UNC SCHOOL OF GOVERNMENT

2018 Defender Trial School

July 9-13, 2018 / Chapel Hill, NC

Sponsored by the
The University of North Carolina School of Government and
Office of Indigent Defense Services

ELECTRONIC COURSE MATERIALS

UNC SCHOOL OF GOVERNMENT

NORTH CAROLINA DEFENDER TRIAL SCHOOL

Monday, July 9 through Friday, July 13, 2018
UNC School of Government, Chapel Hill, NC

Cosponsored by the UNC-Chapel Hill School of Government
& Office of Indigent Defense Services

AGENDA

Monday, July 9

8:00-9:00	Check-in
9:00-9:15	Welcome, Introduction, and Description of Program John Rubin, Professor, UNC School of Government, Chapel Hill, NC
9:15-10:15	**FACTUAL BRAINSTORMING (PLENARY)** Joseph Ross, Assistant Federal Defender, Raleigh, NC
10:15-10:30	Break
10:30-12:15	**BRAINSTORMING (WORKSHOPS)**
12:15-1:15	Lunch (provided in building)
1:15-2:45	**BRAINSTORMING (WORKSHOPS)**
2:45-3:00	Break
3:00-4:30	**DEVELOPING YOUR THEORY OF DEFENSE AND THEMES BY TELLING YOUR CLIENT'S STORY (PLENARY)** Ira Mickenberg, Attorney & Consultant, Saratoga Springs, NY
4:30-5:15	**THEORY OF DEFENSE (WORKSHOPS)**

Tuesday, July 10

9:00-10:30	**THEORY OF DEFENSE (WORKSHOPS)**
10:30-10:45	Break

10:45-12:30	**THEORY OF DEFENSE (WORKSHOPS)**
12:30-1:30	Lunch (provided in building)
1:30-2:30	**BEING VISUAL: DEMONSTRATIVE AIDS AND PHYSICAL EVIDENCE (PLENARY/DEMONSTRATION)** Stephen Lindsay, Sutton & Lindsay, Buncombe County, NC
2:30-2:45	Break
2:45-3:45	**JURY SELECTION: WHAT QUESTIONS TO ASK, HOW TO ASK THEM (PLENARY)** Kevin Tully, Chief Public Defender, Mecklenburg County, NC
3:45-4:15	**JURY SELECTION (DEMONSTRATION)** Kevin Tully
4:15-5:00	**BRAINSTORM VOIR DIRE (WORKSHOPS)**
6:00-????	Dinner @ Top of the Hill Restaurant & Brewery, Chapel Hill (Individual Pay)

Wednesday, July 11

8:00-9:00	Breakfast for Jurors (provided in building)
9:00-10:30	**JURY SELECTION (WORKSHOPS)**
10:30-10:45	Break
10:45-12:15	**JURY SELECTION (WORKSHOPS)**
12:15-12:30	**DEBRIEF JURY SELECTION**
12:30-1:30	Lunch
1:30-2:15	**OPENING STATEMENTS (PLENARY/DEMONSTRATION)** David Clark, Senior Assistant Public Defender, Guilford County, NC
2:15-2:30	Break

2:30-3:00 **BRAINSTORM OPENING (WORKSHOPS)**

3:00-5:00 **OPENINGS (WORKSHOPS)**

Thursday, July 12

9:00-10:00 **CROSS-EXAMINATION (PLENARY/DEMONSTRATION)**
Susan Brooks, Public Defender Administrator, Durham, NC

10:00-10:15 Break

10:15-10:45 **BRAINSTORM CROSS EXAMINATION (WORKSHOPS)**

10:45-12:00 **CROSS EXAMINATION (WORKSHOPS)**

12:00-1:00 Lunch (provided in building)

1:00-1:45 **CROSS EXAMINATION (WORKSHOPS)**

1:45-2:00 Break

2:00-2:45 **DIRECT EXAMINATION (PLENARY/DEMONSTRATION)**
John Rubin

2:45-3:15 **BRAINSTORM DIRECT EXAMINATION (WORKSHOPS)**

3:15-5:15 **DIRECT EXAMINATION (WORKSHOPS)**

Friday, July 13

9:00-10:00 **CLOSING ARGUMENTS (PLENARY/DEMONSTRATION)**
Fred Friedman, Attorney and Professor, University of Minnesota, Duluth, MN

10:00-10:15 Break (light snack provided)

10:15-10:45 **BRAINSTORM CLOSING ARGUMENT (WORKSHOPS)**

10:45-12:45 **CLOSING ARGUMENT (WORKSHOPS)**

12:45-1:00 Conclusion

CLE Hours:29.75
(general credit only)

NORTH CAROLINA DEFENDER TRIAL SCHOOL

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PREPARATION FOR DEFENDER TRIAL SCHOOL: A GUIDE FOR PARTICIPANTS

All participants in the 2018 Defender Trial School must do four things to prepare for the program:

1. Choose one of your own pending cases and thoroughly familiarize yourself with the facts of that case. This case will form the basis for the work you will be doing in all the small group workshop sessions. Here is the type of case to bring:
    - **The case must be an open, pending criminal case at the trial level.** You also may bring an open, pending juvenile delinquency case at the trial level (but not an abuse, neglect, dependency, or termination of parental rights case). The case **must** be an appointed case. It must **not** be an appeal to the appellate division, a post-conviction case, a case you have already tried (unless it's a case you are appealing for a trial de novo), a case that was pled out, a case that has been dismissed, or a case awaiting sentence. It should **not** be another attorney's case unless you are second chair and are actively involved in preparing the case, as you will not know the facts as well as you will in one of your own cases.
    - You should have already interviewed your client and done enough investigation to be familiar with the basic facts and witnesses of the case. You also should review any discovery or other information you have received from the State.
    - The case may be either a felony or a misdemeanor. If you bring a misdemeanor case for which there is no right to statutory discovery, or a felony case for which you have not yet received discovery materials, you will need to do additional investigation so that you will know the State's version of the facts. The workshops will be much more meaningful if you are familiar with the State's evidence as well as your client's side of the case.
    - You do not have to prepare any parts of your trial performance in advance. For example, you do not have to arrive at the program prepared to do an opening or closing. All you need to do in advance is know the facts of your case and be prepared to discuss them in detail.
    - If you have questions, please feel free to contact Professor John Rubin (919.962.2498 or rubin@sog.unc.edu).

2. Using the attached Case Summary Form, please write a one-page summary of the facts of your case (not the law) and **bring 10 copies** of it with you to the program.

3. Please bring the following with you to the program: (a) the indictment or other charging instrument in your case; (b) any police reports; (c) any other discovery or *Brady* material you have received; and (d) any witness or client statements. (All participants will sign

confidentiality agreements to ensure that information shared at the Trial School is subject to attorney confidentiality obligations.)

4. Read the Plenary Session Fact Problem (which will be emailed to you before the program). This is the problem we will be discussing in the large group sessions, and it will form the basis for the demonstrations the faculty will be doing in the large group sessions. You do not have to do any additional research, writing, or preparation concerning the Plenary Session Fact Problem.

This program may be unlike any other skills programs or CLE courses you have attended in the past. All of the sessions are interactive and **require** your attendance and participation. This is not the type of program where participants can attend some sessions and skip others. In the plenary sessions, we will be working together on the plenary fact problem, with the aim of teaching skills that you will be able to apply to your own cases in the small group workshops. The plenary sessions will involve your participation and will include demonstrations by faculty members. In the small group workshops, you will be working on your own case, practicing the skills taught in the plenaries, and assisting the other members of your group to develop their cases. (Please note that if you are an appointed attorney, the Office of Indigent Defense Services does not consider the time spent at the Trial School to be billable time.)

North Carolina Defender Trial School
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Summary of the Facts of Your Case

Lawyer's name _____

Client's name _____

Charges:

Elements of the crimes charged:

Summary of the facts (not the law) of your case (use an extra sheet if necessary):
(In preparing your summary, consider interviews you've had with your client, police reports, discovery you've obtained, investigation you've conducted, and any other sources of information. Indicate the source of the information, such as police report, witness statement, client, etc., particularly if the versions of events differ.)

Please tell us about your client (use an extra sheet if necessary): (Please provide basic demographic information about your client, including age, gender, race, marital status, children, residence, etc., as well as other personal information, such as employment, schooling, military experience, disabilities, mental health or substance abuse issues, family and community ties, prior criminal justice involvement, and other matters of significance in your client's life.)

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PLENARY SESSION
FACT PROBLEM

Ira Mickenberg, Esq.
Public Defender Trainer & Consultant
6 Saratoga Circle
Saratoga Springs, NY 12866
(518) 583-6730
FAX: (518) 583-6731
iramick@att.net

Your client, Juan Mesa, is charged with Sale of a Controlled Substance and Possession of a Controlled Substance with Intent to Sell and Deliver. Mr. Mesa is a 26 year old Mexican-American man who lives in Midway, a city of about 200,000 people. He was born in Los Angeles, and moved with his parents to Midway when he was 5. He has a light complexion, is 5'6" and weighs 170 lbs. He has long, black hair. Mr. Mesa is not employed full-time, but works as a part-time laborer wherever he can pick up jobs. He has past training in construction work, and is skilled at plastering, painting, and plumbing.

Juan Mesa is single and lives alone, although he spends several nights a week at his girlfriend Anna's apartment. Anna works as a receptionist in a dentist's office about six miles away in a suburb of Midway. Juan's mother died when he was 20, and his father then moved back to Mexico City.

Mr. Mesa has one prior conviction. In 2011 he was arrested and charged with felony larceny from a construction site. He accepted a plea bargain to misdemeanor larceny and was placed on one year probation, which he successfully completed.

The neighborhood Mr. Mesa lives in is about 40% black, 50% recent immigrants from Mexico and Central America, and 10% white. Most of the stores now have signs in their windows advertising in both English and Spanish. The neighborhood is poor and has a high unemployment rate and high crime rate. Drug sales have been a persistent problem in the neighborhood.

Juan Mesa has told you that on the day he was arrested he was working on a house that was being repaired on River Street. He got the job through his cousin Ramon, who works in an auto repair shop. Ramon called him in early May 2017 and told Juan that a customer of Ramon's needed someone to do renovation work on a building he had just bought. Juan took the job, and

started working on May 7, 2017. He went to the 27 River Street building four or five times a week, until he was arrested. Juan has admitted to you that Ramon told him the owner was a drug dealer, but insists that everyone in the neighborhood knew that. He also denies having anything to do with the drugs or any sale operation.

On May 25, 2017, Juan Mesa arrived at 27 River Street at about eleven in the morning and did not leave the house until the police raided it at about 6:30 in the evening. He spent the entire time on the second floor, where he was doing drywall work, plastering and painting two bedrooms. There were other people in the house while he was there. Some of those people were doing renovations and construction on the first floor. He isn't sure what the others were doing. No one else was working on the second floor.

Mr. Mesa says that he did not see any drugs in the house and has no idea if anyone came to the door while he was working upstairs.

Officer John Pitt will testify that as the head of the Citizen Response Narcotics Team he had received several complaints about drugs being sold from a house at 27 River Street in Midway. At about 11:30 a.m. on May 25, 2017, he sent a surveillance team to River Street, with five officers, all of whom were stationed at various locations across the street from 27 River St. At about noon, Officer Pitt sent a confidential informant to knock on the door of the building and try to buy drugs. Immediately before this, Pitt had searched the informant and ascertained that he had no drugs on him. Pitt gave the informant $40 in marked bills to buy drugs.

Pitt saw the informant knock on the door. A man appeared and had a conversation with the informant that Pitt could not hear. Pitt saw the informant hand something to the man. After about 10 seconds, the man went back into the house. In his incident report, Officer Pitt described the man as Hispanic, about 5'8" tall, 150 pounds, medium build, long black hair, wearing blue

jeans and a black sweatshirt.

About 30 seconds after the man went back in the house a woman emerged. She spoke to the informant for a few seconds, then went to a car parked on the street about 50 feet to the left of the doorway. She opened the car door, bent down, and retrieved something from the front seat area. She then went back to the informant, handed him something, and returned to the house.

The informant returned to Officer Pitt, told him he had just bought drugs from the man and the woman, and gave him a package of cocaine he said the woman had handed him.

Officer Pitt then returned to the police station, filled out an application for a search warrant, and got a judge to sign the warrant at 3:30 p.m. He left the members of his team behind to watch the house at 27 River Street. They saw a few people enter the house, and a few leave between 12:30 and 6:30 p.m. when Pitt returned with the warrant. None of the people they saw enter and leave was a woman.

At 6:30 p.m., Pitt returned, and with several members of the team, knocked on the door. When a black man they had never seen before opened the door, they entered and searched the entire place. They found six men present on the first floor. Pitt did not recognize any of them. Three of the men were dressed in work overalls and t-shirts. They seemed to be doing construction work. According to Pitt, they were installing video surveillance cameras all over the first floor, adding reinforced steel and extra locks to all the doors, and building what appeared to be hiding compartments in the walls. The officers found no drugs anywhere on the first floor. They did note that there were two back entrances from the first floor—one leading to a back yard and one leading directly to an alley running by the side of the house.

Juan Mesa was the only one on the second floor. He was wearing blue jeans and a blue t-shirt. His clothes were stained with drying white paint and plaster dust. He had paint rollers,

trays, and plastering tools all around him, and the walls were obviously undergoing renovations. The officers found six bags of cocaine hidden in a hole in the ceiling of a back room on the third floor (not one of the rooms under renovation). No marked money was found, and no drugs or money was found on Juan Mesa. The search turned up no black sweatshirt or other clothing.

After his arrest, Mr. Mesa was questioned by the police, and told them that he knew nothing about any drugs and had nothing to do with any drug sale.

Officer Pitt identified Juan Mesa as the man who came out and spoke to the confidential informant. When he returned to the police station, he met the informant and showed him a photo array. The informant picked out Juan Mesa's picture as the person who spoke with him and took the marked money.

A pre-trial motion to suppress the drugs on Fourth Amendment grounds was denied. A motion to suppress both Officer Pitt's identification and the informant's photo ID on Fifth Amendment suggestiveness and statutory grounds has also been denied.

The prosecution has informed you that they will not call the confidential informant to testify at trial. They intend to have Officer Pitt testify both to his own identification of Juan Mesa and to the informant's photo identification. They also have given notice that Officer Pitt will testify as an expert witness that the construction he saw on the first floor was typical of the renovations done to convert a normal house to a house used for major drug sale operations.

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BRAINSTORMING: DEVELOPING THE FACTS TO BUILD A THEORY OF DEFENSE

Ira Mickenberg, Esq.
6 Saratoga Circle
Saratoga Springs, NY 12866
(518) 583-6730
FAX: (518) 583-6731
iramick@worldnet.att.net

WHY BRAINSTORM YOUR TRIAL CASES?

Every good trial lawyer realizes that we win cases on the *facts*, not on the law. Jurors are persuaded not by legal technicalities, but by a theory of defense that is rooted in the facts of the case, and by a good, factual story that convinces them that our client is not guilty.

One of the greatest obstacles to winning trials is that we often tend to accept or buy into the prosecution's version of the facts. When we do this, the jury hears a story that is framed by police testimony and ends with our client being the guilty party. To win a criminal trial, we must develop a different factual narrative from that offered by the prosecution.

Developing a different factual narrative from that of the prosecution and devising a theory of defense based in the facts of your case are only possible if you have first explored and analyzed those facts in depth. Brainstorming is the method we suggest for developing your facts.

The basic reasons we advocate starting your trial preparation by brainstorming the case are simple:

- When we are preparing for trial, we have already become so involved in the facts, issues, and personalities of the case that it is easy to overlook ideas and facts that might help us win.

- Because we get so close to the cases we litigate, it is also almost impossible for us to find new factual perspectives and develop new ideas without help from others. Or to put it another way:

- When preparing for trial, many heads are a lot better than one.

WHAT BRAINSTORMING IS NOT

- Brainstorming is not a "touchy-feely," informal get together.

- Brainstorming is not a theoretical or academic exercise. It is meant to generate practical ideas that will allow you to develop a persuasive theory of defense and a persuasive storyline that will ultimately convince the judge or jury to reach the conclusion you want.

- Brainstorming is not the equivalent of hanging out in the office and discussing your case with a co-worker.

- Brainstorming is not meant just to reinforce the ideas you have already developed about your case. To the contrary, it is meant to develop new ideas and perspectives about your case.

WHAT BRAINSTORMING IS

- Brainstorming is a formal process for developing and analyzing the facts of your case and for gaining new, creative perspectives on your case.

- Brainstorming is a way to reality-check the strategies and tactics you are considering for your case and to make an intelligent decision about what will work and what will not work.

- ***Inclusive*** – At the start of your brainstorming session the goal is to get as many facts and perspectives as possible. You want quantity at this stage, not necessarily quality. As you progress with your case, you will be making decisions as to what can be used and what cannot be used. But at the brainstorming phase, all you want is to get as much on the table as possible, to give you as many options as possible when you get around to making decisions about strategy and tactics. Quantity at the start of the process helps generate quality at the end. Subjects worth brainstorming include:

  --Crime facts, events, actions
  --People (personalities, motivations, interrelationships, influences)
  --Places, objects
  --Investigative and other procedures
  --NOT LAW

- ***Non-Judgmental*** – Some of us have been taught that all facts can be divided into good facts, bad facts, and facts beyond change. While this formulation may be useful later on, the brainstorming phase is much too early to make these judgments. In fact, one goal of brainstorming is to be able to make an intelligent decision about what facts are really good, what facts are really bad, and what facts are really beyond change. One of the best things about the brainstorming process is that we often find that our initial judgments about these factors is incorrect. Facts we thought would be bad can be made good. Facts initially thought to be beyond change can be successfully challenged. So when brainstorming the facts of a case, do not reject any idea out of hand, and do not be too quick to shoehorn facts into pre-determined categories.

- ***Associative*** – One of the best things about brainstorming is that if you are truly inclusive and non-judgmental, you will begin to start associating between ideas and facts that are being brainstormed. One person's suggestion will give rise to a different and possibly better formulation. Brainstorming should encourage this kind of creativity and association, which is another reason to be inclusive and non-judgmental.

HOW TO BRAINSTORM YOUR CASE

1. Find at least 3 other people to do the brainstorming.

a. There should be at least three to facilitate a real exchange of ideas and perspectives.

b. They do not have to be lawyers. In fact, non-lawyers often provide a more realistic perspective on what jurors will and will not accept.

2. Set aside a specific time to do the brainstorming.

a. It should be at least an hour or two.

b. Give everyone sufficient time to prepare and set aside the time.

3. If there are any essential documents, such as police reports, a confession, an indictment, etc., be sure to give all of the brainstormers copies in advance.

4. Start the brainstorming session by giving everyone a 5-10 minute summary of the facts of the case. If there is a particular problem you want to address, define the problem, but do not restrict the ability of the group to redefine the problem if they want.

5. After you spend 5-10 minutes describing the facts, give the group another 10-15 minutes to ask you questions about the case.

6. When the time for questions is over, stop asking and answering questions. This will sometimes be hard to do, but if the questions go on for too long, the group may forget to do any real brainstorming, and all you wind up doing is reinforcing the original answers and perspective of whoever's case it is.

7. Have the group brainstorm the case. This will involve analysis, free-association, and generally tossing around facts that attract your interest and ideas about what those facts mean and how they can be used.

8. When the group starts to brainstorm, the person whose case is being brainstormed should keep quiet. The purpose of the session is not for him or her to defend his or her original ideas. It is to gain new perspectives from the others. Let everyone else talk. Listen to them.

9. Write down everything everyone says. Be as close to verbatim as possible. The purpose of this is twofold: (1) To make sure that nothing is forgotten by the end of the session; (2) To permit participants to compare and make associations between things that were said at various times in the session.

WHAT TO DO WITH THE FACTS YOU HAVE BRAINSTORMED

- Brainstorming should provide enough facts and enough ideas about those facts to enable you to develop a persuasive theory of defense.

- Brainstorming should provide enough facts and enough ideas about those facts to enable you to develop a storyline that will persuade the jury to acquit. To this end, the brainstorming should help you define the characters in the story of your case and the role those characters will play; the setting in which your story takes place; and the sequence in which you will tell the story of your case at trial.

FOLLOWING UP – WHAT COMES NEXT

Preparing a criminal case for trial is not a linear process. As we learn more about the case, our views change. We revise our theory of defense, adjust our strategies and tactics, and go out to do more investigation. Brainstorming is an important first step in the process. After brainstorming, you may see the need to gather and investigate more facts, interview more witnesses, obtain more documents. If this is what happens after the brainstorming session, the session has been a success—you have obtained a better idea of what needs to be done to win the trial. After brainstorming, you may feel that you are ready to develop a theory of defense that will guide future strategic and tactical decisions. If brainstorming has put you in a position to construct a theory of defense, it has also been a success.

A TEMPLATE/WORKSHEET FOR DEVELOPING A PERSUASIVE STORY/THEORY OF DEFENSE AT TRIAL

Ira Mickenberg (with some friendly revisions by John Rubin)
6 Saratoga Circle
Saratoga Springs, NY 12866
(518) 583-6730
imickenberg@nycap.rr.com

1. In factual terms, identify why your client is innocent in one or at most two sentences – in other words, what really happened in this case?

2. Decide which genre of factual defense applies to your client's innocence.

   a. The criminal incident never happened.
   b. The criminal incident happened, but I didn't do it.
   c. The incident happened, I did it, but it wasn't a crime.
   d. The criminal incident happened, I did it, it was a crime, but not the crime charged.
   e. The criminal incident happened, I did it, it was the crime charged, but I'm not responsible.
   f. The criminal incident happened, I did it, it was the crime charged, I'm responsible, but who cares?

3. Craft the story that shows why your client is innocent.

   a. Who are the three main characters in the story of innocence?

   b. What are the three main scenes in the story of innocence?

   c. When and where does the story of innocence start?

4. What emotions do you want the jury (and/or judge) to feel when they hear your story?

5. Write out a paragraph distilling your client's story/theory of defense. Incorporate the key aspects of your responses to the above questions.

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STORYTELLING: PERSUADING THE JURY TO ACCEPT YOUR THEORY OF DEFENSE

Ira Mickenberg, Esq.
6 Saratoga Circle
Saratoga Springs, NY 12866
(518) 583-6730
FAX: (518) 583-6731
iramick@worldnet.att.net

What Does Telling a Story Have to Do With Our Theory of Defense?

Stories and storytelling are among the most common and popular features of all cultures. Humans have an innate ability to tell stories and an innate desire to be told stories. For thousands of years, religions have attracted adherents and passed down principles not by academic or theological analysis, but through stories, parables, and tales. The fables of Aesop, the epics of Homer, and the plays of Shakespeare have survived for centuries and become part of popular culture because they tell extraordinarily good stories. The modern disciplines of anthropology, sociology, and Jungian psychology have all demonstrated that storytelling is one of the most fundamental traits of human beings.

Unfortunately, courts and law schools are among the few places where storytelling is rarely practiced or honored. For three (often excruciating) years, fledgling lawyers are trained to believe that legal analysis is the key to becoming a good attorney. Upon graduation, law students often continue to believe that they can win cases simply by citing the appropriate legal principles and talking about reasonable doubt and the elements of crimes. Prisons are filled with victims of legal analysis and reasonable doubt arguments.

For public defenders, this approach is disastrous because it assumes that judges and jurors are persuaded by the same principles as law students. Unfortunately, this is not true. When they deal with criminal trials, lawyers spend a lot of time thinking about "reasonable doubt," "presumption of innocence," and "burden of proof." While these are certainly relevant considerations in an academic sense, the verdict handed down by a jury is usually based on more down-to-earth concerns:

1. "Did he do it?"

and

2. "Will he do it again if he gets out?"

A good story that addresses these questions will go much further towards persuading a jury than will the best-intentioned presentation about the burden of proof or presumption of innocence.

ETHICS NOTE: When we talk about storytelling, we are not talking about fiction. We are also not talking about hiding things, omitting bad facts, or making things up. Storytelling simply means taking the facts of your case and presenting them to the jury in the most persuasive possible way.

What Should the Story Be About?

A big mistake that many defenders make is to assume that the story of their case must be the story of the crime. While the events of the crime must be a part of your story, they do not have to be the main focus.

In order to persuade the jury to accept your theory of defense, your story must focus on one or more of the following:

Why your client is factually innocent of the charges against him.

Your client's lower culpability in this case.

The injustice of the prosecution.

How to Tell a Persuasive Story

I. Be aware that you are crafting a story with every action you take.

Any time you speak to someone about your case, you are telling a story. You may be telling it to your family at the kitchen table, to a friend at a party, or to a jury at trial, but it is always a story. Our task is to figure out how to make the story of our client's innocence persuasive to the jury. The best way to do this is to be aware that you are telling a story and make a conscious effort to make each element of your story as persuasive as possible. This requires you to approach the trial as if you were an author writing a book or a screenwriter creating a movie script. You should therefore begin to prepare your story by asking the following questions:

1. Who are the characters in this story of innocence, and what roles do they play?

2. Setting the scene -- Where does the most important part of the story take place?

3. In what sequence will I tell the events of this story?

4. From whose perspective will I tell the story?

5. What scenes must I include in order to make my story persuasive?

6. What emotions do I want the jury to feel when they are hearing my story? What character portrayals, scene settings, sequence, and perspective will help the jurors feel that emotion?

If you go through the exercise of answering all of these questions, your story will automatically become far more persuasive than if you just began to recite the events of the crime.

II. "But I Don't Have Enough Time to Write a Novel For Every Case"

We all have caseloads that are too heavy. A short way of making sure that you tell a persuasive story to the jurors is to make sure that you focus on at least three of the above elements:

1. Characters – before every trial, ask yourself, "Who are the characters in the story I am telling to the jury, and how do I want to portray them to the jurors?"

    a. Who is the hero and who is the villain?
    b. What role does my client play?
    c. What role does the complainant/victim play?
    d. What role do the police play?

2. Setting – Where does the story take place?

3. Sequence – In what order am I going to tell the story

    a. Decide what is most important for the jury to know
    b. Follow principles of primacy and recency:
        i. Front-load the strong stuff
        ii. Start on a high note and end on a high note

III. Once you have crafted a persuasive story, look for ways to tell it persuasively.

You will be telling your story to the jury through your witnesses, cross-examination of the State's witnesses, demonstrative evidence, and exhibits. When you design these parts of the trial, make sure that your tactics are tailored to the needs of your story.

A. The Language You Use to Communicate Your Story Is Crucial

1. Do not use pretentious "legalese" or "social worker-talk" You don't want to sound like a television social worker, lawyer, or cop.

2. Use graphic, colorful language.

3. Make sure your witnesses use clear, easy-to-follow, and lively language.

4. If your witnesses are experts, make sure they testify in language that laypeople can understand.

B. Don’t Just Tell the Jury What You Mean – Show Them

1. Don’t just state conclusions, such as “the officer was biased” or “my client is an honest man.” Instead, show the jury factual vignettes that will make the jurors reach those conclusions on their own.

2. Use demonstrative evidence to make your point.

3. Create and use charts, pictures, photographs, maps, diagrams, and other graphic evidence to help make things understandable to the jurors.

4. Visit the crime scene and any other places crucial to your theory of defense. That way when you are describing them to the jury, you will know exactly what you are talking about.

"DO YOU SEE WHAT I SEE?"

Why Demonstrative Evidence Makes A Difference

Said a little lamb to a shepherd boy: "Do you hear what I hear?"

If the Shepherd boy was like our jurors – probably not!

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By:

Stephen P. Lindsay

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INTRODUCTION

Some time ago, as winter was turning to spring, I was traveling on Route 19-23 heading to the far western reaches of North Carolina for a trial. Christmas was a couple of months passed but the peaks of the surrounding mountains remained snow-covered. There was still a winter feeling in the air. I tried to concentrate on real business but kept drifting off into what some people refer to as "la-la land," that state of mind which lets you drive with precision even though your mind is somewhere else. I found myself humming a yuletide tune -- "Do You Hear What I Hear." Although lyrics are by no means my strong suit, I started singing the following rendition: "Said a little lamb

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[1] Stephen P. Lindsay is a partner with Kerry Sutton in Sutton & Lindsay, PLLC which has offices in Asheville and Durham, North Carolina. Lindsay's contact information is 46 Haywood Street, Suite 200, Asheville, NC 28801, (828) 551-6446, persuasionist@msn.com. Lindsay is a 20 year faculty member with the National Criminal Defense College in Macon, Georgia, lectures and teaches in numerous states and on behalf of several organizations including the NACDL, NLADA, and the Federal Defender Trial Skills program in San Diego, California.

to the shepherd boy, 'do you hear what I hear?'" At that very moment, for whatever reason, two distinct thoughts came to my mind. First, any ambition I had to become a singer was unquestionably wishful thinking. Second, and more importantly, if the shepherd boy was anything like our jurors, he probably did not hear the same thing that the lamb heard. However, the song goes on --- "Do you see what I see?" For several reasons, the chances are much better that the little lamb and the shepherd boy, although probably not hearing the same thing, did in fact see the same thing. From these events and observations comes an important lesson for those of us who are criminal defense litigators -- we must do more than present mere testimony to our jurors. We must find creative ways to present our cases that will cause jurors to do more than listen to testimony -- ways that will make them tap into their various senses -- while deciding the fates of our clients.

