

## NORTH CAROLINA DEFENDER TRIAL SCHOOL

Monday, July 7 through Friday, July 11, 2025 UNC School of Government, Chapel Hill, NC Cosponsored by the UNC-Chapel Hill School of Government & Office of Indigent Defense Services

## Monday, July 7, 2025

8:00-8:45	Check-in
8:45-9:00	Welcome, Introduction, and Description of Program Phil Dixon, Teaching Associate Professor UNC School of Government, Chapel Hill, NC Bob Burke, Indigent Defense Consultant and Trainer, Longmont, CO
9:00-10:00	FACTUAL BRAINSTORMING/FACTBUSTING (PLENARY) Joseph Ross, Assistant Federal Defender, Raleigh, NC

At the conclusion of the plenary and workshop, participants will:

- 1. Know the elements of effective brainstorming/factbusting.
- 2. Understand the importance of effective factbusting to creation of a rich pool of facts from which to develop a persuasive theory of the case and story.
- 3. Be able to effectively bust the facts of a case.

10:00-10:15	Break
10:15-12:30	BRAINSTORMING/FACTBUSTING (WORKSHOP)
12:30-1:30	Lunch
1:30-2:30	BRAINSTORMING/FACTBUSTING (WORKSHOP)
2:30-2:40	Break
2:40-3:25	<b>DEVELOPING YOUR THEORY OF THE CASE AND THEMES</b> (PLENARY) Sophorn Avitan, Assistant Public Defender, District Court Misdemeanor Appeals Supervisor

Mecklenburg County Public Defender Office, Charlotte, NC

At the conclusion of the plenary, participants will:

- 1. Know and understand the definitions of, and differences between, a theory of the case (or defense story summary) and a theme.
- 2. Know and understand the purposes of a theory of the case/story summary and themes, especially the driving of a persuasive defense story.



3. Know and understand methods for developing a theory of the case/story summary and themes.

# 3:25-4:15 ADVANCING YOUR THEORY BY TELLING YOUR CLIENT'S STORY

Ira Mickenberg, Attorney & Consultant, Saratoga Springs, NY

At the conclusion of the plenary, participants will:

- 1. Know the elements of storytelling.
- 2. Understand how storytelling elements and skills can be persuasively used throughout trial to advance the case theory or defense story.
- 3. Know and understand basic persuasive techniques ("theory of the case and themes language," primacy and recency, repetition, chapters (clarity), hooks, vivid language, pictures or images, trilogies).

#### 4:15-4:30 Ethics in Criminal Defense: Trial Strategy

Ira Mickenberg, Attorney & Consultant, Saratoga Springs, NY

Discussion of ethical issues in client relations related to trial theories and strategies.

4:30-4:40 *Break* 

## 4:40-5:20 THEORY OF THE CASE/DEFENSE STORY (WORKSHOP)

After completion of these workshops, participants will have:

- 1. Developed a theory of the case/summary of defense story, and a full, persuasive story for a trial case.
- 2. Put in writing a theory of the case/story summary for their case that is consistent with the definition of a theory of the case.
- 3. Identified any supporting emotional theme or themes for their case.
- 4. Sketched out, in writing, a defense story for their case.

# 6:00 Dinner @ Top of the Hill Restaurant & Brewery, Chapel Hill (Individual Pay)



## **Tuesday, July 8, 2025**

9:00-11:00	THEORY OF THE CASE/DEFENSE STORY (WORKSHOP)
11:00-11:15	Break
11:15-12:15	THEORY OF THE CASE/DEFENSE STORY (WORKSHOP)
12:15-1:00	Lunch
1:00-2:00	<b>JURY SELECTION: A JOURNEY OF DISCOVERY (PLENARY)</b> Kevin Tully, Chief Public Defender Office of the Public Defender, Dist. 26 Charlotte, NC

After completion of this session and the workshops, participants will:

- 1. Know and understand the purposes of voir dire (develop rapport, inform, educate, learn, introduce theory of case).
- 2. Know and understand questioning and conversational techniques for accomplishing the purposes of voir dire, such as open-ended, life experience questions, "get it and spread it," and other techniques.
- 3. Be able to effectively use jury selection techniques in their own case, conducting a voir dire of real jurors, with an eye towards deciding whether those jurors would be receptive to the theory of the case the participants will be advocating in their cases.
- 2:00-2:45 **JURY SELECTION (DEMONSTRATION AND DISCUSSION)** 30-minute demo and 15-minute debrief
- 2:45-3:00 **Ethics in Criminal Defense: Jury Selection** Kevin Tully, Chief Public Defender

Office of the Public Defender, Dist. 26 Charlotte, NC

Discussion of a factual supplement to the plenary fact problem related to lawyer and client decisions in jury selection.

- 3:00-3:15 Break
- 3:15-4:30 **BRAINSTORM VOIR DIRE (WORKSHOP)**



## Wednesday, July 9, 2025

9:00-10:30	CONDUCT VOIR DIRE (WORKSHOP)
10:30-10:45	Break
10:45-12:15	CONDUCT VOIR DIRE (WORKSHOP)
12:15-12:30	DEBRIEF JURY SELECTION
12:30-1:30	Lunch
1:30-2:20	<b>OPENING STATEMENTS (PLENARY/DEMONSTRATION)</b> Rebecca Chappell, Senior Assistant Public Defender

At the conclusion of this session, participants will:

Public Defender's Office, Dist. 39, Shelby, NC

- 1. Know and understand that an opening statement must present a factual and persuasive defense story that drives and supports the theory of the case and emotional themes.
- 2. Know and understand basic techniques for doing an opening statement that is factual, persuasive, and drives the theory of the case and themes (Hook, headline, primacy and recency, context, storyline, creation of inferences, use of "theory and theme language").

2:20-2:30 *Break* 

#### 2:30-3:00 BRAINSTORM/PREPARE OPENING (WORKSHOP)

After this workshop, participants will:

- 1. Be able to articulate what they want to accomplish with their opening statement, and how it advances their theory of the case and themes.
- 2. Be able to use basic techniques for the presentation of a factual and persuasive defense story that advances the theory of the case and themes (Hook, headline, primacy and recency, context, storyline, of inferences, use of "theory and theme language").

#### 3:00-5:00 CONDUCT OPENINGS (WORKSHOPS)



## **Thursday, July 10, 2025**

#### 9:00-9:55 CROSS-EXAMINATION (PLENARY/DEMONSTRATION)

Johnna Herron, Assistant Public Defender Guilford County, NC

At the conclusion of this session, participants will:

- 1. Know and understand that the goals of cross-examination, as well as the questions asked and language used, are determined by the theory of the case and supporting themes.
- 2. Know and understand techniques for effective cross-examination (chapters, transitions, use of "theory and theme language," sequence, and leading, one-fact questions).
- 3. Know and understand techniques for impeachment with prior inconsistent statements and omissions.

### 9:55-10:10 Ethics in Criminal Defense: Cross-Examination

Johnna Herron, Assistant Public Defender Guilford County, NC

Discussion of a factual supplement to the plenary fact problem related to lawyer and client decisions on cross-examination.

10:10-10:25 Break

#### 10:25-10:55 BRAINSTORM/OUTLINE CROSS EXAMINATION (WORKSHOP)

After this workshop, participants will:

- 1. Be able to articulate what they want to accomplish with their cross-examination, and how it advances their theory of the case.
- 2. Be able to make use of techniques for the effective cross-examination of a government witness that advances the theory of the case and themes.

## 10:55-12:45 CONDUCT CROSS EXAMINATION (WORKSHOP)

12:45-1:30 Lunch

#### 1:30-2:20 DIRECT EXAMINATION (PLENARY/DEMONSTRATION)

Timothy Heinle, Albert and Gladys Coates Term Professor UNC School of Government, Chapel Hill, NC

At the conclusion of this session, the participants will:

1. Know and understand that all aspects of direct examination -- including the decision to call a particular witness (why is it important and what is important), the questions that should be asked, and the way those



- questions should be asked -- must flow from the theory of defense and emotional themes.
- 2. Know and understand basic techniques for doing a direct examination (preparation of witness, chapters, anchoring questions, transitional questions, use of "theory of the case and themes language", open-ended questions, practice, use of visuals, demonstrations).

#### 2:20-2:35 Ethics in Criminal Defense: Direct Examination

Timothy Heinle, Albert and Gladys Coates Term Professor UNC School of Government, Chapel Hill, NC

Discussion of a factual supplement to the plenary fact problem related to lawyer and client decisions on Direct Examination.

2:35-2:45 *Break* 

#### 2:45-3:15 BRAINSTORM DIRECT EXAMINATION (WORKSHOP)

After this workshop, participants will:

- 1. Be able to articulate what they want to accomplish with their direct examination, and how it advances their theory of the case.
- 2. Be able to effectively prepare a witness for direct and cross and effectively use direct examination techniques to advance the theory of the case, defense story, and supporting themes.

## 3:15-5:15 **CONDUCT DIRECT EXAMINATION (WORKSHOP)**



## Friday, July 11, 2025

### 9:00-10:00 CLOSING ARGUMENTS (PLENARY/DEMONSTRATION)

Dennis D. Maxwell, Jr., Assistant Public Defender Dist. 42, Hendersonville, NC

At the conclusion of this session, participants will:

- 1. Know and understand that closing argument must be factual and persuasive and must flow from the theory of defense and emotional themes.
- 2. Know and understand basic persuasive techniques (use of "theory of the case and themes language," primacy and recency, repetition, chapters (clarity), hooks, vivid language, pictures or images, trilogies) for closing argument.

10:00-10:15 Break

#### 10:15-10:45 BRAINSTORM/PREPARE CLOSING ARGUMENT (WORKSHOP)

After this workshop, participants will:

- 1. Be able to articulate what they want to accomplish with their closing argument, and how it advances their theory of the case or defense story.
- 2. Be able to use basic persuasive techniques to effectively advance the theory of the case, defense story, and supporting themes in closing argument.

