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Avoiding Error in Closing Argument

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by H. Patrick Furman

Trial lawyers dream of the perfect closing argument, in which they blend fact, emotion and persuasion to sway an undecided jury to vote their way. Closing argument is the point at which counsel can be most dramatic and argumentative. However, it is important to recognize the limitations on closing argument, for two reasons. First, closing argument is the point in trial at which trial lawyers' emotions are most likely to lead them astray into unprofessional and even unethical behavior. Secondly, a closing argument that is interrupted by an objection and an adverse ruling may lose effectiveness.

The general principles governing closing argument are easily stated. The scope of closing argument is within the discretion of the trial court, and rulings thereon will not be disturbed absent a gross abuse of discretion.[1] Closing argument must be confined to the evidence adduced at trial and the reasonable inferences that can be drawn from that evidence.[2] Counsel may not express personal opinions concerning the evidence or witnesses.[3] Counsel may not make arguments that appeal to the prejudices of the jury,[4] nor inject collateral issues into closing arguments.[5] Prosecutors may not comment on the post-advisement silence of a defendant.[6]

Recognizing and following these basic rules are not as easy. This article discusses some of the more common errors committed in closing argument. Most of the cases involve the closing arguments of prosecutors because of the nature of the appellate process, but the principles are applicable to both prosecutors and defense counsel. Finally, the article discusses appellate review of claims of error in closing argument.

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Comments on Witness Credibility

The credibility of one or more witnesses is often central to the resolution of a case. Jurors are given an instruction to guide them in their determination of credibility issues.[7] Clearly, counsel may argue whether a witness has passed the credibility test[8] and may tell the jury that the jurors make the determination of whether a witness is credible.[9]

However, the right to comment on the credibility of witnesses is not unlimited. Counsel may not argue credibility in terms that reflect their personal opinions.[10] This rule is particularly strict for prosecutors: "Expressions of personal opinion as to the veracity of witnesses are particularly inappropriate when made by prosecutors in criminal trials."[11]

Thus, a statement that a witness "lied" during his or her testimony has been held inappropriate,[12] as has a statement that a witness was "honest."[13] In both instances, nevertheless, the court found the errors harmless because the improper comments were a small part of the summation and because the jury was properly instructed that closing arguments are not evidence. In *People v. Trujillo*,[14] however, comments that the defendant's statement was "riddled with lies" were held to rise to the level of plain error and justify reversal of the defendant's conviction. The Colorado Court of Appeals in *Trujillo* reiterated that the impropriety in such arguments is that they amount to an expression of personal opinion as to the truth or falsity of testimony.

A defendant who testifies is subject to the same sort of credibility attack as any other witness. If a defendant laughs during the testimony of other witnesses and during the prosecutor's closing argument, it is not plain error for the prosecutor to argue that these actions go to the credibility of the defendant.[15]

Injection of Collateral Issues

Closing argument should be confined to issues relating to guilt or innocence.[16] It is improper for counsel to inject collateral issues, such as sympathy for a defendant or fear about the general crime problem, into closing argument. For example, it has been held improper for either counsel to ask jurors to "stand in the shoes" of a witness, victim or defendant.[17]

A reference to the general problem of drugs in society and the role of police and informants in combatting that problem has been held improper.[18] A suggestion that drugs were being offered to the "men, women and children of Denver" was held improper when there was no evidence presented as to the persons for whom the drugs were intended.[19] Simply injecting the broader issue of drugs in schools also has been held improper.[20]

Attempting to inflame a jury by suggesting that the defendant has engaged in other illegal activity violates the general ban on evidence of other uncharged offenses and improperly shifts the jury's attention away from the issues in a case.[21]

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In a kidnapping case where the victim was an adult but there was evidence that the defendant wanted photographs of young nude children, a suggestion that candy in the defendant's glove box might have been used to solicit young children was held to appeal improperly to the sympathy and prejudice of the jury.[22] Asserting that there was a "good argument" that the defendant had engaged in another crime, after the defendant had been acquitted of that crime, is improper.[23]

Attempting to inflame a jury by characterizing the defendant as an animal is improper. In *People v. Hernandez*, the Colorado Court of Appeals said: "The courts have condemned as improper a prosecutor using such terms as 'rat,' 'dog' or 'animal' to describe a defendant."[24] While this comment was made in connection with an opening statement, the cases cited and the opinion itself suggest that the condemnation extends to every phase of the trial. The *Hernandez* court described the prosecutor's comment that "sometimes it takes a rat to catch a rat . . ." as inflammatory, derogatory, dehumanizing, inconsistent with the prosecutor's role and dignity and improper.[25] Similarly, a reference in closing argument to the defendant as a "lion" who stalked "weak prey" has been held improper,[26] although not plain error, in the context of the facts of the case, the instructions of law and the arguments of the defense counsel.