I have lectured on the use of demonstrative evidence in capital and non-capital litigation. There really isn't that much difference. However, I have seen a troublesome trend developing in capital litigation to overlook the basic principles of non-capital case demonstrative evidence and over emphasize things like family history charts, genographs, pressure charts, and various other visual aids used to try and explain the testimony of "experts." These things can be powerful and should continue to be used in capital trials, not in lieu of, but in addition to, more traditional, non-capital case demonstrative evidence

There is no "cookie cutter" demonstrative evidence. Each case is unique and provides for unique opportunities to show jurors what you are talking about. The ways of demonstrating your points is limited only by your creativity (and occasionally a bothersome rule or judge that can admittedly muck things up a bit). That which follows is applicable to the trial of all cases – criminal and civil – and is offered to hopefully rekindle the creative fires of all litigators.

The "Same Old - Same Old"

When it comes to demonstrative evidence, a majority of criminal defense lawyers get caught in the trap of doing the "same old-same old." Whether this stems from law school theoretical teaching, from a far too intense focus on Imwinkelried's "Evidentiary Foundations," from lawyers repeating what they have "learned" watching other lawyers, or from the sheer comfort that goes along with doing things the way they have always been done, wonderful opportunities to be incredibly persuasive are regularly lost. We must begin to be more creative with demonstrative evidence in our efforts to persuade jurors. In the words of Ralph Waldo Emerson:

> A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do ... Speak what you think today in hard words and tomorrow speak what tomorrow thinks in hard words again, though it contradict everything you said today.

Emerson's quote summarizes the all-too-obvious. When it comes to demonstrative evidence, we must change our ways, try new things, and work out of the demonstrative evidence rut into which many of us have fallen. The creative use of demonstrative evidence affords criminal defense attorneys numerous unique opportunities to become more powerful persuaders. Furthermore, preparing and presenting quality demonstrative evidence is not necessarily an expensive proposition..

What Is "Demonstrative Evidence?"

Black's Law Dictionary

> Demonstrative Evidence: That evidence addressed directly to the senses without intervention of testimony. Real ("thing") evidence such as the gun in a trial of homicide or the contract itself in the trial of a contract case. Evidence apart from the testimony of witnesses

> concerning the thing. Such evidence may include maps, diagrams, photographs, models, charts, medical illustrations, X-rays.

This definition, although commonly used, reminds me of fishing from an ocean pier -- it gets you out in the water a good way but it just doesn't go out far enough to let you fish for the big ones. Put another way, its good as far as it goes but lacks something to be desired. If we limit ourselves to defining demonstrative evidence in this manner (which I suggest is the way many of us tend to view the matter), "demonstrative evidence" becomes nothing more than a synonym for "exhibit." However, there is much more to demonstrative evidence than those items which we mark with an exhibit sticker, proffer to the court for introduction, and then pass to the jury.

The Definition We Must All Start Using

> Demonstrative evidence is anything and everything, regardless of whether admissible or even offered as evidence, including attorney/client/witness demeanor in the courtroom, which tends to convey to and evoke from the jurors a "sense impression" that will benefit our case, whether through advancing our case in chief or diminishing the prosecution's case.

By "sense impression" I mean everything which is calculated to target, or is likely to affect, the jurors' senses (i.e., sight, smell, hearing, touch). This then empowers the jurors to give greater

appreciation to our clients' defense(s) through interpreting various testimony, evidence, and arguments in a particular context which complements the themes and theory of our defense. In other words, our cases are like giant, roll-top desks with many slots for information. Some of these slots are

marked for the prosecution and some for the defense. The trial is a fight over getting jurors to place evidence in particular slots. Based upon our presentations, jurors will interpret evidence, assign weight to it, and place it into one of the slots in the desk. By effectively using demonstrative evidence and tapping into the jurors' sense impressions, our ability to get the jurors to place particular evidence into our slots is markedly increased.

Rationale Underlying the Enhanced Persuasiveness of Demonstrative Evidence

The trial of criminal cases continues to center around oral testimony. However, the second-hand sense impressions conveyed to jurors through verbal testimony have far less impact than the same information conveyed through the creative use of demonstrative evidence. But what is it about demonstrative evidence that gives it enhanced persuasiveness? In the words of McCormick:

> "Since 'seeing is believing,' and demonstrative evidence appeals directly to the senses of the trier of fact, it is today universally felt that this kind of evidence possesses an immediacy and reality which endow it with particularly persuasive effect."

McCormick On Evidence § 212 (E. Cleary 2d ed. 1981). Despite this rationale seeming all-too-obvious, criminal defense lawyers tend to leave demonstrative evidence consideration until the last minute, often times never getting around to creating or using demonstrative evidence at trial.

We Must Start Making Better Use of Demonstrative Evidence Now

Criminal defense lawyers often fail to make use of demonstrative evidence to its potential. However, there is no question but that demonstrative evidence is one of the MOST POWERFUL

persuasion tools a criminal defense attorney has in his or her litigation arsenal. Whether your audience is a jury or the judge, the rationale is the same -- "seeing is believing." For the reasons that follow, we must start changing our ways right now -- not tomorrow, next week, next month, or next year.

1. Diminishing Ability To Use Imagination: Back when I was a young lawyer, fresh out of law school, attorneys seemed to depend on their abilities to sway jurors through verbal gymnastics, fancy speeches, and a big dose of charisma during closing arguments. Although this Clarence Darrow-type approach worked for some lawyers, had they used more demonstrative evidence, their defenses would have been better. But in those times, the general public was, and consequently our jurors were, a different crowd than they are now.

a. Television Then And Now: Much of the change seen in the general public has been brought about by the advancement of television. Twenty years ago, television was largely two-dimensional. That is, the television shows that were being watched tended to be black and white, included such shows as "I Love Lucy," "The Andy Griffith Show," and "The Honeymooners," and were filmed using one or two cameras. By using a limited number of cameras, the viewer was forced to fill in various parts of the show that could not be seen. For example, on the "Andy Griffith Show," when Opie was being lectured by Andy, the viewer could not always see what Aunt Bee was doing. The viewer created his or her own version of what Aunt Bee was doing in the background. One viewer might have concluded that Aunt Bee was smirking, another that she was laughing, and yet another that she was

sympathetic. This required the viewer to use his or her own imagination to fill in the blanks. Now to be sure, most viewers probably came up with about the same conclusion because the structure of the program pushed them in that direction. The important thing was, and is, that the viewers made use of their imaginations.

Today, though, television has become multi-dimensional. Programs are filmed using ten or fifteen cameras giving the viewer a complete perspective of everything that is going on. There is little room, if any room at all, for the viewer to make use of his or her imagination.

b. Music And The MTV Generation: Not only has television gone hi-tech, but so too has the world of music. I think back to my early years and remember how we listened to music on the radio, on our record players, and ultimately on 8-Track tapes. Occasionally we would get to see the artists perform on television, usually on American Bandstand. There were no music video versions to watch. As a result, each listener used his or her imagination to decide what the song was about -- what the words actually meant. I can recall a time when one of my friends and I had a big disagreement about one of the popular songs by Bread. I thought the lyrics went "and taking them all for granted." He thought the lyrics were "and taking them off of branches." Needless to say, the two of us had extremely different opinions as to what the song actually meant. At least, though, we were using our imaginations.

Today the music industry has gone almost exclusively to the music video. A significant portion of the general public is tuned into MTV or its equivalent. The result is that, as with television, the listeners (viewers) are told what the song means,

in vivid color, with stereophonic sound, and from every available camera angle. With nothing left for the imagination, there is little room for disagreement over what the lyrics actually say. Consequently, there seldom are differences of opinion about what a particular song means. Most importantly, though, there presently are very few opportunities for the general public to tap into their imaginations.

c. The General Public Is Our Jury Pool: The viewers of modern television and the listeners to modern music and MTV are the same people who serve as our jurors. The younger ones will be our jurors of the future. Because the general public is now being media-trained to avoid using imagination, we, as lawyers, must work harder than we used to when attempting to persuade jurors in the courtroom. One of the best answers to this problem is to use demonstrative evidence to tap into the imaginations and sense impressions of jurors in ways we can't possibly do with just our charm, our charisma, and our fancy words.

2. Prosecutor's Have Figured It Out: The second reason we must start using demonstrative evidence right now is that prosecutors have figured out the power and persuasiveness of demonstrative evidence and are actively using it against us. In a recent capital murder case in my home town, a man was on trial for the kidnaping, rape, and ultimate murder of a young woman. He randomly selected her while she was out jogging, abducted her, took her to a remote place in the woods, tied her to a tree, then eventually took her life. The jury did not deliberate long at the guilt/innocence phase, finding the defendant

guilty of first degree murder. During the trial, the prosecutor brought in the actual tree to which the victim had been tied. During her penalty phase closing argument, the prosecutor bound herself to the tree and talked from the perspective of the victim in her final moments of life. The jury seemed to hardly hesitate in returning a death sentence. Compelling? Yes. Did it change the outcome? Maybe. Was it persuasive? ABSOLUTELY! And it was persuasive in a way mere words could not have as effectively conveyed. This is what prosecutors are doing in today's litigation arena. We simply cannot wait any longer to at least even the scales.

Some Creative Suggestions Given Limited Budgets

Some time ago, attorney Jon Sands, Assistant Federal Public Defender from Phoenix, Arizona, and I together presented a lecture on demonstrative evidence. I had been giving a presentation entitled "Demonstrative Evidence: Perspectives, Pointers, and your Pocketbooks." Jon had been doing one called "Guerilla Warfare Demonstrative Evidence." We combined these presentations and the following are some excerpts.

Very few of us have the opportunity to represent wealthy clients. As a result, most of us have very limited budgets when it comes to trial preparation. With limited budgets it becomes necessary to find ways to create quality demonstrative evidence that isn't too expensive -- "on the cheap" as Jon would say. Here are some ideas for demonstrative evidence which are inexpensive, easy to make and can be persuasively used in trial:

1. Diagrams: Use of diagrams is a wonderful way to get you up out of your seat, away from your podium and close to the jury. In that many jurisdictions require counsel to either remain at counsel table or at a podium, anything you can do to get away from these locales and closer to the jury **must** be exploited. Diagrams are an excellent way to do this. I have found that you can make diagrams for less than ten dollars. If you need a diagram that shows the floor plan of a house or building, use your computer. In the Windows program, under the "Accessories" section you will find a program called "Paintbrush" or "Paint." Through this program you can create small versions of floor plans which can then be enlarged and mounted at your local print shop. If you have a color printer, you can even use colors which are easily enlarged with a color copier (slightly more expensive).

You will find, though, that the end-product created out of "Paintbrush" is a bit rough around the edges. For about twenty-to-thirty dollars, you can purchase an architectural, home design program for your computer. These programs allow you to lay out floor plans to scale, include furnishings which you can place in various locations, and even allow you to add decks, swing sets, and landscaping. The program I use was a close-out and cost about seven dollars. The end product is extremely professional, is relatively easy and quick to prepare, and is an inexpensive addition to your trial preparation materials which can be used over and over again.

Diagrams also give you the opportunity to have a witness tell his or her story more than once. The more times the witness' version of the events is told, the more likely the jury

is to believe what is said. Use a funnel approach to diagrams. First use one showing a large area, then a second one using a smaller section of the first, then end up with one that focuses on the relevant location (i.e., neighborhood, house plan, room). This gives you and the witness multiple, legitimate opportunities to repeat the witness' version of the events.

Protect Your Diagrams: Prosecutors will often attempt to undermine your diagrams in a variety of ways. You must do what you can to protect the integrity of your evidence. Prosecutors often mark up our exhibits and leave the exhibits looking like a doodle pad. This is easily avoided through purchasing (at little cost) a sheet of clear plastic which you attach to your diagram following direct examination. Fasten it down forcing the prosecutor and his or her witnesses to mark on the plastic. Once done, you can remove the plastic and effectively use the diagram in closing without the distraction of the various markings made by the prosecutor and his or her witnesses.

Jon Sands uses PAM vegetable spray on his diagrams. He puts "Velcro" on the diagram where he wants to affix something. He then sprays the diagram with PAM. The magic of this is that you can't write on a diagram sprayed with PAM. The prosecutors usually don't have "Velcro" and when they try and write on the diagram the ink beads up. Even if the prosecutor does have some "Velcro," it doesn't stick to the PAM-covered diagrams either.

2. Make Use of Art Students: I have had great success in using local art students to create demonstrative evidence. Most of these people will want little or no money to

produce the work product -- usually they are so enamored with being involved in a criminal case that they will work for free. Have them produce their work then have it enlarged and mounted which will cost only a few dollars. The work product is attractive, usable, and uniquely different than anything you will see the prosecutor bring out.

3. Use Architect And Engineering Students: As with art students, these students will work cheap or for free. They can build models for you of just about anything. Houses and other buildings can be reproduced to scale. Models are impressive to use in the courtroom and are extremely helpful in demonstrating various points of your case to the jury.

4. Use Color Photocopies: Many of your photographs will be small. The cost of enlarging photographs into bigger photographs is significant. Take your small photos to the copy center and get them to do a color enlargement and mount these on a foam board. An enlargement from a snap shot to an 8 by 10 is about two dollars compared to the approximate fifteen-to-twenty dollars necessary to do a photo-to-photo enlargement. Given today's technology, the quality of photocopy enlargements is quite good. You can also scan the photos into your computer and enlarge them that way. Projecting them onto a screen is also a good idea.

5. Make Slides From Photos: Many of us use Power Point or Corel Presentations. Once you scan your photos, you can create a program to show them in a certain order. Turn down the lights, and show them to the jury. Often times the impact of

a slide is much greater than a photograph. Juries love it when you turn down the lights. There is also the added benefit that each juror will be taking in the information at the same time and under the same conditions. Think of what happens when a photograph is passed to the jury. Each juror looks at it separately while the judge is saying 'move along counselor.' The case keeps moving, other evidence which may be important is being offered, and the jury is called upon to look at the photo and also take in everything else. Slides make them do but one thing at a time -- look at the slides.

Using slides can also be justified to the trial judge as a "time-saving" procedure. If the witness has several photos to go through, put them in a single photo album. Have the witness identify each photo then offer the album into evidence. Advise the judge that there is only one set and rather than take the time for each juror to go through the album, you have made slides of each picture and they are merely copies of the actual exhibit. Then dim the lights, go through the slides one at a time as the witness describes what is being shown.

6. Make Use of Overhead Projector: If you don't have the funds for a computer and a projector to show your pictures via Power Point, go back to basics and find an overhead projector. You can probably find one in an antique store for about twenty dollars. Most copy machines will allow you to reproduce something onto acetate for use on an overhead projector. This is cheap and gives you an opportunity to get a lot of bang for your buck out of various aspects of the trial. I have used this for comparing the testimony of a witness at trial to that which he/she has said on an earlier occasion. Copy both, juxtaposition

the two and put them up on the overhead. Show the jury how the two differ. The fact that a witness has blown hot and cold is brought home much more effectively if you show them as opposed to just telling them. During closing use the witness' plea agreement comparing it to how he/she testified about having no expectations from providing testimony. You might want to put the relevant jury instructions on credibility up if you plan to talk with the jury about a particular witness' testimony. Many court reporters have the ability to down-load the daily testimony onto disk. You can then put it on your computer, print it out, and copy it to an overhead for use during cross examination, argument to the court, or closing argument to the jury.

7. Paint Chips: Paint chips are the sample colors you get from your paint store. Wal-Mart has them, K-Mart has them, they are easy to get hold of and they are free. The value of the paint chip is found in cross examination of an occurrence witness. Your client was apprehended driving a blue car. The witness who saw the incident says the bad guy was driving a blue car. On its face, and with nothing more, you have a problem here. By using paint chips you can approach the witness and say:

> Mrs. Smith, you said the car you saw was blue. Was it closer to this blue or to this blue?

By doing this, and you can do it over and over using various blue colors, you force the witness to select between options and make choices. This can create the appearance of uncertainty. It certainly makes the point that "blue" can mean a lot of things. The witness whose testimony was damaging is softened a bit. Paint chips can also be used with skin

tones. For example:

> Officer Jones, the store clerk told you the robber was a black man. Did you understand the clerk to mean his skin tone was closer to this color or to this color...

When you do the skin tone, paint chip cross with your police officer have him or her come down in front of the jury with his/her back to the defendant. When you start using the paint chips, nine times out of ten the police officer will peak over his or her shoulder to look at the defendant. This is a wonderful time to say "no cheating now." The point is brought home that even the officer isn't sure, and the point is brought home demonstratively, powerfully, and persuasively. Even if the officer does not sneak a peak, you can still say to the officer "now don't peek."

8. Modern Technology Isn't Always Good: One of the neatest contraptions to come on the market is the laser pointer. If you are in a jurisdiction where you are required to remain by a podium or at counsel table, laser pointers give the judge a basis to prevent you from moving up towards the jury because it can be used from across the room. The wooden pointer, on the other hand, puts you in a position where you must be allowed to move to the diagram, which if strategically placed by you near the jury, gives you the opportunity to move around in the courtroom. In addition, computers can crash. You must have a back-up plan in the event your computer refuses to cooperate with you in the courtroom.

Non-Evidence Demonstrative Evidence

By defining "demonstrative evidence" as I have suggested, anything you do in the courtroom which is calculated to demonstrate something, even if an exhibit sticker is never affixed, or even if it is not formally offered, is necessarily included. At a very basic level, non-evidence demonstrative evidence includes how you dress, how you act, react, or respond, and your overall attitude. However, the concept of non-evidence demonstrative evidence goes much farther, as illustrated by the following ideas and pointers.

1. What's Good For The Goose...: In almost every criminal trial, the prosecutor will ask a witness something along these lines:

- Mr. Jones, do you see the person who robbed you in the courtroom?

- Would you describe for the jury what he is wearing?

- Your Honor, could the record reflect that the witness has identified the defendant.

Maybe I'm just getting tired of hearing this line of questioning. However, it occurred to me that "what's good for the goose is good for the gander." Now whenever I have a snitch on the stand who I am cross examining, I include the following line of questioning:

- Sluggo, you met with the district attorney to cut a deal.

- That district attorney is in the courtroom.

- Describe for the jury what that district attorney is wearing.

- Your Honor, I ask that the record reflect that Sluggo has identified prosecutor Jonathon Johanson, this man right here, as being the person who cut the deal with him.

This process is intended to do two things. First, continue to establish Sluggo's "yuck" factor. Second, spread Sluggo's "yuck" factor onto the prosecutor. There is also the additional benefit that doing this is incredibly fun.

2. Observe Witness Demeanor: Through discovery or otherwise, you will likely know the probable substance of **what** a witness will say on the stand. However, until you actually get the witness on the stand, you will likely have little idea as to **how** the witness will testify. By this I mean that witness demeanor is something you will have to analyze quickly. Sometimes you can find a gem and use it demonstratively during your cross. For example, in a sex offense case where you suspect the child is being coached by his or her parent, when the child is testifying, position yourself between the child and the parent/coach. You will find that the child and/or the parent will move to maintain eye contact. Keep repositioning yourself and force them to do this over and over again. The jury will catch on and before long the jury will look like the gallery at a tennis match -- left, right, left, right, turning first to the child and then to the parent/coach. The point is brought home that the child is being coached. However, nowhere in the trial transcript will that which was so persuasive be revealed.

3. Make Quantity Testimony Visual: Find ways to make important quantities visual.

a. Quantity and Liquids: We often have witnesses testify who admit, either on direct or on cross, that they had been drinking at the time they

supposedly observed that to which they are now testifying. If the witness says he or she had consumed about a case of beer that night, bring in a case of beer, count out the cans or bottles with the witness in front of the jury. Use the cans demonstratively in closing argument to again bring home the point that the witnesses, by his or her own admission, had "this much alcohol to drink." The impact is much greater if you show quantities as opposed to just talk about them.

b. Quantity and Size: Sometimes there is an issue in our case about the size of something. For example, if your client is charged with breaking into a pinball machine and stealing $125.00, try and establish through the various witnesses that the defendant, who they say they saw leaving the area, didn't have anything in his hands, had no bulges under his shirt, his pockets or his clothing. Then go to the bank and get $125.00 worth of quarters. Show the jury the size of that much money. Thump it down on counsel table demonstrating its weight. The bottom line then becomes it could not have been your client or there would have been some evidence of this large, heavy amount of money in his possession.

c. Lack of Quantity in Rape Cases: In some rape cases, your defense will be, in essence, this was not rape it was regret. Establish through the investigating officers that they examined every article of the victim's clothing. Show that the detailed investigation, using microscopes and magnifying glasses, revealed that not a thread was loose, not a button torn

free, not a zipper out of line. Use the physician to show that no evidence of trauma was found. Make two boxes to use in closing argument. Label one "Regret" and the other "Rape." With the jury, go through each item of clothing, as well as the other physical evidence. Make sure to point out that each piece of evidence could support the conclusion that sex occurred but that nothing about the evidence supports the conclusion that there was any force used or rape. When you have finished talking with the jurors about each piece of evidence, place each item in the box marked "Regret." You are creating a full box marked "Regret" versus an empty box marked "Rape" thereby showing in a quantitative way that all of the evidence points to innocence. Attorney Sheila Lewis with the New Mexico Public Defender's Office in Santa Fe tells me that she used this idea in one of her cases and when she mistakenly started to place an item of evidence in the "Rape" box, one of the jurors corrected her.

4. Aural Demonstrative Evidence: Getting jurors to listen to things other than mere testimony can also be particularly persuasive. Again using an example provided by Jon Sands, in a sexual assault case, Jon subpoenaed the bed on which the sexual assault had allegedly occurred. His investigation had revealed that many people were at home when this supposedly happened, were each in close proximity to the bed, and the bed had extremely squeaky springs. He introduced the bed into evidence then made his closing argument to the jury while sitting on the bed, bouncing up and down, making the bed squeak loudly. Jon's

point was brought home perfectly -- listen to all of the noise that must have been made. Had a sexual assault occurred, the squeaking bed would have been heard by someone else in the house. No one heard it therefore it did not happen.

The aural senses of jurors can also be tapped into by using BB's and a metal bowl or galvanized pail. I use this in cases which center on fingerprints. We have all had cases like this where our client has been identified as the culprit but the identification is somewhat shaky. The strongest evidence against the defendant is that his fingerprint is found at the crime scene. In that the science of fingerprints is based upon similarities, not differences, and the examiners generally quit once they have found anywhere from six to twelve points of identification, there remains some 150 points of identification that are never discussed by the "expert." In closing argument you can ask the jurors to close their eyes and listen.

- This case boils down to whether this fingerprint is in fact the defendant's.

- But we know so little about the print. All we know is that it is supposedly the same in six places. (Slowly drop six BB's into the pail, one at a time).

- But there are some two-hundred places we know nothing about. (Slowly pour 150 BB's into the pail).

- I don't know how you define reasonable doubt, but I'd say you just heard it.

The impact of the differences in the two sounds is incredible. You can use the BB's in the pail in any situation where you have a large quantity versus a small quantity. Experiment with different types of pails. Some make better sounds than others. Although I started using BB's, I now use steel shot pellets which you can get in any sporting goods

store. Steel shot is heavier and makes a louder noise when the pellets hit the pail.

5. Humanize Your Client: Find ways to make jurors conclude that the defendant is a real person, possessed of life, emotion, and feelings. Especially in death cases, it is imperative to do more than just have witnesses tell about their past experiences with the defendant. When the football coach testifies that the defendant was on his team, find and use a photograph of the defendant in uniform. If he got a trophy, find it and use it at trial. Perhaps the best example of humanizing the defendant comes from Attorney Bryan Stevenson who tells a story that goes something like this:

In a little town in the South, a man was on trial for his life. The odds were already stacked against him for he was black and his victim was a young white woman. The evidence of guilt was strong and the jury didn't take long to convict him of first degree murder. At the sentencing hearing the defense called the man's third grade teacher. The teacher was an elderly, white-haired woman, having taught the young man some twenty-years before. She took the stand and told the jury how she had been impressed with the defendant when he was her student. She described how he had promise but that she instinctively knew it would never be achieved for he had come from a family that hadn't placed much emphasis on education. She recalled how one day she had taught his class how to make Gods eyes -- two sticks crossed over around which yarn of different colors is woven. A few days later, on her way to her car after school, she heard the pitter patter of little feet running after her and felt a tug on her skirt. She turned around and saw it was the young defendant. In his hand was a Gods eye -- one he had made for her in his home, at his kitchen table, using his yarn. She described to the jury how this had touched her deeply. Then she reached into her pocketbook, pulled out the Gods eye and said "I have kept it with me ever since."

The teacher's testimony by itself was powerful. However, by bringing out the Gods eye and showing it to the jury, an even more powerful and persuasive message was conveyed

to the jury -- the sincerity of this woman became unquestionable. That the young man had goodness somewhere inside him was established. No exhibit sticker was affixed to the Gods eye but it was probably the most powerful and persuasive piece of evidence presented by the defense. I'm told the jury spared this man's life.

CONCLUSION

When it comes to demonstrative evidence, the sky is the limit. Not every technique of demonstrative evidence has been discovered and used, and the techniques that have been used can always be done differently and better.. Evidence is important because it means something. Virtually all evidence can present more than one meaning. Constantly evaluate the evidence in your case to see not only how it might be perceived by the prosecution. If other meanings are helpful to your case, create ways to demonstrate those to the jury. Don't be confined to "the same old - same old," what other attorneys regularly do, or what you comfortably feel will be accepted without controversy. Be bold and creative -- make better use of that incredibly persuasive weapon in your litigation arsenal -- demonstrative evidence.

NATIONAL DEFENDER TRAINING PROJECT
PUBLIC DEFENDER
2012 TRIAL ADVOCACY PROGRAM

University of Dayton School of Law, Dayton, Ohio
June 1 to June 6, 2012

A PICTURE'S WORTH A THOUSAND WORDS: PERSUASION THROUGH THE USE OF VISUAL EFFECTS AT TRIAL

By: Jonathan Rapping

Why should we use visual[1] evidence at trial?

There are two reasons why we should consider using visual effects at trial. The first is that a visual presentation, when accompanying testimony, will help to reinforce the recollection of the fact-finder. The second is that visual effects can help us to paint a picture in the fact-finder's mind that is consistent with the image we are trying to create (or, conversely, there is a real danger that without visual effects jurors may develop a different picture in their mind from testimony than we intend).

It helps the fact-finder recall the testimony

With respect to the first, studies have shown that people are far more likely to retain information presented orally when the oral presentation is accompanied by visual effects. During the course of a trial, jurors hear from many witnesses. A trial is a battle of competing narratives. Every witness should be important to the narrative of that witness' proponent. The problem for the defense attorney is that people have short attention spans. No juror will retain every word she hears. Often, at the end of a trial, jurors will remember testimony differently. However, a creative demonstration will be much less likely forgotten. There will be times when visual evidence can accompany the jury into deliberations. Even when a visual aid is not permitted to be included in deliberations, it will surely leave more of an impression than mere testimony alone.

It helps you convey your interpretation of the testimony to the fact-finder

[1] This article primarily deals with visual evidence since that is the primary form demonstrative evidence will take at trial. However, the creative attorney should consider taking advantage of all of the jury's senses if possible for demonstrative purposes. Consider using a fragrance if it helps illustrate a point of testimony or asking the jury to feel a surface if relevant to an issue at trial.

With respect to the second reason, studies have also shown that the vast majority of people are visual learners. This means that a presentation will be far more likely to successfully covey a concept to a person if it includes visual aids. This presents a particular challenge to us as lawyers because we are hardwired to present our case orally. If we are to maximize our effectiveness at persuasion, we have to better cater to the learning styles of our audience.

We must keep in mind that we win and lose cases based on how the jury interprets the facts presented at trial. We must keep in mind that we are shaped by our experiences as defense attorneys. Your jury will not be made up of defense attorneys. We must keep in mind that we come into the trial having already dissected, digested, processed, and analyzed the facts. Your jury is just learning about the case for the first time.

Don't lose sight of the fact that every person is different. We all bring with us our own set of biases and prejudices. We all come with myriad life experiences. We each have varying cultural and historical perspectives that impact how we see things. All of these factors, and many others, create for each of us our own prism through which we process information. The more vague the information presented, the greater the likelihood that multiple listeners will draw vastly different conclusions. The more detailed the description, the less room there is for wide divergence in the way the information is processed.

Because we live with our cases, it is easy to become wed to a particular version of events. There is the danger that we assume everyone will share this interpretation. But our jurors come to us without prior knowledge of the case and with their own perspectives and biases. It is our job to get them to see things our way. Visual effects can provide a very effective way to get jurors to share a common mental image and, therefore, more likely reach the conclusion we want them to reach.

What do we mean by "visual effects?"

When we talk about visual effects we are talking about anything that we use at trial, intended for the jury to perceive through its sense of sight, to help them frame testimony in a manner helpful to our defense theory. When we talk about visual effects we are talking about a universe of evidence that encompasses several sub-categories. A common distinction drawn between types of visual effects is "real" evidence versus "demonstrative" evidence[2]. The former refers to evidence that has a historical connection to the case at hand. Examples are the actual drugs found at a scene or the actual shell casings related to a shooting. The latter refers to evidence that is not historically connected to the case but will aid the jury in understanding testimony presented. Examples of this include a map or diagram of the crime scene or a replica of the knife described by witnesses to a stabbing.