#### 10:45-12:45 CONDUCT CLOSING ARGUMENT (WORKSHOP)

12:50-1:00 **CONCLUSION** 



## **Small Group Facilitators**

Sophorn Avitan, Assistant Public Defender, District Court, Misdemeanor Appeals Supervisor, Office of the Public Defender, Dist. 26 Charlotte, NC

Dawn Y. Baxton, Chief Public Defender, Dist. 16, Durham, NC

Jonathan Broun, Senior Staff Attorney, North Carolina Prisoner Legal Services, Inc. Raleigh, NC

Derek Brown, Attorney, The Derek K. Brown Law Firm, PC, Greenville, NC

Bob Burke, Attorney and Criminal Defense Consultant, Longmont, CO

Rebecca Chappell, Senior Assistant Public Defender, Office of the Public Defender, Dist. 39, Shelby, NC

Tucker Charns, Chief Regional Defender, OIDS, Durham, NC

Sharif A. Deveaux, Regional Defender, OIDS, Durham, NC

Phil Dixon, Teaching Associate Professor, UNC-SOG, Chapel Hill, NC

Fred Friedman, Attorney and Professor, Univ. of Minnesota, Duluth, MN

Burcu Hensley, Assistant Public Defender, Office of the Public Defender (Wake County), Dist. 10, Raleigh, NC

Johnna Herron, Assistant Public Defender, Dist. 18, Greensboro, NC

Dennis D. Maxwell, Jr., Assistant Public Defender, Dist. 42, Hendersonville, NC

Ira Mickenberg, Attorney and Consultant, Saratoga Springs, NY

John Rubin, Albert Coates Distinguished Professor of Public Law and Government, UNC-SOG, Chapel Hill, NC

Jason St. Aubin, Senior Trial Attorney, Marcilliat & Mills, PLLC, Charlotte, NC



Daniel Spiegel, Assistant Professor of Criminal Law, Procedure and Evidence, UNC-SOG, Chapel Hill, NC

Deonte L. Thomas, Chief Public Defender, Dist. 10, Raleigh, NC

Eddie Thomas, Assistant Public Defender, Violent Crimes Unit, Dist. 26, Charlotte, NC

Kevin Tully, Chief Public Defender, Office of the Public Defender, Dist. 26 Charlotte, NC

Becky Whitaker, Defender Policy and Planning Attorney, NC Indigent Defense Services, Durham, NC

# JURY SELECTION

**KEVIN TULLY** 

TRIAL SCHOOL - 2025

# **JURY SELECTION**

- "OLD SCHOOL" v. "TRIAL SCHOOL"
- How to find jurors who will react appropriately to our client's story of innocence

- Lecture method Lawyer does most of the talking
- Establish lawyer's authority/credibility
- Indoctrinate jurors about the law (burden of proof, reasonable doubt, etc.)
- Elicit PROMISES from jurors to follow the law

# **PROBLEMS**

- --- Tells us almost **NOTHING** about the jurors
- --- We end up falling back on **STEREOTYPES** and gut feelings
- --- Banking on jurors **ASPIRATIONAL** promises

## **STEREOTYPES**

<u>LOVE</u> <u>HATE</u>

Women

Blacks

Young

Poor Wealthy

Teachers/Social Workers Bankers/Cops

"It is arrogant and stupid to choose jurors based on stereotypes of gender, race, age, ethnicity or class."

- Ira Mickenberg

## **ASPIRATIONAL PROMISES**

## Studies show:

- Jurors decide cases based on prejudices, preconceived notions, and feelings, regardless of the LAW or what any judge /lawyer tells them, even if they honestly believe otherwise.
- Asking about future behavior results in aspirational answers.

- LISTENING Jurors do most of the talking
- Establish jurors' authority empower them to act to do right
- Indoctrinate jurors about story of innocence
- Elicit opinions/feelings that help us predict how jurors will emotionally react

## Studies show:

- The best predictor of what a person will do in the future is not what they say they will do, but what they have done in the past in analogous situations.
- Attitudes and feelings (emotions) are based on personal experiences

**COMMAND** 

**SUPERLATIVE** 

**ANALOGY** 

## **COMMAND**

- -- TELL us about...
- -- DESCRIBE for us...
- -- SHARE with us...

# **SUPERLATIVE**

- -- The BEST...
- -- The WORST...
- -- The MOST SERIOUS...
- -- The MOST RECENT...

## **ANALOGY**

- -- Life Experience
- -- Personal
- -- Dealing with a topic central to client's story of innocence

## **EXAMPLES OF CSA "QUESTIONS"**

(Self Defense) -- TELL us about the MOST force you ever had to use to defend yourself

(Alcohol) -- **SHARE** with us about the person who showed the **BIGGEST** change in behavior after drinking alcohol

(Police) -- **DESCRIBE** for us the **WORST** encounter you or someone close to you have had with police

What if my judge won't let me do this?!

## If judge tries to stop this:

- -- Prophylactic setup
- -- Remind judge the Government did this
- -- Cite case law
- -- In order to provide effective assistance of counsel need to judge potential jurors' fairness
- -- Offer to be done sooner

If judge tries to stop it and all else fails...

Go in through the back door!

- Can you be fair?
- What makes you say that?
- Based upon how you feel about \_\_\_\_\_?
- How did you come to your opinion or feelings about \_\_\_\_\_?
- What had the biggest influence on your opinion or feelings about \_\_\_\_\_?

## MAL DAVIS CASE

- What are our emotional pitches?
- What facts/characters might jurors have emotional reactions to after hearing our story?
- What analogous life experiences might we want to have them share with us?

# OPENING STATEMENT

BY: REBECCA CHAPPELL

SENIOR ASSISTANT PUBLIC DEFENDER

CLEVELAND COUNTY

# WHEN TO MAKE AN OPENING STATEMENT

- ► NCGS 15A-1221-OUTLINES THE ORDER OF A JURY TRIAL
- AFTER THE JURY IS SWORN, SELECETED AND IMPANELED
- PURSUANT TO NCGS 15A-1221(a)(4), EACH PARTY MUST BE GIVEN THE OPPORTUNITY TO MAKE A BRIEF OPENING STATEMENT, BUT THE DEFENDANT MAY RESERVE HIS OPENING STATEMENT.

# RESERVING

- NCGS 15A-1221(a)(6) -THE DEFENDANT MAY RESERVE HIS OPENING STATEMENT.
- ► IN OTHER WORDS, IF THE DEFENSE WILL BE PRESENTING EVIDENCE IN THE CASE, THE DEFENSE MAY RESERVE THE MAKING OF AN OPENING STATEMENT UNTIL AFTER THE STATE HAS RESTED ITS CASE-IN-CHIEF AND BEFORE THE DEFENSE'S CASE.

# FAILURE TO REQUEST

THE FAILURE TO REQUEST AN OPPORTUNITY TO MAKE AN OPENING STATEMENT MAY RESULT IN WAIVER OF THIS PROCEDURAL RIGHT. State v. McDowell, 301 N.C. 279 (1980)

■ WAIVER CAN BE EXPRESS OR IMPLIED

# WAIVER

■ ELECT NOT TO GIVE AN OPENING STATEMENT



# SO YOU MAY ASK YOURSELF:

TO GIVE OR NOT TO GIVE AN OPENING STATEMENT?

# PURPOSE OF AN OPENING STATEMENT

THE PURPOSE OF AN OPENING STATEMENT IS TO PERMIT THE PARTIES TO PRESENT TO THE JUDGE AND JURY THE ISSUES INVOLVED IN THE CASE AND TO ALLOW THEM TO GIVE A GENERAL (NOT SPECIFIC) FORECAST OF WHAT THE EVIDENCE WILL BE. Seed State V. Gladden, 315 N.C. 398, 417 (1986)



# WHAT IS AN OPENING STATEMENT

- ► PREVIEW OF THE EVIDENCE YOU INTEND TO PRESENT
- SET FORTH THE THEORY OF YOUR DEFENSE
- STORY OF INNOCENCE OR REDUCED CULPABILITY

#### DO NOT ARGUE THE EVIDENCE



Ask yourself this question:

Are you describing to the jury what a witness or document states, or are you drawing a conclusion from the testimony or the document?

## DO NOT INSTRUCT THE JURY OF THE LAW





HARBISON – Defendant's consent is required before admission of guilt is made.

EXHIBITS – Use exhibits in opening – Consider giving notice to the prosecutor and the judge, to allow the court to resolve any objections in advance and avoid interruptions.

- Keeping promises Counsel should not promise to present witnesses or evidence unless he or she is able to follow through. Failure to keep promises may be ineffective assistance of counsel.
- <u>Time limits</u> The length of opening statements is a matter within the sound discretion of the trial judge. See State v. Call, 349 N.C. 382 (1998).

#### DRAFTING YOUR OPENING STATEMENT

THE HOOK

■THE STORY

■THE CONCLUSION

#### WHAT IS A HOOK

■ A 30 TO 60 SECOND STATEMENT THAT INCLUDES YOUR THEORY, THEME OR DEFENSE

■ ESTABLISHES THE EMOTIONAL THEME THAT WILL MAKE THE JURY FEEL IT IS RIGHT TO ACCEPT YOUR THEORY

#### **THEORY**

- THE CRIMINAL INCIDENT NEVER HAPPENED.
- THE CRIMINAL INCIDENT HAPPENED, BUT I DIDN'T DO IT.
- THE INCIDENT HAPPENED, I DID IT, BUT IT WASN'T A CRIME
- THE CRIMINAL INCIDENT HAPPENED, I DID IT, IT WAS A CRIME, BUT NOT THE CRIME CHARGED.
- THE CRIMINAL INCIDENT HAPPENED, I DID IT, IT WAS THE CRIME CHARGED, BUT I'M NOT RESPONSIBLE.
- THE CRIMINAL INCIDENT HAPPENED, I DID IT, IT WAS THE CRIME CHARGED. I'M RESPONSIBLE, BUT WHO CARES?

#### THE STORY

- THE MAIN PART OF YOUR OPENING
- STORY OF YOUR CLIENT'S INNOCENCE
- ► HITTING THE HIGH POINTS NOT THE ENTIRE STORY

## WHEN AND WHERE DOES THE STORY OF INNOCENCE START

- The sequence of events.
  - Front-load the strong stuff
  - Start on a high note and end on a high-note

#### WHOSE POINT OF VIEW

■ ARE YOU TELLING THE STORY

#### THE CONCLUSION



# TELL THE JURY WHAT YOU WANT THEM TO DO

Leave the jury with a clear understanding of your client's position in the case and a basis for believing your side.







