

# ***Avoiding Pitfalls in Written Advocacy***

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Be understood,  
then be persuasive.

Be understood.  
Be persuasive.

The Basics  
Start to Craft  
Avoid the Sirens  
Artistry

### INTRODUCTION

Although the Plaintiff in this case spends a great deal of time trying to create issues of fact, as the Defendants have asserted from the beginning, trial is not necessary in this case because the dispute is not over *material* facts.

Compu-tec disputes facts which are not material.

## The Basics

- Start Early
- Spell Check
- Grammar Check
- Proofread
  - Read aloud
  - Read from back
  - Read in paper form
  - How many words can be eliminated?

## The Basics (continued)

- Apply the proper standards
  - Standards of review
  - Comply with DUCivR 56
  - Never assume jurisdiction exists
- Every case has a plaintiff and defendant; what are the roles or names in this case?

## Starting to Craft

- Outline
  - Think about the organization
  - Reflect the outline in format – headings, previews, summaries
- Focus on what matters – remove weak arguments and the irrelevant



## Garner's Usage Tip of the Day

January 1, 2010

**obviously**, like other dogmatic words ("clearly," "undeniably," "undoubtedly"), is one that writers tend to rely on when they're dealing with difficult, doubtful propositions. Be wary of it.

## Garner's Usage Tip of the Day

November 23, 2009

**Officialese** is the language of officialdom, characterized by bureaucratic turgidity and insubstantial fustian; inflated language that could be readily translated into simpler terms.

Officialese is governed by four essential rules.

First, use as many words as possible.

Second, if a longer word (e.g., "utilize") and a shorter word (e.g., "use") are both available, choose the longer.

Third, use circumlocutions whenever possible.

Fourth, use cumbersome connectives when possible ("as to," "with regard to," "in connection with," "in the event of," etc.).

Among the linguistically unsophisticated, puffed-up language seems more impressive.

Thus, police officers never "get out of their cars"; instead, they "exit their vehicles."

They never "smell" anything; rather, they "detect it by inhalation."

They "proceed" to a "residence" and "observe" the suspect "partaking of food."

And among lawyers, rather than "suing," one "institutes legal proceedings against" or "brings an action against."

business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

Restatement (Second) Conflict of Laws § 145(2) (1971).

Here, it is undisputed that the alleged injury occurred in Utah. This is the most significant factor in a choice of law analysis for a products liability action. *See Kearns v. Amer. Honda Motor Co.*, 641 F. Supp. 420, 423–24 (D. Idaho 1986); *Richard O’Brien Cos. v. Challenge-Cook Bros., Inc.*, 672 F. Supp. 466, 469 (D. Colo. 1987). “Next to the place where the injury occurred, the most important contact is the place where the relationship between the parties is centered. That place is. . . where the product was purchased.” *Kearns*, 641 F. Supp. at 423–24. Here, Plaintiff does not dispute that the product was used by the Decedent in Utah; thus it is clear that the relationship between the parties was centered in Utah. *See Allison v. ITE Imperial Corp.*, 928 F.2d 137, 142 (5th Cir. 1991) (“the relationships between the parties in a products liability case is the State where the injured party came in contact with the product of the defendant”); *Rottman v. Krabloonik*, 834 F. Supp. 1269, 1271 (D. Colo. 1993) (same).

It is also undisputed that the Decedent resided in Utah. Where the allegedly defective Tysabri® was designed is of little importance when the place of injury, the center of the parties’ relationship, and the domicile of the plaintiff or decedent are all in the same state. Under such circumstances, courts uniformly apply the law of that state, not the state of manufacture. *Richard O’Brien Cos.*, 672 F. Supp. at 469 (“the place the injury occurred, rather than the place of manufacture, provides the most compelling policy concerns”); *White v. Winnebago Indus.*, 718 F. Supp. 1429, 1433 (N.D. Iowa 1989) (concluding that Tennessee had the most significant relationship to products

liability litigation where the injury occurred in Tennessee and the plaintiffs were Tennessee residents, although the allegedly defective product was manufactured in Iowa and defendant was an Iowa corporation); *Crisman v. Cooper Indus.*, 748 S.W.2d 273, 278 (Tex. Ct. App. 1988) (holding that Florida’s statute of repose applied to bar plaintiff’s product liability claims against manufacturer of allegedly defective trailer that was involved in his wife’s death where trailer entered the stream of commerce in Florida and where the accident took place in Florida, even though parties resided in different states and the trailer was manufactured in Illinois); *Kearns*, 641 F. Supp at 423–24 (holding that Idaho had the most significant relationship to a products liability action irrespective of the place of manufacture, where the product was purchased in Idaho and where the accident took place in Idaho); *Allison v. ITE Imperial Corp.*, 928 F.2d 137 (5th Cir. 1991) (concluding that Tennessee law applied to products liability claims where injury occurred in Tennessee and the plaintiff came into contact with the allegedly defective product in Tennessee, despite the fact that product was manufactured in a different state and parties were domiciled in different states). Accordingly, this Court should conclude that the law of Utah applies, as it is the place of the injury, the center of the relationship of the parties, and the place of residence of the Decedent at the time of his alleged injury.<sup>2</sup>