Another useful distinction is that between visual evidence and visual aids. Visual evidence refers to evidence, whether "real" or "demonstrative," that is available to the jury during its deliberations. Visual aids are physical objects used during trial that are not

[2] Some scholars categorize all visual evidence as "demonstrative" and instead draw a distinction between "actual" evidence and "illustrative" evidence. It matters less what you call it and more that you understand the distinction and how the evidence can be used at trial.

intended to be part of the evidence that the jury can take back to the jury room, in their physical form, during deliberations.

For the most part, you will need to lay a proper foundation before you can use visual effects with your jury. However, there will be times that you will get away with not laying a foundation before using a visual aid. In fact, it would be awkward to do so. An example of this might be if you ask a witness to use a chair in the courtroom to demonstrate how a beating victim was slumped in his chair following a fight or if you ask a witness to use a pencil to demonstrate how it saw a mugger holding a knife.

Therefore, I find it helpful to think of visual effects in four categories:

1. **Real or actual evidence (this is a form of visual evidence)** – This is evidence that is historically connected to the case and will usually accompany the jury to the jury room once admitted.
2. **Demonstrative or illustrative evidence admitted as evidence (this is a form of visual evidence)** – This is evidence such as a map or diagram that is helpful to illustrate testimony and that will accompany the jury to the jury room if admitted.
3. **Visual aid admitted for demonstrative or illustrative purposes only** – This is demonstrative or illustrative evidence that is admitted only to be used in the courtroom to help explain testimony. It does not accompany the jury to the jury room.
4. **Visual aid not admitted** – This refers to any appeal to a jury's sense of sight that is not first admitted into evidence.

How do we use visual effects at trial?

The last category is the easiest, so we will start there. Any time you want a witness to step off the witness stand (or remain on the witness stand) and demonstrate something, you are using a visual aid. Any time you get animated or act out a scene from a narrative during a closing argument, you are using a visual aid. Any time you use a prop in the courtroom that has not been admitted into evidence; you are using a visual aid. There are times that you will naturally do these things during a trial without seeking to move anything into evidence. In fact, it would be awkward to try to do so. No one in the courtroom would expect you to do so. These are examples of visual aids that are not technically "evidence." [Note: your description of a witness' demonstration, if not objected to, will become part of the record.]

For the other three categories of visual effects, you must lay a foundation before you can make use of them in the courtroom. Getting visual effects into evidence is a three-step process. The first step is eliciting testimony that makes the visual effect relevant. The second step is getting the object to the witness. The third step is laying the foundation required to get the object admitted into evidence,

Step 1: Eliciting testimony to demonstrate relevance

Visual effects are meant to be adjunct to relevant testimony. Therefore, before a visual effect will be admitted, there must be accompanying testimony that demonstrates

the relevance of the visual effect. So, step one is to call a witness who will provide (or elicit through cross examination) testimony that can be better illustrated through the use of visual effects.

Step 2: Get the object to the witness

Some lawyers refer to the step as "the document dance," although it is not limited to documents. Any time a lawyer wants to get an object to a witness in order to lay a foundation, the lawyer must follow some basic steps. It is helpful to remember the acronym MOPS (mark, opposing, permission, show). The four steps in getting an object to a witness are:

a. **Mark** the object for identification. Some courts require that all exhibits be pre-marked. Others allow the lawyer to mark the object as it becomes needed.

b. Show **Opposing** counsel. The lawyer must make sure opposing counsel has had an opportunity to inspect the item marked for identification.

c. **Permission** to approach the witness. Unless and until a judge tells a lawyer that she need not seek permission to approach a witness, the lawyer should always ask.

d. **Show** the object to the witness.

Now you are ready for step 3.

Step 3: Laying the foundation

Once the lawyer has shown the object to the witness the witness must both identify and authenticate the object.

a. **Identifying the object** – The witness must be asked if they recognize the object, diagram, map, chart, etc. and be given the opportunity to explain what it is. [Note: you are leading the witness if doing this on cross-examination.]

b. **Authenticating the object** – The witness must be able to explain one of two things, **either:**

a. If the object is "real" or "actual" evidence the witness must be able to explain how she knows the object is what it purports to be. This can be done in one of two ways:

i. Establishing that the object is "readily" identifiable." This can be done because the object has distinctive features, through a serial number, or through markings or initials placed on the object at the time of its collection.

ii. Establishing a chain of custody. The witness must be able to account for the items whereabouts from the time of collection until its presentation in court. This could require multiple witnesses.

b. **Or,** if the object is "demonstrative" or "illustrative" the witness must be able to testify that the object/chart/map/etc. fairly and accurately depicts/represents/shows the scale, dimensions, and contours of the underlying object. *The witness need not be the person who created the exhibit or took the photograph.* It is important to note that the judge has wide discretion in determining whether to admit demonstrative evidence. Especially when the evidence is being introduced for illustrative purposes only, the judge need not require that scale, dimensions, or contour be exact. As long as the jury is made aware that an object is not to scale, the judge can ensure that the jury is not misled[3].

Practice Tip:

As defense attorneys we will often have to deal with the State attempting to use visual effects to prove its case against our client. Therefore, it is equally important that we be able to think defensively about keeping visual effects out of the trial. A prosecutor's inability to lay a proper foundation will often result in visual effects being deemed inadmissible if the defense attorney is on her toes with objections. Keep in mind that all visual evidence and effects must be:

a. relevant – it has something to do with an issue at trial
b. material – that it actually helps to illustrate the relevant point
c. competent – that is not misleading or unreliable
d. more probative than prejudicial – as with all evidence it must pass this additional balancing test for relevancy

[3] An accompanying instruction to this effect can also be given.

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VOIR DIRE AND JURY SELECTION

Ira Mickenberg
6 Saratoga Circle
Saratoga Springs, NY 12866
(518) 583-6730
imickenberg@nycap.rr.com

Thanks to Ann Roan and many other fine defenders for their advice and input.

LOOKING FOR A DIFFERENT, MORE EFFECTIVE WAY OF CHOOSING A JURY

For more than twenty years, I have been privileged to teach public defenders all over the country. And it pains me to conclude that when it comes to jury selection, almost all of us are doing a lousy job.

What passes for good voir dire is often glibness and a personal style that is comfortable with talking to strangers. The lawyer looks good and feels good but ends up knowing very little that is useful about the jurors.

More typically, voir dire is awkward, and consists of bland questions that tell us virtually nothing about how receptive a juror will be to our theory of defense, or whether the juror harbors some prejudice or belief that will make him deadly to our client.

We ask lots of leading questions about reasonable doubt, or presumption of innocence, or juror unanimity, or self defense, or witness truth-telling. Then when a juror responds positively to one of these questions, we convince ourselves that we have successfully "educated" the juror about our defense or about a principle of law. In reality, the juror is just giving us what she knows we want to hear, and we don't know anything about her.

Because the questions we are comfortable with asking elicit responses that don't help us evaluate the juror, we fall back on stereotypes (race, gender, age, ethnicity, class, employment, hobbies, reading material) to decide which jurors to keep and which to challenge. Or even worse, we go with our "gut feeling" about whether we like the juror or the juror likes us.

And then we are surprised when what seemed like a good jury convicts our client.

This short treatise, and the seminar it is meant to supplement, are a first effort at finding a more effective way of selecting jurors. It draws on:

- Scientific research done over the last decade or two about juror behavior and attitudes.
- Excellent work done by defenders in Colorado in devising a new and very effective method for voir dire in both capital and non-capital cases.
- Some very creative work done by defense lawyers all over the country.
- My own observations of too many trial transcripts from too many jurisdictions, in which good lawyers delude themselves into thinking that a comfortable voir dire has been an effective voir dire.

I. SOME BASIC THINGS ABOUT VOIR DIRE – WHY JURY SELECTION IS HARD. WHY WE FAIL.

A. It is suicidal to just "take the first twelve." It is arrogant and stupid to choose jurors based on stereotypes of race, gender, age, ethnicity, or class.

Every study ever done of jurors and their behavior tells us several things:

- People who come to jury duty bring with them many strong prejudices, biases, and preconceived notions about crime, trials, and criminal justice.
- Jurors are individuals. There is very little correlation between the stereotypical aspects of a juror's makeup (race, gender, age, ethnicity, education, class, hobbies, reading material) and whether a particular juror may have one of those strong biases or preconceived notions in any individual case.
- The prejudices and ideas jurors bring to court affect the way they decide cases – even if they honestly believe they will be fair and even if they honestly believe they can set their preconceived notions aside.
- Jurors will decide cases based on their prejudices and preconceived notions regardless of what the judge may instruct them. Rehabilitation and curative instructions are completely meaningless.
- Many jurors don't realize it, but they have made up their minds about the defendant's guilt before they hear any evidence. In other words . . .
- Many trials are over the minute the jury is seated.

For this reason it is absolutely essential that we do a thorough and meaningful voir dire – not to convince jurors to abandon their biases, but to find out what those biases are and get rid of the jurors who hold them.

The lawyer who waives voir dire, or just asks some perfunctory, meaningless questions, or relies on stereotypes or "gut feelings" to choose jurors is not doing his or her job.

B. Traditional voir dire is structured in a way that makes it very hard to disclose a juror's preconceived notions

The very nature of jury selection forces potential jurors into an artificial setting that is itself an impediment to obtaining honest and meaningful answers to typical voir dire questions. Here is how the voir dire process usually looks from the jurors' perspective:

1. When asked questions about the criminal justice system, prospective jurors know what

the "right," or expected answer is. Sometimes they know this from watching television. Sometimes the trial judge has given them preliminary instructions that contain the "right" answers to voir dire questions. Sometimes the questions are couched in terms of "can you follow the judge's instructions," which tells the jurors that answering "no" means that they are defying the judge. Jurors will almost always give the "right" answer to avoid getting in trouble with the court, to avoid seeming to be a troublemaker, and to avoid looking stupid in front of their peers.

EX: Q: The judge has told you that my client has a right to testify if he wishes and a right not to testify if he so wishes. Can you follow those instructions and not hold it against my client if he chooses not to testify?

A: Yes.

While it would be nice to believe that the juror's answer is true, there is just no way of knowing. The judge has already told the juror what the "correct" answer is, and the way we phrased our question has reinforced that knowledge. All the juror's answer tells us is that he or she knows what we want to hear.

2. Jurors view the judge as a very powerful authority figure. If the judge suggests the answer she would like to hear, most jurors will give that answer.

EX: Q: Despite your belief that anyone who doesn't testify must be hiding something, can you follow the judge's instructions and not take any negative inferences if the defendant does not take the stand?

A: Yes.

The juror may be trying his best to be honest, but does anyone really believe this answer?

3. When asked questions about opinions they might be embarrassed to reveal in public (such as questions about racial bias or sex), jurors will usually avoid the possibility of public humiliation by giving the socially acceptable answer – even if that answer is false.

4. When asked about how they would behave in future situations, jurors will usually give an aspirational answer. This means they will give the answer they hope will be true, or the answer that best comports with their self-image. These jurors are not lying. Their answers simply reflect what they hope (or want to believe or want others to believe) is the truth, even if they may be wrong.

EX: Q: If you are chosen for this jury, and after taking a first vote you find that the vote is 11-1 and you are the lone holdout, would you change your vote simply because the others all agree that you are wrong?

A: No.

We all know that this juror's response is not a lie – the juror may actually believe that he

or she would be able to hold out (or at least would like to believe it). On the other hand, we also know there is nothing in the juror's response that should make us believe he or she actually has the courage to hold out as a minority of one.

C. The judge usually doesn't make it any easier

1. Judges frequently restrict the time for voir dire. Often this is a result of cynicism – their experience tells them that most voir dire is meaningless, so why not cut it short and get on with the trial?

2. Judges almost always want to prevent defense counsel from using voir dire as a means of indoctrinating jurors about the facts of the case or about their theory of defense. And the law says they are allowed to limit us this way.

D. And we often engage in self-defeating behavior by choosing comfort and safety over effectiveness

1. Voir dire is the only place in the trial where we have virtually no control over what happens. Jurors can say anything in response to our questions. We are afraid of "bad" answers to voir dire questions that might taint the rest of the pool or expose weaknesses in our case. We are afraid of the judge cutting us off and making us look bad in front of the jury. We are afraid of saying something that might alienate a juror or even the entire pool of jurors.

2. If a juror gives a "bad" answer we rush to correct or rehabilitate him to make sure the rest of the panel is not infected by the bias.

3. As a result of these fears, we often ask bland meaningless questions that we know the judge will allow and that we know the jurors will give bland, non-threatening answers to.

4. We then fall back on stereotypes of race, age, gender, ethnicity, employment, education, and class to decide who to challenge. Or worse, we persuade ourselves that our "gut feelings" about whether we like a juror or whether the juror likes us are an intelligent basis for exercising our challenges.

Given all these obstacles to effective jury selection, how can we start figuring out how to do it better? My suggestion is to start with some of the things social scientists and students of human behavior have taught us about jurors.

II. THE PRIME DIRECTIVE: VOIR DIRE'S MOST IMPORTANT BEHAVIORAL PRINCIPLE

It is impossible to "educate" or talk a complete stranger out of a strongly held belief in the time available for voir dire.

Think about this for a moment. Everyone in the courtroom tells the juror what the "right" answers are to voir dire questions. Everyone tries hard to lead the juror into giving the "right" answer. And if the juror is honest enough to admit to a bias or preconceived notion about the case, everyone tries to rehabilitate him until he says he can follow the correct path (the judge's instructions, the Constitution, the law). And if we are honest with ourselves, everyone knows this is pure garbage.

Assume a juror says that she would give police testimony more weight than civilian testimony. The judge or a lawyer then "rehabilitates" her by getting her to say she can follow instructions and give testimony equal weight. When this happens, even an honest juror will deliberate, convince herself that she is truly weighing all testimony, and then reach the conclusion that the police were telling the truth. The initial bias, which the juror acknowledged and tried hard to tell us about, determines the outcome every time. It is part of the juror's personality, a product of her upbringing, education, and daily life. And no matter how good a lawyer you are, you can't talk her out of it.

Imagine, though, what would happen if we gave up on the idea of "educating" the juror, or "rehabilitating" her – If we admitted to ourselves that it is impossible to get that juror beyond her bias. We would then be able to completely refocus the goal of our voir dire:

III. THE ONLY PURPOSE OF VOIR DIRE

The only purpose of voir dire is to discover which jurors are going to hurt our client, and to get rid of them.

When a juror tells us something bad, there are only two things we should do:

- Believe them
- Get rid of them

This leads us to the most important revision we must make in our approach to voir dire:

We Are Not Selecting Jurors – We Are De-Selecting Jurors

The purpose of voir dire is not to "establish a rapport," or "educate them about our defense," or "enlighten them about the presumption of innocence or reasonable doubt." It is not to figure out whether we like them or they like us. To repeat:

The only purpose of voir dire is to discover which jurors are going to hurt our client, and to get rid of them.

IV. HOW TO ASK QUESTIONS IN VOIR DIRE

Once we accept that the only purpose of voir dire is to get rid of impaired jurors, we have a clear path to figuring out what questions to ask and how to ask them. The only reason to ask a question on voir dire is to give the juror a chance to reveal a reason for us to challenge him. These reasons fall into two categories:

- The juror is unable or unwilling to accept our theory of defense in this case.

- The juror has some bias that impairs his or her ability to sit on any criminal case.

This leads us to two more principles of human behavior that will guide us in asking the right questions on voir dire:

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.

The more removed a question is from a person's normal, everyday experience, the more likely the person will give an aspirational answer rather than an honest one. Factual questions about personal experiences get factual answers. Theoretical questions about how they will behave in hypothetical courtroom situations get aspirational answers.

A. ***Stop talking and listen*** – the goal of voir dire is to get the juror talking and to listen to his or her answers. You should not be doing most of the talking. You should start by asking open-ended, non-leading questions. Leading questions will get the juror to verbally agree with you but won't let you learn anything about the juror. Voir dire is not cross-examination.

B. Let the jurors do most of the talking. Your job is to listen to them.

C. ***You can't do the same voir dire in every case***

1. Your voir dire must be tailored to your factual theory of defense in each individual case.

2. You must devise questions that will help you understand how each juror will respond to your theory of defense. This means asking questions about how the juror has responded in the

past when faced with an analogous situation.

D. Our tactics should not be aimed at asking the jurors how they would behave if certain situations come up during the trial or during deliberations. That kind of question only gets aspirational answers (how the juror hopes he would behave) or false answers (how the juror would like us to think he would behave). They tell us nothing about how the juror will actually behave. They also invite the judge to shut us down.

E. Out tactics should be aimed at asking jurors about how they behaved in the past when faced with situations analogous to the situation we are dealing with at trial.

1. It is essential that our questions not be about the same situation the juror is going to be considering at trial or about a crime or criminal justice situation – such questions only get aspirational answers.

2. Instead the question should be about an analogous, non-law related situation the juror was actually in. And we must be careful to ask about events that are really analogous to the issues we are interested in learning about.

EX: Your theory of defense is that the police planted evidence to frame your client because the investigating officer is a racist and your client is black. (Remember OJ?)

a. Asking jurors, “are you a racist?” or “do you think it is possible that the police would frame someone because of his race?” will get you nowhere. Most jurors will say “I am not a racist,” and “Of course it’s possible the police are lying. Anything is possible. I will keep an open mind.” And you will have no way of knowing what they are actually thinking.

b. You have a much better chance of learning something useful about the juror by asking an analogous question about the juror’s experience with racial bias.

EX: Asking the juror to, “tell us about the most serious incident you ever saw where someone was treated badly because of their race” will help you learn a lot about whether that juror is willing to believe your theory of defense. If the juror tells you about an incident, you will be able to gauge her response and decide how a similar response would affect her view of your case. If the juror says she has never seen such an incident, you have also learned a lot about her view of race.

F. You must consider and treat every prospective juror as a unique individual. It is your job on voir dire to find out about that unique person.

IV. WHAT SUBJECTS SHOULD YOU ASK ABOUT?

A. Look to Your Theory of Defense --

1. What do you really need a juror to believe or understand in order to win the case?

2. What do you really need to know about the juror to decide whether he or she is a person you want on the jury for this particular case?

B. What kind of life experiences might a juror have that are analogous to the thing you need a juror to understand about your case or to the things you really need to know about the jurors?

EX: Assume that your client is accused of sexually molesting his 9 year old daughter. Your theory of defense is that your client and his wife were in an ugly divorce proceeding, and the wife got the kid to lie about being abused.

The things you really need to get jurors to believe are:

1. A kid can be manipulated into lying about something this serious.

2. The wife would do something this evil to get what she wanted in the divorce.

The kind of questions you might ask the jurors should focus on analogous situations they may have experienced or seen, such as:

1. Situations they know of where someone in a divorce did something unethical to get at their ex-spouse.

2. Situations they know of where someone got really carried away because they became obsessed with holding a grudge.

3. Situations they know of where an adult convinced a kid to do something she probably knew was wrong.

4. Situations they know of where an adult convinced a kid that something that is really wrong is right.

A fact you really need to know about the jurors is whether they have any experience with child sex abuse that might affect their ability to be fair. Therefore, you must ask them:

5. If they or someone close to them had any personal experience with sexual abuse.

C. When you are choosing which question to ask a particular juror, you should build on the answers the juror gave to the standard questions already asked by the judge and the prosecutor. Often the things you learn about the juror from these questions will give you the opening you need to decide how to ask for a life-experience analogy. Areas that are often fertile ground for

seeking analogies are:

1. Does the juror have kids?
2. Does the juror supervise others at work?
3. Is the juror interested in sports?
4. Who does the juror live with?
5. What are the juror's interests?

D. Another reason to pay attention to the court's and prosecutor's voir dire is that it will often lead you to general subjects that may cause the juror to be biased or impaired. Judges and prosecutors always spend a lot of time talking about reasonable doubt, presumption of innocence, elements of crimes, unanimity, etc. It can be very effective to refer back to the answers the juror gave to the court or prosecutor, and follow up with an open-ended question that allows the juror to elaborate on his answer or explain what those principles mean to him.

V. HOW TO ASK THE QUESTIONS

Although the substance of the questions must be individually tailored to your theory of defense and to the individual jurors, there is a pretty simple formula for effectively structuring the form of the questions:

A. Start with an IMPERATIVE COMMAND:

1. "Tell us about"
2. "Share with us"
3. "Describe for us"

The reason we start the question with an imperative command is to make sure that the juror feels it is proper and necessary to give a narrative answer, not just a "yes" or "no."

B. Use a SUPERLATIVE to describe the experience you want them to talk about:

1. "The best"
2. "The worst"
3. "The most serious"

The reason we ask the question in terms of a superlative is to make sure we do not get a trivial experience from the juror.

C. ASK FOR A PERSONAL EXPERIENCE

1. "That you saw"
2. "That happened to you"
3. "That you experienced"

This is the crucial part of the question where you ask the juror to relate a personal experience. Be sure to keep the question open-ended, not leading.

D. ALLOW THEM TO SAVE FACE

1. “That you or someone close to you saw”
2. “That happened to you or someone you know”
3. “That you or a friend or relative experienced”

The reason we ask for the personal experience in this way is:

a. Give the juror the chance to relate an experience that had an effect on their perceptions but may not have directly happened to them.

b. To give the juror the chance to relate an experience that happened to them but to avoid embarrassment by attributing it to someone else.

VI. PUTTING THE QUESTION TOGETHER

EX: Assume we are dealing with the same hypothetical about the child sex case and the divorcing parents. Some of the questions might come out like this:

1. “Tell us about the worst situation you’ve ever seen where someone involved in a divorce went way over the line in trying to hurt their ex.”

2. “Please describe for us the most serious situation when as a child, you or someone you know had an adult try to get you to do something you shouldn’t have done.”

VII. GETTING JURORS TO TALK ABOUT SENSITIVE SUBJECTS

If you are going to ask about sex, race, drugs, alcohol, or anything else that might be a sensitive topic there are several ways of making sure the jurors aren’t offended.

A. Before you introduce the topic, tell the jurors that if any of them would prefer to answer in private or at the bench, they should say so.

B. Explain to them why you have to ask about the subject.

C. It often helps to share a personal experience or observation you have had with the subject you will be asking questions about. By doing so, you legitimize the juror’s willingness to speak, and show that you are not asking them to do anything that you are not willing to do. If you decide to use this kind of self-revelation as a tool, be sure to follow these rules:

1. Keep your story short.

2. Make sure your story is exactly relevant to the point of the voir dire.
3. Keep your story short.

D. If you are going to voir dire on sensitive subjects, prepare those questions in advance, and try them out on others, to make sure you are asking them in a non-offensive way. Don't make this stuff up in the middle of voir dire.

E. If a juror reveals something that is very personal, painful, or embarrassing, it is essential that you immediately say something that acknowledges their pain and thanks them for speaking so honestly. You cannot just go on with the next question, or even worse, ask something meaningless like, "how did that make you feel."

VIII. SOME SAMPLE QUESTIONS ON IMPORTANT SUBJECTS

A. Race

1. "Tell us about the most serious incident you ever saw where someone was treated badly because of their race."

2. "Tell us about the worst experience you or someone close to you ever had because someone stereotyped you because of your (race, gender, religion, etc.).

3. Tell us about the most significant interaction you have ever had with a person of a different race.

4. Tell us about the most difficult situation where you, or someone you know, stereotyped someone, or jumped to a conclusion about them because of their (race, gender, religion) and turned out to be wrong.

B. Alcohol/Alcoholism

1. "Tell us about a person you know who is a wonderful guy when sober, but changes into a different person when they're drunk."

2. "Share with us a situation where you or a person you know of was seriously affected because someone in the family was an alcoholic."

C. Self-Defense

1. Tell me about the most serious situation you have ever seen where someone had no choice but to use violence to defend themselves (or someone else).

2. Tell us about the most frightening experience you or someone close to you had when they were threatened by another person.

3. Tell us about the craziest thing you or someone close to you ever did out of fear.

4. Tell us about the bravest thing you ever saw someone do out of fear.

5. Tell us about the bravest thing you ever saw someone do to protect another person.

D. Jumping to Conclusions

1. Tell us about the most serious mistake you or someone you know has ever made because you jumped to a snap conclusion.

E. False Suspicion or Accusation

1. Tell us about the most serious time when you or someone close to you was accused of doing something bad that you had not done.

2. Tell us about the most difficult situation you were ever in, where it was your word against someone else's, and even though you were telling the truth, you were afraid that no one would believe you.

3. Tell us about the most serious incident where you or someone close to you mistakenly suspected someone else of wrongdoing.

F. Police Officers Lying/Being Abusive

1. Tell us about the worst encounter you or anyone close to you has ever had with a law enforcement officer.

2. Tell us about the most serious experience you or a family member or friend had with a public official who was abusing his authority.

3. Tell us about the most serious incident you know of where someone told a lie, not for personal gain, but because they thought it would ultimately bring about a fair result.

G. Lying

1. Tell us about the worst problem you ever had with someone who was a liar.

2. Tell us about the most serious time that you or someone you know told a lie to get out of trouble.

3. Tell us about the most serious time that you or someone you know told a lie out of fear.

4. Tell us about the most serious time that you or someone you know told a lie to protect someone else.

5. Tell us about the most serious time that you or someone you know told a lie out of greed.

6. Tell us about the most difficult situation you were ever in where you had to decide which of two people were telling the truth.

7. Tell us about the most serious incident where you really believed someone was telling the truth, and it turned out they were lying.

8. Tell us about the most serious incident where you really believed someone was lying, and it turned out they were telling the truth.

H. Prior Convictions/Reputation

1. Tell us about the most inspiring person you have known who had a bad history or reputation and really turned himself around.

2. Tell us about the most serious mistake you or someone close to you every made by judging someone by their reputation, when that reputation turned out to be wrong.

I. Persuasion/Gullibility/Human Nature

1. Tell us about the most important time when you were persuaded to believe that you were responsible for something you really weren't responsible for.

2. Tell us about the most important time when you or someone close to you was persuaded to believe something about a person that wasn't true.

3. Tell us about the most important time when you or someone close to you was persuaded to believe something about yourself that wasn't true.

J. Desperation

1. Tell us about the most dangerous thing you or someone you know did out of hopelessness or desperation.

2. Tell us about the most out-of-character thing you or someone you know ever did out of hopelessness or desperation.

3. Tell us about the worst thing you or someone you know did out of hopelessness or desperation.

IX. HOW TO FOLLOW-UP WHEN A JUROR SHOWS BIAS

This is the crucial moment of voir dire. Having defined the purpose of voir dire as

identifying and challenging biased or impaired jurors, we now have to figure out what to do when our questions have revealed bias or impairment.

The key to success is counter-intuitive. When a juror gives an answer that suggests (or openly states) some prejudice or preconceived notion about the case, our first instinct is to run away from the answer. We don't want the rest of the panel to be tainted by it. We want to show the juror the error of his ways. We want to convince him to be fair. Actually we should do the exact opposite.

- There is no such thing as a bad answer. An answer either displays bias or it doesn't. If it does, we should welcome an opportunity to establish a challenge for cause.

- If an answer displays or hints at bias, we must immediately address and confront it. Colorado defenders have referred to this strategy as "Run to the Bummer."

A. How To "Run to the Bummer"

Steps to take when a juror suggests some bias or impairment:

1. Mirror the juror's answer: "So you believe that . . . ."

    a. Use the juror's exact language
    b. Don't paraphrase
    c. Don't argue

2. Then ask an open-ended question inviting the juror to explain:

    "Tell me more about that"
    "What experiences have you had that make you believe that?"
    "Can you explain that a little more?"

    No leading questions at this point.

3. Normalize the impairment

    a. Get other jurors to acknowledge the same idea, impairment, bias, etc.
    b. Don't be judgmental or condemn it.

4. Now switch to leading questions to lock in the challenge for cause:

    a. Reaffirm where the juror is:

"So you would need the defendant to testify that he acted in self-defense before you could decide that this shooting was in self-defense"

b. If the juror tries to weasel out of his impairment, or tries to qualify his bias, you must strip away the qualifications and force him back into admitting his preconceived notion as it applies to this case:

Q: “So you would need the defendant to testify that he acted in self-defense before you could decide that this shooting was in self-defense.”

A: “Well, if the victim said it might be self-defense, or if there was some scientific evidence that showed it was self-defense, I wouldn’t need your client to testify.”

Q: “How about where there was no scientific evidence at all, and where the supposed victim absolutely insisted that it was not self-defense. Is that the situation where you would need the defendant to testify before finding self-defense?”

c. Reaffirm where the juror is not (i.e., what the law requires).

“And it would be very difficult, if not impossible for you to say this was self-defense unless the defendant testified that he acted in self-defense.”

d. Get the juror to agree that there is a big difference between these two positions.

“And you would agree that there is a big difference between a case where someone testified that he acted in self-defense and one where the defendant didn’t testify at all.”

e. Immunize the juror from rehabilitation

“It sounds to me like you are the kind of person who thinks before they form an opinion, and then won’t change that opinion just because someone might want you to agree with them. Is that correct?”

“You wouldn’t change your opinion just to save a little time and move this process along?”

“You wouldn’t let anyone intimidate you into changing your opinion just to save a little time and move the process along?”

“Are you comfortable swearing an oath to follow a rule 100% even though it’s the opposite of the way you see the world?”

“Did you know that the law is always satisfied when a juror gives an honest opinion, even if that opinion might be different from that of the lawyers or even the judge? All the law asks is that you give your honest opinion and feelings.”

Jury Selection (or Jury De-selection) (6-29-11)

Michael G. Howell
Capital Defender's Office
123 West Main Street, Ste. 601, Durham, NC 27701
(919) 354-7220

Purpose of Jury De-selection: **IDENTIFY the worst jurors and REMOVE them**.