#### Chili's 3/12/2023

#### Server 1020 Mgr Hale

5 JW Black	60.00
4 Corona	24.50
3 KJ Chardonnay	30.00
Tax	6.85
Total	120.35

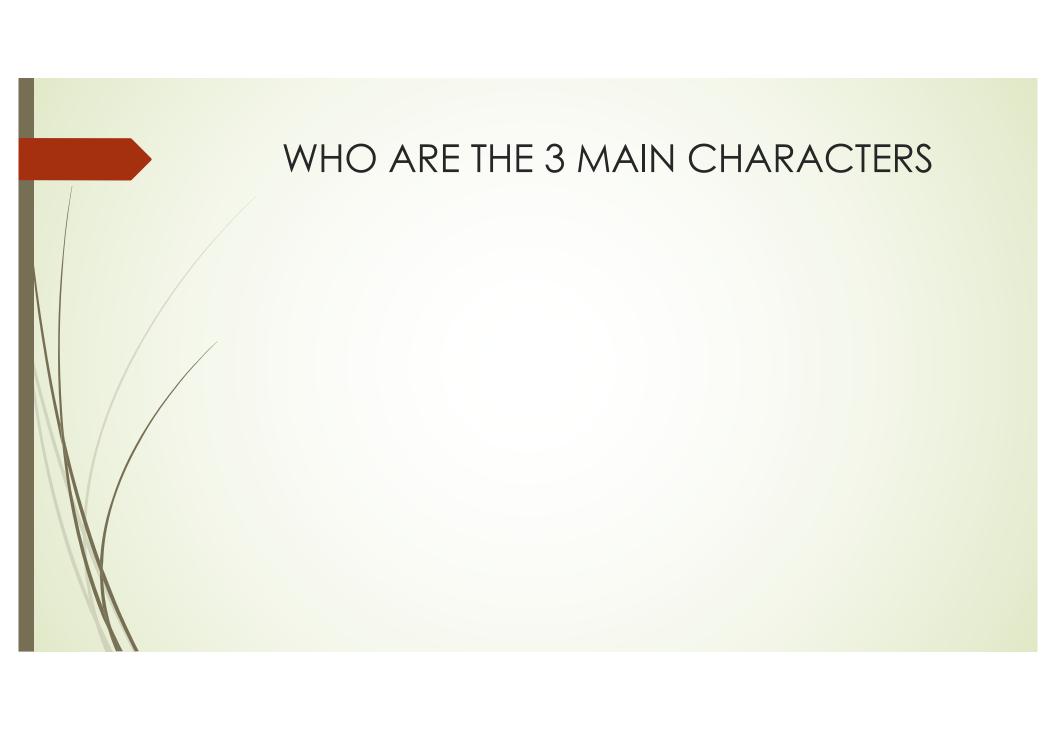


#### THE HOOK

Mr. Mal Davis is not guilty of felony murder because he did not have a weapon, did not fire a weapon, and did not shot Officer Mills. The evidence will show that Mr. Davis was following the orders and instructions of Officer Mills.

#### **GENRE**

THE CRIMINAL INCIDENT HAPPENED, BUT I DIDN'T DO IT.



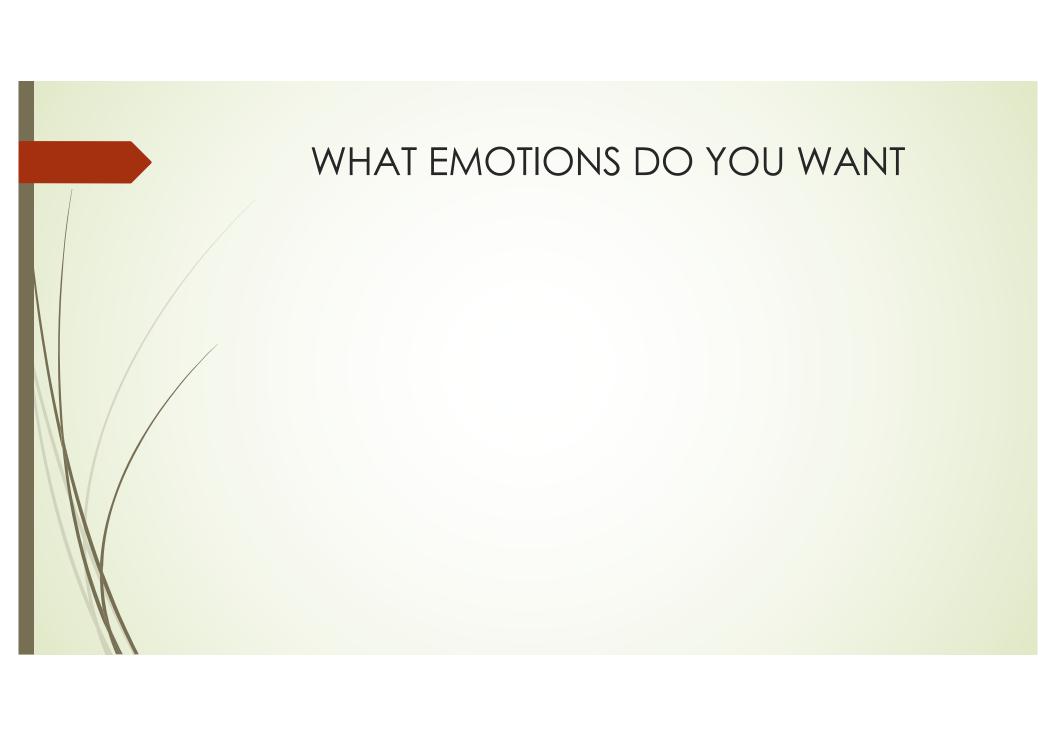
#### WHO ARE THE 3 MAIN CHARACTERS

- Patrol Officer Ron White
- Officer Pete Mills, Special Undercover Narcotics Squad
- Helen Cruz, Officer Mills' girlfriend
- Ed Adkins, drug dealer (Jelly)
- Bob Hale Manager at Chili's
- Informant
- Mal Davis



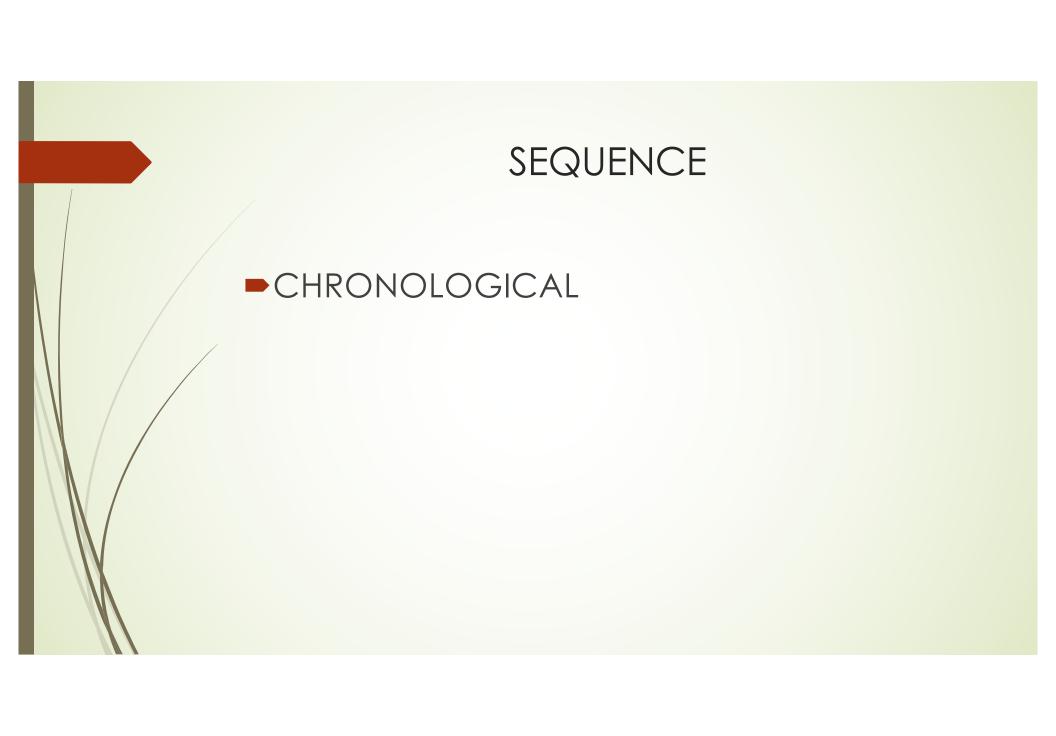
#### WHAT ARE THE SETTINGS AND SCENES

- o Chili's
- Vehicle (unmarked SUV)
- Magnolia Terrace
- o 600 block of Walker Street
- Huron Avenue and Elm Street



#### WHAT EMOTIONS DO YOU WANT

- Anger
- **►**Fear
- Surprise
- Awe
- Disgust
- Powerless



## FROM WHOSE PERSPECTIVE DO YOU WANT TO TELL THE STORY ■NARRATOR

### STILL ASKING YOURSELF – TO GIVE OR NOT TO GIVE AN OPENING STATEMENT



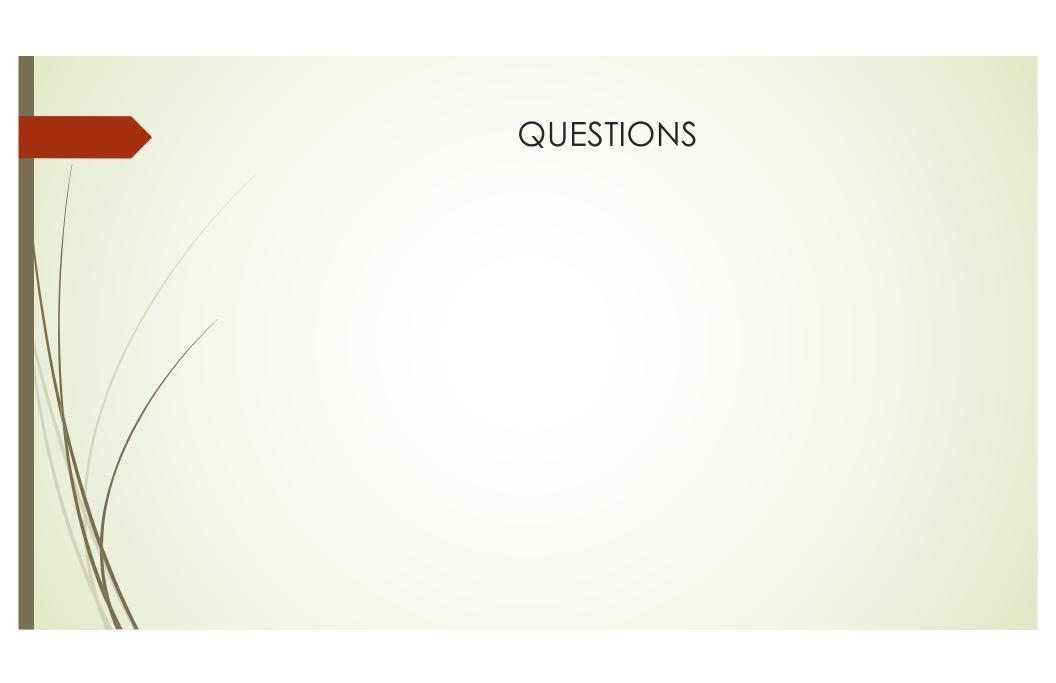
CONSIDER THIS.....

