

Motions in Limine: Admitting Key Evidence, Educating the Court, Capturing Settlement Leverage

TUESDAY, DECEMBER 8, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Robert H. McKirgan, Practice Group Leader, Partner, **Lewis Roca Rothgerber Christie**,
Phoenix, AZ

Frederick Petti, Partner, **Petti and Briones PLLC**, Scottsdale, AZ

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

OCT 20 2003



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Attorneys for Defendant/Counterclaimant

SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

HEATHER MARIE GROSSMAN, a married
woman, individually on behalf of her minor
children, RONALD GROSSMAN, JOSEPH
GROSSMAN and LAUREN GROSSMAN,

Plaintiff,

vs.

JOHN NORMAN GROSSMAN, a married
man (in marital dissolution proceeding),

Defendant.

No. CV 2002-021810

**MOTION IN LIMINE RE:
ADMISSION OF HEATHER M.
GROSSMAN'S PRIOR
CONVICTION FOR CRIMINAL
CONTEMPT**

(Oral Argument Requested)

(Assigned to The Honorable Jonathan H.
Schwartz)

JOHN NORMAN GROSSMAN, a married
man (in marital dissolution proceeding),

Defendant/Counterclaimant,

vs.

HEATHER MARIE GROSSMAN, a married
woman (in marital dissolution proceeding);
RALPH STEPHENS and FLORENCE
STEPHENS, husband and wife; DENISE
LYNN FOSTER, an unmarried woman,

Plaintiffs/Counterdefendants.

Defendant/Counterclaimant John N. Grossman hereby moves *in limine* for the admission into evidence Plaintiff/Counterdefendant Heather M. Grossman's prior conviction for criminal contempt pursuant to Rule 609 of the Arizona Rules of Evidence. This motion is supported by the attached Memorandum of Points and Authorities and this Court's file.

FILE COPY

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. Factual Background.**

3 Plaintiff/Counterdefendant Heather M. Grossman (“Heather”) was married prior to
4 her union with Defendant/Counterclaimant John N. Grossman (“John”). Heather’s first
5 husband was Ronald Samuels. Heather filed for divorce from Mr. Samuels in the Circuit
6 Court in and for Santa Rosa County, Florida in 1992. During the course of those divorce
7 proceedings, three motions for criminal contempt were lodged against Heather, alleging that
8 she was in either direct or indirect criminal contempt for falsely testifying concerning an
9 eating disorder, falsely testifying concerning whether she had plastic surgery, and falsely
10 testifying that she did not stay with Mr. Samuels in the marital home when she returned to
11 Florida in October 1992. *See* Order of Contempt in 92-1365-CA-01-DOM (a copy of which
12 is attached hereto as Exhibit A). Additionally, Heather was alleged to have solicited a third
13 party to commit perjury by testifying that she stayed at the third party’s home in October
14 1992. *Id.*

15 On February 17, 1994, the Circuit Court found that Heather did testify falsely when
16 she denied having plastic surgery and did testify falsely about staying at a third party’s home
17 in October 1992. *Id.* The Court suspended sentence regarding the false testimony
18 concerning plastic surgery. *Id.* However, regarding the false testimony concerning where
19 Heather stayed in October 1992, the Court sentenced Heather to the custody of the Santa
20 Rosa County Sheriff for a period of 48 hours. *Id.*

21 **II. The Law.**

22 Pursuant to Rule 609 of the Arizona Rules of Evidence, John wishes to impeach
23 Heather with her prior conviction for criminal contempt. In that regard, there are two issues
24 before this Court. First, should John be permitted to impeach with her prior conviction.
25 Second, if trial in this matter takes place after February 17, 2004, should the Court permit
26 John to impeach Heather with her prior conviction even though the conviction occurred more

1 than ten years before the trial of this case.

2 **A. The Admissibility of Convictions For Crimes Involving Dishonesty or**
3 **False Statements.**

4 Rule 609(a)(2) permits the admission of evidence of a prior conviction involving
5 dishonesty or false statements if the Court determines that the probative value of admitting
6 the evidence of the prior conviction outweighs its prejudicial effect. *See* Rule 609(a)(2),
7 ARIZ. R. EVID.¹ In balancing the probative value of a prior conviction against its prejudicial
8 effect, courts should consider, among other things, the impeachment value of the prior
9 conviction, the length of time since the prior conviction, the importance of the witnesses'
10 testimony and the centrality of the credibility issue. *See State v. Williams*, 144 Ariz. 433,
11 438, 698 P.2d 678, 683 (Ariz. 1995). The decision whether to admit evidence of a prior
12 conviction for impeachment purposes is left to the sound discretion of the trial court. *See*
13 *State v. McElyes*, 130 Ariz. 185, 188, 635 P.2d 170, 173 (1981).

14 **B. The Ten Year Time Limit.**

15 Any conviction more than ten years old is presumptively inadmissible under
16 Rule 609(b), "unless the court determines, in the interest of justice, that the probative value
17 of the conviction supported by specific facts and circumstances substantially outweighs its
18 prejudicial effect." *See* Rule 609(b), ARIZ. R. EVID. If a court admits into evidence a
19 conviction that is more than ten years old, the court must first set forth its reasons for
20 admitting the conviction on the record. *State v. Ellerson*, 125 Ariz. 249, 252, 609 P.2d 64,
21 67 (1980). The factors that the court considers in making its balancing analysis are similar to
22 those that the court considers in making its 609(a) analysis. "The critical difference between
23

24 ¹ Rule 609 of the Arizona Rules of Evidence differs from Rule 609 of the Federal Rules of
25 Evidence because, under the federal rule, conviction of a crime involving dishonesty or false
26 statements is automatically admissible without a determination by the court that the probative
value outweighs its prejudicial effect. *See State v. Dixon*, 126 Ariz. 613, 617, 617 P.2d 779,
783 (Ariz. App. 1980).

1 Rule 609(a) and (b) lies in the balancing standard to be applied, not in the facts and
2 circumstances to be considered.” *State v. Green*, 200 Ariz. 496, 499, 29 P.3d 271, 274 (Ariz.
3 2001).

4 **III. Argument.**

5 **A. Heather’s Prior Conviction is Admissible Under Rule 609(b).**

6 The first factor the Court should consider is that the impeachment value of Heather’s
7 prior conviction is substantial. Heather’s prior conviction is for *testifying falsely* in a court
8 proceeding, and it is hard to imagine a conviction that has more impeachment value than a
9 conviction for perjury.

10 Moreover, the Court should also consider that there is a great similarity between the
11 matter in which Heather testified falsely and the instant matter. Heather committed perjury
12 in the divorce action involving her first husband, Ron Samuels. In that divorce action,
13 Heather alleged that Samuels was both physically and verbally abusive to her, just as she has
14 alleged in this matter. *See Respondent/Wife’s Answer to Petition for Dissolution of*
15 *Marriage in Case No. 92-1365-CA-01-DOM*, pp. 6-9 (a copy of which is attached hereto as
16 Exhibit B).

17 This action is really nothing more than a companion case to the pending divorce
18 action between Heather and John. In this action, Heather also alleges abusive behavior by
19 her husband John.

20 A third factor the Court should consider is that Heather’s testimony is vitally
21 important in this case. She has accused her husband of abusing her both physically and
22 emotionally. In most, if not *all* instances, the only witnesses to this alleged abuse are
23 Heather and John, and the case boils down to “he said, she said.” This leads to the fourth
24 factor the Court should consider, which is the centrality of Heather’s credibility. In all
25 likelihood, the success of Heather’s case will rise and fall on her credibility.

26 Given the substantial impeachment value of Heather’s prior conviction; the great

1 similarity between the matter in which she perjured herself and this case; the importance of
2 Heather's testimony to her case; and the centrality of her credibility, this Court should allow
3 John to impeach Heather with her prior conviction for testifying falsely even though that
4 conviction may be more than ten years old when Heather testifies at trial. These factors
5 taking together satisfy the outweighing test required by Rule 609(b), and this is one of those
6 cases where a conviction (which may be slightly older than ten years) should be admitted to
7 cast doubt on a witness' credibility. *See State v. Green*, 202 Ariz. at 500, 29 P.3d at 275.

8 **B. Because Heather's Conviction is Admissible Under Rule 609(b), it is**
9 **Automatically Admissible if This Matter is Tried Prior to February 17,**
10 **2004.**

11 In determining whether a prior conviction is admissible under Rule 609(a), this Court
12 will consider the same factors that it analyzes in making its admissibility ruling under Rule
13 609(b). In making its Rule 609(b) analysis, though, the Court applies the more stringent
14 *substantial* weighing test. Accordingly, if Heather's prior conviction is admissible under
15 Rule 609(b), it will also be admissible under Rule 609(a). Therefore, if Heather testifies and
16 is subject to cross-examination prior to February 17, 2004, John should be permitted to
17 impeach her for her prior conviction for testifying falsely.