Means for removal

1) Challenge for Cause § 15A-1212…The 3 most common grounds are:

(6) The juror has ***formed or expressed an opinion as to the guilt or innocence*** of the defendant. (You may ***NOT ask what the opinion is***.)

8) As a matter of conscience, ***regardless of the facts and circumstances, the juror would be unable to render a verdict with respect to the charge in accordance with the law*** of North Carolina.

(9) **For any other cause**, the juror is ***unable to render a fair and impartial verdict***.

2) Peremptory Challenges § 15A-1217

Each defendant is allowed ***six (6) challenges*** (in non-capital cases).

Each party is entitled to ***one (1) peremptory challenge for each alternate juror*** in addition to any unused challenges.

Law of Jury Selection

Statutes (read N.C.G.S. 15A-1211 to 1217)
Case law (See outline, Freedman and Howell, *Jury Selection Questions*, 25 pp.)
Jury instructions (applicable to your case)
Recordation (N.C.G.S. 15A-1241)

Two Main Methods of Jury Selection

1) Traditional Approach or "Lecturer" Method

Lecture technique (almost entirely) with leading or closed-ended questions
Purposes…Indoctrinate jury about law and facts of your case, and establish lawyer's authority or credibility with jury
Commonly used by prosecutors (and some civil defense lawyers)
In the "sermon" or lecture, the lawyer does over 95% of the talking
Example…*"Can everyone set aside what if any personal feelings you have about drugs and follow the law and be a fair and impartial juror?"*
Problem…Learn very little (if anything) about jurors

2) The "Listener" Method of Jury Selection

Purpose…Learn about the jurors' experiences and beliefs (instead of trying to change their beliefs)

The premise…Personal experiences shape jurors' views and beliefs, and can help predict how jurors will view facts, law, and each other.

Open-ended questions will get and keep jurors talking and reveal information about
Jurors' life experiences,
Attitudes, opinions, and views, and
Interpersonal relations with each other and their communication styles

Information will allow attorney to achieve GOAL of jury selection…
Identify the worst jurors for your case, and
Remove them (for cause or by peremptory strike)

Basically, a conversation with lawyer doing 10% of talking (the "90/10 rule")

Quote from life-long Anonymous public defender…*"I used to think that jury selection was my chance to educate the jurors about the law or the facts of my case. Now, I realize that jury selection is about the jurors educating me about themselves."*

"Default positions"
Lecturer… "Can you follow the law and be fair and impartial?"
Listener…"Please tell me more about that…"

Command Superlative Analogue Technique (New Mexico Public Defenders)

Effective technique within Listener Method
Ask about significant or memorable life experiences
It will trigger a conversation about jurors' life experiences and views

Three Elements of Command Superlative Analogue Technique
1) Ask about a personal experience relating to the issue, or an experience of a family member or someone close to the juror [*analogue*]
2) Add superlative adjective (best, worst, etc.) to help them recall [*superlative*]
3) Put question in command form (i.e., "Tell us about…) [*command*]

Example…*"Tell me about your closest relationship with a person who has been affected by illegal drugs."*

Caution…Time consuming…Cannot use it for everything…Save it for the key issues

(*For sample questions, see Mickenberg, *Voir Dire and Jury Selection*, pp. 11-13; Trial School Workshop Aids, pp. 5-7).

Listener Method in Practice

Preparation

Know the case and law…Develop theory and theme

Pick the pertinent issues or areas (in that case) that you want jurors to talk about

Cannot do the same voir dire in every case…It varies with the theory of each case

Outline your questions (or offensive plays) for each area
-Superlative memory technique and follow-up (for 3-4 key topics)

-Open-ended questions for each area or topic
-Introductions (*see below)
-Standard group questions (that may lead to open-ended, individual follow-up)
-Key legal concepts (for the most important issues)

*__Introductions__…to jury selection overall…and to each issue or topic
It makes the issue relevant
It puts jurors at ease and increases their chances of talking to you
Introductions need to be concise, straightforward, and honest
Example…*"Joe is charged in this case with selling cocaine. For decades, illegal drugs have been a problem for our society. Because of that, many of us have strong feelings about people who use and sell illegal drugs. I want to talk to you all about that."*
For motor-mouths…if you have to talk, do it here…At least it serves a purpose.

Jury selection "playbook"
Questions
Statutes and pertinent jury instructions
Case law outline and copies of key cases
Blank seating chart

<u>Three (3) Rules for the Courtroom</u>

1) Always use **PLAIN LANGUAGE**
Never talk like a lawyer…Be your pre-lawyer self
Talking to communicate with average folks…not to impress with vocabulary

2) **Get the jurors talking**…and keep them talking
Superlative memory questions (for the key issues)
Open-ended questions (who, what, how, why, where, when)
Give up control…let jurors go wherever they want
Follow "the 90/10 rule"…a conversation with lawyer doing 10% of talking
Be empathetic and respectful…encourage them to tell you more
Do NOT argue with, bully, or cross-examine a juror

The "superlative memory technique" example…*"Tell me about your closest relationship with a person who has been affected by illegal drugs."*
Open-ended examples…*"What are your views about illegal drugs? Why do you feel that way? What are your experiences with folks who use or sell drugs? How have you or anyone close to you been affected by people who use or sell drugs?"*

3) **Catch every response**…Both verbal and non-verbal
Must LISTEN to every word…and WATCH every gesture or expression
Essential to catch every response to follow-up and keep them talking

Do NOT ignore a juror or cut off an answer
Use reflective questions in follow-up (*Some people believe "x" and others believe "y"…What do you think?*)

Decision-Making Time

Assess the answers and the jurors…Decide what to do..?
NEVER make decision based on stereotypes or demographics
ALWAYS judge a juror based on individual responses

Challenge for cause…The decision whether to challenge is easy
Do you immediately challenge or search for other areas of bias (?)
The hard part is executing a challenge for cause
See handouts, *Jury Selection: Challenges for Cause* (7-11-10) and Mickenberg, *Voir Dire and Jury Selection*, pp. 13-15)

Peremptory challenges...rank the severity of bad jurors with 6 strikes in mind
Severity issue…"Wymore Method" for capital cases uses a rating system
Need to use your limited number of strikes wisely

JURY SELECTION QUESTIONS

Michael G. Howell, Stephen C. Freedman, and Lisa Miles
Capital Defender's Office
123 West Main Street, Ste. 601, Durham, NC 27701
(919) 354-7220
(Feb. 14, 2012)

I. GENERAL PURPOSE OF VOIR DIRE

"Voir dire examination serves the **dual purpose** of enabling the court to **select an impartial jury and assisting counsel in exercising peremptory challenges**." MuMin v Virginia, 500 U.S. 415, 431 (1991). The N.C. Supreme Court explained that a **similar "dual purpose"** was to ascertain whether **grounds exist for cause challenges** and to enable the lawyers to **intelligently exercise their peremptory challenges**. State v. Simpson, 341 N.C. 316, 462 SE2d 191, 202 (1995).

"A defendant is not entitled to any particular juror. His right to challenge is not a right to select but to reject a juror." State v. Harris, 338 N.C. 211, 227 (1994).

The purpose of voir dire and the exercise of challenges "is to eliminate extremes of partiality and to assure both…[parties]…that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial." State v. Conner, 335 N.C. 618, 440 S.E.2d 826, 832 (1994).

Jurors, like all of us, have natural inclinations and favorites, and they sometimes, at least on a subconscious level, give the benefit of the doubt to their favorites. So jury selection, in a real sense, is an opportunity for counsel to see if there is anything in a juror's yesterday or today that would make it difficult for that juror to view the facts, not in an abstract sense, but in a particular case, dispassionately. State v Hedgepath, 66 N.C. App. 390 (1984).

"Where an adversary wishes to exclude a juror because of bias, …it is the adversary seeking exclusion who must demonstrate, ***through questioning***, that the potential juror lacks impartiality." Wainwright v. Witt, 469 U.S. at 423 (1985).

II. PROCEDURAL RULES OF VOIR DIRE

Overall: The trial court has the duty to control and supervise the examination of prospective jurors. Regulation of the extent and manner of questioning during voir dire rests largely in the trial court's discretion. Simpson, 341 N.C. 316, 462 S.E.2d 191, 202 (1995).

Group v. Individual Questions: "The prosecutor and the…defendant…may **personally question prospective jurors individually** concerning their competency to serve as jurors…." NCGS 15A-1214(c).

The trial judge has the discretion to limit individual questioning and require that certain general questions be submitted to the panel as a whole in an effort to expedite jury selection. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

Same or Similar Questions: The defendant may not be prohibited from asking a question merely because the court [or prosecutor] has previously asked the same or similar question. N.C.G.S. 15A-1214(c); State v. Conner, 335 N.C. 618, 440 S.E.2d 826, 832 (1994).

Leading Questions: Leading questions are permitted during jury voir dire [at least by the prosecutor]. State v. Fletcher, 354 N.C. 455, 468, 555 S.E.2d 534, 542 (2001).

Re-Opening Voir Dire: N.C.G.S. 15A-1214(g) permits the trial judge to reopen the examination of a prospective juror if, at any time before the jury has been impaneled, it is discovered that the juror has made an incorrect statement or that some other good reason exists. Whether to reopen the examination of a passed juror is within the judge's discretion. Once the trial court reopens the examination of a juror, each party has the absolute right to use any remaining peremptory challenges to excuse such a juror. State v. Womble, 343 N.C. 667, 678, 473 S.E.2d 291, 297 (1996). For example, in State v. Wiley, 355 N.C. 592, 607-610 (2002), the prosecution passed a "death qualified" jury to the defense. During defense questioning, a juror said that he would automatically vote for LWOP over the death penalty. The trial judge re-opened the State's questioning of this juror and allowed the prosecutor to remove the juror for cause.

Preserving Denial of Challenges for Cause: In order to preserve the denial of a challenge for cause for appeal, the defendant must adhere to the following procedure:
1) The defendant must have exhausted the peremptory challenges available to him;
2) After exhausting his peremptory challenges, the defendant must move (orally or in writing) to renew a challenge for cause that was previously denied if he either:
   a) Had peremptorily challenged the juror in question, or

b) Stated in the motion that he would have peremptorily challenged the juror if he had not already exhausted his peremptory challenges; and

3) The judge denied the defendant's motion for renewal of his cause challenge.

N.C.G.S 15A-1214(h) and (i).

Renewal of Requests for Disallowed Questions: Counsel may renew its requests to ask questions that were previously denied. Occasionally, a trial court may change its mind. See, State v. Polke, 361 N.C. 65, 68-69 (2006); State v. Green, 336 N.C. 142, 164-65 (1994).

III. SUBSTANTIVE AREAS OF INQUIRY

Accomplice Liability: Prosecutor properly asked about jurors' abilities to follow the law regarding acting in concert, aiding and abetting, and the felony murder rule by the following "non-stake-out" questions in State v. Cheek, 351 N.C. 48, 65-68, 520 S.E.2d 545, 555-557 (1999):

"[I]f you were convinced, beyond a reasonable doubt, of the defendant's guilt, even though he didn't actually pull the trigger or strike the match or strike the blow in the murder, but that he was guilty of aiding and abetting and shared the intent that the victim be killed—could you return a verdict of guilty on that?"

"[T]he fact that one person may not have actually struck the blow or pulled the trigger or lit the match, but yet he could be guilty under the felony murder rule if he was jointly acting together with someone else in the kidnapping or committing an armed robbery?"

"[C]ould you follow the law…under the felony murder rule and find someone guilty of first-degree murder, if you were convinced, beyond a reasonable doubt, that they had engaged in the underlying felony of either kidnapping or armed robbery, and find them guilty, even though they didn't actually strike the blow or pull the trigger or light the match…that caused [the victim's] death…?"

Accomplice/Co-Defendant (or Interested Witness) Testimony:

It is proper to ask about prospective jurors' abilities to follow the law with respect to interested witness testimony…When an accomplice is testifying for the State, the accomplice is considered an interested witness, and his testimony is subject to careful [or the highest of] scrutiny. State v. Jones, 347 N.C. 193, 201-204 (1997). See, NCPI-Crim. 104.21, 104.25 and 104.30.

The following were proper questions (asked by the prosecutor) about a **co-defendant/accomplice with a plea arrangement** from State v. Jones, 347 N.C. 193, 201-202, 491 S.E.2d 641, 646 (1997):

a) *There may be a witness who will testify…pursuant to a plea arrangement, plea bargain, or "deal" with the State. Would the mere fact that there is a plea bargain with one of the State's witnesses affect your decision or your verdict in this case?*

b) *Could you listen to the court's instructions of how you are to view accomplice or interested witness testimony, whether it came from the State or the defendant….?*

c) After having listened to that testimony and the court's instructions as to what the law is, and you found that testimony believable, could you give it the same weight as you would any other uninterested witness?

[According to the N.C. Supreme Court, **these 3 questions were proper and not stake-out questions**…They were designed to determine if jurors could follow the law and be impartial and unbiased. Jones, 347 N.C. at 204. The prosecutor accurately stated the law. An accomplice testifying for the State is considered an interested witness and his testimony is subject to careful scrutiny. The jury should analyze such testimony in light of the accomplice's interest in the outcome of the case. If the jury believes the witness, it should give his testimony the same weight as any other credible witness. Jones, 347 N.C. at 203-204.]

You may hear testimony from a witness who is testifying pursuant to a plea agreement. This witness has pled guilty to a lesser degree of murder in exchange for their promise to give truthful testimony in this case. Do you have opinions about plea agreements that would make it difficult or impossible for you to believe the testimony of a witness who might testify under a plea agreement? The prosecutor's inquiry merely (and properly) sought to determine whether a plea agreement would have a negative effect on prospective jurors' ability to believe testimony from such witnesses. State v. Gell, 351 N.C. 192, 200-01 (2000).

Age of Juror and Effects of It: N.C.G.S. 9-6.1 allows jurors age 72 years or older to request excusal or deferral from jury service but it does not prohibit such jurors from serving. In State v. Elliott, 360 N.C. 400, 408 (2006), the Court recognized that it is sensible for trial judges to consider the effects of age on the individual juror since the adverse effects of growing old do not strike all equally or at the same time. [Based on this, it appears that the trial court and the parties should be able to inquire into the effects of aging with older jurors.]

Circumstantial Evidence/Lack of Eyewitnesses:

Prosecutor informed prospective jurors that "*only the three people charged with the crimes know what happened to the victims…and…none of the three would testify against the others and therefore the State had no eyewitness testimony to offer.*" He then asked: "*Knowing that this is a serious case, a first degree murder case, do you feel like you have to say to yourself, well, the case is just too serious…to decide based upon circumstantial evidence and I would require more than circumstantial evidence to return a verdict of first degree murder?*" The court found that these statements properly (1) informed the jury that the state would be relying on circumstantial evidence and (2) inquired as to whether the lack of eyewitnesses would cause them problems. (Also, it was not a stake-out question.) State v. Teague, 134 N.C. App. 702 (1999).

It was proper in first degree murder case for State to tell the jury that they will be relying upon circumstantial evidence with no witnesses to the shooting and then ask them

if that will cause any problems. State v Clark, 319 N.C. 215 (1987).

Child Witnesses: Trial judge erred in not allowing the defendant to ask prospective jurors "*if they thought children were more likely to tell the truth when they allege sexual abuse.*" State v Hatfeld, 128 N.C. App. 294 (1998)

Defendant's Prior Record: In State v Hedgepath, 66 N.C. App. 390 (1984), the trial court erred in refusing to allow counsel to question jurors about their willingness and ability to follow judge's instructions that they are to consider defendant's prior record only for purposes of determining credibility.

Defenses (i.e., Specific Defenses): A prospective juror who is unable to accept a particular defense...recognized by law is prejudiced to such an extent that he can no longer be considered competent. Such jurors should be removed from the jury when challenged for cause. State v Leonard, 295 N.C. 58, 62-63 (1978).

a) Accident: Defense counsel is free to inquire into the potential jurors' attitudes concerning the specific defenses of accident or self-defense. State v. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

b) Insanity: It was reversible error for trial court to fail to dismiss juror who indicated he was not willing to return a verdict of NGRI even though defendant introduced evidence that would satisfy them that the defendant was insane at the time of the offense. State v Leonard, 295 N.C. 58,62-63 (1978); see also Vinson.

c) Mental Health Defense: The defendant has the right to question jurors about their attitudes regarding a potential insanity or lack of mental capacity defense, including questions about: "*courses taken and books read on psychiatry, contacts with psychiatrist or persons interested in psychiatry, members of family receiving treatment, inquiry into feelings on insanity defense and ability to be fair.*" U.S. v Robinson, 475 F.2d 376 (D.C. Cir. 1973); U.S. v Jackson, 542 F.2d 403 (7th Cir. 1976).

d) Self-Defense: Defense counsel is free to inquire into the potential jurors' attitudes concerning the specific defenses of accident or self-defense. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

Drug-Related Context of Non-Drug Offense: In a prosecution for common law robbery and assault, there was no error in allowing prosecutor (after telling prospective jurors that a proposed sale of marijuana was involved) to inquire into whether any of them would be unable to be fair and impartial for that reason. State v Williams, 41 N.C. App. 287, disc. rev. denied, 297 N.C. 699 (1979).

The following was not a "stake-out" question and was a proper inquiry to determine the impartiality of the jurors: "*Do you feel like you will automatically turn off the rest of the case and predicate your verdict of not guilty solely upon the fact that these*

people were out looking for drugs and involved in the drug environment, and became victims as a result of that?" State v Teague, 134 N.C. App. 702 (1999)

Eyewitness Identification: The following prosecutor's question was upheld as proper (and non-stake-out): *"Does anyone have a per se problem with eyewitness identification? Meaning, it is in and of itself going to be insufficient to deem a conviction in your mind, no matter what the judge instructs you as to the law?"* The prosecutor was "simply trying to ensure that the jurors could follow the law with respect to eyewitness testimony…that is treat it no differently that circumstantial evidence." State v. Roberts, 135 N.C. App. 690, 697, 522 S.E.2d 130 (1999).

Expert Witness: *"If someone is offered as an expert in a particular field such as psychiatry, **could** you accept him as an expert, his testimony as an expert in that particular field."* According to State v Smith, 328 N.C. 99, 131 (1991), this was not an attempt to stake out jurors.

It was not an abuse of discretion for the judge to prevent defense counsel from asking jurors "*whether they **would** automatically reject the testimony of mental health professionals."* This was apparently a stake out question. State v. Neal, 346 N.C. 608, 618 (1997).

Focusing on "The Issue":
In a child homicide case, the prosecutor was allowed to ask a prospective juror "*if he could look beyond evidence of the child's poor living conditions and lack of motherly care and focus on the issue of whether the defendant was guilty of killing the child."* The Supreme Court found that this was not a stake-out question. State v. Burr, 341 N.C. 263, 285-86 (1995).

Following the Law: "The right to an impartial jury contemplates that each side will be allowed to make inquiry into the ability of prospective jurors to follow the law. Questions designed to measure a prospective juror's ability to follow the law are proper within the context of jury selection." State v. Jones, 347 N.C. 193, 203 (1997), *citing* State v. Price, 326 N.C. 56, 66-67, 388 S.E.2d 84, 89, *vacated on other grounds*, 498 U.S. 802 (1990).

If a juror's answers about a fundamental legal concept (such as the presumption of innocence) demonstrated either **confusion about**, or **a fundamental misunderstanding** of the principles…or **a simple reluctance to apply** those principles, its effect on the juror's inability to give the defendant a fair trial remained the same. State v. Cunningham, 333 N.C. 744, 754-756, 429 S.E.2d 718 (1993).

Hold-Out Jurors During Deliberations: Generally, questions designed to determine how well a prospective juror would stand up to other jurors in the event of a split decision amounts to impermissible "stake-out" questions. State v. Call, 353 N.C. 400, 409-410, 545 S.E.2d 190, 197 (2001).

It is permissible, however, to ask jurors *"if they understand that, while the law requires them to deliberate with other jurors in order to try to reach a unanimous verdict, they have the right to stand by their beliefs in the case."* (Note that, if this permissible question is followed by the question, *"And would you do that?,"* this crosses the line into an impermissible stake-out question.) State v. Elliott, 344 N.C. 242, 262-63, 475 S.E.2d 202, 210 (1997); see also, State v. Maness, 363 N.C. 261 (2009).

Where defense counsel had already inquired into whether jurors could follow the law as specified in N.C.G.S. 15A-1235 by asking if they could *"independently weigh the evidence, respect the opinion of other jurors, and be strong enough to ask other jurors to to respect his opinion,"* the trial judge properly limited a redundant question that was based on an Allen jury instruction. (N.C.P.I.-Crim. 101-40). State v. Maness, 363 N.C. 261 (2009).

Identifying Family Members: Not error to allow the prosecutor during jury selection to identify members of the murder victim's family who are in the courtroom. State v Reaves, 337 N.C. 700 (1994).

Intoxication: Proper for Prosecutor to ask prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense. *"If it is shown to you from the evidence and beyond a reasonable doubt that the defendant was intoxicated at the time of the alleged shooting, would this cause you to have sympathy for him and allow that sympathy to affect your verdict."* State v McKoy, 323 N.C. 1 (1988).

Law Enforcement Witness Credibility: If a juror would automatically give enhanced credibility or weight to the testimony of a law enforcement witness (or any particular class of witness), he would be excused for cause. State v. Cummings, 361 N.C. 438, 457-58 (2007); State v. McKinnon, 328 N.C. 668, 675-76, 403 S.E.2d 474 (1991).

Legal Principles: Defense counsel may question jurors to determine whether they completely understood the principles of **reasonable doubt** and **burden of proof**. Once counsel has fully explored an area, however, the judge may limit further inquiry. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

"The right to an impartial jury contemplates that each side will be allowed to make ***inquiry into the ability of prospective jurors to follow the law***. Questions designed to measure a prospective juror's ability to follow the law are proper within the context of jury selection." State v. Jones, 347 N.C. 193, 203 (1997), *citing* State v. Price, 326 N.C. 56, 66-67, 388 S.E.2d 84, 89, *vacated on other grounds*, 498 U.S. 802 (1990).

Defendant Not Testifying: It is proper for defense counsel to ask questions concerning a defendant's failure to testify in his own defense. A court, however, may disallow questioning about the defendant's failure to offer evidence in his defense. State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994).

Court erred in denying the defendant's challenge for cause of juror who

repeatedly said that the defendant's failure to testify would stick in the back of my mind while he was deliberating (in response to question "*whether the defendant's failure to testify would affect his ability to give him a fair trial"*). State v Hightower, 331 N.C. 636 (1992).

Presumption of Innocence and Burden of Proof: A juror gave conflicting and ambiguous answers about whether she could presume the defendant innocent and whether she would require him to prove his innocence. The Supreme Court awarded the defendant a new trial because the trial judge denied the defendant's challenge for cause. The Supreme Court said that **the juror's answers demonstrated either confusion about, or a fundamental misunderstanding of the principles of the presumption of innocence, or a simple reluctance to apply those principles**. Regardless whether the juror was confused, had a misunderstanding, or was reluctant to apply the law, its effect on her ability to give the defendant a fair trial remained the same. State v. Cunningham, 333 N.C. 744, 754-756, 429 S.E.2d 718 (1993).

Pretrial Publicity: Inquiry should be made regarding the effect of the publicity upon jurors' ability to be impartial or keep an open mind. Mu'min, 500 U.S. 415, 419-421, 425 (1991). Although "Questions about the content of the publicity…might be helpful in assessing whether a juror is impartial," they are not constitutionally required. Id. at 425. The constitutional question is *whether jurors had such fixed opinions that they could not be impartial*, not whether or what they remembered about the publicity. It is not required that jurors be totally ignorant of the facts and issues involved. Id., 500 U.S. at 426 and 430.

It was deemed proper for a prosecutor to describe some of the "uncontested" details of the crime before he asked jurors whether they knew or read anything about the case. State v. Nobles, 350 N.C. 483, 497-498, 515 S.E.2d 885, 894-895 (1999) (ADA noted that defendant was charged with discharging a firearm into a vehicle occupied by his wife and three small children). It was not a "stake-out" question.

Racial/Ethnic Background: Trial courts must allow questions regarding whether any jurors might be prejudiced against the defendant because of his race or ethnic group where the defendant is accused of a violent crime and the defendant and the victim were members of different racial or ethnic groups. (If this criteria is not met, racial and ethnic questions are discretionary.) Rosales-Lopez v. United States, 451 U.S. 182, 189, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981). Such questions must be allowed in capital cases involving a charge of murder of a white person by a black defendant. Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1783, 90 L.Ed.2d 27 (1986).

Sexual Offense/Medical Evidence: In a sexual offense case, the prosecutor asked, *"To be able to find one guilty beyond a reasonable doubt, are you going to require that there be medical evidence that affirmatively says an incident occurred?"* This was a proper, non-stake-out question. Since the law does not require medical evidence to corroborate a victim's story, the prosecutor's question was a proper attempt to measure prospective jurors' ability to follow the law. State v. Henderson, 155 N.C. App. 719, 724-727 (2003).

Sexual Orientation: Proper for prosecutor to question jurors regarding prejudice against homosexuality for the purpose of determining whether they could impartially consider the evidence knowing that the State's witnesses were homosexual. State v Edwards, 27 N.C. App. 369 (1975).

IV. IMPROPER QUESTIONS OR IMPROPER PURPOSES

Answers to Legal Questions: Counsel should not "fish" for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980). [Does this mean can counsel get judge to give preliminary instructions before voir dire, and then ask questions about the law?]

Arguments that are Prohibited: A lawyer (even a prosecutor) may not make statements during jury selection that would be improper if they were later argued to the jury. State v. Hines, 286 N.C. 377, 385, 211 S.E.2d 201 (1975) (reversible error for the prosecutor to make improper statements during voir dire about how the death penalty is rarely enforced).

Confusing and Ambiguous Questions: Hypothetical questions so phrased to be ambiguous and confusing are improper. For example, *"Now, everyone on the jury is in favor of capital punishment for this offense…Is there anyone on the jury, because the nature of the offense, feels like you might be a little bit biased or prejudiced, either consciously or unconsciously, because of the type or the nature of the offense involved; is there anyone on the jury who feels that they would be in favor of a sentence other than death for rape?"* (see, Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975)); or, *"Would you be willing to be tried by one in your present state of mind if you were on trial in this case?"* State v. Denny, 294 N.C. 294, 240 S.E.2d 437 (1978).

Inadmissible Evidence: An attorney may not ask prospective jurors about inadmissible evidence. State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973).

Incorrect Statements of Law: Questions containing incorrect or inadequate statements of the law are improper. State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

Indoctrination of Jurors: Counsel should not engage in efforts to indoctrinate jurors and counsel should not argue the case in any way while questioning jurors. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980). In order to constitute an attempt to indoctrinate potential jurors, the improper question would be aimed at indoctrinating jurors with views favorable to the [questioning party]…or…advancing a particular position. State v. Chapman, 359 N.C. 328, 346 (2005). An **example of a non-indoctrinating question** is: *Can you imagine a set of circumstances in which…your personal beliefs conflict with the law? In that situation, what would you do?* See Chapman.

Overbroad and General Questions: *"Would you consider, if you had the opportunity,*

evidence about this defendant, either good or bad, other than that arising from the incident here?" This question was overly broad and general, and not proper for voir dire. State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973).

Rapport Building: Counsel should not visit with or establish "rapport" with jurors. State v. Phillips, 300 NC 678, 268 SE2d 452 (1980).

Repetitive Questions: The court may limit repetitious questions. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975). Where defense counsel had already inquired into whether jurors could "*independently weigh the evidence, respect the opinion of other jurors, and be strong enough to ask other jurors to to respect his opinion,"* the trial judge properly limited a redundant question that was based on an Allen jury instruction. State v. Maness, 363 N.C. 261 (2009).

Stake-Out Questions:
"Staking out" jurors is improper. Simpson, 341 N.C. 316, 462 S.E.2d 191, 202 (1995). "Staking out" is seen as an attempt to indoctrinate potential jurors as to the substance of defendant's defense. State v. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

"Staking out" defined***: Questions that tend to commit prospective jurors to a specific future course of action in the case***. Chapman, 359 N.C. 328, 345-346 (2005).

Counsel may not pose hypothetical questions designed to elicit in advance what the jurors' decision will be under a certain state of the evidence or upon a given state of facts...The court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts. State v Vinson, 287 N.C. 326, 336-37 (1975), death sentence vacated, 428 U.S. 902 (1976).