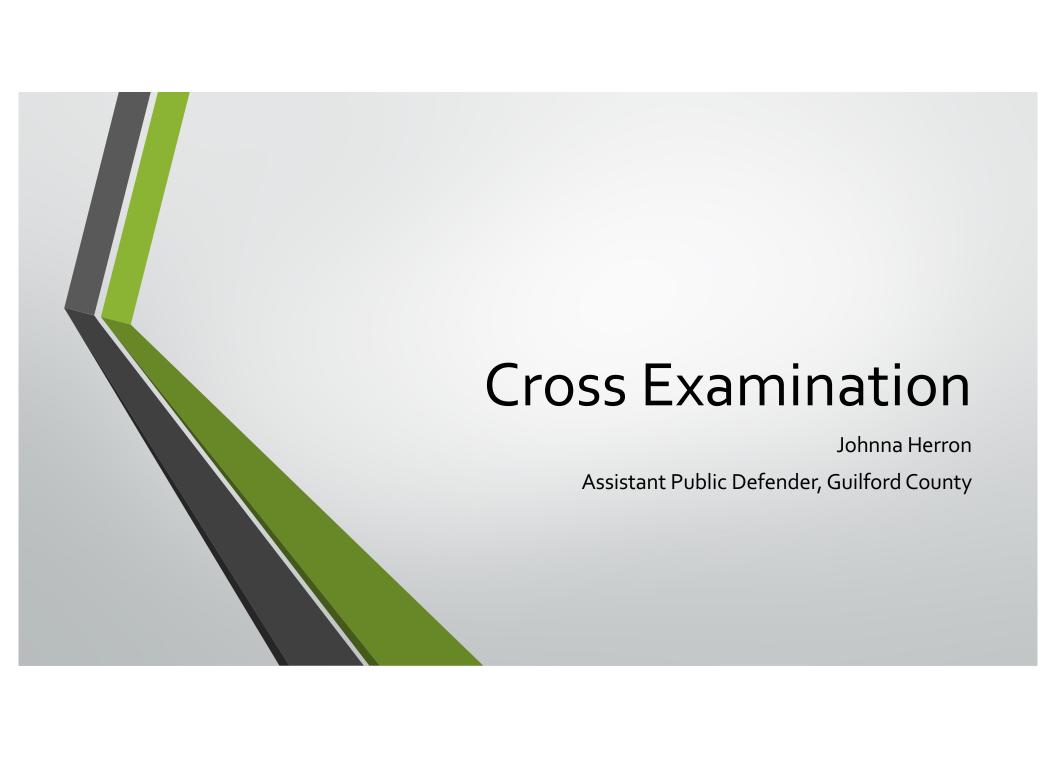




#### TIPS

- THE FIRST IMPRESSION SHOULD BE MORE COMPELLING
- BEGIN YOUR OPENING AS SOON AS THE MOMENT ARRIVES
- START SPEAKING WITH CONFIDENCE KNOW THE FACTS OF THE CASE
- MOVE ABOUT THE COURTROOM WITH PURPOSE TO BE MORE FORCEFUL AND EFFECTIVE
- DO NOT READ YOUR OPENING





## What is the point of cross examination?

- Get helpful information out of the witness
- Discredit hurtful information from the witness
- Discredit the witness

## What is the point of cross examination?

- This is not the time to make your closing argument
- Get the facts you need to make your closing argument later

# Topics to Address

- Facts that support your theory
- Facts that discredit the State's theory
- Facts that attack the witness's credibility

#### **Cross Examination Basics**

- Ask leading questions
- Ask one fact per question
- Keep questions simple and short
- Never ask the "burrito question"

## **Leading Questions**

- Do NOT start with "who," "what," "when," "where," "why," or "how"
- Are NOT simply questions that require a "yes" or "no"
- Are sentences that can (but need not) end with, "right?" or, "correct?"
  - Drop the "tag" at the end and use your tone to ask the question

## **Leading Questions**

- Q: Why didn't you check the gun for fingerprints?
  - A: Well, guns typically have rough surfaces, and fingerprints don't stick very well to them, so we don't usually find fingerprints on guns anyway.
- Q: Did you check the gun for fingerprints?
  - A: No, it's usually not helpful to do that.

- Q: You didn't check the gun for fingerprints?
  - A: No.

#### Just the Facts

- One fact per question
  - If you find yourself with multiple facts per question, break it up into multiple questions
  - Don't be afraid to break down complex or unfamiliar concepts into simple questions
- Stick to facts not characterizations
- Never ask a question if you don't know the answer

#### One Fact Per Question

- Q: You found heroin and cocaine?
  - A: No.

- Q: You found heroin?
  - A: Yes.
- Q: You found cocaine?
  - A: No.

#### Characterizations

- Q: The car was going too fast?
  - A: Well, I wouldn't say that. Everyone drives that speed on that part of the road.
- Q: That was irresponsible, wasn't it?
  - A: I think it would have been more irresponsible to drive significantly slower than all the other cars on the road.
- Q: When the silver car hit the green car, it pushed it all the way up onto the curb?
  - A: Yes.
- Q: And the debris landed as far as 50 feet away?
  - A: Yes.

## Simple and Short Questions

 Q: Officer, on the date in question, did you have the occasion to come upon a white powdery substance that you suspected was (and ultimately confirmed to be) cocaine hydrochloride?

Q: You found cocaine?

- Never ask the "burrito question"
- This gives the witness a chance to explain

- Q: You had rice?
  - A: Yes.
- Q: You had black beans?
  - A: Yes.
- Q: You had chicken?
  - A: Yes.
- Q: You had cheese?
  - A: Yes.

- Q: You had salsa?
  - A: Yes.
- Q: You had guacamole?
  - A: Yes.
- Q: You had sour cream?
  - A: Yes.
- Q: And you put all that in a tortilla?
  - A: Yes.

- Q: So you had a burrito?
  - A: No, I had a taco.

- Ask about all the facts you need leading up to that question, but stop before you start a question with "So..."
- Wait until closing argument to argue your point with the facts you've gathered

- What should you do if you accidentally ask the "burrito question"?
- Pivot!
- Ask questions that differentiate the witness's explanation from your conclusion (if you can)

- Q: So you had a burrito?
  - A: No, I had a taco.
- Q: But the tortilla was twelve inches in diameter, right?
  - A: Yes.
- Q: When you wrapped it up, you tucked in both ends of that tortilla?
  - A: Yes.
- Q: You only ate one of them as your meal?
  - A: Yes.

# Organization

- Use the "chapter" method
- Use signposts
- Remember primacy and recency
- Be flexible listen to the witness and adapt as needed

## The "Chapter" Method

- Write down all the facts you need to get from the witness for your closing argument as bullet points
  - It helps to do this in a Word document so you can rearrange them
- Sort each fact into a broader topic you want to address (your "chapters")
- Organize your chapters so that they will have the most impact
- Signposting: when you change topics, let everyone know

## The "Chapter" Method

- Listen to the direct examination and note anything you want to add to a chapter
- Have each chapter on a separate page so they can be rearranged on the fly
- It's okay to deviate from your written points if the witness gives you an unexpected answer you need to explore
  - The written points will then help you get back on track when you're done!

## Controlling the Witness

- Interrupting the witness mid-answer usually won't work
- Try asking easy questions first to get in the flow of short answers
- Do your best to get a "yes" or "no"
  - If the witness doesn't answer the first time, ask again
    - You can add "to answer my question" or "so that's a 'yes'" or "so that's a 'no"
  - If you ask 3 times with no answer, move on

# Impeachment

- Refer to NC Rules of Evidence 607 through 613
- Common topics of impeachment
  - Prior inconsistent statements
  - Prior convictions
  - Bias or interest

#### **Prior Inconsistent Statements**

- You can ask a witness if they said something different at another time
  - Remember, the prior statement is not evidence itself!
- If the witness denies the prior statement, you may use other evidence to prove it
  - Transcript of prior testimony, video or audio recording, testimony of another witness, etc.
- State is entitled to a copy of the impeaching evidence upon request
- Note: be careful of "putting on evidence" if you do not intend to do so
- Refer to NC Rule of Evidence 613

#### Procedure for Prior Inconsistent Statements

- Have the witness reaffirm the statement you are impeaching
- Establish the prior statement occurred
- Build up the veracity of the prior statement
- Confront witness with prior statement
- Resist the urge to keep going!
  - You will only allow the witness to explain away the inconsistency

#### **Prior Convictions**

- "What, if anything, have you been convicted of in the last ten years that carries a maximum punishment of sixty days or more?"
- If witness doesn't name all convictions, follow up!
- Decide whether the witness's record is bad enough that it's worth asking
- Refer to NC Rule of Evidence 609

#### Bias or Interest

- If the witness has a reason to lie (or err on the side against your client when they don't know), you may ask about it
- Common biases
  - Witness doesn't like client or likes alleged victim
  - Witness (or loved one) could face consequences from admitting the truth
  - Witness has a financial or other interest in outcome of case

## Other Forms of Impeachment

- You may ask about facts that contradict the witness's testimony
- You may cross examine on prior dishonest acts, but cannot prove it by extrinsic evidence
  - Refer to NC Rule of Evidence 6o8(b)
- You may ask experts about treatises that contradict their methods or opinions

## Some Style Points

- Use theory and theme language
- Watch out for verbal "tics"
- Don't be a bully
- Make eye contact with jurors during important points

#### Mal Davis Case

- What are some facts we would want to get out of Officer White?
- What are some chapters we would include in our cross examination of Officer White?



# Ethics in Criminal Defense: **Cross Examination**

## Cross Examining Officer White

Mal tells you a week before trial that he has seen White mistreat Black men on the streets, has heard that he consistently harasses them, and that White has had complaints filed against him for doing so. He thinks that is another reason White is saying Mal was at the scene of the shooting when he actually wasn't. He wants White cross-examined on this issue.

# Cross Examining Officer White

Is there additional communication with Mal that is needed? If so, when?

## Rule 1.1 | Competence

"A lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

## Rule 1.3 | Diligence

[Comment 3] "Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions. In extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client."