18 **IV. Conclusion.**

19 For the reasons set forth above, this Court should permit John to impeach Heather
20 with her prior conviction for testifying falsely regardless of when she testifies in this matter.

21 DATED this 20th day of October, 2003.

22 LEWIS AND ROCA LLP

23 By



24 Robert H. McKirgan

Frederick R. Petti

Christopher T. Pierson

25 Attorneys for Defendant/Counterclaimant

LEWIS
AND
ROCA
LLP
LAWYERS

1 Copy of the foregoing hand-delivered
this 20th day of October, 2003, to:

2 Honorable Jonathan H. Schwartz
3 Maricopa County Superior Court
4 201 West Jefferson, Suite 12D
Phoenix, Arizona 85003

5 Copy of the foregoing mailed this
6 20th day of October, 2003, to:

7 Bryan F. Murphy
8 Burch & Cracchiolo, P.A.
9 702 East Osborn Road, Suite 200
Phoenix, Arizona 85014
Attorney for Heather Grossman, Ralph Stephens, and Florence Stephens

10 Christopher D. Payne
11 Law Office of Christopher D. Payne
12 3315 East Vogel
13 Phoenix, Arizona 85028-00001
14 Attorney for Denise Foster

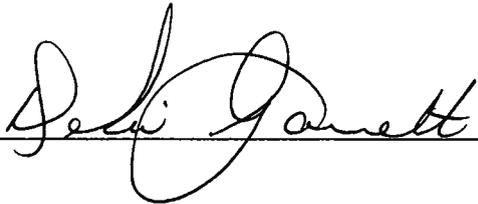
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EXHIBIT A

IN THE CIRCUIT COURT IN AND FOR SANTA ROSA COUNTY, FLORIDA

IN RE:

The Marriage of RONALD SAMUELS, Petitioner/Husband,
and HEATHER MARIE SAMUELS, Respondent/Wife.

CASE NO. 92-1365-CA-01-DOM-A

FEB 18 1 32 PM '94
SANTA ROSA COUNTY
CLERK OF COURT
WILLIAM H. BELLAN
CLERK OF COURT
MILTON, FLA

ORDER ON CONTEMPT

This matter is before the Court upon three motions for criminal contempt alleging that the Respondent/Wife, Heather Marie Samuels, is in direct and indirect criminal contempt for the following reasons:

1. Falsely testifying to the Court at the September 17, 1993 hearing that her husband, Ron Samuels, had not discussed her having an eating disorder with Dr. Antonetti in her presence.
2. That the Respondent/Wife, Heather Marie Samuels, falsely testified to the Court at the December 9, 1992, hearing when she stated that she had not had plastic surgery.
3. That the Respondent/Wife, Heather Marie Samuels, falsely testified to the Court at the December 9, 1992 hearing when she stated that she did not stay with the Petitioner/Husband, Ronald Samuels, in the marital home when she returned to Florida in October of 1992 but that she stayed with a friend named Dawn Wilkinson or in her home. Additionally, as indirect criminal contempt the Respondent/Wife, Heather Marie Samuels, was charged with individually and through her employed nanny "Susan" soliciting Dawn Wilkinson to commit perjury to the Court by testifying that the Respondent/Wife had stayed with Dawn Wilkinson at her house when in fact she did not. Respondent/Wife was represented by counsel and entered a plea of not guilty to all charges. The Court after conducting a hearing in this

matter which was consolidated with the final hearing on dissolution of marriage finds that the Respondent/Wife, Heather Marie Samuels, is not guilty of the Motion for Criminal Contempt filed with the Clerk on or about September 23, 1993, which involved the alleged eating disorder being discussed with Dr. Antonetti. However, with regard to the Motion for Criminal Contempt filed September 7, 1993, involving the false testimony regarding the plastic surgery the Court finds her guilty but suspends the imposition of any sentence thereon. The Court further found the Respondent/Wife guilty of direct and indirect criminal contempt on the motion filed on or about August 9, 1993, regarding her false testimony wherein she testified that she stayed with a friend named Dawn Wilkinson when in truth and in fact the Court finds beyond a reasonable doubt that she did not stay with her friend or at her friends residence. Accordingly, it is

ORDERED AND ADJUDGED that the Respondent/Wife, Heather Marie Samuels, is found guilty and adjudicated guilty on the Motions for Criminal Contempt filed with the Clerk of Court on August 9, 1993, and September 7, 1993.

IT IS FURTHER ORDERED AND ADJUDGED that with regard to the Motion for Criminal Contempt filed August 9, 1993, the Respondent/Wife, Heather Marie Samuels, shall be remanded to the custody of the Santa Rosa County Sheriff for a period of 48 hours commencing at 8:00 p.m. on Thursday, February 17, 1994, and terminating at 8:00 p.m. on Saturday, February 19, 1994.

DONE AND ORDERED in chambers at the Santa Rosa County Courthouse, Milton, Florida, this 18th day of February, 1994, *none pro tunc Feb. 17, 1994*

Paul A. Quinn
CIRCUIT JUDGE

COPIES TO:

T. Sol Johnson, Esq.
John L. Myrick, Esq.
David H. Levin, Esq.
SHERIFF, SANTA ROSA COUNTY

EXHIBIT B

IN THE CIRCUIT COURT IN AND FOR SANTA ROSA COUNTY, FLORIDA

IN RE: The Marriage of
RONALD SAMUELS,
Petitioner/Husband, and
HEATHER MARIE SAMUELS,
Respondent/Wife.

CASE NO: 92-1365-CA-01-DOM
DIVISION: A

RESPONDENT/WIFE'S ANSWER TO
PETITION FOR DISSOLUTION OF MARRIAGE

COMES NOW, the Respondent/Wife, HEATHER MARIE SAMUELS, by and through her undersigned attorney and files this Answer to the Petitioner/Husband's Petition for Dissolution of Marriage in respectively numbered paragraphs as follows:

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted.
7. Admitted.
8. Admitted.

9. Admitted that the parties entered into a prenuptial agreement on November 4, 1988. Denied that the agreement should be incorporated into a final judgment of dissolution of marriage.

10. (a) Denied.
(b) Denied.
(c) Admitted that Wife has obtained \$5,500.00 as cash advances on credit cards.

(d) Denied.

11. Denied.

SAVED
AUG 21 10 02 AM '92

12. Admitted that Wife and children no longer reside in the marital home. Denied as to the remaining portion of allegation.

13. Admitted.

14. Admitted.

COUNTERPETITION FOR DISSOLUTION OF MARRIAGE

Respondent/Wife, HEATHER MARIE SAMUELS, by and through her undersigned counsel files this Counterpetition for Dissolution of Marriage and alleges as follows:

COUNT I

1. This is a Counterpetition for a dissolution of the marriage between the Respondent/Wife, HEATHER MARIE SAMUELS, and the Petitioner/Husband, RONALD SAMUELS.

2. The Petitioner/Husband has been a resident of the State of Florida for 6 months immediately prior to the filing of this Petition.

3. The parties were married to each other on December 3, 1988, in Pensacola, Florida.

4. RONALD SAMUELS, II, whose date of birth is April 2, 1989, JOSEPH ANTHONY SAMUELS, whose date of birth is May 3, 1991, and LAUREN ANN SAMUELS, whose date of birth is May 3, 1991 are the only children born during the course of the parties' marriage. The minor children are currently temporarily residing with the Respondent/Wife and her parents at 15032 7th Avenue, N. W. Anoka, Minnesota. The Respondent/Wife alleges that the parties should share parental responsibility for the minor children with the Respondent/Wife designated as the primary residential parent, subject to the Petitioner/Husband's right of reasonable and liberal visitation.

5. The Petitioner/Husband is not an active member of any military service.

6. During the course of the marriage the parties have acquired substantial assets, both realty and personalty, including the marital home located at 4141 Madura Drive, Gulf Breeze, FL 32561.

7. The Respondent/Wife requires that the real and personal property and the parties' liabilities be equitably divided between the parties as required by the Florida Equitable Distribution Act.

8. The Respondent/Wife requires that the Petitioner/Husband be required to maintain a policy of life insurance upon his life in order to secure any support hereafter awarded by this Court.

9. The Petitioner/Husband has and is paying for health/hospitalization insurance for the benefit of the Respondent/Wife and minor children and should be required to maintain such coverage at his expense.

10. The Respondent/Wife is without the means or the ability to fully financially support herself or the parties' minor children, but the Petitioner/Husband is financially capable of providing significant support for his family.

11. The Respondent/Wife requires and is entitled to temporary, permanent, periodic and/or lump sum alimony, which the Petitioner/Husband has the ability to pay.

12. During the marriage the parties have had the benefit of a full-time nanny to assist with the care of the three minor children. The Petitioner/Husband should be required to continue paying for this service on both a temporary and permanent basis.