Examples of Stake-Out Questions:

1) "*Is there anyone on the jury who feels that because the defendant had a gun in his hand, no matter what the circumstances might be, that if that-if he pulled the trigger to that gun and that person met their death as result of that, that simply on those facts alone that he must be guilty of something?"* Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

2) Improper "reasonable doubt" questions:
- a) *What would your verdict be if the evidence were evenly balanced?*
- *b) What would your verdict be if you had a reasonable doubt about the defendant's guilt?*
- *c) What would your verdict be if you were convinced beyond a reasonable doubt of the defendant's guilt?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).
- d) The judge will instruct you that *"you have to find each element beyond a reasonable doubt. Mr. [Juror], if you hear the evidence that comes in and find three elements beyond a reasonable doubt, but you don't find on the*

fourth element, what would your verdict be?" State v. Johnson, __ N.C.App. __, 706 S.E.2d. 790, 796 (2011)

3) *Whether you would vote for the death penalty […in a specified hypothetical situation…]?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

4) *If you find from the evidence a conclusion which is susceptible to two reasonable interpretations; that is, one leading to innocence and one leading to guilt, will you adopt the interpretation which points to innocence and reject that of guilt?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

5) *If it was shown…that the defendant couldn't control his actions and didn't know what was going on…,would you still be inclined to return a verdict which would cause the imposition of the death penalty?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

6) *If you are satisfied from the evidence that the defendant was not conscious of his act at the time it allegedly was committed, would you still feel compelled to return a guilty verdict?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

7) *If you are satisfied beyond a reasonable doubt that the defendant committed the act but you believed that he did not intentionally or willfully commit the crime, would you still return a guilty verdict knowing that there would be a mandatory death sentence?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

8) Improper Burden of Proof Questions:

a) *If the defendant chose not to put on a defense, would you hold that against him or take it as an indication that he has something to hide?*

b) *Would you feel the need to hear from the defendant in order to return a verdict of not guilty?*

c) *Would the defendant have to prove anything to you before he would be entitled to a not guilty verdict?* State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994); State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980), or

d) *Would the fact that the defendant called fewer witnesses than the State make a difference in your decision as to her guilt?* State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986).

9) Improper Insanity Questions:

a) *Do you know what a dissociative period is and do you believe that it is possible for a person not to know because some mental disorder where they actually are, and do things that they believe they are doing in another place and under circumstances that are not actually real?*

b) *Are you thinking, well if the defendant says he has PTSD, for that reason alone, I would vote that he is guilty?* State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

10) Improper "Hold-out" Juror Questions:

a) A question designed to determine how well a prospective juror would stand up

to other jurors in the event of a split decision amounts to an impermissible "stake-out." State v. Call, 353 N.C. 400, 409-410, 545 S.E.2d 190, 197 (2001). For example, *"if you personally do not think that the State has proved something beyond a reasonable doubt and the other 11 jurors have, could you maintain the courage of your convictions and say, they've not proved that?"*

b) It is permissible to ask jurors *"if they understand that, while the law requires them to deliberate with other jurors in order to try to reach a unanimous verdict, they have the rights to stand by their beliefs in the case."* If this permissible question is followed by the question, *"And would you do that?"* this crosses the line into an impermissible stake-out question. State v. Elliott, 344 N.C. 242, 263, 475 S.E.2d 202, 210 (1996).

c) The following hypothetical inquiry was deemed an improper stake-out question: *"If you were convinced that life imprisonment without parole was the appropriate penalty after hearing the facts, the evidence, and the law, could you return a verdict of life imprisonment without parole even if you fellow jurors were of different opinions?"* State v. Maness, 363 N.C. 261, 269-70 (2009).

11) Improper Questions about Witness Credibility:

a) *"What type of facts would you look at to make a determination if someone's telling the truth?"*

b) In determining whether to believe a witness, *"would it be important to you that a person could actually observe or hear what they said [that] they have [seen or heard] from the witness stand?"* State v. Johnson, __ N.C.App. __, 706 S.E.2d. 790, 793-94 (2011).

c) 11) *"Whether you **would** automatically reject the testimony of mental health professionals."* State v. Neal, 346 N.C. 608, 618 (1997).

Examples of NON-Stake Out Questions:

1) Prosecutor asked the jurors *"if they would consider that the defendant voluntarily consumed alcohol in determining whether the defendant was entitled to diminished capacity mitigating factor."* The Supreme Court stated, "This was a proper question. He did not attempt to stake the jury out as to what their answer would be on a hypothetical question." State v. Reeves, 337 N.C. 700 (1994)

2) Prosecutor informed prospective jurors that *"only the three people charged with the crimes know what happened to the victims…and…none of the three would testify against the others and therefore the State had no eyewitness testimony to offer."* He then asked: *Knowing that this is a serious case, a first degree murder case, do you feel like you have to say to yourself, well, the case is just too serious…to decide based upon circumstantial evidence and I would require more than circumstantial evidence to return a verdict of first degree murder?* Court found that these statements properly (1) informed the jury that the state would be relying on circumstantial evidence and (2) inquired as to whether the lack of eyewitnesses would cause them problems. (Also, it was not a stake-out question.) State v. Teague, 134 N.C. App. 702 (1999).

3) *"Do you feel like you will automatically turn off the rest of the case and predicate your verdict of not guilty solely upon the fact that these people were out looking for drugs and involved in the drug environment, and became victims as a result of that?"* State v Teague, 134 N.C. App. 702 (1999).

4) *"If someone is offered as an expert in a particular field such as psychiatry, could you accept him as an expert, his testimony as an expert in that particular field."* According to State v Smith, 328 N.C. 99, 131 (1991), this was NOT an attempt to stake out jurors.

5) Proper "non-stake-out" questions (by the prosecutor) about a **co-defendant/accomplice with a plea arrangement** from State v. Jones, 347 N.C. 193, 201-202, 204, 491 S.E.2d 641, 646 (1997):

a) *There may be a witness who will testify…pursuant to a plea arrangement, plea bargain, or "deal" with the State. Would the mere fact that there is a plea bargain with one of the State's witnesses affect your decision or your verdict in this case?*

b) *Could you listen to the court's instructions of how you are to view accomplice or interested witness testimony, whether it came from the State or the defendant….?*

c) *After having listened to that testimony and the court's instructions as to what the law is, and you found that testimony believable, could you give it the same weight as you would any other uninterested witness?*

6) Proper "non-stake-out" questions asked by prosecutor about views on death penalty from State v. Chapman, 359 N.C. 328, 344-346 (2005):

a) As you sit here now, do you know how you would vote at the penalty phase…regardless of the facts or circumstances in the case?

b) Do you feel like in any particular case you are more likely to return a verdict of life imprisonment or the death penalty?

c) Can you imagine a set of circumstances in which…your personal beliefs [for or against the death penalty] conflict with the law? In that situation, what would you do?

A federal court in United States v. Johnson, 366 F.Supp. 2d 822 (N.D. Iowa 2005), explained how to avoid improper stakeout questions in framing proper case-specific questions. A proper question should address the juror's ability to consider both life and death instead of seeking to secure a juror's pledge vote for life or death under a certain set of facts. 366 F.Supp. 2d at 842-844. For example, questions about *1) whether a juror* ***could find*** *(instead of would find)* ***that certain facts call for the imposition of life or death****, or 2) whether a juror* ***could fairly consider both life and death in light of particular facts*** are appropriate case-specific inquiries. 366 F.Supp. 2d at 845, 850. Case-specific questions should be prefaced on "if the evidence shows," or some other reminder that an ultimate determination must be based on the evidence at trial and the court's instructions. 366 F.Supp. 2d at 850.

7) The prosecutor's question, *"Would you feel sympathy towards the defendant simply because you would see him here in court each day…?"* was NOT a stake-out attempt to get jurors to not consider defendant's appearance and humanity in capital sentencing hearing. Chapman, 359 N.C. 328, 346-347 (2005).

8) Prosecutor properly asked "non-stake-out" questions about jurors' abilities to follow the law regarding acting in concert, aiding and abetting, and the felony murder rule in State v. Cheek, 351 N.C. 48, 65-68, 520 S.E.2d 545, 555-557 (1999):

a) *"[I]f you were convinced, beyond a reasonable doubt, of the defendant's guilt, even though he didn't actually pull the trigger or strike the match or strike the blow in the murder, but that he was guilty of aiding and abetting and shared the intent that the victim be killed—could you return a verdict of guilty on that?"*

b) *"[T]he fact that one person may not have actually struck the blow or pulled the trigger or lit the match, but yet he could be guilty under the felony murder rule if he was jointly acting together with someone else in the kidnapping or committing an armed robbery?"*

c) *"[C]ould you follow the law…under the felony murder rule and find someone guilty of first-degree murder, if you were convinced, beyond a reasonable doubt, that they had engaged in the underlying felony of either kidnapping or armed robbery, and find them guilty, even though they didn't actually strike the blow or pull the trigger or light the match…that caused [the victim's] death…?"*

9) In a sexual offense case, the prosecutor asked, *"To be able to find one guilty beyond a reasonable doubt, are you going to require that there be medical evidence that affirmatively says an incident occurred?"* This was NOT a stake-out question. Since the law does not require medical evidence to corroborate a victim's story, the prosecutor's question was a proper attempt to measure prospective jurors' ability to follow the law. State v. Henderson, 155 N.C. App. 719, 724-727 (2003) (The court said that the following question would have been a stake-out if the ADA had asked it, *"If there is medical evidence stating that some incident has occurred, will you find the defendant guilty beyond a reasonable doubt*).

10) In a case involving eyewitness identification, the prosecutor asked: *"Does anyone have a per se problem with eyewitness identification? Meaning, it is in and of itself going to be insufficient to deem a conviction in your mind, no matter what the judge instructs you as to the law?"* The Court said that this question did NOT cause the jurors to commit to a future course of action. The prosecutor was "simply trying to ensure that the jurors could follow the law with respect to eyewitness testimony…that is treat it no differently that circumstantial evidence." State v. Roberts, 135 N.C. App. 690, 697, 522 S.E.2d 130 (1999).

11) In a child homicide case, the prosecutor was allowed to ask a prospective juror *"if he could look beyond evidence of the child's poor living conditions and lack of motherly care and focus on the issue of whether the defendant was guilty of killing the child."* The

Supreme Court found that this was not a stake-out question. State v. Burr, 341 N.C. 263, 285-86 (1995).

JURY SELECTION IN DEATH PENALTY CASES

I. GENERAL PRINCIPLES

Both the defendant and the state have the right to question prospective jurors about their views on capital punishment…The extent and manner of the inquiry by counsel lies within the trial court's discretion and will not be overturned absent an abuse of discretion. State v. Brogden, 334 N.C. 39, 430 S.E.2d 905, 908 (1993).

A defendant on trial for his life should be given great latitude in examining potential jurors. State v Conner, 335 N.C. 618 (1995).

[C]ounsel may seek to identify whether a prospective juror harbors a general preference for a life or death sentence or is resigned to vote automatically for either sentence….A juror who is predisposed to recommend a particular sentence without regard for the unique facts of a case or a trial judge's instruction on the law is not fair and impartial. State v. Chapman, 359 N.C. 328, 345 (2005) (citation omitted).

"Part of the Sixth Amendment's guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors…Voir dire plays a critical function in assuring the criminal defendant that his constitutional right to an impartial jury will be honored." Morgan v Illinois, 504 U.S. 719, 729, 733 (1992)

Voir dire must be available ***"to lay bare the foundation"*** of a challenge for cause against a prospective juror. Were voir dire not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would always impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would never do so. . Morgan, 504 U.S. at 733-34.

In voir dire, "what matters is how…[the questions regarding capital punishment] might be understood-or misunderstood-by prospective jurors." For example, "a general question as to the presence of reservations [against the death penalty] is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direst cases." One cannot assume the position of a venireman regarding this issue absent his own unambiguous statement of his beliefs. Witherspoon, 391 U.S. at 515, n. 9.

The trial court **must allow a defendant to go beyond the standard "fair and impartial" question**: "As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed...It

may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under such misconception." Morgan, 504 U.S. at 735-36.

It is not necessary for the trial court to explain or **for a juror to understand the process of a capital sentencing proceeding before the juror can be successfully challenged for his answers to questions.** An **understanding of the process should not affect one's beliefs regarding the death penalty**. Simpson, 341 N.C. 316, 462 SE2d 191, 202, 206 (1995).

II. Death Qualification: General Opposition to Death Penalty Not Enough

Under the "impartial jury" guarantee of the Sixth Amendment, death penalty jurors may not be excused "for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction"…, or "that there are some kinds of cases in which they would refuse to recommend capital punishment. Witherspoon, 391 U.S. at 522, 512-13.

The Supreme Court recognized that "A man who opposes the death penalty…can make the discretionary judgment entrusted to him by the state and can thus obey the oath he takes as a juror." Id., 391 U.S. at 519.

"Not all [jurors] who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors…so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." Lockhart v. McCree, 476 U.S. 162, 176, 106 S.Ct. 1758, 1766, 90 L.Ed.2d 137, 149 (1986). [Note that the Court in Lockhart reaffirmed its position that death-qualified juries are not conviction-prone, and it is constitutional for a death-qualified jury to decide the guilt/innocence phase. The Court rejected the "fair-cross-section" argument against death-qualified juries deciding guilt.]

"[A] ***juror is not automatically excluded from jury service merely because that juror may have an opinion*** about the propriety of the death penalty." State v. Elliott, 360 N.C. 400, 410 (2006). General opposition to the death penalty will not support a challenge for cause for a potential juror who will "conscientiously apply the law to the facts adduced at trial." Such a **juror may be properly excluded "if he refuses to follow the statutory scheme and truthfully answer the questions** put by the trial judge." State v. Brogden, 430 S.E.2d at 907-08 (1993)(citing Witt, Adams v. Texas, and Lockhart).

III. Death Qualification Rules: Witherspoon and Witt Standards

The State may excuse jurors who make it **"unmistakably clear" that (1) they**

would "automatically vote against the death penalty" no matter what the facts of the case were, or (2) "their attitude about the death penalty would prevent them from making an impartial decision" regarding the defendant's guilt. Witherspoon, 391 U.S. at 522, n. 21 (1968).

A . . . prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be **willing to consider all of the penalties** provided by state law, and that he **not be irrevocably committed against the penalty of death regardless of the facts and circumstances**..." that might emerge during the trial. Witherspoon v Illinois, 391 U.S. 510, 523 n.21 (1968).

The proper standard for excusing a prospective juror for cause because of his views on capital punishment is: **"Whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instruction or his oath."** Wainwright v. Witt, 469 U.S. at 424.

Note that **considerable confusion regarding the law** on the part of the juror could amount to **"substantial impairment."** Uttecht v. Brown, 551 U.S. 1, 127. S.Ct. 2218, 167 L.Ed.2d 1014, 1029 (2007).

Prospective jurors may not be excused for cause simply because of the possibility "of the **death penalty may affect** what their **honest judgment of the facts** will be or **what they may deem to be a reasonable doubt**." The fact that the possible imposition of the death penalty would **"affect" their deliberations by causing them to be more emotionally involved or to view their task with greater seriousness** is not grounds for excusal. The same rule against exclusion for cause applies to **jurors who could not confirm or deny** that their **deliberations would be affected** by their views about the death penalty or by the possible imposition of the death penalty. Adams v. Texas, 448 U.S. 38, 49-50 (1980).

The State may excuse for cause a juror if he affirmatively answers the following question: **"Is your conviction [against the death penalty] so strong that you cannot take an oath [to fairly try this case and follow the law], knowing that a possibility exists in regard to capital punishment."** Lockett v. Ohio, 438 U.S. 586, 595-96 (1978). This ruling was based on the impartiality prong of the Witherspoon standard (i.e., their attitudes toward the death penalty would prevent them from making an **impartial decision as to the defendant's guilt**.)

The N.C. Supreme Court has upheld the removal of potential jurors **who equivocate** or who state that although they believe generally in the death penalty, they indicate that they personally **would be unable or would find it difficult to vote for the death penalty**. Simpson, 341 N.C. 316, 462 S.E.2d 191, 206 (1995); State v. Gibbs, 335 NC 1, 436 SE2d 321 (1993), cert. denied, 129 L.Ed.2d 881 (1994).

The following questions **by the prosecutor** were found to be proper:

1) [Mr. Juror…], *how do you feel about the death penalty, sir, are you opposed to it or [do] you feel like it is a necessary law?*

2) *Do you feel that you could be part of the legal machinery which might bring it about in this particular case?* State v Willis, 332 N.C. 151, 180-81 (1992).

IV. Rehabilitation of Death Challenged Juror

It is not an abuse of for the trial court to deny the defendant the chance to rehabilitate a juror **who has expressed clear and unequivocal** opposition to the death penalty in response to questions asked by the prosecutor and judge **when further questioning by defendant would not have likely produced different answers**. Brogden, 334 N.C. 39, 430 SE2d 905, 908-09 (1993); see also State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992). [In Brogden, a juror said that he could consider the evidence, was not predisposed either way, and could vote for death in an appropriate case. The same juror also said his feelings about the death penalty would "partially" or "to some extent" affect his performance as a juror. The trial court **erroneously** denied the defendant the opportunity to rehabilitate this juror.]

It is **error** for a trial court to enter "**a general ruling, as a matter of law," a defendant will never be allowed to rehabilitate** a juror when the juror's answers…have indicated that the **juror may be unable to follow the law** and fairly consider the possibility of recommending a sentence of death. State v. Green, 336 N.C. 142, 161 (1994) (based on Brogdon).

V. Life Qualifying Questions: Morgan v. Illinois

"If you found [the defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts were?" Morgan, 504 U.S. at 723. A juror who will automatically vote for the death penalty in every case will fail to follow the law about considering aggravating and mitigating evidence, and has already formed an opinion on the merits of the case. Id. at 504 U.S. at 729, 738.

"Clearly, the extremes must be eliminated-i.e., those who, in spite of the evidence, would automatically vote to convict or impose the death penalty or automatically vote to acquit or impose a life sentence." Morgan, 504 U.S. at 734, n. 7.

"General fairness and follow the law questions" are not sufficient. **A capital defendant is entitled to inquire and ascertain a potential juror's predeterminations regarding the imposition of the death penalty.** Morgan, 504 U.S. at 507; State v. Conner, 335 N.C. 618, 440 S.E.2d 826, 840 (1994).

[For a good summary of Morgan, see U.S. v. Johnson, 366 F.Supp. 2d 822, 826-831 (N.D. Iowa 2005).]

Proper Questions:

1) ***As you sit here now, do you know how you would vote at the penalty phase…regardless of the facts or circumstances in the case?*** Chapman, 359 N.C. 328, 344-345 (2005).

2) ***Do you feel like in any particular case you are more likely to return a verdict of life imprisonment or the death penalty?***

[According to the Supreme Court, these general questions (asked by the prosecutor, i.e., #1 and #2 herein) did not tend to commit jurors to a specific future course of action. Instead, the questions helped to clarify whether the jurors' personal beliefs would substantially impair their ability to follow the law. Such inquiry is not only permissible, it is desirable to safeguard the integrity of a fair and impartial jury" for both parties. Chapman, 359 N.C. 328, 344-345 (2005).]

3) ***Can you imagine a set of circumstances in which…your personal beliefs*** *[…for or against the death penalty…]* ***conflict with the law? In that situation, what would you do?***

[While a party may not ask questions that tend to "stake out" the verdict a prospective juror would render on a particular set of facts…, **counsel may seek to identify whether a prospective juror harbors a general preference for a life or death sentence or is resigned to vote automatically for either sentence**….A juror who is predisposed to recommend a particular sentence without regard for the unique facts of a case or a trial judge's instruction on the law is not fair and impartial. State v. Chapman, 359 N.C. 328, 345 (2005) (citation omitted)…..The Supreme Court said that, although the prosecutor's questions (numbered 1-3 above) were hypothetical, they did not tend to commit jurors to a specific future course of action in this case, nor were they aimed at indoctrinating jurors with views favorable to the State. These questions do not advance any particular position. In fact, the questions address a key criterion of juror competency, i.e., ability to apply the law despite of their personal views. In addition, the questions were simple and clear. Chapman, 359 N.C. 328, 345-346 (2005).]

4) ***Is your support for the death penalty such that you would find it difficult to consider voting for life imprisonment for a person convicted of first-degree murder?*** Approved in State v Conner, 335 N.C. 618 (1994)

5) ***Would your belief in the death penalty make it difficult for you to follow the law and consider life imprisonment for first-degree murder?*** Approved in State v Conner, 335 N.C. 618 (1994). [The gist of the above two questions (numbered 4 and 5) was to determine whether the juror was willing to consider a life sentence in the appropriate circumstances or would automatically vote for death upon conviction. Conner, 440 SE2d at 841.]

6) ***If at the first stage of the trial you voted guilty for first-degree murder, do you think that you could at sentencing consider a life sentence or would your feelings about the death penalty be so strong that you could not consider a life sentence?*** State v Conner, 335 N.C. 618, 643-45 (1994) (referring to State v Taylor).

7) ***If you had sat on the jury and had returned a verdict of guilty, would you then presume that the penalty should be death?*** State v Conner, 335 N.C. 618, 643-45 (1994). [Referring to questions used in State v Taylor, 304 N.C. at 265, would now be acceptable). Also approved in State v. Ward, 354 N.C. 231, 254, 555 S.E.2d 251, 266 (2001) when asked by the prosecutor.]

8) ***If the State convinced you beyond a reasonable doubt that the defendant was guilty of premeditated murder and you had returned a verdict of guilty, do you think then that you would feel that the death penalty was the only appropriate punishment?*** State v Conner, 335 N.C. 618, 643-45 (1994). [The Court recognized that questions (numbered here as 6-8) that were deemed inappropriate in State v Taylor, 304 N.C. at 265, would now be acceptable.]

9) A capital defendant **must be allowed** to ask, ***"whether prospective jurors would automatically vote to impose the death penalty in the event of a conviction."*** State v. Wiley, 355 N.C. 592, 612 (2002) (citing Morgan 504 U.S. 719, 733-736).

Improper Questions:

1) Improper questions due to "**form**" (according to Simpson, 341 N.C. 316, 462 S.E.2d 191, 203 (1995)):

a) *Do you think that a sentence to life imprisonment is a sufficiently harsh punishment for someone who has committed cold-blooded, premeditated murder?*

b) *Do you think that before you would be willing to consider a death sentence for someone who has committed cold-blooded, premeditated murder, that they would have to show you something that justified that sentence?*

2) Questions that were **argumentative, incomplete statement of the law, and "stake-outs"** are improper. Simpson, 341 N.C. at 339-340.

3) The following question was properly disallowed under Morgan because it was **overly broad and called for a legislative/policy decision**: *Do you feel that the death penalty is the appropriate penalty for someone convicted of first-degree murder?* Conner, 335 N.C. at 643.

4) Defense counsel was not allowed to ask the following questions because they were **hypothetical stake-out questions** designed to pin down jurors regarding the kind of fact scenarios they would deem worthy of LWOP or the death penalty:

a) *Have you ever heard of a case where you thought that LWOP should be the appropriate punishment?*

b) *Have you ever heard of a case where you thought that the death penalty should be the punishment?*

c) *Whether you could conceive of a case where LWOP ought to be the punishment? What type of case is that?* State v. Wiley, 355 N.C. 592, 610-613 (2002).

Case-Specific Questions under Morgan:

The court in United States v. Johnson, 366 F.Supp. 2d 822 (N.D. Iowa 2005) addressed the issue of whether Morgan allows for case-specific questions (i.e., questions that ask whether jurors can consider life or death in a case involving stated facts). The court decided that Morgan did not preclude (or even address) case-specific questions. 366 F.Supp. 2d at 844-845. ***The essence of the Supreme Court's decision in Morgan was that, in order to empanel a fair and impartial jury, a defendant must be afforded the opportunity to question jurors about their ability to consider life and death sentences based on the facts and law in a particular case rather than automatically imposing a particular sentence no matter what the facts were.*** Therefore, the court in

Johnson found that case-specific questions (other than stake-out questions) are appropriate under Morgan. 366 F.Supp. 2d at 845-846.

In fact case-specific questions may be constitutionally required since a prohibition on such questions could impede a party's ability to determine whether jurors are unwaveringly biased for or against a death sentence. 366 F.Supp. 2d at 848.

The Johnson court explained how to avoid improper stakeout questions in framing proper case-specific questions. A proper question should address the juror's ability to consider both life and death instead of seeking to secure a juror's pledge vote for life or death under a certain set of facts. 366 F.Supp. 2d at 842-844. For example, questions about *1) whether a juror **could find** (instead of would find) **that certain facts call for the imposition of life or death**, or 2) whether a juror **could fairly consider both life and death in light of particular facts*** are appropriate case-specific inquiries. 366 F.Supp. 2d at 845, 850. Case-specific questions should be prefaced on "if the evidence shows," or some other reminder that an ultimate determination must be based on the evidence at trial and the court's instructions. 366 F.Supp. 2d at 850.

VI. Consideration of MITIGATION Evidence

General Principles:

Pursuant to Morgan v. Illinois, capital jurors must be able to consider and give weight to mitigating circumstances. "Any juror who states that he or she will automatically **vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider mitigating evidence** and to decide if it is sufficient to preclude imposition of the death penalty." Morgan, 504 U.S. at 738, 119 L.Ed.2d at 508. Such jurors "not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and that they will not consider it." Morgan, 504 U.S. at 736, 119 L.Ed.2d at 507. **"Any juror to whom mitigating factors are likewise irrelevant should be disqualified for cause**, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial." Morgan, 504 U.S. at 739, 119 L.Ed.2d at 509.

Not only must the defendant be allowed to offer all relevant mitigating circumstance, "the sentencer [must] listen-that is **the sentencer must consider the mitigating circumstances when deciding the appropriate sentence.** Eddings v Oklahoma, 455 U.S. 104, 115 n.10 (1982)

[Jurors] may determine the weight to be given relevant mitigating evidence...[b]ut **they may not give it no weight by excluding such evidence from their consideration**. Eddings v Oklahoma, 455 U.S. 104, 114 (1982)

[The] decision to impose the death penalty is a reasoned moral response to the

defendant's background, character and crime…Jurors make individualized assessments of the appropriateness of the death penalty. Penry v. Lynaugh, 109 S.Ct. 2934, 2948-9 (1988)

Procedure must require the sentencing body **to consider the character and record of the individual offender and the circumstances of the particular offense**. Woodsen v North Carolina, 428 U.S. 280, 304 (1976)

In a capital sentencing proceeding before a jury, the jury is called upon to make a highly subjective, unique individualized judgment regarding the punishment that a particular person deserves. Turner v Murray, 476 U.S. 23, 33-34 (1985) (quoting Caldwell v Mississippi, 472 U.S. 320, 340 n.7 (1985).

Potential Inquiries into Mitigation Evidence:

[The N.C. Supreme Court] conclude[d] that, in permitting defendant to inquire generally into jurors' feelings about mental illness and retardation and other mitigating circumstances, he was given an adequate opportunity to discover any bias on the part of the juror…[That, combined with questions] asking jurors if they would automatically vote for the death penalty…and if they could consider mitigating circumstances.., satisfies the constitutional requirements of Morgan.
State v. Skipper, 337 N.C. 1, 21-22 (1994). [Note that the only restriction…was whether a juror could "consider" a specific mitigating circumstance in reaching a decision. State v. Skipper, 337 N.C. 1, 21 (1994)]

The Supreme Court had the following to say about the following question (and two other questions) originally asked by a prosecutor: "***Can you imagine a set of circumstances in which…your personal beliefs*** *[about __?]* ***conflict with the law? In that situation, what would you do?"*** Although the prosecutor's questions were hypothetical, they did not tend to commit jurors to a specific future course of action in this case, nor were they aimed at indoctrinating jurors with views favorable to the State. These questions do not advance any particular position. In fact, the questions address a key criterion of juror competency, i.e., ability to apply the law despite of their personal views. In addition, the questions were simple and clear. Chapman, 359 N.C. 328, 345-346 (2005).

Note, however, the following questions were deemed improper because 1) they "fished" for answers to legal questions before the judge instructed the jury about the applicable law, and 2) the questions "staked-out" jurors about what kind of verdict they would render under certain named circumstances:

a) "*If the State is able to prove that the defendant premeditatedly and deliberately killed three people…, would you be able to fairly consider things like sociological background, the way he grew up, if he had an alcohol problem, things like that in weighing whether he should get death or LWOP?"*;

b) "*Assuming the State proves three cold-blooded P&D murders, can you conceive in your own mind the mitigating factors that would let you find your ability for a*

penalty less than death?" State v. Mitchell, 353 N.C. 309, 318-319 543 S.E.2d 830, 836-837 (2001).

The following question was allowed by the trial court: ***"Do you feel like whatever we propose to you as a potential mitigating factor that you can give that fair consideration and not already start out dismissing those and saying those don't count because of the severity of the crime."*** State v Jones, 336 N.C. 229, 241 (1994).

An inquiry into jurors' **latent bias against any type of mitigation evidence** may be appropriate. In Simpson, 341 N.C. 316, 340-341, 462 S.E.2d 191, 205 (1995), the "majority" of the following questions **were deemed improper** questions about whether jurors could consider certain mitigating circumstances due to "form" or "staking out":

a) "*Do you think that the punishment that should be imposed for anyone in a criminal case in general should be effected [sic] by their mental or emotional state at the time that the crime was committed?"*

b) *"If you were instructed by the Court that certain things are mitigating, that is they are a basis for rendering or returning a verdict of life imprisonment as opposed to death and were those circumstances established you must give them some weight or consideration, could you do that?"*

c) *"Mr. [Juror], in this case if there was evidence to support, evidence to show that the defendant was under the influence of a mental or emotional disturbance at the time of the commission of the murder and if the Court instructed you that was a mitigating circumstance, if proven, that must be given some weight, could you follow that instruction?"*

d) *"If the Court advises you that by the preponderance of the evidence that if you are shown that the capability of the defendant to conform his conduct to the requirements of the law was impaired at the time of the murder, and the Court instructed you that was a circumstance to which you must give some consideration, could you follow that instruction?"*

e) *"Do you believe that a psychologist or a psychiatrist can be successful in treating people with mental or emotional disturbances?"*

f) *"Do you personally believe, and I am talking about your personal beliefs, that if by the preponderance of evidence, that is evidence that is established, that a person who committed premeditated murder was under the influence of a mental or emotional disturbance at the time that the crime was committed, do you personally consider that as mitigating, that is as far as supporting a sentence of less than the death penalty?"*

g) *"Now if instructed by the Court and if it is supported by the evidence, could you take into account the defendant's age at the time of the commission of the crime?"*

h) *"Do you believe that you could fairly and impartially listen to the evidence and consider whether any mitigating circumstances the judge instructs you on are found in the jury consideration at the end of the case?"*

In finding "most" of the above-cited questions improper, it was important to the Supreme Court that the trial court had allowed the defense lawyers to asked jurors about their experiences with mental problems, mental health professions, and foster care. **Such questions allowed the defendant to explore whether jurors had any latent bias**

against any type of mitigation evidence. Simpson, 341 N.C. at 341-342.

