

January 2009

The Rebuttal Case

Francis J. Carney

Getting the first word out is nice, but getting the last word in is even nicer. You are all familiar with the psychology concepts of primacy and recency. Testimony heard first and last tend to be more memorable. Having served as an arbitrator on several dozen complex actions, I can attest to the value of a rebuttal expert for the plaintiff, especially after a long interval of defense witnesses. It shouldn't make a difference, but it does. Rebuttal witnesses often have been approached by trial lawyers as last-minute add-ons, something not contemplated before trial. I disagree with this approach, and I strongly recommend that a powerful expert witness be held back for rebuttal by the plaintiff.

This does *not* mean that you get to save your best evidence for the end and not present it in your case-in-chief. Proper rebuttal evidence is that which tends to refute, modify, explain, or otherwise minimize or nullify the effect of the opponent's evidence. *Astill v. Clark*, 956 P.2d 1081, 1086 (Ut. App. 1998), *quoting Randle v. Allen*, 862 P.2d 1329, 1338 (Utah 1993). In other words, the evidence must be offered to rebut something raised in your opponent's case, not simply restating evidence from your case-in-chief.

The leading Utah case on rebuttal is *Astill v. Clark* and you should read it (copy follows) and keep it in your trial book. The other rebuttal cases you should review include *Green v. Louder*, 29 P.3d 638 (Utah 2001) (even somewhat repetitive testimony should be allowed as rebuttal); *Randle v. Allen*, supra ("Here, the purpose of Dr. Watkins' testimony was to rebut Mr. Knight's testimony, not to rehash Dr. Watkins' previous testimony. Randle's initial questions, while covering some of the same material, were intended to provide the basis, and otherwise set the stage, for Dr. Watkins' rebuttal");

Turner v. Nelson, 872 P.2d 1021 (Utah 1994)(*undisclosed* rebuttal witnesses were excluded);
Takayama v. Kaiser, 923 P.2d 903 (Hawaii 1996)(cannot use rebuttal as an opportunity to establish a condition that was plaintiff's obligation to establish in case-in-chief.)

The core principles of permissible rebuttal (or surrebuttal¹) are these:

1. It is not necessary for rebuttal evidence to be based on surprise; it is perfectly acceptable to use rebuttal evidence which could have been reasonably anticipated.
2. Rebuttal witnesses should be disclosed in discovery and in your trial designations. Do not confuse "pure impeachment" evidence or witnesses (which do not need to be disclosed under Rule 26) with rebuttal witnesses (which do).
3. The purpose of rebuttal evidence is not to merely contradict or corroborate evidence already presented, but to respond to new points or new evidence first introduced by the opposing party. *Astill* at 1086.
4. Rebuttal is *not* designed for the plaintiff to withhold pieces of its case-in-chief, and thus denying the defense the opportunity to respond in its own case-in-chief.
5. However, a plaintiff, in its case-in-chief, need not anticipate and disprove every potential theory of the case of the defendant. It only needs to establish a prima facie case of liability.
6. Evidence should not be excluded from rebuttal merely because it *could* have been made part of the case-in-chief. *Id.*

¹"Surrebuttal" is rebuttal to rebuttal. It is limited to responding to matters raised in rebuttal, not rearguing the defense case. The drill is P case-in-chief, then D case-in-chief, then P rebuttal, then D surrebuttal, then P rebuttal to surrebuttal, then D sur-surrebuttal— until the judge puts an end to it.

While rebuttal is psychologically powerful, there is a tactical danger in saving important evidence for rebuttal— the judge may not allow you to use it, especially if it smells like sandbagging or is simply repetitive of what has already been said. Nevertheless, the best time to rebut your opponent's witnesses' testimony is after they have spoken, not before, and I urge you consider taking advantage of the opportunities that proper rebuttal offers you.

FJC