13. During the marriage, the Petitioner/Husband has provided the Respondent/Wife with a reliable automobile through his business, Ron Samuels Toyota, Inc. The Respondent/Wife is currently without transportation and requires that the Husband furnish her with a reliable new automobile.

14. The marriage between the parties is irretrievably broken.

15. The Respondent/Wife has retained counsel to represent her and has agreed to pay a reasonable attorney's fee for this representation. The Respondent/Wife is without the means or ability to pay the attorney's fee but the Petitioner/Husband is well able to do so.

WHEREFORE, the Respondent/Wife prays for the following:

- a) a dissolution of marriage between the parties;
- b) a fair and equal division of all marital assets and marital liabilities as provided by the Florida Equitable Distribution statute;
- c) that the parties share parental responsibility of the minor children, with Respondent/Wife designated as the primary residential parent with Petitioner/Husband's right of reasonable and liberal visitation;
- d) child support, pendente lite and permanent, in accordance with the applicable guidelines;
- e) temporary, rehabilitative, permanent and/or lump sum alimony;
- f) that the Petitioner/Husband be required to supply the Respondent/Wife with new reliable transportation;
- g) that the Petitioner/Husband be required to pay for the services of the children's nanny, on a temporary and permanent basis, as an incident of child support;

h) a reasonable award of attorney's fee and reimbursement of taxable costs incurred pendente lite and final;

i) that the Petitioner/Husband be required to maintain a sufficient life insurance policy in order to secure any support hereinafter awarded to Respondent/Wife, including alimony and/or child support;

j) that the Petitioner/Husband be required to maintain health/hospitalization insurance on the Respondent/Wife and minor children;

k) all other relief the court may deem necessary in the circumstances of this case.

* * * * *

COUNT II

16. The parties entered into an prenuptial agreement on November 4, 1988, a copy of which is attached hereto as Exhibit "A" and incorporated herein by reference.

17. The prenuptial agreement is unenforceable because:

a) it does not make fair and reasonable provisions for the Respondent/Wife,

b) the Wife did not have truly independent, competent counsel prior to execution of the prenuptial agreement,

c) there was no full financial disclosure prior to execution of the prenuptial agreement,

d) the Respondent/Wife did not have a full understanding of the rights being waived prior to executing the agreement,

e) the Respondent/Wife was four months pregnant at the time the prenuptial agreement was executed and the Respondent/Wife

executed the prenuptial agreement under conditions of extreme duress, fraud, undue influence, coercion and overreaching conduct by the Petitioner/Husband, and

f) there has been a material and substantial change of circumstances since the Respondent/Wife's execution of the prenuptial agreement, to-wit: the birth of three children.

WHEREFORE, the Respondent/Wife prays that the prenuptial agreement be set aside.

COUNT III

18. This is an action for an injunction for protection against domestic violence under Chapter 741, Florida Statutes.

19. The Wife and the minor children are temporarily residing with the Wife's parents at 15032 7th Avenue, N. W. Anoka, Minnesota.

20. The Husband resides at 4141 Madura Drive, Gulf Breeze, Florida, 32561.

21. The Husband's last known place of employment is Ron Samuels Toyota, Inc., 6130 Pensacola Blvd., Pensacola, Florida.

Physical description of Husband:

Race: White
Sex: Male
Date of birth: 4/7/48
Height: 6' 5"
Weight: 280
Eye color: Hazel
Hair color: Light Brown
Distinguishing marks or scars:
None.

Aliases of Husband: None.

22. The Wife has suffered or has reasonable cause to fear domestic violence because:

a) The Husband has held a gun to the Wife's head and ordered her to leave the marital home.

b) During the marriage the Husband has thrown the Wife to the floor and up against the wall during a fit of rage.

c) The Husband has threatened to ruin the Wife's clothes and other personal belongings.

d) The Husband has been verbally abusive toward the Wife on several occasions.

e) Since the Wife has relocated to Minnesota, the Husband has repeatedly and constantly telephoned the Wife at the home of her parents.

This harassment was so severe that it was necessary for Wife's parents to change their telephone number to an unlisted number on Thursday, August 6, 1992.

On information and belief, the Husband thereupon called the Minnesota telephone company, US West, represented falsely to them that he was with the Fraud Department AT&T, and fraudulently obtained from US West the unlisted telephone number for Wife's parents, calling several times per hour and allowing the phone to ring 20 or more times per call.

As a result, it was necessary for the Wife's parents to obtain yet another unlisted telephone number.

This continued harassment has put the Wife in even greater fear for her personal safety and the personal safety of the minor children and her parents.

(f) On numerous occasions, the Husband has threatened to retaliate against the Wife if she left him by hurting the Wife's parents.

(g) On or about December 28 or 29, 1990, when the Wife's

parents were visiting with the parties in Florida, the Husband became enraged when the Wife's father did not hear the dog scratching at the door. The Husband pulled a knife out of his pocket and attempted to stab Wife's father. The police were called and the Husband left with a knife and a gun before the police arrived.

(h) Wife fears that the Husband will retaliate against her by attacking her parents or trying to take the children away from her.

23. The Wife alleges the following additional specific facts:

a) The Wife is the custodian of minor children whose names and ages are as follows: RONALD SAMUELS, II, whose date of birth is April 2, 1989, JOSEPH ANTHONY SAMUELS, whose date of birth is May 3, 1991, and LAUREN ANN SAMUELS, whose date of birth is May 3, 1991 are the only children born during the course of the parties' marriage.

b) Because of the physical assaults and the Husband's abusive behavior, the Wife fears for her safety and the safety of the children.

24. The Wife genuinely fears domestic violence by the Husband.

WHEREFORE, the Wife seeks an injunction:

a) Immediately restraining the Husband from committing any acts of domestic violence.

b) Awarding temporary custody of the minor children of the parties to the Wife.

c) Providing any terms the Court deems necessary for the

protection of a victim of domestic violence, including any injunctions or directives to law enforcement agencies.

* * * * *

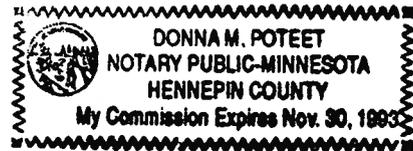
Heather M. Samuels
HEATHER MARIE SAMUELS

STATE OF Minnesota
COUNTY OF Hennepin

BEFORE ME, the undersigned authority, personally appeared the Respondent/Wife, HEATHER MARIE SAMUELS, who after being duly sworn by me, says that she is the Wife in the above-styled cause and that all matters and things contained in the foregoing Counterpetition for Dissolution of Marriage are true and correct.

This the 19th day of August, 1992.

Donna M. Poteet
NOTARY PUBLIC, Hennepin County
MY COMMISSION EXPIRES: 11/30/93
MY COMMISSION NUMBER: 6126947
PERSONALLY KNOWN OR PRODUCED
IDENTIFICATION _____ TYPE OF
IDENTIFICATION PRODUCED _____



* * * * *

I HEREBY CERTIFY that a true and correct copy of the foregoing was this the 20th day of August, 1992, furnished to T. Sol Johnson, Esquire, Johnson, Green & Locklin, P.A., Post Office Box 605, Milton, FL 32570, by U. S. Mail.

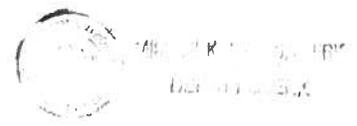
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Christopher T. Pierson, Ph.D. (State Bar No. 021977)

Attorneys for Defendant/Counterclaimant

DEC 06 2003



SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

HEATHER MARIE GROSSMAN, an
unmarried woman, individually on behalf of
her minor children, RONALD GROSSMAN,
JOSEPH GROSSMAN and LAUREN
GROSSMAN,

Plaintiff,

vs.

JOHN NORMAN GROSSMAN, an
unmarried man,

Defendant.

No. CV 2002-021810

**DEFENDANT/COUNTERCLAIMANT'S
REPLY IN SUPPORT OF MOTION IN
LIMINE RE: ADMISSION OF
HEATHER M. GROSSMAN'S PRIOR
CONVICTION FOR CRIMINAL
CONTEMPT; AND DEFENDANT/
COUNTERCLAIMANT' RESPONSE TO
PLAINTIFF/COUNTERDEFENDANTS'
CROSS-MOTION IN LIMINE**

(Assigned to The Honorable Jonathan H.
Schwartz)

(Oral Argument Requested)

JOHN NORMAN GROSSMAN, an
unmarried man,

Defendant/Counterclaimant,

vs.

HEATHER MARIE GROSSMAN, an
unmarried woman; RALPH STEPHENS and
FLORENCE STEPHENS, husband and wife;
DENISE LYNN FOSTER, an unmarried
woman,

Plaintiffs/Counterdefendants.