See discussion of U.S. v. Johnson, 366 F.Supp. 822 (N.D. Iowa 2005) above for authority or argument that case-specific inquiry about mitigation should be allowed under Morgan.

*For more mitigation questions, see below for "specific areas of inquiry."

VII. Specific Areas of Inquiry

Accomplice Liability: It was proper for prosecutor to ask prospective juror if he would be able to recommend the death penalty for someone who did not actually pull the trigger since it was uncontroverted that the defendant was an accessory. The State could inquire about the jurors' ability to impose the death penalty for an accessory to first-degree murder. State v Bond, 345 N.C. 1, 14-17, 478 S.E.2d 163 (1996):

a) *"The evidence will show [the defendant] did not actually pull the trigger. Would any of you feel like simply because he did not pull the trigger, you could not consider the death penalty and follow the law concerning the death penalty."*

b) *"Regardless of the facts and circumstances concerning the case, you could not recommend the death penalty for anyone unless it was the person who pulled the trigger."*

Age of Defendant:

The following question was asked by defense counsel: *"[T]he defendant will introduce things that he contends are mitigating circumstances, things like his age at the time of the crime...Do you feel like you can consider the defendant's age at the time the crime was committed ...and give it fair consideration?"* The Supreme Court assumed it was error for the trial court to sustain the State's objection to this question. In finding it harmless, however, the Court stated, "[i]n the context that this question was propounded, the juror is bound to have known the circumstance to which the defendant referred was the age of the defendant." State v Jones, 336 N.C. 229, 241 (1994)

Note, however, the question *"Would you consider the age of the defendant to be of any importance in this case [in deciding whether the death penalty is appropriate]?"* was found to be a "stake-out" question in State v. Womble, 343 N.C. 667, 682 473 S.E.2d 291, 299 (1996).

Aggravating Circumstances:

The Supreme Court has held that **questions about a specific aggravating circumstance that will arise in the case amounts to a stake–out question**. State v. Richmond, 347 N.C. 412, 424, 495 S.E.2d 677 (1998)(*"could you still consider mitigating circumstances knowing that the defendant had a prior first-degree murder conviction"*); State v. Fletcher, 354 N.C. 455, 465-66 (2001)(in a re-sentencing in which

the first-degree murder conviction was accompanied by a burglary conviction, counsel asked, the State has *"to prove at least one aggravating factor, that is…the fact that the murder was part of a burglary. That's true in this case because [the defendant] was also convicted of burglary. Knowing that about this case, could you still consider a life sentence…?"*)

Cost of Life Sentence vs. Death Sentence

In State v. Elliott, 360 N.C. 400, 409-10 (2006), the Supreme Court held that "we cannot say that the trial court clearly abused its discretion" when it did not allow defense counsel to ask, *"Do you have any preconceived notions about the costs of executing someone compared to the cost of keeping him in prison for the rest of his life."* The Supreme Court admitted that the question was "relevant" but, in light of the inquiry the trial court allowed, it was not a clear abuse of discretion to disallow the question. See also, State v. Cummings, 361 N.C. 438, 465 (2007). On the other hand, a trial court may reverse its previous denial and allow the "costs" question. State v. Polke, 361 N.C. 65, 68 (2006).

Course of Conduct Aggravator (or Multiple Murders):

Prosecutor was not staking out juror when asking: *"If the State satisfied you... that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty, then I take it you could give the defendant the death penalty for beating two humans to death with a hammer, is that correct?"* State v Laws, 325 N.C. 81 (1989).

Felony Murder Defined:

Prosecutor properly defined felony murder as *"a killing which occurs during the commission of a violent felony, such as _____"* (the felony in this case was discharging a firearm into an occupied vehicle). State v. Nobles, 350 N.C. 483, 498, 515 S.E.2d 885, 895 (1999).

Forecast of Aggravating or Mitigating Circumstance(s):

In State v Payne, 328 N.C. 377, 391 (1991), the defendant argued it was improper for the prosecutor to forecast to the jury during voir dire that they might consider HAC as an aggravating factor. The Court found no error and stated: **[I]t is permissible for a prosecutor during voir dire to state briefly what he or she anticipates the evidence may show,** provided the statements are made in good faith and are reasonably grounded in the evidence available to the prosecutor.

A defendant is not entitled to put on a mini-trial of his evidence during voir dire by using hypothetical situations to determine whether a juror would cast his vote for his theory. The trial court in Cummings **allowed defense counsel to question prospective jurors about whether they had been personally involved** in any of those situations [such as domestic violence, child abuse, and alcohol and drug abuse], however, the judge **properly refused to allow defense counsel to ask hypothetical and speculative questions** that were being used to try the mitigation evidence during jury selection. State v. Cummings, 361 N.C. 438, 464-65 (2007).

Foster Care:

It was proper to ask, *Whether any jurors have had any experience with foster care?* Simpson, 341 N.C. 316, 462 S.E.2d 191, 205 (1995).

Gender of Defendant [or Victim?]:

The prosecutor properly asked, *"Would the fact that the Defendant is a female in any way affect your deliberations with regard to the death penalty?"* This was not a stake-out question. It was appropriate to inquire into the possible sensitivities of prospective jurors toward a female defendant facing the death penalty in an effort to ferret out any prejudice arising out of defendant's gender. State v. Anderson, 350 N.C. 152, 170-171, 513 S.E.2d 296, 307-308 (1999).

HAC Aggravator:

In State v Payne, 328 N.C. 377, 391 (1991), the defendant argued it was improper for the prosecutor to forecast to the jury during voir dire that they might consider HAC as an aggravating factor. The Court found no error and stated: [I]t is permissible for a prosecutor during voir dire to state briefly what he or she anticipates the evidence may show, provided the statements are made in good faith and are reasonably grounded in the evidence available to the prosecutor.

Impaired Capacity (f)(6):

Could the juror consider impaired capacity due to intoxication by drugs or alcohol as a mitigating circumstance and give the evidence such weight as you believe it is due ? Would your feelings about drugs or alcohol prevent you from considering the evidence ? State v Smith, 328 N.C. 99, 127 (1991). (See, where Court found that the following was a stake-out question: *"How many of you think that drug abuse is irrevelant to punishment in this case."* State v. Ball, 344 N.C. 290, 304, 474 S.E.2d 345, 353 (1996).

Prosecuting attorney asked the jurors, *"If they would consider that the defendant voluntarily consumed alcohol in determining whether the defendant was entitled to diminished capacity mitigating factor.* The Supreme Court stated: "This was a proper question. He did not attempt to stake the jury out as to what their answer would be on a hypothetical question." State v. Reeves, 337 N.C. 700 (1994).

It was proper for prosecutor to ask prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense. (*If it is shown to you from the evidence and beyond a reasonable doubt that the defendant was intoxicated at the time of the alleged shooting, would this cause you to have sympathy for him and allow that sympathy to affect your verdict.*) State v McKoy, 323 N.C. 1 (1988).

Lessened Juror Responsibility:

In closing argument and during jury selection, **it is improper for a prosecutor to make statements that lessens the jury's role or responsibility** in imposing a potential death penalty **or lessens the seriousness or reality of a death sentence**. State v. Hines, 286 N.C. 377, 381-86, 211 S.E.2d 201 (1975) (reversible error for the prosecutor to tell a

prospective juror, *"to ease your feelings [about imposing the death penalty], I might say…that one [person] has been put to death in N.C. since 1961"*; State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975), State v. Jones, 296 N.C. 495, 497-502 (1979) (it is error for *a prosecutor to suggest that the appellate process or executive clemency will correct any errors in a jury's verdict*); State v. Jones, 296 N.C. at 501-502 (prosecutor improperly discussed how *15A-2000(d) provides for an automatic appeal and how the Supreme Court must overturn a death sentence if it makes certain findings*. This had the effect of minimizing in the jurors' minds their role in recommending a death sentence).

Life Sentence (Without Parole):

During jury selection, a prospective juror indicated that he did not feel that a life sentence actually meant life (prior to LWOP statute). The trial court then instructed the jury that they should consider a life sentence to mean that defendant would be imprisoned for life and that they should not take the possibility of parole into account in reaching a verdict. The juror indicated that he would have trouble following that instruction and was excused for cause. Defense counsel requested that he be allowed to ask the other prospective jurors whether they could follow the court's instructions on parole. The trial court erroneously refused to allow the question. The Supreme Court held that **the defendant has a right to inquire as to whether a prospective juror will follow the court's instruction (i.e., life means life).** State v Jones, 336 N.C. 229, 239-40 (1994).

In several cases, the Supreme Court has upheld the refusal to allow defense counsel to ask about jurors' *"understanding of the meaning of a sentence of life without parole", "conceptions of the parole eligibility of a defendant serving a life sentence", or their feelings about whether the death penalty is more or less harsh that life in prison without parole."* State v. Neal, 346 N.C. 608, 617-18 (1997); State v. Jones, 358 N.C. 330 (2004); State v. Garcell, 363 N.C. 10, 30-32 (2009). These decisions were based on the principle that a defendant does not have the constitutional right to question the venire about parole. State v. Neal, 346 N.C. at 617.

In light of this, a safe inquiry might avoid the topic of "parole" and simply ask jurors about "their views of a life sentence for first-degree murder."

Another safe inquiry might be based on 15A-2002 which provides that "the judge shall instruct the jury…that a sentence of life imprisonment means a sentence of life without parole." There is no doubt that the jury will hear this instruction and, generally, the parties should be allowed to inquire whether jurors hold misconceptions that will affect their ability to "follow the law." **"Questions designed to measure a prospective juror's ability to follow the law are proper within the context of jury selection voir dire."** See, State v. Jones, 347 N.C. 193, 203 (1997), *citing* State v. Price, 326 N.C. 56, 66-67, 388 S.E.2d 84, 89, *vacated on other grounds*, 498 U.S. 802 (1990); State v. Henderson, 155 N.C.App. 719, 727 (2003)

A juror's misperception about a life sentence with no possibility of parole may substantially impair his or her ability to follow the law. Uttecht v. Brown, 551 U.S. 1, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007). In Uttecht, despite a juror being informed four

or five times that a life sentence meant "life imprisonment without the possibility of parole," the juror continued to say that he would support the death penalty if the defendant would be released to re-offend. That juror was properly removed for cause. 167 L.E.d2d at 1025-30.

In a pre-LWOP case, the prosecutor improperly argued that the defendant could be paroled in 20 years if the jury awarded him a life sentence. The Supreme Court stated that, **"The jury's sentence recommendation should be based solely on their balancing the aggravating and mitigating factors before them. The possibility of parole is not such a factor, and it has no place in the jury's recommendation of their sentence to be imposed."** State v. Jones, 296 N.C. 495, 502-503 (1979). This principle might provide authority for inquiring into jurors' erroneous beliefs about parole to determine if they can follow the law.

Mental or Emotional Disturbance:

If the court instructs you that you should consider whether or not a person is suffering from mental or emotional disturbance in deciding whether or not to give someone the death penalty, do you feel like you could follow the instruction? State v Skipper, 337 N.C. 1, 20 (1994)).

The following were proper mental health related questions as found in Simpson, 341 N.C. 316, 462 S.E.2d 191, 205 (1995):

1) *Whether the jurors had any background or experience with mental problems in their families ?*

2) *Whether the jurors have any bias against or problem with any mental health professionals ?*

Murder During Felony Aggravator (e)(5):

Prosecutor informed jury about aggravating factors and indicated that the State *is relying upon...the capital felony was committed while the defendant was engaged, or was an aider and abettor in the commission of, or attempt to commit...any homicide, robbery, rape....* Supreme Court said that the prosecutor during jury voir dire should limit reference to aggravating factors, including the underlying felonies listed in G.S. 15A-2000(e)(5), to those of which there will be evidence and upon which the prosecutor intends to rely. Payne, 328 N.C. 377 (1991)

No Significant Criminal Record:

The following question was deemed improper as hypothetical and an impermissible attempt to indoctrinate a juror: *"Would the fact that the defendant had no significant history of any criminal record, would that be something that you would consider important in determining whether or not to impose the death penalty?"* State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989).

Personal Strength to Vote for Death:

Prosecutor asked: *"Are you strong enough to recommend the death penalty ?"*

State v Smith, 328 N.C. 99, 128 (1991). This repeated inquiry by prosecutor is not an attempt to see how jurors would be inclined to vote on a given state of facts. State v. Fleming, 350 N.C. 109, 125, 512 S.E.2d 720, 732 (1999).

Prosecutors were allowed to ask jurors *"whether they possessed the intestinal fortitude [or "courage", or "backbone"] to vote for a sentence of death."* When jurors equivocated on the imposition of the death penalty, prosecutors were allowed to ask these questions to determine whether they could comply with the law. State v. Murrell, 362 N.C. 375, 389-91 (2008); State v. Oliver, 309 N.C. 326, 355 (1983); State v. Flippen, 349 N.C. 264, 275 (1998); State v. Hinson, 310 N.C. 245, 252 (1984).

Religious Beliefs:

The defendant's "right of inquiry" includes "the right to make appropriate inquiry concerning a prospective juror's moral or religious scruples, morals, beliefs and attitudes toward capital punishment." State v. Vinson, 287 N.C. 326, 337, 215 S.E.2d 60, 69 (1975), death sentence vacated, 428 U.S. 902, 49 L.Ed.2d 1206 (1976). The issue is whether the prospective juror's religious views would impair his ability to follow the law. State v. Fletcher, 354 N.C. 455, 467 (2001). This right of inquiry does not extend to all aspects of the jurors' private lives or of their religious beliefs. State v. Laws, 325 N.C. 81, 109, 381 S.E.2d 609, 625 (1989).

General questions about the effect of a juror's religious views on his ability to follow the law are favored over detailed questions about Biblical concepts or doctrines. It was held improper to ask about a juror's *"understanding of the Bible's teachings on the death penalty."* State v. Mitchell, 353 N.C. 309, 318, 543 S.E.2d 830, 836 (2001). The Defendant, however, was allowed to ask the juror about her religious affiliation and whether any teachings of her church would interfere with her ability to perform her duties as a juror. In State v. Laws, 325 N.C. 81, 109, 381 S.E.2d 609, 625-626 (1989), sentence vacated on other grounds, 494 U.S. 1022, 110 S.Ct. 1465, 108 L.Ed.2d 603 (1990), the trial court did not abuse its discretion by not allowing defense counsel to ask a juror *"whether she believed in a literal interpretation of the Bible."*

In State v. Fletcher, 354 N.C. 455, 467, 555 S.E.2d 534, 542 (2001), defense counsel was allowed to inquire into a juror's religious affiliation and his activities with a Bible distributing group, but the trial court properly disallowed the question, whether the juror is a person *"who believes in the Biblical concept of an eye for an eye."* On the other hand, another trial court did not allow counsel to ask questions about jurors' *"church affiliations and the beliefs espoused by others [about the death penalty] representing their churches."* State v. Anderson, 350 N.C. 152, 171-172, 513 S.E.2d 296, 308 (1999).

Sympathy for the Defendant [or the Victim?]:

An inquiry into the sympathies of prospective jurors is part of the exercise of (the prosecutor's) right to secure an unbiased jury. State v. Anderson, 350 N.C. 152, 170-171, 513 S.E.2d 296, 307-308 (1999). (Arguably, the same right applies to the defendant.)

Prosecutor properly asked, "*Would you feel sympathy towards the defendant simply because you would see him here in court each day…?"* Jurors may consider a defendant's demeanor in recommending a sentence. The question did not "stake out" jurors so that they could not consider the defendant's appearance and humanity. The question did not address definable qualities of the defendant's appearance and demeanor. It addressed jurors' feelings toward the defendant, notwithstanding his courtroom appearance or behavior. Chapman, 359 N.C. 328, 346-347.

LIST OF CASES

Federal Courts

Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)
Eddings v Oklahoma, 455 U.S. 104 (1982)
Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)
Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986)
Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992)
Mu'min v. Virginia, 500 U.S. 415, 111 U.S. 1899, 114 L.Ed.2d 493 (1991)
Penry v. Lynaugh, 109 S.Ct. 2934 (1988)
Rosales-Lopez v. United States, 451 U.S. 182, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981)
Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1783, 90 L.Ed.2d 27 (1986)
Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)
Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)
Woodsen v North Carolina, 428 U.S. 280 (1976)
United States v. Jackson, 542 F.2d 403 (7th Cir. 1976)
United States v. Robinson, 475 F.2d 376 (D.C. Cir. 1973)
United States v. Johnson, 366 F.Supp. 2d 822 (N.D. Iowa 2005)
Uttecht v. Brown, 551 U.S. 1, 127. S.Ct. 2218, 167 L.Ed.2d 1014 (2007)

North Carolina Courts

State v. Anderson, 350 N.C. 152, 513 S.E.2d 296 (1999)
State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985) (note 6-7)
State v. Ball, 344 N.C. 290, 474 S.E.2d 345 (1996)
State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994) (note 2)
State v Bond, 345 N.C. 1, 478 S.E.2d 163 (1996)
State v. Brogden, 334 N.C. 39, 430 S.E.2d 905 (1993) (notes 1-2)
State v. Burr, 341 N.C. 263, 285-86 (1995)
State v. Call, 353 N.C. 400, 545 S.E.2d 190 (2001)
State v. Chapman, 359 N.C. 328 (2005) (note 2)
State v. Cheek, 351 N.C. 48, 520 S.E.2d 545 (1999)
State v Clark, 319 N.C. 215 (1987)
State v. Conner, 335 N.C. 618, 440 S.E.2d 826 (1994) (notes 1-4, 7-9, 19-21)
State v. Cummings, 361 N.C. 438, 457-58 (2007)
State v. Cunningham, 333 N.C. 744, 429 S.E.2d 718 (1993)
State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989) (notes 5, 8)
State v. Denny, 294 N.C. 294, 240 S.E.2d 437 (1978) (note 1)

State v Edwards, 27 N.C. App. 369 (1975)
State v. Elliott, 344 N.C. 242, 475 S.E.2d 202 (1996)
State v. Elliott, 360 N.C. 400, 628 S.E.2d 735 (2006)
State v. Fleming, 350 N.C. 109, 512 S.E.2d 720 (1999)
State v. Fletcher, 354 N.C. 455, 555 S.E.2d 534 (2001)
State v. Garcell, 363 N.C. 10 (2009)
State v. Gell, 351 N.C. 192 (2000)
State v. Gibbs, 335 NC 1, 436 SE2d 321 (1993), cert. denied, 129 L.Ed.2d 881 (1994)
State v. Green, 336 N.C. 142, 161 (1994)
State v Hatfeld, 128 N.C. App. 294 (1998)
State v Hedgepath, 66 N.C. App. 390 (1984)
State v. Henderson, 155 N.C. App. 719, 724-727 (2003)
State v Hightower, 331 N.C. 636 (1992)
State v. Hines, 286 N.C. 377, 381-86, 211 S.E.2d 201 (1975)
State v. Johnson, __ N.C.App. __, 706 S.E.2d. 790 (2011)
State v. Jones, 296 N.C. 495, 497-502 (1979)
State v Jones, 336 N.C. 229 (1994)
State v. Jones, 347 N.C. 193, 491 S.E.2d 641 (1997)
State v. Jones, 358 N.C. 330 (2004)
State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), sentence vacated on other grounds, 494 U.S. 1022, 110 S.Ct. 1465, 108 L.Ed.2d 603 (1990)
State v Leonard, 295 N.C. 58 (1978)
State v. Maness, 363 N.C. 261 (2009)
State v. McKinnon, 328 N.C. 668, 675-76, 403 S.E.2d 474 (1991)
State v McKoy, 323 N.C. 1 (1988)
State v. Mitchell, 353 N.C. 309, 543 S.E.2d 830 (2001)
State v. Murrell, 362 N.C. 375 (1008)
State v. Neal, 346 N.C. 608, 487 S.E.2d 734 (1998)
State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999)
State v. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989) (notes 1-2)
State v. Payne, 328 N.C. 377 (1991)
State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980) (note 1)
State v. Polke, 361 N.C. 65 (2006)
State v Reaves, 337 N.C. 700 (1994)
State v. Richmond, 347 N.C. 412, 424, 495 S.E.2d 677 (1998)
State v. Roberts, 135 N.C. App. 690, 522 S.E.2d 130 (1999)
State v Robinson, 339 N.C. 263 (1994)
State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986) (note 12)
State v Skipper, 337 N.C. 1 (1994)
State v. Simpson, 341 N.C. 316, 426 S.E.2d 191 (1995) (notes 1-10)
State v Smith, 328 N.C. 99 (1991)
State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992) (note 10)
State v. Teague, 134 N.C. App. 702 (1999)
State v Thomas, 294 N.C. 105 (1978)
State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975), death penalty vacated, 428 U.S. 902, 49 L.Ed.2d 1206 (1976) (notes 2-10)

State v. Ward, 354 N.C. 231, 555 S.E.2d 251 (2001)
State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973) (note 7)
State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975)
State v. Wiley, 355 N.C. 592 (2002)
State v Williams, 41 N.C. App. 287, disc. rev. denied, 297 N.C. 699 (1979)
State v Willis, 332 N.C. 151 (1992)
State v. Womble, 343 N.C. 667, 473 S.E.2d 291 (1996)

Jury Selection: Challenges for Cause (7-11-10)

Michael G. Howell
Capital Defender's Office
123 West Main Street, Ste. 601, Durham, NC 27701
(919) 354-7220

Basis for Challenge for Cause. 15A-1212

(6) The juror has formed or expressed an opinion as to the guilt or innocence of the defendant. (You may NOT ask what the opinion is.)
(8) As a matter of conscience, regardless of the facts and circumstances, the juror would be unable to render a verdict with respect to the charge in accordance with the law of N.C.
(9) For any other cause, the juror is unable to render a fair and impartial verdict.

GOAL for Challenge for Cause…Have the juror agree that the juror:
1) has formed an opinion about guilt (or "expressed" an opinion),
2) would be unable to follow the law about ____, or
3) would be unable to be fair and impartial.

The STEPS to obtain a for cause challenge

1) Repeat the juror's bias or impaired position.
Use their EXACT words
"My son was a cocaine addict…I despise anyone ever remotely involved in it."

2) Follow up with OPEN-ENDED questions to get the juror to further explain views.
Tell me more…What happened…Why…?
NO leading at this point
"Tell us about your son's problem…How did he get into using cocaine…What happened…How is he today…?

3) Acknowledge the validity of the juror's position and compare it to other jurors
Ira calls it…"Normalize the impairment"
Do NOT argue or be judgmental…Some empathy but NOT condescending
Recognize their sharing of a very personal experience
See if other jurors have the same or similar views
"Thank you for your honesty and for sharing your personal experience about your son. It is understandable that you feel the way you do. Does anyone else feel the same way about people charged with selling drugs?"

4) Lock the juror's biased answer into a challenge for cause basis
Switch to LEADING questions from here on
Repeat the juror's biased views and emphasize the strength of the views
If the juror tries to wiggle out or qualify the answer, strip or take away their

qualifier and repeat the essence of their views

"Your son's struggles with cocaine has caused you to have very strong and personal feelings against anyone charged with a drug crime."

5) Suggest how the bias or impairment "might" provide the grounds for challenge

First, just raise the issue…do not go for the kill

The bias may provide more than one basis for challenge [see below examples]

Use leading questions but do not be confrontational

You may have to re-validate the juror's belief and right to hold those beliefs

"Your feelings about someone charged with a drug crime might affect your ability to be a neutral juror in this case?

[or your ability to presume innocence…or may make you lean toward an opinion of guilt before the trial starts…or prevent you from considering all the evidence]"

6) Get the juror to agree that their bias will affect their ability to serve

This may be tricky…you have to go from "might affect" to "would affect"

It might take several closely worded questions quantifying the effect...from "might" to "possible" to "probable" to "likely" to "substantially", etc.

You need to discuss how every case is not a right fit for every juror

Another type of case would be better for that juror…a case not involving that bias

Do not argue with the juror…You need the juror to agree with you

You may need to praise their honesty or right to hold their beliefs

"Your views about someone charged with a drug crime would affect your ability to be a neutral juror in this case?

[or your ability to presume innocence…or may make you lean toward an opinion of guilt before the trial starts…]"

This should provide the basis for a challenge for cause but beware "rehabilitation"

7) Protect your challenged juror's answers from "rehabilitation"

Commend the juror's honesty and willingness to talk about this personal issue

Remind juror of appropriateness of having strong views

Lock juror in on strength of views and views are part of who they are

Reassure juror that there is nothing wrong with having views that differ

from lawyers, other jurors, or judge

from the rules about jury service

Note that the juror does not appear the type who change opinions for convenience

Make your Challenge for CAUSE

North Carolina Defender Trial School
Sponsored by the UNC School of Government and
North Carolina Office of Indigent Defense Services
Chapel Hill, NC

IMPROVE YOUR OPENING STATEMENTS

Ira Mickenberg
6 Saratoga Circle
Saratoga Springs, NY 12866
(518) 583-6730
iramick@worldnet.att.net

An Opening Statement Is:

- The first opportunity to communicate your theory of defense to the jury, along with the emotional themes that support it.
- It is a story.
- It is a shortened form of the story of your case -- a story of innocence or reduced culpability.
- It is like the prologue to a play -- an introductory speech that gives the audience pertinent facts necessary for them to understand the characters and action.
- It is factual.

An Opening Statement Is Not:

- An argument.
- A road map.
- The table of contents of a book.
- An explanation of how trials proceed.
- An explanation of the burden of proof or presumption of innocence.
- A collection of buzzwords, fungible devices, and gimmicks.

If you give the same opening statement in every case, you are doing something very, very wrong.

Components of an Opening Statement

The Hook -- A thirty to sixty second statement that encapsulates your theory of defense and establishes the emotional theme that will make the jury feel it is right to accept your theory. This is the most important part of your opening because it sets the tone and determines whether the jurors will listen to the rest of your statement.

Story -- The main part of your opening, in which you tell the jury the factual story of your client's innocence or reduced culpability. Your opening should not contain the entire story of the case, in all its detail. It should, however, hit the high points and tell the jury everything that is essential to reaching the right verdict.

The Conclusion -- In which you tell the jury what you want them to do.

How to Prepare an Opening Statement

1. **Know Your Theory of Defense Before You Prepare an Opening**

2. **Think in Terms of Telling a Story**

    a. In what sequence will I tell the story? -- Put the important things up front. A good way to prepare is to ask yourself where the story should start.
    b. Who are the characters in this story? How do I want to portray them?
    c. What events and other facts are so important that I should tell the jury about them in my opening?

3. **Think About Emotional Themes**

    a. Ask yourself how you want the jury to feel about the case -- On a gut level, what is this case really about?
    b. What facts can you tell the jurors about the case that will make them feel that way.

4. **Think About Language**

a. What words or phrases can you use that will make your theory of defense and emotional themes more powerful to the jurors?
b. Always try to use clear, graphic language. Draw word pictures.
c. No legalese.
d. No exaggeration.
e. Say what you mean.
f. Shorter is better.
g. Simpler is better.

5. **Don’t Write It Out**

a. Use an Outline.
b. Practice.

6. **Don’t Do It Alone**

a. Practice before other people -- particularly non-lawyers.
b. Ask for other people’s suggestions and criticism.
c. Follow other people’s suggestions.

DIRECT EXAMINATION:

"ALLOWING OTHERS TO HELP TELL THE STORY"

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I. A Few Key Concepts

A. Persuasive Storytelling: The Goal of direct examination is to persuasively have others tell your story or to discredit the prosecutor's case.

B. The SIX Ps: **"P**roper **P**reparation **P**revents **P**iss **P**oor **P**erformance**!"** (John Delgado, Esq.)

C. **Advances the Theory of Defense**

D. You must have an **"AURA"** about yourself:

A = **ATTENTION** Get and Keep Your Jurors' **ATTENTION**.
U = **UNDERSTAND** Make Sure The Jurors **UNDERSTAND** Your Witness' Testimony.
R = **REMEMBER** Make Sure The Jurors **REMEMBER** Your Witness' Testimony.
A = **ACCEPT** Make Sure The Jurors **ACCEPT** Your Witness' Testimony.

E. Keep the **Jury in Mind**

1. What you do must be considered from the perspective of the jury (or your trier of fact).

2. Try viewing your ideas through the eyes and minds of your potential jurors.

3. While delivering your direct, always consider the juror's ability to see, hear, understand, etc.

F. YOUR Witness: The witness is in your possession and it is your responsibility to do all you can to ensure that your witness' testimony is successful.

G. Persuasion

1. Communication is 65% non-verbal.

2. Use non-verbal communication (body language, key words, tone, pitch, pace, movement, gestures, etc.) to <u>reinforce</u> your message.