## Rule 1.3 | Diligence

[Comment 7] Conduct warranting the imposition of professional discipline under the rule is characterized by the element of intent manifested when a lawyer knowingly or recklessly disregards his or her obligations. Breach of the duty of diligence sufficient to warrant professional discipline occurs when a lawyer consistently fails to carry out the obligations that the lawyer has assumed for his or her clients. A pattern of delay, procrastination, carelessness, and forgetfulness regarding client matters indicates a knowing or reckless disregard for the lawyer's professional duties. For example, a lawyer who habitually misses filing deadlines and court dates is not taking his or her professional responsibilities seriously. A pattern of negligent conduct is not excused by a burdensome caseload or inadequate office procedures."

## Rule 1.3 | Diligence

[Comment 6] "Conduct that may constitute professional malpractice does not necessarily constitute a violation of the ethical duty to represent a client diligently. Generally speaking, a single instance of unaggravated negligence does not warrant discipline. For example, missing a statute of limitations may form the basis for a claim of professional malpractice. However, where the failure to file the complaint in a timely manner is due to inadvertence or a simple mistake such as mislaying the papers or miscalculating the date upon which the statute of limitations will run, absent some other aggravating factor, such an incident will not generally constitute a violation of this rule."

# Cross Examining Officer White

Is there investigation that needs to be done?

# Rule 1.3 | Diligence

"A lawyer shall act with reasonable diligence and promptness in representing a client."

# Rule 1.1 | Competence

[Comment 5] "Competent handling of a particular matter includes inquiry into, and analysis of, the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined, in part, by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity or consequence...."

# Cross Examining Officer White

• If Mal is right about the complaints against White, what might you do on cross if you are quite certain that Mal's version about not being present is false?

# Rule 1.3 | Diligence

[Comment 4] "Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client."

# Rule 1.3 | Diligence

[Comment 1] "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client....The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."

# State v. Ward, COA16-52 (Nov. 1, 2016)

Where there was evidence that mold had formed in a freezer near and on DNA samples, but not evidence that the mold had affected Ward's DNA sample, counsel was not required to cross-examine the DNA expert about the mold at the client's insistence.

## DEALING WITH CLIENT PERJURY

By Thomas Spahn and Alice Neece Mine (This article appeared in Journal 24,2, June 2019)

What should a lawyer do when...?

- Before trial, the client's version of the facts continually changes.
- The client testifies in a deposition to something the lawyer never heard before.
- The client tells the lawyer her answers in a deposition were "based on what I understood to be best for me at the time."
- The client tells the lawyer he lied on the witness stand about an immaterial matter.
- The client tells the lawyer he lied on the witness stand about a material matter.

Responding to client perjury, or the prospect that a client intends to commit perjury, is one of the most difficult ethical dilemmas a lawyer can face. NC Rule 3.3, the key rule on client perjury, provides some guidance, but not definitive instructions for professional conduct. Monroe Freedman,1 a law professor and nationally recognized scholar on professional responsibility, describes it as a "trilemma." Freedman observes that there are three conflicting obligations of a lawyer in the adversary system. First, there is the duty to represent the client competently which requires thorough investigation including learning everything the client knows about the case. Second, there is the duty to hold in confidence what the client reveals which, coupled with assurances to the client that the lawyer will do so, encourages the client to trust the lawyer and be forthcoming with the information needed to represent the client. And third, there is the duty to act with candor toward the tribunal so that the lawyer does not participate in a judicial system that makes decisions on the basis of false testimony.

[a]s soon as one begins to think about these responsibilities, it becomes apparent that the conscientious attorney is faced with what we may call a trilemma—that is, the lawyer is required to know everything, to keep it in confidence, and to reveal it to the court.

Monroe H. Freedman, Perjury: The Lawyer's Trilemma, 1 Litigation 26 (No. 1, Winter 1975).

Professor Freedman answers "yes" to the "trilemma" question of whether it is proper for a criminal defense lawyer to put a witness on the stand who the lawyer knows will commit perjury because the duty of confidentiality

does not permit him to disclose the facts he has learned from his client which form the basis for his conclusion that the client intends to perjure himself. What that means—necessarily, it seems to me—is that, at least the criminal defense attorney, however unwillingly in terms of

personal morality, has a professional responsibility as an advocate in an adversary system to examine the perjurious client in the ordinary way and to argue to the jury, as evidence in the case, the testimony presented by the defendant.

Id.

Although there is a continuing academic debate on whether a lawyer—and specifically a criminal defense lawyer—may offer perjured testimony, the NC Rules, the ABA Model Rules, and the rules of most jurisdictions have resolved the issue in favor of prohibiting a lawyer from offering perjured testimony and, upon learning that perjured testimony has been offered, requiring the lawyer to take reasonable remedial measures including, if necessary, disclosure to the court.

NC Rule 3.3(a)(3) and ABA Model Rule 3.3(a)(3) provide one of the few instances in the Rules of Professional Conduct that is "anti-client" in the sense that the duty of confidentiality to the client is trumped by the duty of candor to the court. As stated in the comment to NC Rule 3.3 and ABA Model Rule 3.3,

[t]his Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adjudicative proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of material fact or law or evidence that the lawyer knows to be false.

NC Rule 3.3, cmt. [2]; ABA Model Rule 3.3, cmt. [2].

## North Carolina Rule 3.3(a)(3)

NC Rule 3.3(a)(3) states that:

[a] lawyer shall not knowingly...offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

**First**, note that the provision contains distinct professional obligations that take place at different junctures in litigation.

Before testimony is offered, the lawyer is admonished not to offer evidence that the lawyer knows to be false, and is advised that he may refuse to offer evidence that he reasonably believes is false other than the testimony of a criminal defendant. After testimony is offered, upon learning that the lawyer offered false evidence (presumably "unknowingly" at the time), the lawyer is required to "take reasonable remedial measures, including, if necessary, disclosure to the tribunal."

**Second**, note that the meanings of terms in the rule are critical to its interpretation and application.

The rule governs the conduct of a lawyer who is representing a client in the proceedings of a "tribunal." NC Rule 1.0(n) defines "tribunal" as

a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, may render a binding legal judgment directly affecting a party's interests in a particular matter.

If the body does not have the authority to "render a binding legal judgment" affecting a party's interests, it is not a "tribunal" and NC Rule 3.3 would be inapplicable.

The prohibition on offering false evidence in NC Rule 3.3(a)(3) hinges on a double knowledge requirement. The lawyer is prohibited from "knowingly" offering evidence that he "knows to be false." The duty to take remedial measures only arises if the lawyer "comes to know" that the offered evidence was false. NC Rule 1.0(g) defines "knowingly," "known," and "knows" as denoting "actual knowledge of the fact in question," but that "a person's knowledge may be inferred from the circumstances." The obligation to protect confidential client information remains unless the lawyer "knows" the testimony is false.

**Third**, note that the duty applies not only in litigation, but also in other matters under the jurisdiction of a tribunal, including ancillary proceedings conducted pursuant to the tribunal's authority, such as a deposition. Comment [1] specifies

[this rule] applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

NC Rule 3.3, cmt. [1]

## The Knowledge Requirement

As noted above, "knowingly" means that the lawyer "actually knows" that the offered evidence is false, but knowledge can be inferred from the circumstances. Comment [8] states that

[a] lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact...[but] although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

NC Rule 3.3, cmt. [8]. One standard for evaluating whether knowledge can be inferred from the circumstances is to ask whether a reasonable lawyer would believe the evidence in light of the other evidence known to the lawyer. *See, e.g., Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, No. 98 CIV 10175 (JSM) 202 WL 59434 (S.D.N.Y. Jan. 16, 2002)(law firm sanctioned by court for permitting client to submit false affidavit).

Actual knowledge is not required, however, for a lawyer to refuse to offer testimony if the lawyer reasonably believes the testimony will be false. However, this discretion does not allow a lawyer to decline to offer the testimony of a criminal defendant because of the defendant's due process right to testify in his own behalf. *See Nix v. Whitesides*, 474 U.S. 157 (1986). Even if a criminal defense lawyer reasonably believes that the client's testimony will be false, the lawyer must allow the defendant to testify unless the lawyer "knows" that the testimony will be false. NC Rule 3.3, cmt. [9].

## What to Do Before and During Client Testimony

NC Rule 3.3(a)(3) prohibits a lawyer from knowingly offering any false evidence regardless of its materiality. If a lawyer knows that the client intends to testify falsely, the comment to NC Rule 3.3 provides the following guidance:

the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

NC Rule 3.3, cmt. [6].

In seeking to persuade the client not to offer false evidence, the lawyer may advise the client that he will seek to withdraw from the representation if the client persists. If the lawyer concludes that the client will persist in a course of action that the lawyer believes is criminal or fraudulent, the lawyer may seek permission of the court to withdraw. NC Rule 1.16(b)(3).

If the lawyer must call the client as a witness, as in the case of a criminal defendant who insists upon testifying, the lawyer should structure the examination to elicit as little false testimony as possible. Note that the comment does not recommend the use of the "narrative approach" to testimony by a client that may be perjured. The narrative approach allows the client to testify in a narrative fashion without benefit of direct examination questions from the lawyer, but the lawyer is prohibited from using the testimony in closing argument. *Annotated Model Rules of Professional Conduct* (Sixth Ed.), p. 317. The narrative approach is rejected by the Model Rules and in ABA Formal Ethics Opinion 87-353 (1987) (since *Nix v. Whitesides*, lawyer can no longer use narrative approach to insulate himself from charge of assisting a client's perjury). *Id.*Nevertheless, the narrative approach is not specifically prohibited by the North Carolina Rules or formal ethics opinions and it may be "one of the imperfect options available in the client perjury dilemma." *Id.* 

## After the Client Testifies: Reasonable Remedial Measures

Rule 3.3(a)(3) requires a lawyer to take remedial measures upon discovering that materially false evidence has been offered by the lawyer, by the client, or by a witness called by the lawyer during either direct examination or cross examination by opposing counsel. If the false evidence is immaterial, the lawyer is not required to take action.

Reasonable remedial measures do not have to be taken as soon as the lawyer learns that the offered evidence was false, but they must be taken before a third party relies upon the false evidence to his detriment. As explained in comment [10] to NC Rule 3.3,

[t]he lawyer's action must also be seasonable: depending upon the circumstances, reasonable remedial measures do not have to be undertaken immediately; however, the lawyer must act before a third party relies to his or her detriment upon the false testimony or evidence.