Inviting, even implicitly, the jury to draw inferences about the defendant from evidence that had been barred is an improper argument calculated to inflame the jury.[27]

Comments on Silence Of Defendant

In *People v. Reynolds*, the Colorado Supreme Court stated:

> Any comment on the post-arrest silence of a defendant once he invokes his right to remain silent may well violate a defendant's due process rights.[28]

Two principles underlie this rule. First, the government should not be allowed to punish citizens for exercising a constitutional right.[29] Second, every post-advisement silence is ambiguous because the silence may simply be nothing more than the citizen's exercise of the right and not an indication of any consciousness of guilt.[30] Comment of this sort has been held to amount to plain error and to justify reversal even in the absence of a contemporaneous objection.[31]

The analysis is different if the silence occurs before the advisement. The U.S. Supreme Court has held that it is proper to impeach a testifying defendant with his or her pre-arrest silence.[32] That Court also has reasoned that post-arrest, pre-advisement silence is not based on any governmental inducement or implicit offer and has held that the use of such silence to impeach the defendant's testimony at trial did not violate either the Fifth or the Fourteenth Amendment.[33]

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The Colorado Supreme Court has not squarely addressed this issue but has acknowledged the inherent ambiguity of a defendant's post-arrest silence. In *People v. Quintana*,[34] the defendant remained silent after arrest (it was unclear when, or if, an advisement was given) and then presented at trial, through witnesses other than himself, a defense of duress. The court noted that the defendant's silence could be interpreted in a number of different ways and that it was, therefore, so ambiguous and lacking in probative value as to be inadmissible as substantive evidence to disprove duress against a nontestifying defendant.[35]

A situation that frequently arises is how to handle the "silence" of a defendant who is silent as to some details but not others. Clearly, if there are inconsistencies between the post-arrest statements and the trial testimony, the defendant may be impeached with the inconsistencies,[36] and the inconsistencies can then be used in the closing argument. The omission of a significant detail may amount to such an inconsistency,[37] but if the trial testimony merely augments, rather than contradicts, the original statement, it is improper to allow impeachment using the original statement or closing argument commenting on the original statement.[38]

Another recurring situation is that of a defendant who falls silent only after initially making a statement. It is improper to question a defendant about this sort of silence or to use such silence in closing argument to infer guilt.[39]

During closing argument in *People v. Todd*,[40] the prosecutor, after going through the facts, said, "I believe there is no contradiction. Defendant will agree to that. There is no other evidence at this point." In affirming the conviction, the Colorado Supreme Court considered whether (1) the comments specifically focused on the defendant's failure to testify, (2) a limiting instruction was given, (3) the comments were aggravated or repetitive and (4) the defendant was the only person who could have refuted the evidence that was the subject of the comments.[41]

A comment on the silence of the defendant is particularly improper if it also misleads the jury. In *People v. Burress*,[42] the prosecutor asked questions which implied that the defendant refused to talk with the police and then commented on this implication. In fact, the defendant had never been questioned by the police, so the Supreme Court reversed the conviction.[43]

Use of Instructions/Law

Clearly, counsel may use the relevant law and jury instructions during closing argument. Nevertheless, counsel must state the law accurately and may not make personal comments on the law and instructions or personal comments about the other party's use of the law. It is improper to call into question the instructions given by the trial court.[44] Further, much to the dismay of law faculties everywhere, it has been held proper for a trial court to refuse to allow counsel to read from a law review article, on the theory that doing so usurps the functions of the jury instructions.[45]