Defendant/Counterclaimant John Grossman ("John") hereby replies to
Plaintiff/Counterdefendant Heather Grossman's ("Heather") response to John's Motion *in*
limine concerning Heather's prior conviction for criminal contempt. John also responds to
Heather's Cross-Motion *in limine* concerning the same topic. The reply and the response to

1 the cross-motion are supported by the following Memorandum of Points and Authorities and
2 attached exhibits.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. It Was Appropriate For John To File A Motion *In Limine*.**

5 Heather states in her Response/Cross Motion to John's Motion *in limine* that such
6 motions are "by definition" designed to preclude the admission of evidence, and that it is
7 inappropriate for John to move *in limine* for the admission of evidence. "*In limine*" is a
8 Latin phrase that means, "at the outset." *See* Black's Law Dictionary, 7th ed., p. 791; *see*
9 *also State v. Rodrigues*, 126 Ariz. 28, 30, 612 P.2d 484, 486 (Ariz. 1980) (*in limine* means
10 on or at the threshold; at the very beginning, preliminary). The authority for filing motions
11 *in limine* is found in Rule 104(a) of the Rules of Evidence, which allows courts to resolve
12 preliminary questions regarding evidence, and in Rule 103(c) of the Rules Evidence, that
13 requires courts to conduct proceedings to prevent inadmissible evidence from being
14 suggested to the jury. *See* McLaughin, *Federal Evidence Practice Guide*, § 3.04[4], page 3-
15 57 (1996). Motions *in limine* may be used offensively to pre-qualify evidence (as in the case
16 with John's motion), or they may be used defensively to request a pretrial ruling precluding
17 certain evidence (as in the case with Heather's cross-motion). *Id.*; *see also* Saltzburg,
18 *Federal Rules of Evidence Manual*, § 103.02[12], page 103-20 (8th ed. 2002); Dombroff,
19 *Trial Objections*, § 110, page 1-10 (2nd ed. 1998). In other words, it was entirely appropriate
20 for John to file a motion *in limine* seeking a ruling on the use of Heather's criminal contempt
21 conviction, and this Court may properly grant John's motion if it finds that his motion is well
22 taken.

23 **II. Allowing John To Impeach Heather With Her Prior Conviction For Criminal**
24 **Contempt Will Not Expand The Trial Into Irrelevant And Collateral Matters.**

25 Heather asserts in her Response/Cross Motion that if this Court permits John to
26 impeach her with her prior conviction for criminal contempt, it "will entail wholesale

1 immersion in facts and circumstances of Heather's divorce proceedings from Ron Samuels."
2 Heather is mistaken.¹

3 Rule 609 only permits the admission of evidence of certain criminal convictions of a
4 witness when offered to impeach that witness by proving character for truthfulness.
5 Moreover, even when a court allows a party to impeach a witness with a prior conviction,
6 only limited information about that conviction and the circumstances of the crime are
7 admissible. *See Wright & Gold, Federal Practice and Procedure: Evidence*, § 6134, pp.
8 221-28 (1993). In Arizona, when evidence of a conviction is elicited for impeachment
9 purposes, the impeaching party is limited to showing the fact of conviction and the name,
10 place, and date of the crime. *See State v. Tucker*, 157 Ariz. 433, 448, 759 P.2d 579, 594
11 (Ariz. 1988); *State v. Dunlap*, 187 Ariz. 441, 446, 930 P.2d 518, 538 (Ariz. App. 1996), *cert.*
12 *denied*, 520 U.S. 1275 (1997); Livermore, *Arizona Laws of Evidence*, § 609.1, pp. 237-38
13 (4th ed. 2000). Further, the party impeached with a prior conviction is not permitted to
14 explain the circumstances of the prior conviction for fear of opening up a reinvestigation of
15 the former case. *See State v. Britson*, 130 Ariz. 380, 383, 636 P.2d 628, 631 (Ariz. 1981);
16 *State v. Harris*, 152 Ariz. 150, 153, 730 P.2d 859, 861 (Ariz. App. 1986); *State v. Pavao*, 23
17 Ariz. App. 65, 67, 530 P.2d 911, 913 (Ariz. App. 1975). If this Court allows John to
18 impeach Heather with her prior conviction for criminal contempt it will not lead to a retrial
19 of her divorce from Ron Samuels.

20 **III. Heather's Claim Concerning Her Deposition In CV2003-011311 Is A Red**
21 **Herring.**

22 In her Response/Cross-Motion, Heather claims that the question asked and the
23 exhibits marked during her deposition in *John Grossman v. Thomas C. Green and Heather*
24 *Grossman*, CV2003-011311 (the "Green Litigation") proves that John intends to rehash her

25 ¹ Our motion and Heather's cross-motion address impeachment pursuant to Rule 609.
26 Whether John may offer into evidence the facts and circumstances of the Heather/Samuels
divorce is not at issue and should not be an issue until discovery is taken.

1 substantial amount of money from John is through this litigation. The same factors that
2 convinced Heather to lie in her litigation with Samuels are present in this litigation.

3 It is rare for a party to be convicted of falsely testifying to a court, and it is even rarer
4 for a party to be jailed for such conduct. Heather was not only convicted of criminal
5 contempt, she was sentenced to and served 48 hours in jail. Her conviction is neither trivial
6 nor common place.

7 Finally, Heather claims that this Court should consider that she is now a quadriplegic
8 and that this fact should be considered when deciding whether her past mistakes are an
9 accurate reflection of her current character. The events of October 14, 1997, in which
10 Heather and John were both shot by men hired by Ron Samuels, are tragic. There is no
11 doubt that this was a life-changing event for both Heather and John. These circumstances
12 notwithstanding, Heather's current condition does not alter the fact that in litigation almost
13 identical to this litigation she decided to testify falsely in a court proceeding.

14 As set forth in John's Motion *in limine*, when considering whether the probative value
15 of Heather's prior conviction substantially outweighs its prejudicial effect, this Court should
16 consider the following. First, Heather's prior conviction is for testifying falsely in a court
17 proceeding and it therefore has great impeachment value. Next, Heather was convicted of
18 perjury in a suit in which she made accusations nearly identical to the accusations she is
19 sponsoring in this litigation. Finally, this is a "he said, she said" matter and, if this case
20 proceeds to a jury trial, it will likely be decided on the basis of whether the jury believes the
21 testimony of John or Heather. Nothing set forth in Heather's Response/Cross-Motion
22 suggests that impeaching Heather with her prior conviction would be unfairly prejudicial,
23 and John should be permitted to impeach her with her prior conviction for criminal
24 contempt.

1 **V. Conclusion.**

2 For the reasons set forth above, John should be permitted to impeach Heather with her
3 prior conviction for testifying falsely regardless of when she testifies in this matter.

4 DATED this 5th day of December, 2003.

5 LEWIS AND ROCA LLP

6
7 By 
8 Robert H. McKirgan
9 Frederick R. Petti
Christopher T. Pierson
Attorneys for Defendant/Counterclaimant

10 COPY of the foregoing hand-delivered
11 this 5th day of December, 2003, to:

12 Honorable Jonathan H. Schwartz
13 Maricopa County Superior Court
201 West Jefferson, Room 413
Phoenix, Arizona 85003

14 Bryan F. Murphy
15 Burch & Cracchiolo, P.A.
702 East Osborn Road, Suite 200
16 Phoenix, Arizona 85014
Attorney for Heather Grossman, Ralph Stephens, and Florence Stephens

17 COPY of the foregoing mailed this
18 5th day of December, 2003, to:

19 Christopher D. Payne
20 Law Office of Christopher D. Payne
3315 East Vogel
Phoenix, Arizona 85028-0001
21 Attorney for Denise Foster

22 
23 _____

EXHIBIT A

1 divorce from Ron Samuels here.² That claim is a Red Herring. In the Green Litigation, John
2 claims that he and Heather were concerned that if Samuels had access to cash that Samuels
3 would try again to kill them. *See* First Amended Complaint, Request for Injunctive Relief
4 (attached hereto as Exhibit A). John claims further that he and Heather hired Thomas C.
5 Green to locate and seize Samuels' money in the Cayman Islands, and that once the money
6 was seized it was to be used to pay Green's fees and other costs incurred by John in his effort
7 to bring Samuels to justice. *Id.* In her Answer to the Green Litigation, Heather claims that
8 she is entitled to the money seized by Green for back child support owed by Samuels, and
9 she denies that Samuels was a dangerous man capable of killing her and John, and that she
10 and John went after Samuels' money to help ensure their safety. *See* Separate Answer,
11 Counterclaim and Cross-Claim of Heather Grossman (attached hereto as Exhibit B). Given
12 Heather's Answer in the Green Litigation, the nature of her divorce from Samuels is highly
13 relevant and there is nothing untoward in John asking about that divorce in the context of the
14 Green Litigation.