NC Rule 3.3, cmt. [10]. Note that the comment to ABA Model Rule 3.3 does not include this statement and, presumably, the duty under the Model Rule is to take remedial action as soon as the lawyer knows that material false evidence has been offered.

Reasonable remedial measures include remonstrating with client privately and seeking client's cooperation regarding the correction of the false evidence. NC Rule 3.3, cmt. [10]. The lawyer may threaten to withdraw if the client will not cooperate. Withdrawing from the representation may be the next logical remedial measure, but only if withdrawal will undo the effect of the false evidence and is permitted by the tribunal.

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## **Direction Examination – Session Summary**

Timothy Heinle, UNC School of Government

Direct exam allows you to deliver your message to your audience. Tell your story. Control your narrative.

#### Choose your witnesses

- Driven by your case theory. Each witness should advance your theory in at least one way.
- Identify a witness' strengths and weaknesses (and cut off anticipated attacks on cross in advance).

## *Tell your client's story*

- Use the chapter method to prepare your direct. Chapters can be
  - o a place or moment in time (e.g., Harris Teeter the night of June 10), or
  - o facts or themes (e.g., childhood bullying, desperation, or lack of sleep).
- Decide the order of your chapters and questions. Different options have pros and cons.
  - o Chronologically may be appropriate but can also be boring/mimic the State's case.
  - Consider starting with an impactful event (e.g., the shock of being tackled by store security seemingly out of nowhere) and allow the testimony to move non-chronologically.
  - o Or begin with a certain theme (e.g., fear of police) rather than an event.
- → Tip! Write facts you want brought out in different chapters on separate sheets of paper. Rearrange them to find the most effective sequence. Then create your transition statements and questions.

#### Design your questions

Move beyond "leading questions on cross, open questions on direct." There are degrees to open-ended questions. Ask open but controlled, purposeful questions.

- 1. Wide open: "Tell us about your family." "Did anything happen that night?"
  - a. Risky (witness could give a harmful or ineffective response).
- 2. Less open: "Were you angry that day?" "How far from the kitchen were you?"
  - a. Still open, but it allows you to exercise some control over the direction of the response.
- 3. Close-ended but non-leading: "Did you smell smoke?" "Could you clearly see her?"
  - a. If objections are sustained for leading, retreat to somewhat more open, less-directed style questions, then fluctuate. Find the line and walk it.

Your style may vary by witness. For example, you may give a forensic expert more wide-open questions, allowing them to testify freely. Whereas for your client, you may prefer to use more controlled questioning, while still allowing the client's voice to shine through.

### Bring scenes to life

- Use transition statements (e.g., "I want to discuss your typical day").
- Incorporate demonstrative evidence (e.g., a map; photograph of room).
- Take your time. Do not just use conclusory questions and move on. Flesh out details.
- Use descriptive words to activate the listener's five senses (e.g., in a self-defense case, asking the defendant to describe the taste of blood in her mouth before asking what she did next).

## Prepare your witnesses

Practice testimony with witnesses, out loud, whenever possible. Help each other be more effective. Explain their purpose to them. Simulate trial so they are not surprised by the feeling of pressure in court.

# Stories are what remind us that we are human



# A story of innocence is a human story

- Closing is when you tell your client's story
  - It's when the characters become human
  - It's when your client becomes human
  - It's when you get to show the jury what happened in human terms

# What is the purpose of closing?

- Summarizing the evidence
- Tease out the important facts that corroborate your client's story
- Set the scene by showing what happened in words and images
- Address the bad facts
- Address the State's arguments
- Tell your client's story of innocence

# When should you complete your closing?

BEFORE THE TRIAL STARTS!

# Organize

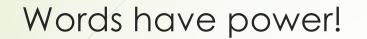
- What facts and evidence are critical to tell the story of innocence?
- How are those facts and evidence related?
- Group pieces of evidence or facts by how they are related to an issue or critical scene
- These are groups will be the chapters of your story

# Chapters

- Each chapter relates to a block of your argument
- Each chapter should be a complete argument
  - Start with your hook
  - Remind them of your hook
  - End with your hook
- Decide on the order of your chapters
  - Primacy and recency
  - Chapters should build logically and emotionally

## Primacy and Recency

- Rank your chapters by which convey the strongest arguments
- Again, each chapter needs to build logically and emotionally on the previous one
- Start with your second strongest argument
- End on the most emotional argument



- Chronology
- ► Rule of 3
- Analogy



- Story should flow naturally through time
  - Easier to follow
  - Tends to build to the emotional climax or to the point of the story
- Makes it easier to humanize characters and choices they made

# Rule of 3s

Humans tend to hang on to things better in threes

"Red, white, and blue"

"Blood, sweat, and tears"



- "Sometimes, the second person gets the technical foul"
- "Sometimes the person who reacted to the primary aggressor gets in trouble"



# Chapter Headings and Transitions

- Give jurors a heads up that you are moving to a new chapter
- Avoid abrupt transitions
  - Slow down near the end of each chapter
  - Make sure you have a definite closure
  - Pause. Take a breath.
- Start new chapter with its hook
  - Try to tie it to the previous one

# Stories are what remind us that we are human

- Words you use and the way you tell a story remind jurors that the people involved are human
  - They are motivated by common emotions or needs
  - They are recognizable to everyone
    - Bully
    - Scared kid
    - Sad sack
- Scenes can be familiar to jurors



- Address bad facts
- Address State's arguments
- Ask questions of the prosecution that they can't answer

# Mal Davis Theory of the Case

Mal Davis is a 28-year-old drug addict who was forced by two drunk police officers to help set up a drug deal that resulted in the killing of Officer Pete Mills by a dealer named Ed (Jelly) Akins. Mills and his partner, P.O. White, were rogue cops who spent the night getting into drunken arguments and fights in a futile effort to make a drug bust in violation of many laws and police department policies. Mal had no weapon, never killed anyone and never intended to be involved in any drug deal or shooting.

## State v. Mal Davis

- What is the hook?
- What are the important facts/evidence?
- What are the chapters/scenes?
- Who are the characters?

# Demonstration

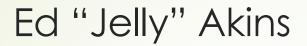
Mal Davis was in the wrong place at the wrong time

## Mal Davis

- 28 years old
- 9<sup>th</sup> grade drop out
- Heroin and crack addict since he was 13
- Never had a real job
- History of convictions for drug possession and selling small amounts of drugs
- No dealer trusts him

## Officer mills

- 8 years on Special Undercover Narcotics Squad
- History of using excessive force
- Reputation for pushing people around
- "Pretty nasty guy. You wanted to stay out of his way."
- "Hot temper when it came to work."



- "Notorious drug dealer"
- Didn't know Mal
- The guy who actually shot Mills

## At Chili's



# Mills was drunk

- ► 7:15 till 11:00
- Manager knew him
- "Very drunk and loud"
- Other patrons complained
- Afraid to cut them off
- ► BAC .11

# Mills was pissed off

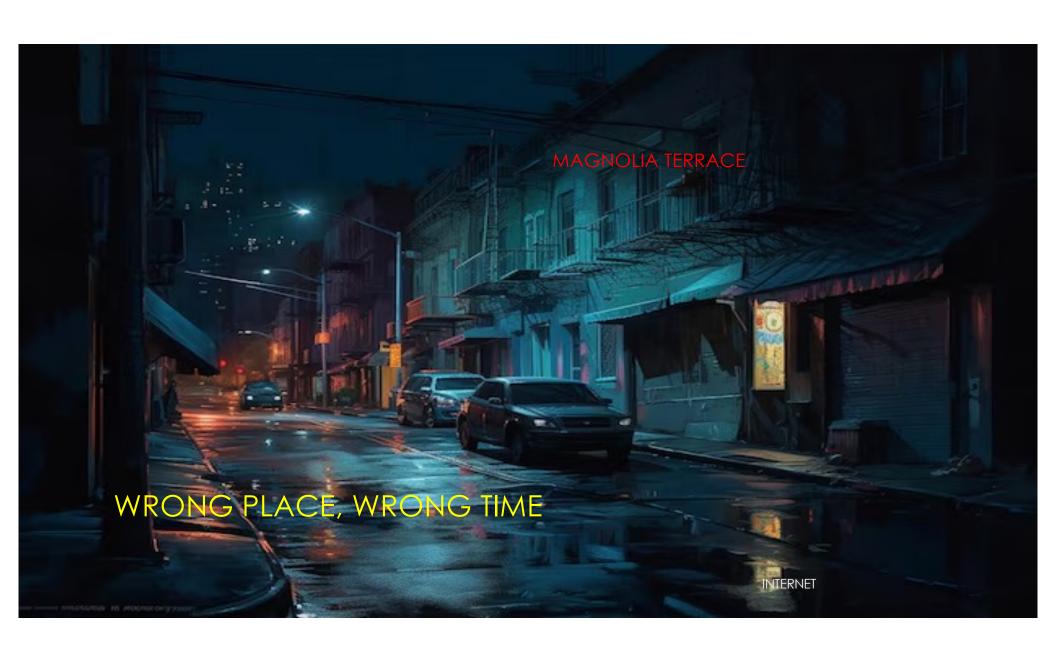
- Waited with informant for an hour and a half
- "Said some hateful things" to informant
- White urinated on informant's car
- "Hot temper when it comes to work"

## Mills was reckless

- Told White not to call for backup
- Wanted badly to arrest Jelly, "notorious drug dealer."
- "I know somewhere else we can make a buy."
- Brought his girlfriend along



- Mills got out alone
- Shouting match
- White had to pull Mills out
- **■** 2 AM



## Mal meets mills

- Recognized him as a cop who "was always pushing people around"
- Recognized Mills's car as a cop car
- Mills was "drunk and pissed off"
- Ordered him into the car
- Ordered to take him to Jelly

## Mal davis was not there to sell crack

- No car
- No phone
- Didn't have Jelly's number
- No drugs
- NO GUN







- No disagreement about that
- Jelly was convicted of it

Mal Davis was in the wrong place at the wrong time



## **Final Argument**

Fred Friedman

#### **Tips for Writing a Final Argument**

FIND AN OPENING HOOK

START WITH A SCENE

AVOID LEGAL LANGUAGE

DO NOT WRITE AS IF YOU ARE GIVING A LECTURE. YOU ARE WRITING PERSUASIVELY TO DECISION MAKERS

BLOCK YOUR ARGUMENTS OFF OF YOUR THEORY

ORGANIZE YOUR ARGUMENTS OFF OF YOUR THEORY AND DETERMINE THE ORDER OF THE ARGUMENTS

DECIDE WHAT TESTIMONY CAME UP AT TRIAL THAT YOU WANT TO HIGHLIGHT IN FINAL. DECIDE WHEN IN FINAL YOU WANT TO INSERT IT.