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<sup>2</sup> The Restatement also suggests that the “purpose sought to be achieved by the relevant tort rule” is another factor to be considered in determining the state of most significant relationship. R.2d (Conflicts) § 145, cmt. c. Unquestionably, Utah’s tort rule providing immunity from design defect claims for FDA-approved drugs is intended to promote the availability and affordability of drugs for Utah’s citizens. *Grundberg v. Upjohn Co.*, 813 P.2d 89, 99 (Utah 1991). As the Court in *Grundberg* noted, if Utah did not afford drugs comment k immunity, “[f]irst, drug manufacturers might stop producing valuable drugs because of lost profits resulting from lawsuits or the inability to secure adequate insurance. Second, consumers have a vested interest in prompt availability of new pharmaceutical products. Imposing strict liability for design defects might cause manufacturers to delay placing new products on the market, even after those products



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It is also undisputed that the Decedent resided in Utah. Where the allegedly defective Tysabri® was designed is of little importance when the place of injury, the center of the parties' relationship, and the domicile of the plaintiff or decedent are all in the same state. Under such circumstances, courts uniformly apply the law of that state, not the state of manufacture.<sup>4</sup>

Accordingly, this Court should conclude that the law of Utah applies, as it is the place of the injury, the center of the relationship of the parties, and the place of residence of the Decedent at the time of his alleged injury.

<sup>1</sup> See *Kearns v. Amer. Honda Motor Co.*, 641 F. Supp. 420,423-24 (D. Idaho 1986); *Richard O'Brien Cos. v. Challenge-Cook Bros., Inc.*, 672 F. Supp. 466,469 (D. Colo. 1987).

<sup>2</sup> *Kearns*, 641 F. Supp. at 423-24.

<sup>3</sup> Utah. See *Allison v. ITE Imperial Corp.*, 928 F.2d 137, 142 (5th Cir. 1991); *Rottman v. Krabloonik*, 834 F. Supp. 1269, 1271 (D. Colo. 1993).

<sup>4</sup> *Richard O'Brien Cos.*, 672 F. Supp. at 469; *White v. Winnebago Indus.*, 718 F. Supp. 1429, 1433 (N.D. Iowa 1989); *Crisman v. Cooper Indus.*, 748 S.W.2d 273, 278 (Tex. Ct. App. 1988); *Kearns*, 641 F. Supp at 423-24; *Allison v. ITE Imperial Corp.*, 928 F.2d 137 (5th Cir. 1991).

not renders Plaintiffs' theory less compelling than the opposing, non-fraudulent inference.<sup>8</sup>

Plaintiffs' remaining arguments are boilerplate. They suggest "false and misleading SOX certifications . . . [are] indicia of scienter" (Opp. at 10-11), but their cases hold no such thing.<sup>9</sup> Indeed, inferring scienter from SOX certifications would "eviscerat[e] the pleading requirements for scienter set forth in the PSLRA." *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1004 (9th Cir. 2009) (citation omitted).<sup>10</sup> Plaintiffs similarly conflate distinct pleading requirements when they argue (Opp. at 8-9) scienter can be inferred from a false statement or omission. *See, e.g., Imergent*, 2009 WL 3731965, at \*8 ("[I]t is well established that GAAP violations, *without more*, fail to raise an inference of scienter.").<sup>11</sup> Moreover, the undersigned is aware of only a single lawsuit alleging a violation of Item 403(b),<sup>12</sup> and where a rule is obscure (as it is here), an inference of scienter is especially inappropriate. *See, e.g., In re Hansen Natural Corp. Sec. Litig.*, 527 F. Supp. 2d 1142, 1157 (C.D. Cal. 2007) ("the Court cannot determine

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<sup>8</sup> "[A]n inference of scienter must be more than merely plausible or reasonable – it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007).