15 **IV. John Should Be Permitted To Impeach Heather With Her Prior Conviction**
16 **For Criminal Contempt.**

17 Heather claims that this Court should not permit John to impeach her with her prior
18 conviction for criminal contempt because she *only* lied in her divorce proceedings from Ron
19 Samuels because those proceedings were contentious, and because the court in Florida *only*
20 jailed her for 48 hours. Contrary to Heather's claims, these factors argue for the admission
21 of her prior conviction.

22 The instant litigation is also contentious. Heather has accused John of horrific acts,
23 first to the Paradise Valley police and then in this litigation. Additionally, she received a
24 very modest award in her divorce proceedings with John, and her only hope of getting a

25 _____
26 ² John is represented in the Green Litigation by Edward Voss from the law firm of Gallagher
& Kennedy.

1 Edward C. Voss (002386)
 2 GALLAGHER & KENNEDY, P.A.
 3 2575 East Camelback Road
 4 Phoenix, Arizona 85016-9225
 5 (602) 530-8167
 6 Attorneys for Plaintiff

7 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
 8 IN AND FOR THE COUNTY OF MARICOPA

9 JOHN GROSSMAN,

10 Plaintiffs,

11 vs.

12 THOMAS C. GREEN AND HEATHER
 13 GROSSMAN,

14 Defendants.

No.

**FIRST AMENDED COMPLAINT,
 REQUEST FOR INJUNCTIVE
 RELIEF
 (Contract, Non Classified Civil)**

GALLAGHER & KENNEDY, P.A.
 2575 EAST CAMELBACK ROAD
 PHOENIX, ARIZONA 85016-9225
 (602) 530-8000

15 Plaintiff John Grossman for his complaint against defendants Thomas C. Green
 16 (hereinafter "Green") and Heather Grossman (hereinafter "Heather") hereby alleges as
 17 follows:

JURISDICTION

18 1. The defendants, and each of them, have caused events to occur in this state
 19 out of which this cause arose.
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FACTUAL ALLEGATIONS COMMON TO ALL COUNTS

2. Heather and Ronald Samuels (hereinafter "Samuels") were involved in protracted legal conflict over the dissolution of their marriage as well as the custody of their children. Heather was ultimately awarded custody of their three minor children (hereinafter "the children"). The relationship between Heather and Samuels remained strained and the conflict over custody/visitation with the children continued unabated.

3. During the course of the proceedings, the judge assigned to the case found Heather guilty of direct and indirect criminal contempt for lying under oath to the court on two occasions. Heather was remanded to the custody of the Santa Rosa County Courthouse in Milton, Florida as punishment for criminal contempt.

4. Heather met Grossman in Minneapolis, Minnesota. Their relationship grew positively and quickly involved the children. This relationship and the attention the children were seeking and receiving from Grossman was distressing to Samuels. Samuels' displeasure increased as the relationship between Grossman, Heather, and the children prospered. The communications from Samuels soon included threats of physical harm. Samuels' threats notwithstanding, the relationship between Grossman, Heather, and the children continued to grow.

5. Heather and Grossman married on June 8, 1997 in Palm Beach, Florida and since said date have been and are now husband and wife.

6. Heather's marriage to Grossman enraged Samuels. The threats now included death threats. Heather knew Samuels had a history of violent outbursts and believed that he would follow through with his threats to harm her and Grossman. Heather believed that

1 Samuels was a drug dealer and she described finding large sums of cash in their residence
2 when they were married. This vocation, she believed, allowed Samuels access to the type
3 of people who would not hesitate to commit murder for the most nominal consideration.
4 Heather convinced Grossman that Samuels' threats were real and he too became
5 concerned, if not afraid for their well being.

6 7. Heather's fears compelled her to report her fears to a judge in Boca Raton,
7 Florida. Several days later, on October 14, 1997, a green Ford Thunderbird pulled
8 alongside their car and opened fire with a 30.06 caliber rifle. One shot severely injured
9 Heather's spinal column and another impacted Grossman's jaw. Heather is a quadriplegic
10 requiring 24 -hour care. Grossman has suffered through multiple reconstructive surgeries
11 from his bullet wound.

12 8. The perpetrators of the vicious crime were apprehended and implicated
13 Samuels. The two shooters and the contracting party obtained immunity to provide
14 testimony necessary to convict Samuels of two counts of attempted murder; an aggravated
15 offense because it was an attempted murder-for-hire. Samuels would have none of that so,
16 having learned of the apprehensions and the deals that were made, he headed South.
17 Mexico, it appears is a place Samuels knows well. Heather's beliefs regarding Samuels'
18 vocation during their marriage were vindicated with the arrest of Samuels in Mexico for
19 drug trafficking offenses. Samuels was tried, convicted, and sentenced to prison in Mexico
20 for his offenses and he remains incarcerated in Mexico to this day. The United States
21 Government and officials from Florida are negotiating with Mexican authorities to have
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1 Samuels delivered to their custody upon release so he can be prosecuted for the cowardly
2 crimes visited upon Heather and Grossman.

3 9. Heather nearly died. Grossman and his family spent over one million dollars
4 during her first year for medical care and have spent at least \$250,000 in each following
5 year for her care. At that time she had two very good reasons to survive: her children and
6 her new husband, all of whom supported her consistently. During this year, the
7 relationship between Grossman and the children grew even stronger.

8 10. As Heather's strength grew, she and Grossman discussed the reality that
9 even though Samuels was in prison he could easily contract with others to finish what he
10 had attempted. Heather knew Samuels had large amounts of cash at the house and had
11 always believed he maintained substantial accounts offshore. The concern was that if
12 Samuels had access to funds, he would use that money to have them killed.

13 11. Heather and Grossman discussed the need to try to find the offshore accounts
14 and, if found, to somehow keep Samuels from accessing the funds. Heather and Grossman
15 agreed that an investigation should be undertaken to determine if funds could be found.

16 12. The marital estate of Grossman and Heather had no community funds. All
17 the income to the marital estate derived from Grossman's separate assets. Therefore, all
18 funds utilized to search for offshore accounts would come from Grossman's separate
19 estate. Heather and Grossman knew that a search for offshore accounts would be
20 expensive and if any were found it would require a multiple of the locating expense to
21 actually seize and recover the funds. It was understood and agreed that if Grossman
22

1 expended the funds and funds were recovered they would be first utilized to repay
2 Grossman for the costs of finding and recovering the funds.

3 13. The Grossman family hired Thomas C. Green, Sidley Austin Brown &
4 Wood LLP, located in Washington DC. Mr. Green has represented clients in many
5 significant criminal cases and congressional inquiries and is a highly experienced and
6 highly regarded trial lawyer.

7 14. Heather was right. As a result of substantial efforts, Green and his
8 investigators were able to find account(s) in the Cayman Islands belonging to Samuels.
9 The account(s) totaled in excess of \$500,000. The task then turned from finding to
10 acquiring the funds. All funds realized were to be Grossman's.

11 15. Numerous possible avenues were explored. Among them were suing
12 Samuels civilly for the shootings and/or purchasing outstanding debts (notes) owed by
13 Samuels to others. Any judgment in the civil action or on the note(s) could then be used to
14 attach the funds offshore. These plans were rejected because they would take too much
15 time and would involve the expenditure of substantial additional funds. The idea of
16 reducing Samuels' outstanding child support obligation to a judgment and attaching the
17 funds with a child support judgment took root. Samuels had abdicated his parental
18 responsibility to support his children for years and because Heather had no need to and
19 made no effort to collect the payments they accrued and totaled approximately \$313,000
20 including interest. Through Green's efforts, approximately \$350,000 was seized from the
21 Cayman accounts and Green retains control of that sum. The Grossman family expended
22 over \$300,000 to find and successfully attach the funds and to pursue extradition of

1 Samuels upon his release. Grossman is still expending funds to gain control of the funds
2 personally and to insure that Samuels will be returned to the United States for trial upon
3 his release from prison in Mexico.

4 16. During the entire period of time covered in the child support judgment the
5 children were supported by Grossman from his separate funds. Indeed Grossman has
6 supported the children continuously from the time Heather and Grossman began dating
7 until the date of their separation. The children still live with their mother in the home
8 Grossman purchased when they moved to Arizona. The amount contributed by Grossman
9 to support the children far exceeds the amount recovered from Samuels through the
10 Cayman actions.

11 17. Samuels had a legal obligation to support his children and he abdicated that
12 responsibility. Grossman has financially supported the children of the marriage of Heather
13 and Samuels and the law implies a promise by the irresponsible parent(s) to reimburse
14 Grossman for providing the necessities to the children.