USE DEMONSTRATIVE EVIDENCE/VISUAL AIDS

WORK ON CRAFTING YOUR LANGUAGE

**USE TRILOGIES** 

REPEAT YOUR THEME

**TELL TWO STORIES.** 

- -Not about the case but about what really is
- -Relate facts of the case but in story fashion

HAVE A BETTER STORY

BE A BETTER STORY TELLER

FIND A CLOSING HOOK

#### **Tips for Delivering a Final Argument**

ACKNOWLEDGE YOUR CLIENT

DEFINITELY USE VISUAL AIDS—PowerPoint, diagrams, maps, something . . . .

REFER TO AND HANDLE ALL ADMITTED EXHIBITS—either they help you or discard them because they are of no relevance or miss the point or do not go to guilt

- 1. ASSERT YOUR CLIENT'S INNOCENCE
- 2. THEME—say it once early and once late
- 3. THEORY—say nothing that is inconsistent with your THEORY
- 4. GENRE—one and only
- 5. WHAT IS NOT AT ISSUE?
- 6. WHAT IS AT ISSUE?
- 7. HUMANIZE YOUR CLIENT
- 8. HUMANIZE YOURSELF. BE CREDIBLE WITH THE JURY
- 9. CONSIDER TELLING TWO STORIES
  - -A story with a moral
  - -The story of innocence in this case
- 10. DECIDE WHAT FACTS YOU MUST MENTION
- 11. CONSIDER REFERENCE TO THE INSTRUCTIONS
- 12. POSE A QUESTION FOR THE PROSECUTOR THAT HE/SHE CANNOT POSSIBLY ANSWER
- 13. REMIND THE JURY THAT YOU GET ONE FINAL ARGUMENT AND THE GOVERNMENT GETS TWO IF YOU ARE IN A STATE WHERE THE GOVERNMENT GOES TWICE
- 14. BE TOTALLY HONEST
- 15. BE SINCERE
- 16. ARGUE WITH PASSION
- 17. LET EXPERIENCES IN EVERY PHASE OF YOUR LIFE ENRICH AND IMPROVE YOUR ARGUMENTS

## a Ten-Step Guide to CLOSING ARGUMENT

by

Cathy R. Kelly

Director of Training

Missouri State Public Defender System

#### STEP ONE: LIST THE BLOCKS OF YOUR ARGUMENT

You cannot argue effectively that which you cannot yourself believe. List first for *yourself* all the facts that support the verdict you want the jury to return, whether that verdict is not guilty or a verdict of guilty on some lesser-included offense. Once you have them listed, group them together into related blocks and give each a working title. These will become the "chapters" of your closing argument.

*Ex: 1. Problems with the identification.* 

- 2. Alibi
- 3. Physical evidence
- 4. Police screw-ups

TIPS: Try to come up with a minimum of three chapters, but make sure you have no more than seven. Listeners have a tough time retaining the cohesion of your argument if you throw more than seven categories at them. Four or five is probably ideal. List each block title at the top of its own page, then go on to Step Two.

#### STEP TWO: LIST BENEATH EACH CHAPTER TITLE EVERY

#### PIECE OF EVIDENCE WHICH SUPPORTS THAT POINT.

Scour the discovery in your case -- every police report, lab report, motion hearing transcript, witness interview, photograph, piece of physical evidence, record or fact of any other kind you can get your hands on. Pull out each piece of evidence which can be used to support your theory of the issues and list it beneath the appropriate chapter heading(s).

#### Ex: Problems with the Identification

- > Only saw man 1 to 2 seconds across parking lot
- > Orig told police could give no description
- > 2d time, gave descrip of beige pants
- > 3rd time, descrip changed to bib overalls

TIP: You will often encounter one piece of evidence that supports more than one chapter of your argument. Go ahead and list it under as many chapters as it fits.

<u>Caveat</u>: The first time a piece of evidence or a particular witness is mentioned in your argument, the temptation is to launch into a discussion of all the other inferences that can be drawn from that same piece of evidence or particular witness. "As-long-as-we're-talking-about-so-and-so . . . "

#### DON'T DO IT!

Think of it as a play. The *issue* you are arguing is the scene. The pieces of evidence and the individual witnesses are the actors, brought out to say their few lines in support of the issue currently on center stage *and then sent back to the wings* to wait for their next scene. If they have more lines to share on other blocks of your argument, call them back out when *that* block moves onto center stage and refer to them again. But do not allow them to destroy the progress of the show by launching all of their lines for

the entire production the first time they make an appearance!

#### STEP THREE: DEVELOP A COMPLETE ARGUMENT WITHIN EACH CHAPTER

Every chapter must have a beginning, a middle, and an end:

1. In the **beginning**, tell your listeners what your point is.

In other words, tell them what you're going to tell them.

2. In the **middle**, discuss each piece of evidence that supports your point, using to your advantage the good facts and neutralizing as best you can the negative ones.

In other words, tell them.

3. At the **end**, *repeat* the overall point you are trying to make, highlighting its connection to the verdict you seek. In other words, *tell them not only what you told them but why you told them*. Don't just set out the facts and fail to articulate the significance of those facts to your theory of the case. The close of each block of your argument is often an ideal place to repeat your *case theme* if you can make it fit smoothly.

#### PREPARATION TIP:

*Talk* first, write second. None of us talks the same way we write. If you write out your argument first, and *then* practice speaking it, your end product is much more likely to sound stilted and to be unpersuasive. Instead, try developing each of your arguments by *talking* aloud to yourself. Make each point of your argument, playing with the phrasing, word choices, points of emphasis, etc. When you're satisfied with a particular point, *then* stop and write down whatever notes you need to help you remember what you've just developed beyond the next 30 minutes and move on to the next point of your argument.

file:///H /PUBLIC/Defender Training/Trial School/2006/Materials/15 Closing Argument Kelly.htm
CONTENT TIPS:
I. Avoid Legal Arguments!
Only lawyers are persuaded by legal arguments (and sometimes not even them!) The rest of the world is persuaded by <i>higher</i> principles than legal loopholes things like justice, fairness, right & wrong. If your case is built on a legal argument, find a way to argue your point <i>without</i> invoking the dry, legal technicality itself. Remember those technicalities jurors detest were in fact created to protect or implement those very principles that so appeal to their hearts. Find ways to tie your argument to the <i>principle</i> rather than to the <i>technicality</i> !
Ex: To most jurors, the requirement of proof beyond a reasonable doubt is a legal technicality. The fear of convicting an innocent man is not.
II. Consider Your Audience!
David Ball, a trial consultant extraordinaire, teaches that you have three audiences during your closing argument and a different mission to fulfill with each. Your audiences are:

a) Jurors who are already in your favor. Your mission is to give them the ammunition with which to fight

b) Jurors who are undecided. Your mission is to persuade them to your point of view and likewise give

your battle for you in the jury room.

them the ammunition to support it.

c) Jurors who are already against you. Your mission is to avoid entrenching them further and allow them room to both save face and change their minds. (In other words, you don't want to say things like "only an idiot would believe . . .!")

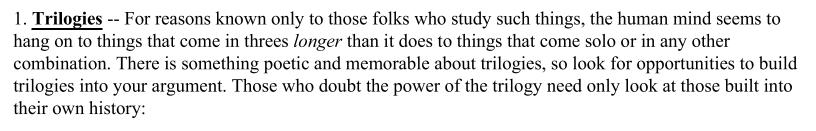
#### STEP FOUR: DECIDE UPON THE ORDER AND WEED OUT THE CHAFF

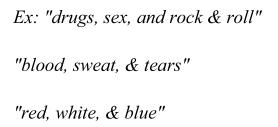
- 1. Select the chapter that you believe is your very strongest argument. Place it at the very end of your closing.
- 2. Select the chapter that you believe is your *second* strongest argument. Place it at the beginning of your closing.
- 3. Evaluate each chapter of your argument for weak or inconsistent arguments. You will often find that some don't really carry their weight. They're throw-away arguments, so throw them away. Less is more.

TIP: When selecting the order of your remaining chapters, you want your arguments to build upon each other both logically *and emotionally*. The emotion of your argument should *build* throughout to a strong ending, not wax and wane. 'Tis not a tide we're creating here. If you have a very emotional plea in one chapter and another which is not so emotional, you will generally want to put the emotional argument toward the end of your closing and your less emotional chapters toward the front.

#### STEP FIVE: POLISH THE PERSUASIVENESS

There are ways to say things and there are ways to say things. All is not equal when it comes to the power of the spoken word. Listed below are a number of devices to consider when you begin putting together your argument:





2. <u>Metaphors</u> - Sentiments, which may be difficult to understand when expressed in the abstract, can often be made much more real and memorable through the use of metaphorical word pictures. Not only do such word pictures capture our imagination and, therefore, our memories more than any abstract concept can, they also appeal to our other senses in ways the word alone does not.

Ex: "All of his life, he'd been pricked with sharp needles of humiliation."

--Robert Pepin

3. <u>Alliteration</u> - A series of words that begin with or include the same sound tend to be more memorable and more powerful than words with no auditory connection to one another.

Ex: "A small-time snitch searching for someone to sacrifice."

"Close enough for Callahan" (the sloppy investigating officer)

"Like most teenagers, she was curious and confused, seduced by and scared of sex."

4. <b>Quotations</b> Not only are quotations a much more succinct and powerful way of making the point we want to make, they also invoke the imprimatur of the wisdom of the ages upon the actions of your client.

Ex: Where your client remained at the scene until police arrived, you may want to invoke the wisdom of the Proverbs: "The wicked flee when no man pursueth, but the righteous stand, bold as a lion.." Or if you want to highlight how a witness has been caught in his own lies, there is always Sir Walter Scott's wonderful quote, "Oh, what tangled webs we weave when first we practice to deceive."

TIPS: When using a quotation in your argument, play with placing the emphasis upon different words within the quote to vary the meaning and power. In the Proverbs quote above, I had always placed the emphasis on the word "righteous" and was surprised at how much more powerful the quote became for my case simply by shifting the emphasis to the action of my client!

5. <u>Analogies</u> -- As with metaphors, it is sometimes easier for us to understand a situation if we can analogize it to an experience or story that is familiar to us. This is true for jurors as well. Fairy tales, children's stories, or everyday experiences can all be valuable tools for analogy in a closing argument.