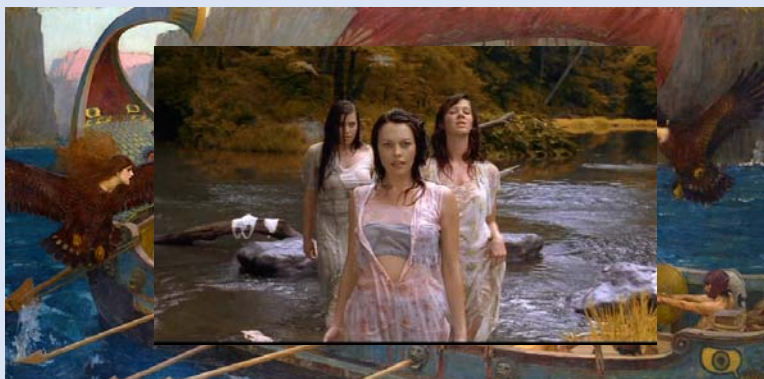
<sup>9</sup> In *Adams v. Kinder-Morgan, Inc.* 340 F.3d 1083, 1105 (10th Cir. 2003), the defendant CFO stated that a plant positively impacted earnings despite being told by an assistant treasurer that it was losing money. In *In re SemGroup Energy Partners, L.P. Sec. Litig.*, 729 F. Supp. 2d 1276, 1300 (N.D. Okla. 2010), the plaintiffs alleged the defendants directed or participated in questionable accounting activity, including paying themselves undisclosed bonuses. And in *In re Nature's Sunshine Prods. Sec. Litig.*, 486 F. Supp. 2d 1301, 1304-05, 1309 (D. Utah 2007), the defendant CEO was found, by a board committee, knowingly to have violated the FCPA.

<sup>10</sup> Further, the March 2012 Form 10-K (which contained the certifications) is only alleged to have been false because it incorporated portions of the later-filed April 2012 Proxy. ¶ 57.

<sup>11</sup> None of Plaintiffs' cases (Opp. at 8-9) transmute an omission into scienter. The *In re Scholastic Corp. Sec. Litig.* complaint alleged "what defendants knew on a daily, weekly and monthly basis . . . while at the same time making public statements" to the contrary. 252 F.3d 63, 76-77 (2d Cir. 2001). The *Citiline Holdings, Inc. v. iStar Fin. Inc.* complaint alleged that, while the company's financial performance deteriorated, the defendants "monitored the value of their [loan] portfolio on a nearly real-time basis." 701 F. Supp. 2d 506, 516 (S.D.N.Y. 2010). And *In re Campbell Soup Co. Sec. Litig.* suggested Item 303 of Regulation S-K supported a finding of a falsity, not scienter. 145 F. Supp. 2d 574, 591 (D.N.J. 2001).

<sup>12</sup> The court in that case found Item 403(b) inapplicable. *See City of Omaha v. CBS Corp.*, No. 08 Civ. 10816(PKC), 2010 WL 1029290 (S.D.N.Y. Mar. 16, 2010); *City of Omaha v. CBS Corp.*, No. 08 Civ. 10816(PKC), 2011 WL 2119734 (S.D.N.Y. May 24, 2011).

## Avoiding the Sirens



Having made the requisite showings, the burden now shifts back to the individual defendants to establish that no disputed issues of material fact remain which would defeat the claim of qualified immunity.

As discussed in Plaintiff's opposition to motion, Defendant began its attacks against Plaintiff's counsel by sending him a personal subpoena during the holidays on December 29, 2008 in an attempt, believes, to set up a motion to disqualify Plaintiff's co-trial counsel, and in an attempt to ruin his holidays. As further discussed in Plaintiff's opposition to the motion, Defendant's counsel engaged in Gestapo tactics in serving Plaintiff's counsel with the subpoena in his law office without even giving a reasonable opportunity to accept service of the subpoena, or the professional courtesy of a telephone call.

Plaintiff asserts that Defendant accuses Plaintiff of making "disingenuous arguments" in response to various points raise in Defendant's submission. (Application, p. 1.) Defendant's assertion is more pointed: "Plaintiff disingenuously argues that Defendant has not substantiated its assertion that Plaintiff has failed to produce the 'order' source code." Defendant's reply brief, (pp. 1-2) In its brief in opposition Plaintiff implies that if any source code was produced for three Perl files at issue that is compliance with the Court's September 28, 2009 order. Defendant respectfully submits that is not the case.

Plaintiff's argument is a bit like suggesting that Rembrandt could not have applied proper methodology in his paintings because he did not make use of a "paint by numbers"

The assertion that Dr. P "failed to show" his work blows right by audacious and nearly steamrolls over ridiculous . . .

Even if it is necessary to reschedule the trial date, it is difficult to see how this is unfair to the defendant. "Unfairness" is often tossed out as a reason for the court to do, or not do, something. Like the cry of the loon, it is haunting, but often without substance.