15 18. Irreconcilable differences have arisen between Heather and Grossman.
16 Indeed, this is a massive understatement. On June 3, 2002, Heather filed for a Petition for
17 Dissolution of marriage. On June 4, 2002, Heather filed a request for temporary orders.
18 The request, among other things alleged that Grossman had committed multiple acts of
19 emotional and physical violence against Heather, who was helpless to defend herself.
20 Grossman was ordered out of his house, where Heather and the children remain to this day.
21 Grossman maintains the home, pays for Heather's nursing care and provides for all
22 reasonable needs of Heather.

1 19. In addition to filing her complaint, Heather contacted the Town of Paradise
2 Valley (hereinafter "Paradise Valley") police to report Grossman's alleged actions. The
3 Paradise Valley police investigated the allegations for months. Paradise Valley could have
4 filed misdemeanor charges but chose to submit its findings and recommendations to the
5 county attorney for review. The county attorney reviewed the 1000 page report and the
6 county attorneys' office conducted its own investigation. Investigators hired by Grossman
7 cooperated and supplemented the information developed by the county attorney and
8 Paradise Valley investigations. The county attorney took no action on the allegations and
9 the time to do so has expired. Paradise Valley had until June 2, 2003 to file any action it
10 felt appropriate and it declined also.

11 20. Unable to persuade local, county, and federal law enforcement officials that
12 there was probable cause to proceed against Grossman, Heather turned elsewhere. Heather
13 has filed a civil complaint and has been successful in convincing one, non-subscriber
14 weekly to print her allegations. Grossman will vigorously defend the civil suit and will
15 pursue those who have slandered him.

16 21. Heather will not abide the agreement of the parties and have the Cayman
17 funds transferred to Grossman for reimbursement of the funds expended to find and
18 acquire the Cayman funds and the funds expended to support the children. Green will not
19 voluntarily hold the Cayman funds absent the filing of court action.

20 22. Without court intervention, the funds will be paid to Heather and they will be
21 lost despite the ultimate vindication of this complaint. Heather has shown through her
22 actions that she has no intention of complying with the agreement of the parties and the

1 funds will be dissipated. Once dissipated, Heather has no assets or funds from which
2 Grossman could satisfy his judgment.

3 CLAIMS FOR RELIEF

4 **COUNT ONE**

5 23. Green holds funds owned by Grossman. The vehicle used to secure the
6 funds was a child support judgment. The child support judgment was utilized as simply
7 the most expeditious way to deny Samuels access to the funds. The agreement between
8 Grossman and Heather, as understood by Green, was that these funds would be paid first to
9 Grossman to reimburse him for the costs of locating and securing the funds. By her
10 actions, Heather has or will refuse to pay the funds to Grossman as agreed. Green will not
11 pay the funds to Grossman without agreement of Heather or the filing of an action seeking
12 his compliance.

13 24. To enforce the agreement of the parties and to obtain complete justice, it is
14 requested that the court create and imposes a constructive trust on the Cayman proceeds.
15 A constructive trust may be imposed in any case where there is a wrongful acquisition or
16 detention of property to which another is entitled. In the alternative, the court should grant
17 the injunctive relief sought by separate petition and order that Green deposits the Cayman
18 funds into a restricted, interest bearing account to await disposition following trial or
19 further order of the court.
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COUNT TWO

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25. Heather has breached her contract with Grossman to reimburse him for the sums expended to find and recover the Cayman funds. If Heather obtains the Cayman funds, the funds will be dissipated and there is no other asset from which Grossman's judgment may be satisfied. If the funds are transferred to Heather, by that fact alone, Heather will be converting Grossman's property illegally and that act will give rise to a new claim. The funds should not be transferred to Heather unless they are transferred to her either in the form of an interest bearing restricted account to await final disposition through court order. Alternatively, a constructive trust should be created and imposed.

COUNT THREE

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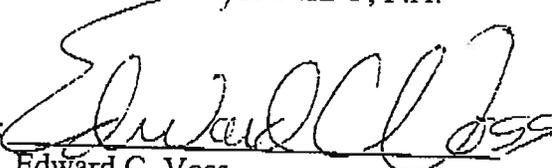
26. To allow Heather to possess and dissipate the Cayman funds would result in unjust enrichment. A constructive trust may be created where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that she would be unjustly enriched if she were permitted to retain the property. The Cayman funds are Grossman's funds. Where possession or title to property is acquired by one person under circumstances that she is under a duty to surrender it, a constructive trust immediately arises.

WHEREFORE, Grossman respectfully requests that this court immediately order that the funds held by Green be interplead into the court to await disposition after trial. In the alternative, Green could deposit the funds into an interest bearing restricted account to await further order of the court. It is also requested that this court enter judgment for

1 Grossman and against Heather in such sum that will reimburse him for the support he has
2 provided for her children as well as the costs incurred in recovering the Cayman funds.
3 Grossman also seeks recovery for his costs and attorneys' fees incurred in pursuing this
4 action.

5 DATED this _____ day of July 2003.

6 GALLAGHER & KENNEDY, P.A.

7
8 By: 

9 Edward C. Voss
10 2575 East Camelback Road
11 Phoenix, Arizona 85016-9225
12 Attorneys for Plaintiff
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EXHIBIT B

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BURCH & CRACCHIOLO, P.A.
702 East Osborn Road
Phoenix, Arizona 85014
Telephone (602) 274-7611

Bryan F. Murphy, SBA #006414
Daryl Manhart, SBA #005471
Jake D. Curtis, SBA #019726

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

JOHN GROSSMAN

Plaintiff,

vs.

THOMAS C. GREEN AND HEATHER
GROSSMAN,

Defendants.

HEATHER MARIE GROSSMAN,

Counterclaimant/Crossclaimant,

vs.

JOHN NORMAN GROSSMAN,

Counterdefendant, and

THOMAS C. GREEN,

Crossdefendant.

No. CV 2003-011311

SEPARATE ANSWER,
COUNTERCLAIM AND
CROSSCLAIM OF HEATHER
GROSSMAN

ANSWER

For her answer to plaintiff's First Amended Complaint, defendant Heather
Grossman admits, denies, and affirmatively alleges as follows:

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I.

Denies all allegations of the First Amended Complaint except as expressly admitted herein.

II.

Denies the allegations of paragraph 1 as pleaded, affirmatively alleging that this court has personal and subject matter jurisdiction over this complaint.

III.

Admits the allegations of paragraph 2, although there is no identification of time.

IV.

Denies the allegations of paragraph 3 as pleaded, affirmatively alleging that the terms of the Florida court's orders speak for themselves.

V.

Admits the first sentence of paragraph 4, assuming Grossman refers to John Grossman. Lacks knowledge of, and therefore denies, the third, fourth, and fifth sentences of paragraph 4. Denies all remaining allegations of paragraph 4.

VI.

Admits the allegations of paragraph 5.

VII.

Lacks knowledge of, and therefore denies, the first sentence of paragraph 6. Admits the allegations of the fourth sentence of paragraph 6 that Ron Samuels kept large sums of cash around the house. Denies all remaining allegations of paragraph 6.

VIII.

Admits the allegations of the first sentence of paragraph 7 that Heather reported to the Florida judge concerns that Ron Samuels would harm her. Admits the second, third and fourth sentences of paragraph 7. Denies all remaining allegations of

1 paragraph 7.

2 IX.

3 Admits the allegations of paragraph 8 that three conspirators were
4 apprehended and were granted immunity, and that Samuels fled to Mexico, where he was
5 arrested and incarcerated. Lacks knowledge of, and therefore denies, the fourth and
6 seventh sentences of paragraph 8. Denies all remaining allegations of paragraph 8.

7 X.

8 Admits the first sentence of paragraph 9. Admits the allegations of the
9 second sentence of paragraph 9 that John Grossman's parents paid for some of her
10 healthcare; denies the allegations of the second sentence of paragraph 9 that John
11 Grossman paid for her healthcare; lacks knowledge of, and therefore denies, the
12 allegations of the second sentence of paragraph 9 as to the specific sums paid. Moves to
13 strike the third sentence of paragraph 9 as argumentative and editorial commentary rather
14 than factual pleading. Denies all remaining allegations of paragraph 9.

15 XI.

16 Admits the second sentence of paragraph 10. Denies all remaining
17 allegations of paragraph 10.

18 XII.

19 Admits the second sentence of paragraph 11. Denies all remaining
20 allegations of paragraph 11.

21 XIII.

22 Denies the allegations of paragraph 12.

23 XIV.

24 Admits the allegation of paragraph 13 that Thomas C. Green was retained.
25 Denies all remaining allegations of paragraph 13.

26

1 XV.

2 Admits the first three sentences of paragraph 14. Denies all remaining
3 allegations of paragraph 14.

4 XVI.

5 Admits the allegations of paragraph 15 that Heather was involved in
6 discussions with Thomas Green about seizing Samuels' offshore accounts to satisfy
7 Samuels' outstanding child support obligations, that some \$350,000.00 was seized, and
8 that Green retains possession of those funds. Denies all remaining allegations of
9 paragraph 15.