#### Caveats:

- (a) Make it *succinct*. Analogies are notorious for running rampant and swallowing up large chunks of argument time while your jury fidgets and wishes you would get to the point!
- (b) Only use an analogy if it is *unquestionably* and *directly* on point to a *significant* issue of your case. Analogies are too time-consuming to waste on an insignificant point; nor do you want to get bogged down in a side battle over whether your analogy fits the point you're trying to make. (Such battles can be loud and painful if the prosecutor chooses to ram it down your throat during rebuttal, or silent and secret within a juror's own mind. Either is deadly to your case.)

- 6. <u>Silence</u> -- This is an incredibly powerful tool often overlooked by lawyers who are uncomfortable with it.
- *Use silence at the beginning* of your closing argument to build tension in the courtroom and to gather the attention of your audience. Have you ever been in a noisy classroom where the teacher suddenly stops talking? You can literally watch the silence move, row by row, all the way to the back of the room until every eye is turned to the teacher and you could literally hear a pin drop in that room. THAT is a level of attention you want to use your benefit in a courtroom. You get it, easily and instantly, by using silence.
- *Use silence during your argument* as a nonverbal parenthesis to set apart and emphasize a powerful point or to let an argument float in the air for a bit before moving on to the next one. Give the jurors time not only to taste but to savor your point, before moving to the next one.
- *Use silence at the end* of your argument after you have said your last words. Simply stand for a moment, meeting the eyes of each of your jurors, letting your last words soak in before you simply, softly say *thank-you* and return to your seat. All that will happen when you sit down is the prosecutor starts talking again. That alone is worth postponing. But the silence also again gives the jurors time to savor and absorb your argument and to note your obvious belief in what you're saying as you solidly stand your ground and meet their eyes

Do not clutter it up by moving about! Movement destroys the power of the silence. Learn to simply stand and let the silence speak for you on occasion.

**BUYERS BEWARE**: Each of the techniques discussed above is a valuable tool that you need to know how to use. Each can be very powerful *if* used effectively. As with most good things, however, they must be used in moderation! Too much of even a good thing can quickly descend into gimmickry and undercut the sincerity of your plea.

#### STEP SIX: CREATE CHAPTER HEADINGS & TRANSITIONS

Ever try to read a book of several hundred pages with no chapters? Probably not. There is a *reason* for that. Without some framework for processing it all, the reader gets information overload and just gives up. The same is true for closing arguments. *You* have lived and breathed this case for days, weeks, and months by the time of closing. *You* can jump back and forth between issues & topics & players without once losing the action. Jurors don't have that luxury. This is their one and only time through. It is much easier for them to get lost than you realize! And if you lose them? You lose.

### 1. Chapter Headings:

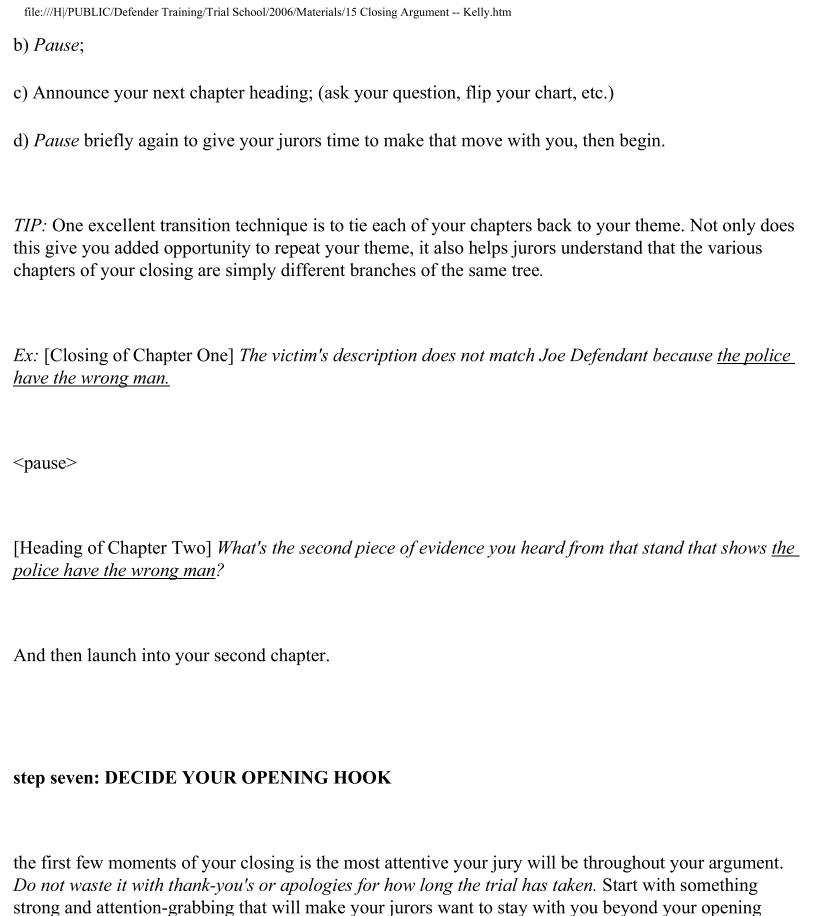
Always give your jurors a "heads-up" that you are moving to a new topic. This can be as simple as a "Now let's talk about the sloppy police work brought to you in this case." Or you may want to use a flip chart to list "the five things you heard in this case that show us the police have the wrong man," then simply flip the page to the next chapter of your argument when you're ready to move on. Another excellent method of chapter headings is to simply ask the questions you know the jury wants answered. Ex. In a rape case where the defense is consent but all parties agree the victim was found in tears, If this is what she wanted, if this were her choice, then why was she crying? Then answer the question! There are any number of ways to communicate your chapter headings to your jurors and by all means draw upon your own creativity in the process. Just make sure you DO it.

### 2. Transitions Between Chapters

Even *with* a chapter heading, shifts of topic can be jarring if they are too abrupt or seem wholly unrelated or unconnected in any way to what has gone before. It's as if you're speeding down a street and suddenly slam on your brakes to make a sharp, right turn. Your passengers may be dragged along with you, but if they didn't know it was coming they may take a few minutes to catch their breath again. You cannot afford for your jurors to spend a few minutes "catching up" to you during your closing argument. After all, you only *have* a few minutes! How to avoid it?

Make sure you slow down before you reach the turn:

a) Give each chapter of your argument a clear and definite closure;



lines!

#### STEP EIGHT: DECIDE ON YOUR CLOSING LINES:

All too often you will see an otherwise great closing argument trickle off into a mumbled thanks at the end, draining the power of the defense away with it. Don't leave your closing lines to chance! You want to take that opportunity to ask the jury for the verdict you want, but there are thousands of ways to do just that. The goal is to find a way that is powerful, persuasive, and that comes from your heart.

#### **STEP NINE: Practice it**

You must prepare not only the content of the closing, but the delivery, and that can only be done through practice. Practice it aloud -- to yourself, to your mirror, to your spouse, colleague or pets -- but *practice it.* 

Do not *memorize* it. Few of us are sufficiently gifted thespians to deliver a memorized monologue and make it ring sincere. Simply talk it through several times. Each time you do, your argument will come out slightly different and that is the way it should be. That's what keeps it fresh and sincere and real. What you want to *remember* are those key phrases you've chosen, the metaphors, analogy, or trilogies; the silences you've built in; the transitions you've decided upon-- as well as, of course what evidence you want to discuss under each chapter!

#### STEP TEN: reduce it to outline form

You cannot <u>read</u> a closing argument and persuade anyone of anything. Your persuasiveness comes from your own passion about that of which you speak. If you don't know it well enough to remember it without reading it, you've just spoken volumes to the jury about just how passionately you feel about it!

"But there is SO much to remember!!" Yes, there is. That's why you must PRACTICE, PRACTICE,

PRACTICE until you know your arguments so well that you can speak from the heart about each	ı and
every one of them.	

Then reduce your argument to a <u>one-page outline form</u> which you can lay on the lecturn or table corner as your safety net in case you go blank. The outline will list your chapter headings and *no more* than a word or two prompt for each of the pieces of evidence you plan to discuss under that heading.

### Ex: I. ID Probs

- > 1-2 secs
- > distance
- > descriptions

If your notes are any more detailed than this, you will not be able to even find your *place* in a glance, much less your *prompt*; and a glance is all you can spare for notes during closing!!

TIPS: Place your cup of water beside your outline during your closing. Then if you DO go blank and have to refer to them, you can simply pause, walk to your cup, take a sip (while you're frantically scanning your outline) and as far as the jury knows, you simply had a dry throat.

Or you can list your chapters and supporting evidence on a flip chart for use as demonstrative evidence during your closing argument. Not only does this allow the jury to follow your argument more easily as you go through each topic, you don't have to worry about using your notes!

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### A Word About Storytelling:

The new touchstone in trial practice is *storytelling* and I am one of its avid disciples. However, I am convinced that the best storyteller will fail to persuade the jury if s/he uses closing argument *only* as an opportunity to tell a story. A story told well may hold the jurors' interest and even entertain them, but if the lawyer fails to explain why it matters to their verdict, in the end, the lawyer will still lose. For that reason, I encourage you to think of a good closing argument not as a single story, but as a well-organized photo album; each page of vivid, vibrant photographs carefully attached in its appropriate place beside a succinct, running commentary. The commentary points out the significance of and subtleties within each photograph that might easily be missed or overlooked by the casual observer.

The photographs in your closing argument are the vignettes and scenes carefully culled from the evidence and vividly painted for your jurors through the skills of storytelling to prove a point. The moment your innocent client learns he's falsely accused and yet does not run away is a photograph that supports his innocence. The harsh reality of an interrogation room is a photograph which explains why the confession does not match the physical evidence and is therefore not believable. Each of these scenes must be brought to life again for the jurors during your argument through the skill of storytelling. *Yet they do not and cannot stand alone*. Without benefit of an accompanying commentary, a carefully-crafted explanation of how each of these events fit together to paint a picture of innocence, you run the very real risk that your jurors may never understand the significance of or subtleties within your photographs. Absent that understanding, the likelihood they will reach the conclusion you want them to reach is a risk no gambler would want to take.

Of course, the opposite extreme is equally ineffective. The perusers of our proverbial photo album will quickly lose interest in the most thorough of commentaries if there are no photographs to accompany it! A dry exposition on how the evidence supports a finding of not guilty does not move us, capture our attention or imagination, or make us care. BOTH vivid photographs (storytelling) and carefully crafted commentary (argument) are critical to an effective closing. Equal attention must be paid to both.