It has been held improper for a prosecutor to suggest to a jury that guilty people prefer jury trials, while innocent people prefer trials to the court.[46] It is not improper for a prosecutor to note that everyone who is convicted of a crime enjoyed the presumption of innocence at the outset of trial: this is merely a proper comment that the evidence adduced at trial may overcome the presumption of innocence.[47] It is improper to shift or misstate the burden of proof, but it is not improper to respond to a defense argument that the prosecution failed to investigate other suspects by noting that the defense saw the same information as the prosecution and did not produce information suggesting another person committed the offense.[48]

It is not improper for counsel to compare the evidence to the instructions and argue that a lesser included instruction is not applicable by merely pointing out inconsistencies,[49] but it is improper to tell the jury that opposing counsel requested a particular instruction.[50]

The Court of Appeals declared harmless error the decision of a trial court to refuse to allow the defense to comment on the fact that a prosecution witness exercised the right against self-incrimination and refused to testify and that the prosecution refused to immunize the witness. The court noted that the situation might be different if the witness did not testify due to the actions of the prosecution.[51] Similarly, it has been held improper to comment on a defendant's invocation of the spousal privilege.[52]

It is improper for counsel to make disparaging remarks about the theory or tactics of opposing counsel. Describing counsel's theory as "insulting" or "a lie," calling the cross-examination "cheap innuendo" and questioning counsel's good faith have resulted in a reversal of the defendant's conviction.[53] These sorts of arguments constitute improper comments on the right to use the law and present a defense. They are inflammatory, divert the jury from the issues at hand and amount to forbidden expressions of personal opinion.

Misleading Arguments

While closing arguments may include all reasonable and legitimate inferences, even if the inferences are illogical or erroneous,[54] "closing arguments to the jury . . . may not be utilized to mislead the jury."[55] It has been held improper for defense counsel to engage in "flights of fancy" by arguing that the defendant found the stolen property when there was no evidence to support the argument, and proper for the trial court to preclude the further use by counsel of such hypotheticals that lacked factual foundation.[56]

In a theft by receiving case involving guns, when the guns were in the possession of the authorities at the time of trial, the prosecutor nonetheless asked, rhetorically, "So where is the proof of these three other guns?"[57] The court characterized this comment as "unfair [and] misleading"[58] and held that it undermined the fundamental fairness of the trial.

Counsel crosses the line from argument into improper conduct by arguing a theory that has no evidentiary support. A wholly speculative argument that a murder was motivated by the poverty-stricken defendant's desire to rob the victim has been held to be unprofessional conduct.[59] A speculative argument that the defendant might have had to load his gun when he retrieved it from his home, made to bolster a claim of premeditation, was similarly condemned, although the error was found harmless because the defendant was acquitted on the premeditation charge.[60]

Opening the Door

It is clear that improper argument by one attorney may open the door to what would otherwise be an inappropriate argument by opposing counsel. The principle was stated in *Kurtz v. People* as "[D]efense counsel may by improper argumentative comment open the door to a response by the prosecuting attorney"[61] and in *People v. Vialpando* as "A prosecutor is afforded considerable latitude in the right to reply to a remark by opposing counsel."[62]

In *People v. Becker*, defense counsel argued that he could personally vouch for the integrity of the defendant and that the *mens rea* element in the offense was necessary to prevent "our police and prosecutors from becoming a Gestapo."[63] The prosecutor, in rebuttal, "threatened to abandon the prosecution of teenagers who committed burglaries if the jury acquitted the defendant."[64] In light of the defense counsel's comments, the lack of a contemporaneous objection and the instructions to the jury, the Colorado Supreme Court affirmed the conviction. The dissent argued that prosecutorial misconduct should not be excused simply because defense counsel misbehaved as well.

Where a murder defendant hugged and kissed his mother after she testified, the Court of Appeals held that it was not improper for the prosecutor to note in closing that the victim would never again get to kiss his mother, because the defendant's actions had opened the door to the comment.[65] That court has also held that it was proper for a prosecutor to argue that "there was only one eyewitness to the crime" and that the prosecution has no control over the number of witnesses to a crime after the defense attacked the credibility of the victim/witness.[66] In a third case, the Court of Appeals held that a closing argument accusing the other side of using "smoke

screens" and "dirty evidence" opened the door to a rebuttal that was otherwise improper.[67]

Scope of Appellate Review

There are two important factors affecting appellate review of alleged error in closing argument. The first is whether there was a contemporaneous objection to the allegedly improper argument. The second is whether the error was harmless when considered in the context of the entire closing argument and trial.