10 XVII.

11 Admits the allegations of the first sentence of paragraph 16 that Grossman
12 voluntarily provided financial support to Heather Grossman's children during the time
13 period covered by the child support judgment. Admits the allegations of the third
14 sentence of paragraph 16 that the children reside with their mother in a residence which
15 was purchased after Heather and Grossman moved to Arizona. Denies all remaining
16 allegations of paragraph 16.

17 XVIII.

18 Admits the allegations of the first sentence of paragraph 17. Admits the
19 allegations of the second sentence of paragraph 17 that Grossman has voluntarily provided
20 financial support to Heather's children. Denies all remaining allegations of paragraph 17.

21 XIX.

22 Admits the allegations of the first sentence of paragraph 18. Moves to strike
23 the second sentence of paragraph 18 as argumentative and editorial commentary rather
24 than factual pleading. Admits the allegations of the third and fourth sentence of paragraph
25 18. Admits that Heather and her children continue to reside in a residence which was
26 purchased after Heather and Grossman moved to Arizona. Denies all remaining

1 allegations of paragraph 18.

2 XX.

3 Admits the allegations of paragraph 19 that the Paradise Valley Police
4 Department investigated abuse by Grossman and submitted their recommendation that
5 felony charges be filed against Grossman to the Maricopa County Attorney, who to date
6 has not filed charges. Denies all remaining allegations of paragraph 19.

7 XXI.

8 Admits the allegations of paragraph 20 that Heather filed a civil complaint
9 against Grossman. Denies all remaining allegations of paragraph 20.

10 XXII.

11 Admits the allegations of paragraph 21 that Heather will not consent that
12 funds collected for the benefit of her children pursuant to a judgment against Samuels for
13 child support be turned over to Grossman, affirmatively alleging that there never was an
14 agreement between the parties to this effect. Lacks knowledge of, and therefore denies,
15 the second sentence of paragraph 21. Denies all remaining allegations of paragraph 21.

16 XXIII.

17 Denies the allegations of paragraphs 22, 23, 24, 25, and 26.

18 AFFIRMATIVE DEFENSES

19 For her first affirmative defense, defendant alleges failure to state a claim
20 upon which relief can be granted.

21 For her second affirmative defense, defendant asserts that plaintiff lacks
22 standing as the real party in interest to prosecute the claims asserted.

23 For her third affirmative defense, defendant asserts failure to join parties
24 indispensable to just adjudication of this cause.

25 For her fourth affirmative defense, defendant asserts unclean hands.

26 For her fifth affirmative defense, defendant asserts the statute of limitations.

1 For her sixth affirmative defense, defendant asserts the statute of frauds.
2 For her seventh affirmative defense, defendant asserts failure of
3 consideration.

4 For her eighth affirmative defense, defendant asserts issue and/or claim
5 preclusion, or splitting of a cause of action.

6 WHEREFORE, having fully answered plaintiff's complaint, defendant
7 Heather Grossman prays that the complaint against her be dismissed and that plaintiff take
8 nothing thereby; and that Heather Grossman be awarded her costs and attorneys' fees
9 incurred in this matter arising out of contract pursuant to A.R.S. § 12-341.01(A).

10 COUNTERCLAIM AND CROSSCLAIM

11 For her Counterclaim and Crossclaim, Heather Marie Grossman alleges as
12 follows:

13 1. Counterclaimant/Crossclaimant Heather Marie Grossman is a
14 resident of Maricopa County, Arizona, and is the natural mother and sole custodian of her
15 minor children Ronald Grossman, Lauren Grossman and Joseph Grossman.

16 2. Counterdefendant John Norman Grossman was at all relevant times
17 a resident of Maricopa County, Arizona.

18 3. Crossdefendant Thomas C. Green is an attorney who maintains law
19 offices in Washington, District of Columbia, and who provided legal services to Heather
20 Grossman in the State of Arizona.

21 4. In or about 2001, Heather Grossman secured a judgment in Milton
22 County, Florida, in the approximate amount of \$313,000.00 against Ronald Samuels, the
23 natural father of her three children, for delinquent child support.

24 5. Crossdefendant Thomas C. Green was retained to assist in collection
25 of the judgment for child support against Ronald Samuels and succeeded in collecting
26 approximately \$350,000.00 from Samuels which, upon information and belief, is being

1 held in the trust account of Thomas C. Green's law firm pending resolution of this
2 dispute.

3 6. The funds at issue were collected from Ronald Samuels solely for the
4 purpose of supporting Heather Grossman's children pursuant to a valid judgment for
5 delinquent child support, and Heather Grossman is entitled to exclusive possession of the
6 funds at issue as the mother and legal custodian of her children.

7 7. As set forth in his First Amended Complaint in this matter, John
8 Grossman has wrongfully claimed entitlement to the funds at issue. A concrete
9 controversy has arisen between Heather Grossman on one part and John Grossman on the
10 other part regarding their respective claims of entitlement to the funds at issue, which
11 dispute is justiciable under the Declaratory Judgment Act, A.R.S. § 12-1831 *et seq.*

12 8. Heather Grossman is entitled to a declaration from this court that she
13 is entitled to possess and control all funds collected from Ronald Samuels by Thomas C.
14 Green in satisfaction of the judgment for delinquent child support.

15 9. Because John Grossman's wrongful claim of entitlement to the funds
16 at issue purports to arise out of contract, Heather Grossman is entitled to an award of her
17 attorneys' fees incurred in this matter pursuant to A.R.S. § 12-341.01(A).

18 WHEREFORE, Counterclaimant/Crossclaimant Heather Grossman prays
19 relief against Counterdefendant John Grossman and Crossdefendant Thomas C. Green as
20 follows:

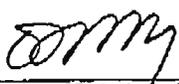
21 (1) For a declaration that Heather Grossman is entitled to exclusive
22 control and possession of all funds collected from Ronald Samuels by Thomas C. Green
23 in satisfaction of the judgment for delinquent child support, and that John Grossman has
24 no right or claim to the funds at issue;

25 (2) For an order that Thomas C. Green forthwith remit to Heather
26 Grossman all such funds in his possession and control, and any interest earned thereon;

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RESPECTFULLY SUBMITTED this 30 day of July, 2003.

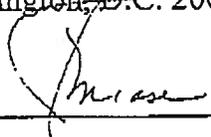
BURCH & CRACCHIOLO, P.A.

By: 
Bryan F. Murphy
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Phoenix, Arizona 85014
Attorneys for Defendant/
Counterclaimant/Crossclaimant
Heather Grossman

Copy of the foregoing mailed
this 30 day of July, 2003, to:

Edward C. Voss
GALLAGHER & KENNEDY, P.A.
2575 East Camelback Road
Phoenix, Arizona 85016-9225

Thomas C. Green
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OFFENSIVE USE OF MOTIONS *IN LIMINE*

By Frederick R. Petti and Robert H. McKirgan

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We recently handled a civil matter in which our client was alleged to have mistreated his former spouse. During the investigation of the spouse's case, we discovered that the spouse had made similar claims of mistreatment during her divorce proceeding against her first husband. Moreover, we discovered that the spouse had been convicted of criminal contempt during those proceedings, and that the court had sentenced her to jail for a period of 48 hours. The court based its findings on false testimony provided by the spouse and the spouse's solicitation of a third party to commit perjury. Given the great impeachment value of the spouse's prior conviction, as well as the similarity between the matter in which she perjured herself and the case we were defending, we were excited to have this evidence and wanted to use it if the case was ever tried.

However, from an evidentiary standpoint, there was a problem with the spouse's conviction. Even though the date of the spouse's criminal contempt conviction was still less than 10 years old, the 10th anniversary of the conviction would occur prior to the start of the trial in the matter we were handling. We knew that the Arizona Rules of Evidence provide that any conviction that is more than 10 years old is presumptively inadmissible unless the proponent gives the adverse party sufficient advance written notice to contest the use and the court then determines that the probative value of the prior conviction substantially outweighs the prejudicial effect.¹ Because this was an evidentiary issue, we decided to file a motion *in limine* asking the court to make a determination of the admissibility of the spouse's prior conviction.

The lawyer on the other side of the case was a very seasoned and well-respected practitioner, a lawyer to whom we regularly referred matters. Consequently, we were surprised when we saw his response to our motion *in limine*. In that response, the lawyer wrote that motions *in limine* are "by definition" designed to preclude the admission of evidence, and that it was inappropriate for us to move *in limine* for the admission of evidence. We simply could not believe that our opponent did not realize that motions *in limine* are used both to prequalify evidence (offensively) and to request a pretrial ruling precluding certain evidence (defensively).²

Because we were so surprised by our opponent's response to our use of an offensive motion *in limine*, we thought it might be helpful to remind litigators that such motions can be effective tools and discuss the reasons why a litigator might want to file such a motion.

