Multi-jurisdictional practice issues
- Duty to discuss ADR options with the client
- Civility issues

1:00 pm

Adjournment

CO-CHAIRS:

Hon. Paul B. Grimm

U.S. Magistrate Judge
Baltimore, MD



Robert B. Fitzpatrick

Robert B. Fitzpatrick, PLLC
Washington, DC



Paul F. Mickey, Jr.

Shaw Pittman LLP
Washington, DC

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Hon. Jerry E. Smith

U.S. Circuit Judge
Houston, TX
(Former Chair, Judicial Conference
Committee on the Federal Rules of
Evidence)

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