Many lawyers are more reluctant to object during closing argument than at other points in a trial. They reason that closing argument is, after all, argument and that both sides should have great latitude to interpret and argue the evidence. However, counsel must be aware that a failure to make a contemporaneous objection during closing argument can adversely impact the chances of winning on appeal.

In the absence of a contemporaneous objection, Colorado's appellate courts will reverse a conviction on grounds of error in closing argument only if there is a "gross abuse of discretion,"[68] or an error that is so significant as to undermine the fundamental fairness of the trial[69] or "as to cast serious doubt on the reliability of the judgment of conviction."[70] In fact, a reviewing court may refuse even to consider an argument of misconduct in closing argument when there was no contemporaneous objection.[71]

The other side of this coin is that when counsel contemporaneously objects to a comment, and the objection is sustained, appellate courts will normally hold that a curative instruction overcomes the error unless the error "is so prejudicial that, but for the comment, the jury might not have found the defendant guilty."[72] The appellate courts operate on the assumption that jurors follow their instructions.[73]

Although the courts do not use the phrase "totality of the circumstances" in the decisions discussing error in closing argument, it is clear that the courts view the alleged error in the context of the entire closing argument. Errors in closing argument have been held harmless because the error was viewed as a relatively small and unimportant aspect of the entire argument. For example, in *People v. Huggins*,[74] the Court of Appeals described the improper arguments as a "small and insignificant part" of the entire closing argument and affirmed the conviction despite the impropriety.

Improper argument concerning a count on which the defendant is acquitted will normally be held harmless. Thus, improper argument concerning a count of murder after deliberation was held harmless when the defendant was acquitted of that charge and convicted of felony murder instead.[75]

Most appellate decisions review situations in which the trial court has allowed certain arguments. In *People v. Raibon*,[76] the Court of Appeals considered whether a trial court erred in barring defense counsel from commenting on a missing prosecution witness. The court held that any error was harmless because the only possible prejudice to the defendant was that it undercut his efforts to claim that all of the witnesses were engaged in a conspiracy to finger him. He was allowed to argue this theory, and the absence of the other witness was obvious. Thus, the trial court's refusal to allow specific comment did not contribute to the conviction or affect the fairness of the trial.

Conclusion

Trial lawyers love to argue. They particularly love closing argument because they can be at their persuasive and argumentative best. However, the very emotion that contributes to an effective closing may also lead counsel into unprofessional and unethical behavior. In the heat of trial, it is sometimes easy to lose sight of professional responsibilities, but every unprofessional argument adversely affects the reliability of jury verdicts and the criminal justice system.

NOTES

1. *People v. Walters*, 821 P.2d 887 (Colo. App. 1991); *People v. Moody*, 676 P.2d 691 (Colo. 1984).

2. *People v. DeHerrera*, 697 P.2d 734 (Colo. App. 1985); ABA Standards for Criminal Justice, Prosecution Function and Defense Function (3rd ed., 1993) (*hereinafter*, "ABA Standards"), Standards 3-5.8(a) and 4-7.7(a); Colorado Rules of Professional Conduct (*hereinafter*, "Rules") Rule 3.4(e).

3. ABA Standards 3-5.8(b) and 4-7.7(b); Rule 3.4(e).

4. ABA Standards 3-5.8(c) and 4-7.7(c).

5. ABA Standards 3-5.8(d) and 4-7.7(d).

6. *People v. Hardiway*, 874 P.2d 425 (Colo. App. 1993).

7. COLJI-Crim 3:06.

8. *Wilson v. People*, 743 P.2d 415 (Colo. 1987); *People v. Constant*, 645 P.2d 843 (Colo. 1982).

9. *People v. Doss*, 782 P.2d 1198 (Colo. App. 1989).

10. *Wilson*, *supra*, note 8 at 418.

11. *Id.* at 418; *see also* ABA Standard 3-5.8 (b) and Rule 3.4(e).

12. *People v. Herr*, 868 P.2d 1121 (Colo. App. 1993).

13. *People v. Gillis*, 23 Colo.Law. 1564 (July 1994) (App. No. 93CA438, *annc'd* 5/5/94).

14. 624 P.2d 924 (Colo.App. 1981).

15. *Constant*, *supra*, note 8.