¹ See ARIZ. R. EVID. 609(b).

² See FEDERAL EVIDENCE PRACTICE GUIDE § 3.04[4] (Joseph M. McLaughlin ed., 1996).

Legal Basis for the Use of Offensive Motions *in Limine*

As translated from its Latin origins, the term *in limine* means “at the threshold” or “at the outset.”³ Although motions *in limine* are not expressly sanctioned by the Federal Rules of Evidence, courts and litigants rely heavily on them to clarify and address issues of admissibility prior to trial. The authority for filing motions *in limine* is found in Rules 104(a) and 103(c) of the Federal Rules, which authorize courts to control pretrial proceedings and resolve preliminary questions of evidence.⁴ Motions *in limine* are intended to secure advance rulings by trial judges on questions of evidence admissibility.

Despite the fact that motions *in limine* are most frequently used to seek the exclusion of evidence at trial, treatises and court decisions commonly recognize that such motions can be used in an offensive manner as well. For example, in *Federal Practice and Procedure*, Wright and Graham state that motions *in limine* may be used offensively by litigants to procure a definitive ruling on the admissibility of evidence at the outset of trial.⁵ Likewise, the *Federal Rules of Evidence Manual* explains that “a party who is concerned about the admissibility of evidence it intends to proffer may find it advisable to seek an advance ruling” through an offensive motion *in limine*.⁶ Finally, in a general discussion on motions *in limine*, the *Federal Evidence Practice Guide* explains that they may be used defensively to preclude anticipated evidence, “or they may be used offensively to prequalify favorable evidence.”⁷

Many federal and state court decisions document a general acceptance of offensive motions *in limine*. Although these decisions do not expressly analyze the appropriateness of filing offensive motions *in limine*, the willingness of the courts to grant offensive motions *in limine* with no additional comment or admonition certainly supports the position that such motions are proper.⁸ In *United States v. Chan*, the government sought a motion *in limine* seeking advanced permission to introduce plea allocations of three of the defendants’ co-conspirators. In granting the motion, the Chan court explained, “The purpose of a motion *in limine* is to allow the trial court to rule in advance of a trial on the admissibility and relevance of certain forecasted evidence.”⁹ Given the implicit acceptance of the practice of filing offensive motions *in limine*, the *Chan* decision is not surprising. It is also important to remember the U.S. Supreme Court has

³ See BLACK’S LAW DICTIONARY 791 (7th ed. 1999); 75 AM. JUR. 2D *Trials* § 94, at 306 (1991).

⁴ See 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM JR., FEDERAL PRACTICE AND PROCEDURE § 5037.10 (2005).

⁵ See *id.*

⁶ STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 34-35 (7th ed. 1998).

⁷ FEDERAL EVIDENCE PRACTICE GUIDE, *supra* note 2, at 3-59-60.

⁸ See *Gibbs v. Frank*, 387 F.3d 268, 271 (3d Cir. 2004) (“[T]he Commonwealth moved *in limine* for permission to call Sadoff as a witness to testify about the inculpatory statements Gibbs made to him. The court granted the Commonwealth’s motion . . .”); *United States v. Vangates*, 287 F.3d 1315, 1318 (11th Cir. 2002) (“Prior to trial, the Government filed a motion *in limine* seeking permission to use the testimony and exhibits from the civil trial . . . [T]he magistrate judge issued a Memorandum and Order granting in part the motion *in limine*.”); *United States v. Short*, 4 F.3d 475, 478 (7th Cir. 1993) (“Before trial, the government moved in limine for permission to introduce testimony . . . [T]he district court granted the motion.”).

⁹ 184 F. Supp. 2d 337, 340 (S.D.N.Y. 2002) (the government’s motion was granted).

noted that “although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the district court’s inherent authority to manage the course of trials.”¹⁰

Reasons for Filing Offensive Motions *in Limine*

A popular rephrasing of Ockham’s razor is that “the simplest explanation is the best one.”¹¹ Adopting that principle, the obvious reason for filing an offensive motion *in limine* is to get an advanced ruling that an item of evidence is admissible. There flows from this simple reason many ancillary benefits, which counsel should consider during the pretrial phase of litigation.

Help Force Settlement

If there is an item of evidence that is crucial, if not dispositive, in a case, why not seek an advanced ruling from the court on the admissibility of that evidence in an effort to drive settlement discussions? Litigators routinely file motions for summary judgment for such a purpose. Clarity on important evidentiary issues to parties allows a great ability to evaluate the strength and weakness of their cases. In our experience, such clarity reduces posturing during settlement discussions and leads to honest, frank discussions. It is axiomatic that when parties are speaking honestly and frankly, the possibility arises for parties to resolve their differences and reach a consensus. Filing offensive motions *in limine* can help parties get to this point and settle cases.

Opening Statements

If a certain item of evidence is important to a litigator’s case, the litigator most likely will want to discuss that item during opening statements. The same is true for important summary charts. If an offense motion *in limine* has been filed and ruled on favorably by the court, then there is no danger in discussing either the evidence or chart during opening statements. On the other hand, if a litigator discusses evidence during the litigator’s opening statement and the court later rules that the evidence is inadmissible, the jury is likely to remember the overstatement and lose trust in what the litigator says. Moreover, if the jury has forgotten about the promised evidence, a litigator can rest assured that his or her opponent will point out to the jury that the promised evidence was never presented. Filing an offensive motion *in limine* can take the guess work out of opening statements.

Help Ensure That You Get the Evidentiary Ruling You Want

Judges are busy. During trial, a judge’s other responsibilities do not end. Judges also can get distracted during trial, especially if the trial is a long one. If an item of evidence is critical to

¹⁰ See *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984).

¹¹ Ockham’s razor is a principle attributed to the fourteenth-century English logician and Franciscan friar William of Ockham. His principle, sometime referred to as the law of succinctness, was that “entities should not be multiplied beyond necessity.”

a litigant's case, why leave it to chance that a judge will be focused on any evidentiary nuance necessary to evaluate the admissibility of the evidence at the time a litigant moves that evidence? If a litigator files an offensive motion *in limine*, the litigator is much more likely to get an accurate ruling from the court. Filing an offensive motion in limine will ensure that the matter has been adequately briefed and, hopefully, give the court adequate time to consider the evidentiary issue.

The following is a practice example of why a litigant may want to file an offensive motion *in limine* to ensure an accurate ruling from the court. During the impeachment trial of former Arizona Governor Evan Mecham, the special prosecutor filed with the Court of Impeachment a motion *in limine* concerning the ability to impeach Governor Mecham with specific instances in which the governor, a former car dealer, had been accused of fraud under Rule 608(b) of the Arizona Rules of Evidence. After considering the motion, the chief justice of the Arizona Supreme Court, sitting as the presiding officer of the Court of Impeachment, determined that Governor Mecham could be impeached only if he testified that no one had ever accused him of being dishonest. When the time came for Governor Mecham to be cross-examined, he surprisingly testified that no one had ever accused him of being dishonest. Because the special prosecutor had filed a motion *in limine* on the issue, the chief justice was able to consider the evidentiary issues regarding the proposed impeachment prior to the moment in trial when the special prosecutor wanted to use the evidence to impeach Governor Mecham. The chief justice allowed the cross-examination, and it was effective.¹²

Show the Court That You Know What You Are Doing

Another reason to file offensive motions *in limine* is to help build confidence in the judge that a litigator understands the rules of evidence and knows how to properly move an exhibit into evidence. This is especially true when a litigator has little or no experience in front of a particular judge. By filing well-taken offensive motions *in limine* prior to trial, a litigator can demonstrate to the judge that the judge can have confidence that the litigator knows the Rules of Evidence and speaks from a position of substance when addressing the court on evidentiary issues. In our experience, judges look for litigators to help them make the proper evidentiary rulings and, during the course of a trial, judges rely on litigators who appear to know what they are talking about.

So what happened in our case in which we asked the court to rule that we could impeach the plaintiff with her prior conviction for perjury? There was a hearing on our motion, and the judge stated that, although he wanted to take some more evidence on the matter, he was inclined to allow us to impeach the plaintiff with her prior conviction. Shortly thereafter, the plaintiff, who had resisted all earlier settlement discussions, suggested that we mediate the matter. At the conclusion of the mediation, the case was settled in a way that was very advantageous for our client.

¹² One of the authors of this article, Mr. Petti, was a law clerk to Chief Justice Frank X. Gordon Jr. when the chief justice served as the presiding officer of the Court of Impeachment of Governor Evan Mecham in 1988. The governor was convicted by the Arizona Senate and removed from office.

We hope that after litigators read this article, they will remember that motions *in limine* can be used both defensively and offensively, and that there are several good reasons to consider filing offensive motions *in limine*.