*This paragraph appears in argument without any prior recitation of these facts*

Second, Defendant's assumptions are wrong. In particular, Defendant's Attorney's assertion that "Defendant was not even at Plaintiff when Plaintiff developed its incremental sector tracking software," and therefore "does not know, and could not know, anything about Plaintiff's code for that function or the underlying source code," is demonstrably incorrect. (8/26/11 Defendant's Attorney's Letter to Plaintiff's Attorney; 9/21/11 Plaintiff's Attorney's Letter to Defendant's Attorney at 2.) Incremental sector tracking was specifically requested by Company X as a deliverable, and the last Computer code drops Defendant made to Company X in 2002--well before his departure from Plaintiff--include incremental sector tracking, as evidenced by the emails on the Exhibit Disc. (See, e.g., Defendant's 0007549, 101520-21, 101991-92, 109999-01, 110711-13, 116084-85, 158566, 170105, 203584-88, 204117-18, 205103, 205150-51, 205154-55, 220109, 223744, 227291, 230546, and 232179-80, collectively attached as Ex. P hereto (without exhibits).)

Despite the Court's ruling that Defendant Name Redacted ("Redacted") is liable for breach of the parties' Settlement Agreement and Mutual Release signed in 20XX (the "20XX Settlement Agreement" or "Agreement") and for copyright infringement, and that Plaintiff has presented strong evidence of Defendant's misappropriation of trade secrets, coupled with its decision to permit Plaintiff to conduct additional discovery regarding Defendant's activities while working for Company1, Company2 and/or Company3, particularly as they relate to Plaintiff's intellectual property rights and trade secrets under that Agreement, Defendant has objected to virtually all of Plaintiff's discovery issued pursuant to Magistrate Judge Nuffer's Order entered on June XX, 2011, impermissibly narrowed the scope of the discovery in providing limited substantive responses, failed to perform an adequate search for documents under Federal Rule of Civil Procedure 34, and thereby failed to produce all responsive documents.

#### ARGUMENT

- I. **ACCEPTING PLAINTIFFS FACTS AS TRUE, THE COURT SHOULD DENY SALT LAKE CITY'S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE ARE DISPUTED ISSUES OF MATERIAL FACT REGARDING THE REASONABLENESS OF THE ACTIONS TAKEN IN INSTIGATING THE DELIBERATE ACTION PLAN AND THE RESULTANT FORCE USED DURING THAT PLAN WAS EXCESSIVE AND THAT SALT LAKE CITY IS SUBJECT TO MUNICIPAL AND SUPERVISORY LIABILITY.**

course.”<sup>7</sup> “As Bob Dylan sang in ‘Subterranean Homesick Blues,’ ‘You don’t need a weatherman to know which way the wind blows.’ And you don’t need a Reexamination Certificate to know that this case is now poised to move forward.”<sup>8</sup>

<sup>2</sup> Defendants’ duck analogy was stated incorrectly. See Defs.’ Mem. at 5. Defendants’ theory is actually “if it sits next to a duck, then it must be a duck.” This would prove to be a dangerous survival theory if the animal next to the duck was actually a bear.

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<sup>12</sup> See [United States v. Jimenez, 789 F.2d 167, 171 \(2d Cir. 1986\)](#) (observing that evidence is not unfairly prejudicial simply because it is “harmful” to a case). Like the rest of twenty (20) motions *in limine*, the instant motion calls to mind the following exchange from the movie *Liar Liar* (Universal Pictures 1997):

Fletcher: Your honor, I object!  
 Judge Stevens: And why is that, Mr. Reede?  
 Fletcher: It’s devastating to my case!  
 Judge Stevens: Overruled.  
 Fletcher: Good call!

## Avoiding the Sirens

- Convoluted arguments
- Characterizations
- Cuteness
- Long sentences
- Long paragraphs
- The sound of your own voice
- Distractions

## Artistry

- Flow
  - Is it enjoyable to read?
  - Does it read as if heard, and not studied?
  - Eliminate the need to re-read anything.
- Would an educated person understand every word?
- Is a legally trained complete stranger to the case compelled by every word?
- Let it sit; then come back a day or two later.

## John Irving on being a writer – and a wrestler

"Many of my wrestling friends find it odd that I'm a writer, just as many of my writer friends in the writing world find it odd that I was — for so many years — a wrestler and wrestling coach. But they seem very similar to me. In both cases you have to be devoted to tireless repetition and small details. For many more hours than you will be in competition, you will be with a nameless workout partner — a sparring partner, drilling the same outside single-legged dive, inside collar tie — hundreds upon thousands of times. Well, how many times as a writer do you — or should you — rewrite the same sentence, the same paragraph, the same chapter? If you're good, you never tire of that."

<http://www.npr.org/2012/05/12/152361634/in-one-person-a-tangled-gender-bender>