16. *Herr*, *supra*, note 12.

17. *People v. Fernandez*, 23 Colo.Law. 1564 (May 1994) (App. No. 91CA1732, *annc'd* 3/10/94); *People v. Rodriguez*, 794 P.2d 965 (Colo. 1990) (comment may, however, be proper in the sentencing phase of capital case).

18. *People v. Hernandez*, 829 P.2d 394 (Colo. App. 1991).

19. *Id.*

20. *People v. Adams*, 708 P.2d 813 (Colo. App. 1985).

21. *People v. Jones*, 832 P.2d 1036 (Colo. App. 1991); *see also Herr*, *supra*, note 12 (improper to imply other criminal activity during cross-examination of defendant).

22. *People v. San Emerterio*, 819 P.2d 516 (Colo.App. 1991); *rev'd on other grounds*, 839 P.2d 1161 (Colo. 1992).

23. *People v. Ball*, 821 P.2d 905 (Colo.App. 1991).

24. *Hernandez*, *supra*, note 18 at 396, *citing United States v. Williams*, 496 F.2d 378 (1st Cir. 1974); *United States v. Scaglione*, 446 F.2d 182 (5th Cir. 1971); *Pacheco v. State*, 414 P.2d 100 (Nev. 1966).

25. *Hernandez*, *supra*, note 18.

26. *People v. Smith*, 856 P.2d 26, 29 (Colo. App. 1992).

27. *People v. Oliver*, 745 P.2d 222 (Colo. 1987).

28. 575 P.2d 1286 (Colo. 1978); *Doyle v. Ohio*, 426 U.S. 610 (1976). The pre-arrest silence of a defendant may be used to impeach him or her; *Jenkins v. Anderson*, 447 U.S. 231 (1980).

29. *Doyle*, *id.*; *People v. Wright*, 511 P.2d 460 (Colo. 1973).

30. *Doyle*, *supra*, note 28; *People v. Quintana*, 665 P.2d 605 (Colo. 1983).

31. *People v. Ortega*, 597 P.2d 1034 (Colo. 1979).

32. *Jenkins*, *supra*, note 28.

33. *Fletcher v. Weir*, 455 U.S. 603 (1982).

34. *Supra*, note 30.

35. *Id.* at 611.

36. *People v. Sandoval*, 710 P.2d 1159 (Colo. App. 1985), *rev'd on other grounds*, 733 P.2d 319 (Colo. 1987).

37. *Quintana*, *supra*, note 30 at n.7; *Hardiway*, *supra*, note 6.

38. *Hardiway*, *supra*, note 6 at 427-28; *United States v. Leonardi*, 623 F.2d 746 (2nd Cir. 1980).

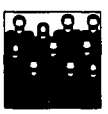
39. *Sandoval*, *supra*, note 36; *Ortega*, *supra*, note 31.

40. 538 P.2d 433 (Colo. 1975).

41. *Id.* at 436.

42. 515 P.2d 460 (Colo. 1973).
43. The court cited a number of cases with similar results: *Hines v. People*, 497 P.2d 1258 (Colo. 1972); *People v. Mingo*, 509 P.2d 800 (Colo. 1973); *Montoya v. People*, 457 P.2d 397 (Colo. 1969); *Griffin v. California*, 380 U.S. 609 (1965).
44. *People v. Graham*, 590 P.2d 511 (Colo. App. 1978).
45. *People v. Alvarez*, 530 P.2d 506 (Colo. 1975).
46. *People v. Rodgers*, 756 P.2d 980 (Colo. 1988).
47. *People v. Atkins*, 844 P.2d 1196 (Colo. App. 1992).
48. *People v. Martinez*, 652 P.2d 174 (Colo. App. 1981).
49. *People v. Garcia*, 826 P.2d 1259 (Colo. 1992).
50. *People v. Carrier*, 791 P.2d 1204 (Colo. App. 1990).
51. *People v. Raibon*, 843 P.2d 46 (Colo. App. 1992).
52. *People v. Harris*, 729 P.2d 1000 (Colo. App. 1986).
53. *Jones, supra*, note 21.
54. *People v. Leick*, 322 P.2d 674 (Colo. 1958).
55. *People v. Lundy*, 533 P.2d 920 (Colo. 1975).
56. *Id.*
57. *People v. Fierro*, 651 P.2d 416, 417 (Colo. App. 1982).
58. *Id.* at 418.
59. *Hervey v. People*, 495 P.2d 204 (Colo. 1972).
60. *People v. Sepeda*, 581 P.2d 723 (Colo. 1978).
61. 494 P.2d 97, 106 (Colo. 1972).
62. 804 P.2d 219, 225 (Colo.App. 1990); *Hafer v. People*, 492 P.2d 847 (Colo. 1972).
63. 531 P.2d 386, 389 (Colo. 1975).
64. *Id.* at 389 (Erickson, J., dissenting).
65. *Atkins, supra*, note 47.
66. *San Emerterio, supra*, note 22.
67. *Vialpando, supra*, note 62.
68. *Moody, supra*, note 1.
69. *Herr, supra*, note 12; *Vialpando, supra*, note 62.
70. *Wilson, supra*, note 8 at 420.
71. *People v. Swanson*, 638 P.2d 45 (Colo. 1981).
72. *Carrier, supra*, note 50 at 1205.
73. *Moody, supra*, note 1.
74. 825 P.2d 1024 (Colo.App. 1991).
75. *People v. Moya*, 23 Colo.Law. 2604, 2606 (Sept. 1994) (App. No. 92CA0686, *annc'd* 9/22/94).
76. *Supra*, note 51.