3. If you communicate one message with your words and a different one non-verbally, the trier of fact will believe the non-verbal message or not know which one to believe.

H. Your witness is the Attraction: On cross examination, the focus is on you. On direct, the focus must be on your witness

II. Do I Put <u>This</u> Witness On?

A. Does your theory of defense require you to put on this witness?

1. Test your theory of defense with this witness and without. Which is better? Why?

2. Benefits of calling this witness

    a. Directly supports your theory of defense
    b. Damage the prosecutor's version.
    c. Corroboration by witness supports theory.

3. Benefits of NOT calling this witness

    a. Good defense witnesses can help. Bad defense witnesses can destroy. Weigh the benefits against possible damage. Do you need it? Is it valuable enough?
    b. Keeps spotlight on the prosecution's case. Limits prosecutor's case and arguments.
    c. Even truthful witnesses may not be believed.
    d. Defense witnesses can fill or fix holes in the prosecutor's case.

B. Choose quality over quantity.

1. Put up the best evidence and witnesses to back up your theory of defense.

2. Having the body to say the words, does not make a defense. They must say it well!

III. INVESTIGATING For Direct Examination

A. Investigation concepts.

1. Investigation Fact finding

    a. What are the facts? What does the witness have to say?
    b. Does the witness seem credible? Will s/he be a good witness?
    c. Help decide theory of defense?

2. Investigation Fact development

    a. Find facts that support or enhance your theory of defense.
    b. Seek details that make the witness' testimony real and believable.
    c. Collect corroborating documentation and locate other supporting witnesses.

B. What do you need to know about your witness? **EVERYTHING.**

1. **History (background**) - educational, employment, military, family, criminal history, religious affiliations, health, vision problems, hearing problems, etc.

2. **Relations -** to client, other parties, witnesses, relatives of witnesses or parties

3. **Knowledge** - facts of the case, other witnesses or other parties, source of knowledge and reason for recollection

4. **Quality** - demeanor and attitudes, intelligence, willingness to cooperate, communication skills, ability to survive cross examination, etc.

5. **Actions** - With whom has this witness spoken about the case? police? prosecutor? written statements? contact with other witness? nature of that contact?

C. Is this witness essential to the theory of defense or case?

1. Is there a less dangerous means of presenting the evidence than through a witness who may be subject to cross examination? A document? A less "attackable" witness?

2. Is the witness' testimony cumulative, trivial or peripheral?

IV. PREPARING The Direct Examination: 13 STEPS

Once you have decided that your theory of defense allows and requires to call *this* witness, you must have an organized method of preparing. There are many methods of preparation. What follows is one method. It is one method of many, but it is one that may work for you. Whether you use this one or another is immaterial, so long as you develop one that works for you.

A. STEP 1: Review Everything

1. Read everything document in the file. Then re-read everything that you have about this witness.

2. **"Stream of consciousness note taking"** - anything that pops into your mind about this witness or this witness' testimony should be jotted down. By writing down these thoughts and ideas, you preserve your initial reactions, as well as those flashes of brilliance (that arrive invariably while you are in the shower!) about trial tactics and direct examination techniques that will be perfect for this case and/or this witness.

3. Brainstorm with others – including others who are not lawyers.

B. STEP 2: Juror Questions and Emotions Lists

1. **Anticipate the jurors thoughts about and reaction to your witness and your witness' testimony. (Assess your witness).** This includes the factual thoughts and the "gut" or emotional reactions.

2. **Juror Questions List**

   a. What questions will “normal” people i.e. non-lawyers ask about this witness? about the witness' testimony? What are the motives of the witness?
   b. **Write them down.**
   c. Which questions work for you? against you?

3. **Juror Emotions List**

   a. What will the jurors "feel" about your witness and his/her testimony?
   b. **Write them down.**
   c. Which emotions work for you? against you?

C. **STEP 3: Determine your Objectives**

1. How will this witness advance your theory of defense?

2. What are your **legal, factual, emotional and "believability enhancement" themes and objectives with this witness?**

3. **Factual Themes**

   a. What do you want the jurors to believe after hearing from this witness?
   b. Every objective must advance your theory.
   c. Develop objectives that appeal to people, not lawyer.

4. **Emotional Themes**

   a. How do you want the jurors to **feel** when the witness is finished testifying?
   b. What words would you like them to use to describe the witness?
   c. Emotional objectives must advance your theory.

5. **"Believability Enhancement" Objectives**

   a. Make the witness be and appear to be believable in the eyes of your jurors.
   b. What facts can you bring out? What things can you have the witness do? What can you do to make this witness more believable?
   c. Develop in the jury one of the following reactions: **Identification,** "The Witness is like me;" or **Understanding,** "The Witness is nothing like me, but I understand how s/he came out that way."
   d. Create a connection between the witness and juror i.e. “That’s what I would have done.”

6. **Legal objectives**

   a. Is this witness necessary to establish a legal point?
      - the absence of an element?
      - an affirmative defense?
      - to generate an issue?
      - to lay an evidentiary foundation?
   b. List the legal point(s) that must be established.
   c. List the legal point(s) that <u>this witness</u> must establish.
   d. List the facts that this witness must testify to, to satisfy the legal objective(s).

7. Re-evaluate and Reduce

   a. We all have limited attention spans. Re-evaluate your objectives, reducing them to the essentials. Discard any that you believe are not important.
   b. Select, from among all of the objectives lists, only those objectives that are critical for this witness.

D. **STEP 4: Marshal the facts**

1. Ask yourself, “what am I trying to achieve, and why?”

2. For EVERY THEME, list EVERY SUPPORTING FACT.

3. Consider every fact in the case in light of the particular theme. Repeat this process for each objective, going through the facts over and over, considering the next objective each time.

4. Don't settle for just the obvious facts. Develop reasonable and logical extrapolations.

5. Ask yourself: Which facts lead you to believe that the stated objective is true. Write those facts down. Then look for more!

6. Marshaling the facts develops depth and believability in your theory. It provides new facts that support your objectives that had not been identified before.

E. **STEP 5: Develop story(s), images and key words**

1. Identify and develop the **witness' story(s)** and develop **key words.**

2. Whatever information you want the witness to convey, put it in story form.

3. **Why Stories?**

   a. Stories create and maintain interest.
   b. Stories provide a context into which the jurors may understand and place the facts. It allows the jurors to discern which facts are important and which are insignificant.
   c. Stories enhance recall.
   d. Stories encourage empathy and increase believability.

4. **Identify the witness' story(s).**

   a. A single witness may have one or several relevant stories. Whatever the witness has to offer, be it short or long, consider how to present it in story form.
   b. Gives your jurors a better sense of the witness and makes the witness more "real".
   c. You work with the witness as they are the storyteller. The lawyer's role is that of facilitator.

5. **Develop key words**

   a. "Words Are Magic". Maximize the effectiveness of a witness' testimony e.g. "scared" or "in fear" is less compelling than "terrified," or "I knew I was about to die."
   b. Consider the best words and the worst words that the witness can use. The witness must use the best language to make their point and avoid the bad phrases.
   c. Develop word that **maximize or minimize** the desired impression.
   d. Develop descriptive, poetic language.

F. **STEP 6: Organize persuasively**

1. Organize your themes and your witness' story(s) persuasively and effectively. Organization is a key tool of persuasion.

2. Where To Begin Your Direct

   a. Traditional Organization**:** Ease-In
      - Allows the witness to get comfortable on the stand.
      - Allow the witness to ease into the testimony.
      - Allows the witness to get over the nervousness of being on the stand.
      - Allows better communication of the important points better.

   b. Modern Organization: Primacy and Recency
      - We remember best what we hear first and last.
      - Jurors will perceive the first and last points as most important.
      - Identify your best one or two points. This points should be the first and last points you have the witness make.
      - Consider starting with questions that establish the theme of the witness' testimony superficially, turning to background information and returning to the theme.

3. Other Organizational Issues

   a. Background / Scene / Action organization - This approach is logical and easy to follow.
      (1) Witness background
      (2) Event background
      (3) Scene of the action described
      (4) Action described
   b. Logical progression of your questions; from general to specific
   c. Complete a topic before moving to another.

4. Do you disclose weaknesses?

   a. The **"majority opinion**" recommends that you disclose weaknesses to maintain credibility and take the "sting" out of disclosure by the adversary. The disclose must be made in a way that reduces the impact of the weakness.
   b. The **"minority opinion**," sometimes referred to as the "sponsorship" theory, recommends that you do not disclose weaknesses because doing so increases, rather than reduces, the impact of the weaknesses. "If they are admitting that much, imagine how bad it really is" is representative of this view.
   c. **If you do plan to disclose weaknesses**, consider the following:
      - Place it in the middle where it is least likely to have a major impact and least likely to be remembered.
      - Only disclose weakness that you are sure will come out.
      - Present the **good stuff before the bad stuff.**
      - Present the weakness in the best possible light.
      - Attempt to reasonably minimize the weakness by using minimizing words and questioning about it briefly.

G. **STEP 7: Anticipate cross examination**

1. Anticipate the weaknesses in witness' attitude, testimony and history for cross examination.

2. What are the weaknesses of this witness?

    a. Easily riled?
    b. Have an "attitude?"
    c. Will s/he hold up on cross?
    d. Does s/he answer well, volunteer too much or shade the answers?

3. What are the weaknesses of this witness' testimony?

    a. Holes in the story
    b. Unbelievable story
    c. Absence of expected corroboration

4. What attitude/demeanor do you anticipate from the prosecutor during cross.

H. **STEP 8: Prepare re-direct examination**

1. Be very careful with re-direct. Use it to rehabilitate or introduce something that is necessary and failed to introduce during direct (if you can).

2. Re-direct can be dangerous. Because it is difficult to plan the result, often questions that are unartfully crafted, open doors, and permits re-cross providing the prosecutor with another chance to hurt your client and the witness.

3. If re-direct is necessary be brief. It is not necessary to refute or respond to every point made by the prosecutor on cross examination. Stick to the important ones.

I. **STEP 9: Prepare Your Trial Props**

1. Doing things and using things during the trial heighten interest, clarify facts, increase recall and promote acceptance.

2. Using slides, videos, pictures, etc., or moving around during the presentation usually is more interesting than just standing still and talking. Appeal to the jurors' senses.

3. Use actions and creations during trial

    a. Use re-enactments, demonstrations by the witness
    b. Create and use maps, diagrams, pictures, things written on flip charts
    c. Rebuild the interrogation room where your client confessed in the courtroom.
    d. Use clothing, toy guns, knives or weapons similar to the ones involved in the case. Use Sweet N' Low packets to show a gram of cocaine, or an ounce of oregano to show an ounce of marijuana. Such things help illustrate the witness' testimony.

J. **STEP 10: Prepare the other parts of the trial to aid your direct examination**

1. The trial is an "integrated whole." Each part of the trial should be used to support and advance the other parts of the trial and the theory of defense.

2. Think about how each part of the trial can be used to aid the testimony of this witness. The other part of the trial may be used to undercut anticipated cross, to minimize weaknesses, to corroborate strengths, etc.

    a. What **pre-trial motions** can/must be filed to aid the direct examination of this witness?
        - During a suppression motion, "lock down" a witness' testimony that will corroborate the direct of a defense witness.
        - File a Motion In Limine to determine whether a particular defense witness' prior conviction or an item of evidence will be admissible.
    b. What **voir dire questions** can be asked to aid the direct examination of this witness?
    c. What **types of jurors** are most desirable considering this witness and his/her testimony?
    d. What can/must be said in **opening statement** to aid the direct examination of this witness?
    e. What **cross examination** of state's witnesses can/must be conducted to aid the direct examination of this witness?
    f. What **jury instructions** can/must be requested/given to aid the direct examination of this witness?
    g. What must be said in **closing argument** to aid the direct examination of this witness?

K. **STEP 11: Prepare your <u>questions</u>**

1. Review your themes & objectives lists and marshal the facts sheet.

2. Should you write out your questions for each theme? It depends on your organizational style.

    a. Writing out your questions can be beneficial however it is time consuming and may prevent you from actually listening to the answers.
    b. It requires you to think about the best way to ask the question. It also encourages better use of good key words.
    c. If you don't write out your questions, write out the themes and facts that must be covered.
        - Use a separate page for each theme / objective (Posner and Dodd)
        - Easy to re-organize or discard.

3. Choreograph the direct

    a. Build movement into your direct. The absence of movement during the direct will add to the boredom potential substantially. Movement adds interest to the exam.
    b. Plan when, where and how YOU and YOUR WITNESS will move.
    c. Plan how to use your voice; loud, soft, when to use the appropriate tone of voice, etc.

L. **STEP 12: Practice**

1. Practice your questions and practice with props and demonstrations.

2. If you don't practice out loud, alone or in front of someone else, at least, go through the questions and movements in your head. Ideally, ask a friend, spouse, etc. for feedback. If not, a mirror will do.

3. Sometimes ideas that seem wonderful in your mind or on paper, don't work when given sound. Try it, and find out before you are standing before a jury.

4. Practice demonstrations and practice with demonstrative aids or items of tangible evidence. A great demonstration about the ease of misfiring a gun may fall flat if you can't get the gun open when standing before the jury.

M. **STEP 13: Tune-up**

Review and refine your direct examination. This is the time to tighten-up your examination, to add anything necessary, to discard anything unnecessary, etc.

V. PREPARING <u>Your Witness</u>:

N. General thoughts

1. **The witness stand is an alien environment.** It has strange rules, a foreign language and an odd Q & A style of communication. Keep this in mind when preparing the witness for testimony.

2. **Don't forget to ask your witness.** S/he may have good suggestions and insights about what will work.

3. **Explain why**. Your witness must understand why everything that s/he is to do or say is necessary. If your witness understands "why", s/he will respond better on direct and cross.

O. **STEP 1: The Basics**

1. **Logistics**

   a. The physical layout of the courtroom
   b. Courtroom location, number, directions, etc.
   c. Court reporters, sheriffs, bailiffs, jail guards, etc.
   d. Time to arrive, where to wait, what to do upon arrival, who will meet the witness
   e. How the witness will be called into the courtroom, the oath, etc.

2. Basics of law, procedure and evidence

P. **STEP 2: Explain Witness' Role**

1. Explain your **theory of defense**, the **witness' role** in that theory and it's **importance.**

   a. If the witness understands the **big picture,** this will help the witness to know what is important to tell you and tell the jury.
   b. **Beware** giving too much detail or explaining too much to a potentially hostile witness, as they may use this information against you or tell your adversary what they learned.
   c. Your explanation should clarify what information is required of the witness, how it fits in with the overall theory and why it is important.

Q. **STEP 3: Discuss Appearance and Communication Skills**

1. Refine the witness' appearance and communication skills.

2. Discuss how to dress for court

   a. Proper dress is about **respect** for the court, the trial process and the jury.
   b. Be **specific.** Don't merely say, "Dress nicely," or "Wear what you would wear to worship services."

3. **Discuss non-verbal communication and refine these skills**

   a. May require **Q & A sessions**
   b. **Explain** what non-verbal communication is and its **impact**
      - what the jurors believes
      - the jurors' impression of the witness
      - believability
   c. **Body language**
   d. **Voice and manner**
      - volume - loud enough for the farthest juror to hear
      - tone - should be conversational but congruent with the content of the testimony
      - polite, always polite
      - pause before answering to ensure that the question is completed; to ensure that witness understands the question and, on cross, to permit you to object
      - Nervousness is OK - Acknowledge witness' reality
   e. **Words Choice**
      - Encourage **Simple words** - "bar" talk, per Terry MacCarthy e.g. "Told me" rather than "indicated"
      - Encourage **Fact words** - not opinions, characterizations or conclusions; "6'2" and 240 lbs." rather than "big"; "Light blue button down shirt, khaki pants and docksiders" rather that "preppie attire"
      - Encourage **Power words** - Words that communicate certainty.
      - Avoid **Hedge words** (I think, probably, I submit, we contend, etc.)
      - Avoid **Unnecessary intensifiers** (really, very, extremely, etc.)
      - **Hesitations or filler words** (ah, ladies and gentlemen, well, etc.)
      - **Question intonation** (when your voice goes up at the end of a sentence)

R. **STEP 4: Review Prior Statements**

1. Review all of the witness' prior statements with your witness.

2. Let your witness read all of his/her prior statements, especially those given to the State.

S. **STEP 5: Practice Questions and Answers**

1. Practice and refine your questions and answers with the witness.

2. Encourage **NARRATIVE ANSWERS** by the witness

3. **Conduct a mock direct examination** session with your witness.

    a. **Ask the exact questions** and explain why you are asking those questions; don't merely talk about the topics you plan to ask about.
    b. **Get the exact answers the witness will give** - as they will answer in the courtroom.
        - Improve the quality of the answer - The answer may not be clear, may not bring out all of the facts, use poor language, include irrelevant information, etc. You must help the witness answer clearly and effectively.
        - You are not putting words into the witness' mouth. You are ensuring that the words that do come out are clear, complete and effectively communicate the information.

4. Tell the witness to look at the jury, where appropriate or at the questioning lawyer.

T. **STEP 6: Practice Cross and Re-direct**

1. Prepare your witness for **cross examination and re-direct** examination.

2. **Explain "typical" cross examination objectives and tactics**.

    a. Leading questions
    b. Attempts to limit the witness to "yes" or "no" answers
    c. Efforts to show that the witness is unsure, mistaken, biased or lying
    d. Efforts to show that the witness is not reliable or a believable person
    e. Efforts to get the witness upset or angry, in the hope that the witness will appear violent, rash, less believable, or will say something foolish or wrong.

3. **Explain "typical" cross examination techniques** that you expect will be used.
    a. Asking about the witness' recollection about other days around the time of the crime.
    b. Asking why didn't the witness tell this information to the police.
    c. Asking how does the witness recall this particular date.
    d. Exploiting the witness' relationship with the client to suggest that the witness is lying.
    e. Making big issues out of minor variations or inconsistencies with the testimony of others witnesses or with the witness' prior statements.
    f. Asking the "lying then or lying now" question.
    g. The old, "You say A. Witness X says B. Is Witness B lying or mistaken?" technique.
    h. You discussed this information with the defense attorney and others and were told what to say.

4. **Explain <u>this</u> prosecutor's anticipated cross examination objectives and why.**

5. **Practice cross Q & A session.**

    a. Have someone else play the prosecutor's role. Don't take it easy on the witness.
    b. Consider several different styles - an aggressive, fast paced, in-your-face style or a friendly disarming pleasant style cross.

6. **Explain the rules of re-direct and your objectives.**

    a. Explain your **objectives,** why and how they fit in with the theory

b. Conduct a **Q & A** session for the re-direct questions.

VI. DELIVERING Your Direct Examination.

U. Remember your **"AURA"** and being **jury centered**!

V. **Your Organization - Start Well**

1. **Traditional or modern "primacy" approach**

2. **Primacy** - You may start with the **ultimate question.**

3. **Traditional** - You may wish to **ease in** to the exam

W. **Your Movement, Body and Voice**

1. **Your movement**

a. Movement **adds interest.** Exciting movies aren't called "action" pictures for nothing!
b. Your movement should **not detract** or distract attention from the witness
c. Your movement should be intentional. **Limit** your movement.

2. **Your witness' movement**

a. **Build in** as much movement of this witness as is possible e.g. witness draw diagrams, show photos, demonstrate actions, handle exhibits, etc.
b. Good witness? Get him or her off the stand and as close to the jury as much as possible.

3. **Your Voice**

a. A lack of variety in the examination makes any direct **boring.**
b. Inflection in your voice will create interest. If your tone of voice is monotone, your witness will begin to answer in the same monotone. If you sound interested, your witness will sound interested and be more interesting to your jurors.
c. **Variety in your voice:** Pace, tone, volume, pitch
d. **Belief -** Your belief in your witness must come across. If you do not believe your witness, do not put the witness on the stand.

4. **Congruity**

a. You and your questions must be congruent. Your tone, volume, pace, word choice, etc. must be congruent with the content of the question and the content of the witness' testimony.
b. **Mirror the emotion**
c. Your pace, tone, etc. must be congruent with the message

X. **Basic Questioning Thoughts and Techniques**

1. **Main objective: Get THE WITNESS to speak**. The witness must be the focus of attention, not the attorney.

2. **LISTEN** to your witness and her answers.

3. **Avoid Prosecutorial techniques**

   a. The "What, if anything,..." questions.
   b. The "And then what happened?" or the "What happened next?" questions.
   c. These are examples of being unprepared

4. **Simple and short questions**

   a. **Single issue** or single point per question
      - Avoid compound, long questions
      - Simple questions are understood easily by your witness and your jurors.

5. **Open-ended questions**

   a. Ask questions that seek and solicit a **NARRATIVE** response.
   b. **Journalism questions** - Ask questions that begin with **who, what, when, where, why, how, tell us, describe, explain**, etc. These are the questions that will let the witness speak, the objective of direct examination.

6. **Leading questions? RARELY.**

   a. Leading questions reduce your and your witness' credibility and the impact of the witness' testimony because it appears that you are putting words into your witness' mouth.
   b. Leading <u>sometimes</u> is okay
      - Preliminary or inconsequential matters
      - Hostile witness

7. Avoid or clarify **"quibble"** words

   a. "Quibble" words are unhelpful qualifiers and words that are subject to interpretation. Unhelpful qualifiers are words like very, really, extremely, so, etc.
   b. Words that are subject to interpretation usually are adjectives, such as upset, big, fast.
   c. These words do not clearly define the testimony for the trier of fact. How upset is upset? Is really upset any clearer?
   d. Prepare your witness not to use these words. Prepare them to offer the facts instead. If they do use them, ask a clarifying question.

8. **Transitions**

   a. Transitions are used to let everyone know that you are changing the subject or to highlight an important question or answer.

b. **Pauses**

- Those golden moments of silence in the courtroom, the ones that terrify lawyers. Those moments of silence are powerful weapons and should be used.
- A moment of silence between topics signals a change in the subject matter of the questions to the witness and the trier of fact.
- Silence lets the good stuff sink in and lets the jurors think about and **feel the emotional impact** of the testimony

c. **Headlines**

- Use to **change topic or objectives**
- **Orient the jurors** and make the testimony easier to follow
- **Orient the witness** and make the questions easier to answer e.g. "I'd like to ask you about the lighting in the alley"; "Lets talk about the moment when you first saw Mr. Violent."; "Can I stop you right there. What was going through your mind at that moment.";"I have some questions about your relationship with Mr. Smith."

9. **Avoid "recollection stage" of questions and answers.**

a. The recollection stage, ("Do you recall seeing....") can lead to confusing and inefficient responses.
b. For example, if you ask "Do you recall if the person had a moustache?" and the witness says "No," does the witness mean that she didn't see a moustache or that she doesn't recall seeing a moustache or doesn't recall whether the person had a moustache or not. To avoid the problem, leave the "do you recall" part of the question out.
c. Further, including this stage in the question suggests uncertainty. If the question suggests uncertainty, the witness may become or appear uncertain.

Y. Advanced Questioning Thoughts and Techniques

1. **Present tense questions**
   a. Ask questions in the present tense, rather than the past tense.
   b. This techniques adds interest and immediacy to your witness' testimony. If you ask the questions in the present tense, the witness will begin to answer in the present tense.
   c. Q: Where were you on May 2, 1993 at 1 a.m.? A: I was in Red Alley.
      Q: Now Mr. Client, it <u>is</u> May 2, 1993 at 2 a.m. in Red Alley. What <u>are</u> you doing?
      A: I am standing there and this big guy is walking toward me.

2. **Sense questions**

a. Ask questions that seek answers that focus on the **senses**. These questions seek evocative answers to which the trier of fact will relate.
   - **Hear**
   - **See**
   - **Smell**
   - **Taste**
   - **Touch**
   - **Feel physically**
   - **Feel emotionally.**

b. Focusing on colors and familiar objects at the scene will make the scene come to life f or the jurors.

3. **Looping technique**

   a. Use the words of a question or answer in a succeeding question or questions.
   b. These can be planned and/or spontaneous.
      Q: How big was the man? A: He was 6'2" and weighed about 225.
      Q: What was the 6'2", 225 lb. man doing when you saw him? A: Hitting Mr. Client.
      Q: When the 6'2", 225 lb man was hitting Mr. Client, what was Mr. Client doing?

4. **Juror's Voice Technique**

   a. Ask the questions that are in the jurors' minds. (See your "juror questions list")
   b. Ask the questions using the same words and the same tone of voice that the juror would use if asking the question. Hear it in your head.
   c. You become the juror's representative. The jurors will come to rely on you to ask the things they want to know. This also takes the sting out of the prosecutor's points
   d. For example:
      Q: How could you have seen it wasn't Mr. Client when you were driving the car at the same time as you say you were watching the fight?
      Q: How could you possibly recall such details about a single day 14 months ago?
   e. A well prepared witness will knock these questions out of the ballpark!

5. **Jury instruction questions.** Use the language of the anticipated jury instructions in framing questions and refining answers.

6. **"What were you thinking / feeling" questions**

   a. Ask questions that disclose the witness' thoughts, feelings and motivations, particularly at the critical time for the witness.
   b. These question humanize the witness and help juror identification.
      Q: "As you saw the person being robbed, what were you thinking?"
      Q: "When you heard that your son was charged with shooting someone on Saturday, May 3, what went through your mind?"
      Q: "You told us that he came at you with a knife. What were you feeling at that moment?"

7. **Emphasis**

   a. Highlights, clarifies and adds interest
   b. Placing **emphasis** on a particular word in a sentence can change the meaning or focus of the question.
      Q: **WHERE** was Fred when you first saw him?
      Where **WAS** Fred when you first saw him?
      Where was **FRED** when you first saw him?
      Where was Fred **WHEN** you first saw him?
      Where was Fred when **YOU** first saw him?
      Where was Fred when you **FIRST** saw him? etc.

c. **Pausing** after a particular word in a sentence can change the meaning or focus of the question.
   Q: Where..... was Fred when you first saw him?
   Where was..... Fred when you first saw him?
   Where was Fred..... when you first saw him?

8. **Flagging** a question will give it emphasis.

Q: "Now, Mr. Witness, this question is very important, so please listen carefully before answering...."
Q: "What is the one thing that stands out most in your mind?"

9. **Stretch out / shrink down technique**

a. The **"stretch out"** technique seeks to maximize the impact of information by "stretching out" answers. It can be used to make something big seem bigger, something far seem farther, something slow seem slower, etc. For example:
   To show that the client stood <u>far</u> from the shooting and, therefore, was not involved;
   Q: You told us that Mr. Client was across the street from where the shooting took place. I'd like to ask you about how far away he was. First, is there a sidewalk?
   Q: How wide is it?
   Q: Is there a lane where cars park on the south side of the street?
   Q: How many lanes of traffic going south?
   Q: How many lanes of traffic going north?
   Q: Is there a lane where cars park on the north side of the street? etc.

b. The **"shrink down"** technique seeks to minimize the impact of information by "shrinking it down." It can be used to make something fast seem faster, something minor seem even more minor, something close seem closer, etc. For example:
   To show client stood <u>close</u> to the shooting and therefore, was not involved:
   Q: You told us that Mr. Client was across the street from where the shooting took place. How close was he to Mr. Decedent at the time the shots were fired?
   A: Pretty close. He was just across the street. He's lucky he didn't get hit himself.

10. **Influencing words**

a. The words included in the question can influence the answer.
b. Decide what answer you want and use the language of the desired answer to ask the question.
   - If you want something to seem far, ask "How far?"
   - If you want something to seem close, ask "How close?"
   - Short/tall; big/small; fast/slow. etc.
c. Your question may presuppose a desired fact. "Did you see <u>THE</u> gun?" versus "Did you see <u>A</u> gun?" This presumes the existence of the gun. The jurors and the witness are more likely to believe that a gun was involved and seen by the witness.

11. **Stop action or Freeze frame technique**

    a. Have the witness focus on a specific moment or part of an event and have her describe it in detail. For example:
       Q: "Let me stop you there. Please describe Mr. Aggressor at that moment."
       Q: "Where was the knife?"
       Q: "Where was his other hand?"
       Q: "What was he saying?"
    b. This technique brings a critical moment to life by presenting substantial detail.

Z. **Techniques for Problem Witnesses**

1. Non-responsive answers or who won't stay on the subject

    a. Take the blame - "I'm sorry, my question wasn't clear. Let me try again."
    b. Explain what you want - "Mr. Witness, I'm trying to find out about whether you got a look at the face of the attacker. Do you understand that? Now, did you see his face? Can you please tell us about it?"

2. Who has a bad attitude (occasionally, your client)

    a. Confront it.
    b. Your jurors are taking it in. "Mr. X, you seem upset. Would you like to tell the ladies and gentlemen of the jury why you are upset?"

3. Who repeatedly refer to **inadmissible evidence:** Explain the rules, but be nice!
   Q: "Mr. Witness, the law doesn't allow you to offer your opinion about Mr. Victim. When I ask you a question about him, please just tell us the facts that answer the question. OK?"
   Q: "Ms. Witness, the law doesn't permit you to tell us what you heard in the neighborhood. That is called hearsay. You can tell us only what <u>you</u> saw, <u>you</u> heard. Not what someone else told you. Do you understand what I mean by that?"