Training Courses for Legal Secretaries and Support Staff Begin in January



The Denver Legal Secretaries Association ("DLSA") is again offering the Basic Legal Secretary Training Course and the Professional Legal Secretary/Accredited Legal Secretary Training Course. Details about each course are given below.

Basic Legal Secretary Training Course

This course is designed for legal secretaries and support staff who have minimal law office experience or whose experience has been limited to a specialized area of the law. It will be held on Thursday evenings from January 19 through March 16.

The course will be taught by local attorneys, educators and Certified Professional Legal Secretaries and is a structured program with twenty-four hours of concentrated study covering all major areas of the law. The course provides legal, procedural and office management background necessary to perform efficiently and effectively, with an emphasis on practical information that can be put to immediate use in the law office.

The DLSA Basic Legal Secretary Training Course represents a unique opportunity to enhance the competency and efficiency of law office support personnel. For the student, the course can mean career advancement and greater job satisfaction; for the employer, it is a cost-effective investment in a better-trained, more productive staff.

For more information about the Basic Legal Secretary Training Course, call Linda Chandler, Certified PLS, at (303) 634-4453.

Professional Legal Secretary ("PLS")/Accredited Legal Secretary ("ALS") Training Course

This course is taught by local attorneys, educators and members of DLSA who have attained PLS certification. A PLS is an individual with at least three years' experience as a legal secretary who demonstrates ability to interact on a professional level with attorneys, clients, judges and co-workers; assumes responsibility; exercises initiative and judgment; has a working knowledge of procedural law and research; and works with a minimum of supervision. The PLS Training Course prepares the advanced legal secretary to sit for a two-day examination administered by the National Association of Legal Secretaries International® ("NALS"), which covers written communication skills and knowledge; ethics; legal secretarial procedures; legal secretarial accounting; legal termination, techniques and procedures; exercise of judgment; and legal secretarial skills.

An ALS is an individual with at least one year of experience as a legal secretary or equivalent legal secretarial training who wishes to demonstrate a commitment to and aptitude for succeeding in the ever-changing legal environment. The course, designed to prepare individuals to take the PLS examination, also provides valuable information for individuals wishing to take the ALS examination. The six-hour written ALS exam demonstrates ability to perform business communication tasks; gauges ability to maintain office records and calendars and prioritize multiple tasks when given "real life" scenarios; measures understanding of office equipment and related procedures; denotes aptitude for understanding legal terminology, legal complexities and supporting documents; assesses recognition of accounting terms to resolve accounting problems; and appraises knowledge of law office protocol as prescribed by ethical codes. The one-day ALS examination is divided into three parts: written communication, comprehension and application; office administration, legal terminology and accounting; and ethics, human relations and applied office procedures.

The DLSA Professional Legal Secretary/Accredited Legal Secretary Training Course will be held on successive Thursdays, from February 2 through March 16. For more information, call De Anne Larrow, Certified PLS at (303) 980-1077.