4. Who gives an **unexpected bad / fatal answer**

    a. Prevention, through preparation, is the best technique.
    b. There are no good ways to handle this. Seek the lesser of evils.
       - Ignore it and hope the jurors didn't hear it. At least you aren't making a big deal out of it for the jurors.
       - Claim surprise and cross examine the witness.
       - "You just said.... Is that what you meant to say?"
       - Refresh recollection with previous interview notes. Q: "You and I just spoke about this yesterday, didn't we?" Q: "Didn't you say X, not Y?" Q: "Can you explain that?"
       - **Fail-safe response** - Approach the bench and hope for a good plea!

5. Who is **forgetful**

    a. Refresh recollection
    b. Use a document as "past recollection recorded"
    c. Ask for a recess

d. Lead the witness - option of last resort

AA. **Storytelling and picture painting techniques**

1. **Scene Before Action.**

   a. Before describing the action of a story, tell the jurors about the place where the events are happening. This gives context for the story; gives the jurors a place to put the people and events to follow.
   b. Sometimes a **physical description** of the location is required.
      Q: I'd like you to tell the ladies and gentlemen of the jury about Red Alley. Can you please describe it?
      Q: If I were walking in it, what things would I see?
      Q: What does it smell like?

   c. Sometimes the **emotional landscape** must be described.
      Q: What kind of place is Joe's Bar? A: It's a filthy biker's bar.
      Q: Can you describe the people who have been there when you've been there in the past?
      A: They're all biker's, big guys with tattoos who get drunk and like to mess with people.
      Q: What activities have gone on there when you've been there? A: There are always fights, every night I was ever there.

   d. Having set the scene, you can describe the action using any of the techniques described below.

2. **Flashback** or **flash forward** - Start the story at the point that is most critical for your theory. Then, flash back to something earlier or forward to something later. For example:
   Q: Mr. Client, why did you hit Mr. Jones?
   A: He threw a beer in my face and was reaching for a pool stick. I hit him before he got the stick and smacked me with it.
   Q: Let's back up a moment, and please, tell us how this all started?
   A: I was in the bar with a few friends and this guy was drunk and ....

3. **Parallel action development** - Present the story of different parties separately, a little at a time, until you bring them together at the critical moment. For example:
   Q: Ms. Witness, what was Mr. Client doing at this time?
   A: He was sitting there minding his own business, drinking a beer at the bar.
   Q: While Mr. Client was minding his own business, what was Mr. Accuser doing?
   A: He was shooting pool.
   Q: How was he acting?
   A: He was screaming at some guy, accusing him of taking his quarter. He was pretty drunk and pretty loud.
   Q: How did Mr. Client come to fight with Mr. Accuser?
   A: Mr. Accuser swung the pool stick at the guy he was playing pool with and missed. He hit Mr. Client. As Mr. Accuser was winding up again, that's when Mr. Client hit him.

4. **Freeze frame** - Select the critical moment in light of the specifics of your theory and paint it in minute detail so that your jurors see it exactly as it was. For example:

Q: Mr. Witness, you told us that you saw the whole thing. Can you tell us what you saw?
A: Yes, I saw Mr. Deceased running at Mr. Client with a table leg and Mr. Client shot him.
Q: I'd like you to tell us about Mr. Deceased and what he was doing. First, How big is he?
A: He is a big man, 6'2", maybe 225 lbs.
Q: How was he built?
A: He was real strong. Built kinda like a weightlifter. Big arms and all.
Q: Tell us about his clothes?
A: He had on a black tank top with something like "...Meanest SOB in the valley" on it.
Q: What else was he wearing?
A: Jean shorts, cutoffs, black combat boots....

5. The **Interview** or the **Investigation** - Tell the story by following the police investigation or the interview of an important witness.
   Q: Officer Jones you told us that you were the investigating officer? Was Mr. Witness on the scene when you got there? A: Yes
   Q: Did you talk to him? A: Yes.
   Q: Did he tell you he saw the guy who did it? A: Yes
   Q: Did you ask him whether he could describe the guy?
   A: Yes. He said he could.
   Q: Tell us about the questions that you asked him?

6. **Panorama to zoom** - Put the story into context. Question the witness about the big picture and move to questions about the specific important things. For example:
   Q: Can you tell us about the area?
   A: It's a nice neighborhood. There are row houses on both sides of the street. Cars park on both sides too. There's a little Ma & Pa grocery on the corner. It's nice.
   Q: What kind of day was it?
   A: It is a beautiful day. Real sunny, the sky was blue and it was real warm. In the street, some of the kids were playing stickball.
   Q: Did you see Mr. Violent in the area?
   A: Yeah, on the corner with a group of guys, wearing a blue coat and had a black steel revolver in his right hand.
   Q: Tell us about the gun?

7. **The walk through.** Directional comments are confusing and meaningless too often. Think about the homicide police report; "The body was lying in a northerly direction with the head facing in a westerly direction and the feet facing the southeast...." Not very helpful. Instead, select a place to start and question the witness about the things they see to their right, their left, in front, etc. as they walk through the scene. For example:
   Q: Officer Jones when you walked into the alley, what did you see?
   A: I saw a body.
   Q: Please describe the way the body was lying as you were looking at it?
   A: It was face down. The person's face was to the left...
   Q: Whose left?
   A: My left and his left. His face was facing kind of away from me.

8. **Chronological** - Easy to follow, but it's less interesting and harder to highlight the important stuff.

BB. **Objections**

1. **Your objections to the prosecutor's cross examination.**

   a. Can you object? Is the prosecutor doing something improper? Can you win? at what cost?
   b. Should you object?
      - Your objections must be consistent with your theory.
      - Does the question hurt the witness? damage your theory? If the answer is no, why object?
      - Jurors dislike objections. They feel excluded and believe that you are hiding something from them. So, even if the objection is proper, is it worth the price?
   c. Protect your witness. If your witness needs help, step in with a proper objection.
      - Harassment, too fast paced
      - Prosecutor won't let witness answer
      - Interrupting the witness
      - Remember, a good witness may be able to handle it.

2. **Objections by the prosecutor to your direct examination**

   a. Prevention; don't ask objectionable questions.
   b. Make 'em pay
      - Tell the jury that you won; "Thank you, your Honor. Mr. Witness the Judge has ruled that the question is proper. You may answer the question."
      - Repeat the question; "Let me state the question again. Why do you say that Mr. State's Witness is known to be a lying scumbag in the neighborhood?"
      - Summarize what the witness said; "Before the objection, you told us that Mr. Victim was drunk, had a large knife and was looking for my client. Had you finished the answer or is there more you'd like to add?"
   c. Don't apologize or withdraw the question. Rephrase the question so that the judge will allow it.
   d. Use proffers and other strategies to get the court to allow an important question.

CC. **FINISH STRONG:** You should save something with high impact and substance for your last point.

VII. Your Client in the Courtroom and on the Stand

A. **To Testify or Remain Silent**

1. There should be no set rule. Like any other witness, the decision to have a client testify depends on the quality of the client as a witness and the value and necessity of his/her testimony. Remember, this is the client's decision, but should be reached with the advice of counsel.

2. Recent research suggests that juror's expect the client to testify and held it against him or her when s/he didn't. However, the same study found that when the client did testify, the testimony did more harm than good far more often than not.

B. **Should the client show emotion?**

1. Traditional wisdom suggests that clients shouldn't show emotion in front of the trier of fact. However, a lack of emotion under the circumstances seems unnatural. Your call.

2. If the client will be emotional, be sure that the emotion is consistent with the theory of defense.

3. Anger and violence are not suggested, but frustration and righteous indignation may be fine.

C. **Over preparation? No such thing with your client**

1. Everything done to prepare a witness for direct, should be done to prepare your client.

2. Discuss how your client should behave in the courtroom. Remind her that someone on the jury will always be watching.

3. Practice denials: Just saying "no" may not have enough force. Tell your client to give the denial some verbal "ummph" and add something like "No, I didn't do it," "No, that is not true" or the like.

D. **References to your client**

1. **Physical reference.**

   a. Do not have witnesses point at your client. You shouldn't do it either.
   b. You and/or the witness become just another accusing finger. Clients have suggested that this makes them uncomfortable.
   c. If you must, gesture to your client using an open hand, palm up. Preferably, walk over to the client or ask the client to stand.

2. **Verbal reference**

   a. Have witnesses call your client by name, preferably a less formal name. John is better than Mr. Client. If a judge won't permit this, call him John Client. CAVEAT: If you are considerably younger than your client or circumstances suggest that it will appear disrespectful to use the client's first name alone, don't do it.
   b. Never use the dehumanizing phrase "the defendant." The only way to ensure that you do not use this phrase during the trial is not to use it at all. Calling your client by name will help you to see him or her as a person. Where a generic name is needed, such as in motions, substitute the word "accused" for defendant.

E. Beware of, and counsel against, **overly broad responses**

1. **Opens the door** to otherwise irrelevant and inadmissible testimony.

2. Avoid generalizations like:
   a. "I never have done...."
   b. "I wouldn't even know what that stuff looks like."

3. This is a good suggestion to discuss with all witnesses.

F. **Organization for the client's direct**

1. The beginning (The important stuff)

   a. Consider beginning with an absolute denial and brief explanation why. Client wants to say it and jurors want to hear it. The explanation orients the jurors. A simple "No" isn't enough. A little added punch is necessary.
   b. Q: "Mr. Client, did you do it?"
      A: "No, I didn't."
      Q: "If you didn't do it, where were you at the time of the shooting?"
      A: "I was home with my mother and girlfriend the whole night." .....(Pause)
      Q: "Can you tell us about yourself?"

2. The middle (The bad or less important stuff)
   a. Confront prior record, prior inconsistent statements and other bad stuff in the middle where they are more likely to be minimized or forgotten.

3. The end (More important stuff or the same important stuff from the beginning)
   a. Select a second strong point and question about it here. Alternatively, repeat the same point with which you began.
   b. Consider ending with a denial again, if asked in a slightly different way to avoid an objection.
   c. Consider closing with a trilogy.
      You may close with a trilogy
      Q: On June 1st did you point a gun at Mr. Jones? A: No, I didn't.
      Q: On June 1st did you shoot a gun at Mr. Jones? A: No, absolutely not.
      Q: On June 1st did you have a gun? A: No, I didn't have a gun at all.

      PAUSE
      Thank you. I don't have any other questions.

G. **Humanize the client.**

1. Lots of background information, whenever you can

2. All the good stuff and Even the bad stuff, playing up the rough upbringing angle to develop understanding or sympathy.

H. **Corroboration.** Seek as much corroboration of the client's testimony as is possible, but don't get bogged down in details.

VIII. Conclusion

Direct examination is too important to surrender to prosecutors. If you prepare yourself, your case and your witness well, direct examination and the techniques set forth here will help you win cases. Remember the "Six Ps" and always remember your "AURA."

Daniel Shemer

“I was an Assistant Public Defender in Maryland from 1980 until 1999. The material included in this handout was shamelessly stolen from numerous parties and publications. I have listed many of the subjects of my theft below. My thanks to the ingenious authors, actors and lawyers, particularly, the many other Maryland Public Defenders, for creating and sharing this wealth of ideas. May your creative juices continue to bubble up and ‘may justice flow down like the waters and mercy like an everflowing stream.’”

1. "Direct Examination: Strategic Planning, Preparation and Execution." by Phyllis H. Subin, Esq., Director Of Training and Recruitment, Defender Association Of Philadelphia.
2. The ABA Journal, Litigation Section, by James McElhaney, Esq.
3. "The Art Of Formulating Questions: Preparation Of Witnesses." by Neal R. Sonnett, Esq., 2 Biscayne Blvd., 1 Biscayne Tower, Ste.2600, Miami, Fla. 33131
4. "The Drama and Psychology of Persuasion in the Defendant's Opening Statement," by Jodie English, Esq. (I know this outline is about direct examination, but this is an exceptional article that explains the psychological bases for many of the techniques recommended in this outline.)
5. Joe Guastaferro, Actor, Director and Trial Consultant. 4170 N. Marine Drive, #19L, Chicago, Ill. 60613. Just about anything Joe has ever said or done!
6. "Jury Psychology" by Paul Lisnek, J.D., Ph.D., Trial Consultant. 612 N. Michigan Ave., Suite 217, Chicago, Ill. 60611.

Any thoughts, comments or suggestions to improve this outline? Share them, please. Write me at Office of the Public Defender, Training and Continuing Education Division, 6 St. Paul Street, Baltimore, Maryland 21202, call me at (410) 767-8466 or FAX to me at (410) 333-8496. Thank you.

SPDTC
The Southern Public Defender Training Center
34 Peachtree Street, NW, Suite 2460 • Atlanta, GA 30303 • 404-525-4505
www.thespdtc.org

The Best Offense is a Good Defense: Preparing, Organizing, and Executing Your Cross-Examination

Jonathan Rapping
Southern Public Defender Training Center

A. Purpose – cross-examination must advance the defense theory by eliciting answers which provide facts that either:

- **a. Affirmatively advance our defense theory, or**
- **b. Undermine/discredit the prosecution's evidence**

B. Structure

- **a. Compile the facts that are the building blocks of the defense theory**
- **b. Identify 3-5 important points you wish to make with these facts**
- **c. Write chapters**
  - **1. each point becomes a chapter**
  - **2. order the facts from general to specific to logically lead to the point of the chapter**
  - **3. do not ask the ultimate question**
- **d. Organize the chapters**
  - **1. primacy and recency**
  - **2. tell a persuasive and coherent story**
- **e. Transition between chapters with headlines**

C. Control

- **a. Leading questions**
- **b. One fact per question**
- **c. Keep questions short and simple**
- **d. Never ask a question that calls for an answer you can't prove**
- **e. Listen**
- **f. Each question must have a purpose**
- **g. No tags**
- **h. Looping**
- **i. Consider language**
  - **1. Talk like a "regular" person**
  - **2. Use words that advance your defense theory**
- **j. Do not argue with/cut off the witness**
- **k. Do not treat all witnesses the same**

D. Preparation

- **a. Investigation (and other forms of fact gathering)**
  - **1. Evidence of unreliability**
    - **i. perception**
    - **ii. memory**
  - **2. Evidence of lack of credibility**
    - **i. Bias**
    - **ii. Prior Inconsistent Statements**
    - **iii. Prior Convictions**
    - **iv. Character Evidence**
- **b. Anticipate objections**
- **c. Have impeachment ready**

As we have learned, a trial is a battle of competing narratives. The prosecution attempts to marshal the evidence to tell a story of guilt; often accompanied by a narrative in which the defendant is a cruel and unlikable character. Alternatively, the defense must demonstrate that the evidence supports the defense theory; usually a narrative in which the client is a more sympathetic person, innocent of the allegations against him. Because the defense is not obligated to present any evidence, and often only does so for limited purposes, if at all, the defense attorney must learn to tell the client's story of innocence through cross examination.

Purpose - Why Do We Cross-Examine?

Cross examination must be conducted with an eye towards advancing the defense theory, which necessarily includes undermining the prosecution's theory. Because the defense theory incorporates legal, factual, and emotional components, the defense attorney must consider how to bring out each of these themes through cross-examination.[1] Certain facts must be elicited in order to warrant the desired defense theory instruction at the end of trial (i.e. that the alleged assault victim was the first aggressor in a self-defense case, that the alleged rape victim willingly engaged in intercourse with the client in a consent case, or that the defendant was coerced and had no viable alternative but to break the law in a duress case). Additional facts will be needed to help weave together the story of innocence that the lawyer will tell during opening statements and closing arguments. Other facts will help develop the emotional themes so critical to the defense theory (i.e. the terrified and sympathetic client, the jilted and vengeful ex-lover, the opportunistic and manipulative snitch). While there will be times that some of these facts will only be available through a defense witness (or the client) the thoughtful lawyer must first consider how these facts can be elicited through cross examination.

As mentioned above, a significant goal of cross-examination is to undermine the prosecution's case (by showing that the state's witnesses are mistaken, confused, or flat-out lying). However, this is really just an extension of advancing the defense theory, as a well crafted defense theory includes the reasons why damaging witnesses cannot be believed.

While cross-examination is an essential tool of the defense attorney, it entails risks. Every time a lawyer takes on a witness, one side gains ground while the other loses. If the attorney is able to effectively make his or her point, the defense theory is advanced. However, if the witness is given an opportunity to

[1] There will invariably be times when defense counsel is unable to bring out through cross examination the legal, factual, and/or emotional themes necessary to advance the defense theory. These will be factors to consider when deciding whether and to what extent to present a defense case. This consideration is more fully explored in our discussion of the defense case and direct examination. However, defense counsel cannot make an informed decision about the defense case until s/he has explored strategies for developing these themes through cross examination.

offer additional damaging information or to make the lawyer appear dishonest, bullying, desperate, or wasting the jury's time, the momentum shifts towards the prosecution. Obviously, it will be necessary to subject some prosecution witnesses to thorough cross examination either because they are harmful to the defense theory and must be discredited or because they can provide helpful information that the prosecution did not elicit on direct examination. For these witnesses, the defense attorney must pursue those lines of cross examination for which the potential reward outweighs the risks. For example, if a jailhouse informant who is cooperating with the prosecution in exchange for a reduced sentence testifies that the defendant confessed to him, the defense attorney will need to bring out through cross examination the benefit the witness hopes to gain by helping the prosecution. On the other hand, if eliciting past criminal conduct on the part of the witness opens the door to the prosecution bringing out that the witness engaged in the criminal behavior at the direction of the defendant, defense counsel may conclude that the cost of this line of examination outweighs the benefit. Therefore, before pursuing any line of cross examination, the lawyer must weigh the potential gains against the possible negative consequences.

Some lawyers feel like they must cross examine every witness, even when the witness has nothing further to offer. The lawyer may ask a couple of meaningless questions which, while eliciting seemingly harmless information, do not advance the defense theory. There is a cost to this approach. The jury knows the lawyer is not scoring any points and may either become irritated that s/he is wasting their time, or conclude that s/he is grasping at straws in a desperate attempt to make something out of nothing. If a witness is not harmful to the defense case and has no information that can advance the defense theory, do not cross-examine him or her. For the same reasons, when there is only a fact or two needed from a witness that can be educed with a couple of questions, the lawyer should make the pertinent inquiry and conclude cross examination.

In short, the lawyer should not engage in any cross examination that does not potentially advance the defense theory and which, after assessing the potential risks to the line of questioning, s/he determines will result in a net benefit to his or her cause. There is no such thing as a draw in cross-examination. If a question does not elicit an answer that advances the defense theory, there is a cost to asking it. DON'T DO IT!

Structure – How Do We Organize Cross Examination?

1. Viewing the facts as the building blocks of the defense theory

Cross-examination advances the defense theory when it elicits facts that provide the building blocks that allow us to tell our client's story of innocence. If the defense theory is that the client was not the person who committed the crime and that the identifying witness is mistaken, the building blocks might be facts that show the witness gave a description of the perpetrator immediately after the incident that does not match the defendant. They might be facts that help explain that the scene was poorly lit, that the incident happened very quickly, or that the witness was intoxicated at the time of the crime. If the theory is that the witness is lying, rather than mistaken, the building blocks might include facts that show the witness dislikes the client, is receiving a benefit from the prosecution for his testimony, or otherwise has a motive to falsely accuse the defendant. Through cross-examination, we might bring out facts that show forensic evidence pointing to our client's guilt is either unreliable or subject to an alternate explanation. All of these are examples of building blocks critical to our defense theory. Through investigation, discovery, motions practice, pre-trial litigation, and client interviews we have an understanding of the universe of facts potentially available for the jury to consider. From this universe of facts we have constructed a defense theory calculated to most likely achieve our client's desired outcome. Through cross examination we must bring these facts into evidence in a coherent and organized manner that will allow the jury to appreciate how they are relevant to our theory as they are elicited. Through cross-examination, we do not simply educe these facts in any order; we seek to tell a story.

2. Identify the important points to make with the witness in light of the defense theory

The cross-examiner must be effective, yet efficient. S/he must highlight the critical points and not get bogged down in the minutia. For most witnesses, we want to select no more than three to five points to make. There is always the risk that the important points will be lost on some jurors if the examination is too long. Spending time hammering less significant points runs the risk of detracting from the important areas of cross.

When selecting the areas of cross examination, be mindful of your defense theory. One mistake that lawyers make is to conduct cross-examination in a vacuum. When the cross-examination is not derived from the defense theory, it can be counter-productive. So, for example, assume we are planning our cross-examination of a robbery victim who claims our client was the person who stole his money. Assume further that we believe we can elicit from the witness facts to make the following points:

a. the witness has a reputation as an untruthful person
b. the witness dislikes our client because our client slept with his girlfriend
c. the witness has a pending drug charge that he hopes to have dismissed by the prosecutor in exchange for his testimony
d. the witness gave a detailed description of the robber to the police immediately after the incident and the description does not match our client
e. the description given by the witness matches a violent gang member in the neighborhood
f. the witness did not have a good opportunity to observe the robber (it was nighttime, the lighting was poor, and the witness did not have his glasses)

Suppose our theory is that the witness got a good look at the robber and it was not our client. The witness is afraid of the actual robber and does not want to identify him for fear of retribution. Furthermore, the witness falsely accused our client to get back at him for sleeping with the witness' girlfriend. In this case the lawyer probably does not want to bring out point "f" since it undermines the power of the original description which does not match the client and which matches the violent gang member. In a vacuum point "f" seems like a great area for cross. But, it is inconsistent with out defense theory.

3. Write a "chapter" of your cross for each point you wish to make

Many schools of trial advocacy teach that cross examination should be organized using the "chapter" method. Under this method, each point that the examiner wishes to bring out through the witness becomes a chapter of the cross. In the hypothetical case above, we would have five chapters in our cross examination: a) witness is untruthful, b) witness doesn't like client, c) witness hopes to benefit from his testimony, d) description does not match client, and e) description is that of person witness fears.

Now, we must collect the facts we know we can get from the witness that together lead us to the point we wish to make with each chapter and organize them so that they logically lead to the desired conclusion. There are two rules to follow when writing the questions in each chapter: **1) start general and move to specific**, and **2) do not ask the ultimate question**.

Let's take for example point "b," the chapter that shows the witness does not like the client. You do not want to simply ask, "You don't like Mr. Client, do you?" There are two problems with this question. First, it does not give the jury any sense of why this must be true. It fails to give the jury of any context and deprives them of the facts necessary to logically reach the conclusion on their own. It does not tell a story. Second, by jumping to the ultimate issue, it gives the witness an "out." The witness immediately sees where the cross-examiner is going and may try to deny the point. The witness may respond that he loves the

client and come up with a reason why this is so that the cross-examiner did not anticipate. By building up to the desired conclusion, the witness may be led down the path that leads to the desired conclusion with much less opportunity to escape. Starting general and moving to the specific means taking "baby" steps that lead to the inescapable conclusion that the point of the chapter is true. Not asking the ultimate question means stopping at the point that every jury knows the point of the chapter is the inescapable conclusion desired without giving the witness the change to explain why it is not true. Therefore, this chapter may look something like:

In June 2008 you were seeing a woman?

Her name was Rhonda?

You had been together for three years?

You spent a lot of time together?

You traveled together?

You even took a trip to Paris together?

The two of you talked about marriage?

And you talked about raising a family together?

You loved her?

You trusted her?

Then one day, in June 2008, she broke that trust?

You found out she was unfaithful?

She was sleeping with another man?

You learned it was Mr. Client?

This series of question leads to the conclusion that the witness has a reason to dislike, and seek revenge against, our client. It is an example of starting generally (the witness was seeing a woman) and moving to the specific (the witness has a reason to dislike our client). The jury can follow the questions and reach the point of the chapter without being told. It is also an example of not asking the ultimate question. There is not need to say, "so you don't like Mr. Client," because the jury already understands that point. It avoids the risk that

the witness will have some clever response that minimizes the power of the cross (e.g. “well, I was mad initially, but over time I realized Rhonda was not the woman I thought she was and that he did me a favor and I have grown to be thankful to him for that.”)

4. Organize your chapters in a logical and compelling order

Now that we have written our chapters, we must decide how to order them. Two principles should guide us: **1) consider “primacy” and “recency,”** and **2) the chapters should be organized to tell a coherent and persuasive story.** This means that we want to start strong and end strong (based o the idea that people most remember the first and last things hear) and tell a compelling story throughout.

In our hypothetical case we may choose to start with the fact that the witness gave a description that does not match the client, then move to the point that the description does match a person the witness is terrified of, then bring out the facts that show the witness is not a believable person, then show that the witness has a lot to personally gain by helping the prosecution, and end with the point that the witness does not like the client. This is a logical order since the first and last points are pretty powerful and the chapters are organized in a way that tells a compelling story. However, once the chapters are written it is easy to interchange them to figure out an order that makes the most sense.

5. Transition between chapters using headlines

A headline is a sentence that allows the cross-examiner to signal to the jury that s/he is moving from one point to the next. It helps tell coherent story by ensuring the jury understands the transition the lawyer is making. A headline can move the jury from one time to another (“I want to take you to the night of June 23rd”); it can transition to a particular place (“Let’s go to the interrogation room in the police station where you were brought after our arrest”); it can focus the questioning on a specific person (I want to talk to you about Jimmy White); or it can move the story to any other topic (Let’s talk about X). For example, in our hypothetical case, suppose the lawyer wants to transition from the first chapter (the description does not match the client) to the next chapter (the description does match the feared gang member). The lawyer may use the following headline: “The description you gave of the robber immediately following the incident did not match Mr. Client . . . let’s talk about who it did match.” Or, in transitioning from the fourth chapter (the witness has much to gain by working with the prosecution) to the last (the witness does not like the client), the lawyer might use the following headline: Now that we have established what you have to gain today by saying Mr. Client was the robber, let’s talk about another reason you might wrongly accuse him of this crime.”

Headlines can help emphasize your first point as well. In our hypothetical case the cross may start with a headline: "I want to start by talking about the description of the person who actually robbed you." This then allows us to start the process of eliciting the building blocks that show the description given does not match the client. By tying the chapters together using headlines, the cross-examiner can ensure that the story told on cross is coherent and effective.

Control - How Do We Ask Questions?

The key to cross-examination is that the lawyer controls the witness. If the witness is allowed to say what s/he wants to say, the lawyer loses the battle. The trick is for the lawyer to provide the testimony through the question and for the witness to simply confirm what the lawyer has said. Unlike direct examination, a "witness-focused" process where the lawyer's job is to help present the story through the witness, cross examination is "lawyer-focused." The lawyer is testifying with the witness simply serving as a source of confirmation. Of course, the witness will not likely willingly play this role. Therefore, a good cross-examiner must ask questions that leave the witness no room to refuse. There are some rules that every developing attorney must follow on cross-examination, or risk catastrophic consequences for his or her client.[2]

Rule # 1: ALWAYS ask leading questions!

One of the first rules of controlling a witness is to ask leading questions. Leading questions are questions that contain the answer. Non-leading questions often start with who, what, where, when, why, or how. These are the words that begin your questions on direct examination. Avoid these words on cross examination. Questions that start with "did" also tend to be too non-leading for cross-examination[3]. Questions on cross examination should be short, declaratory statements which suggest a question because the examiner raises his or her voice at the end. The question leaves room for only one answer (or a denial which will be impeached as discussed below). Below is an example of a series of leading questions that might show that a witness could not get a good look at the robber:

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[2] I say every "developing" lawyer must follow these rules because unless very experienced, the examiner will not likely have the tools to recover from a witness who tries to seize control of the exchange. It is a sound practice for even the most seasoned lawyer to follow these rules as well, and most do. However, some very experienced lawyers will break one or more of these rules from time to time, confident in their ability to regain control if the risk does not pay off. Frequently lawyers in movies and on television completely abandon these rules, as it makes for a more dramatic performance. However, until the lawyer has become expert at cross-examination, or is following a script in a Hollywood performance, s/he would be ill-advised to deviate from these rules.

[3] Although, "did" is also too leading for direct examination. As a general rule, you should avoid the use of the word "did during either direct or cross examination. An example of why did is not leading enough from cross but too leading for direct is as follows: "Did you go to the store?" is a question that suggests the answer and therefore is too leading for many judges on direct examination. The appropriate question on direct would be: "Where did you go?" However, it is also not leading enough for a tight cross-examination. A better question for cross is, "You went to the store, didn't you?"

Let's talk about the robbery.

It was night?

It was cloudy?

The light from the moon was dim?

There were no street lights in the area?

In fact, there were no sources of artificial light?

Assuming you can show that all of these facts are true, there is nothing for the witness to do but to agree or to appear to be dishonest. Imagine a non leading question and the potential answer:

Q: *How well could you see the person who robbed you?*

A: Very well

This is an example of what can happen if a lawyer gives up control. Could the lawyer go back and try to fix it? Sure. But to do so necessarily invites the witness to explain the answer that is so harmful, and we might not like the explanation.

Rule # 2: One fact per question

Each question should only contain one fact. Questions that contain more than one fact invite confusion, often require the lawyer to backtrack in order to clarify, and can disrupt to rhythm of the cross-examination. Take for example, the following question and answer:

Q: It was nighttime, the moonlight was dim, and there were no streetlights, right?

A: No

It is not clear whether the witness is denying that it was nighttime, that the moonlight was dim, that there were no streetlights, or some combination of the three. The examiner will need to backtrack to clarify with which question the witness disagrees in order to know how to proceed. Rather than saving time by jamming multiple facts in a single question, doing so often takes more time and sows confusion. The above question should be three separate inquiries:

It was nighttime?

The moonlight was dim?

There were no streetlights in the area?

Rule # 3: Keep questions short and simple

The cross-examiner wants to get into a rhythm in which s/he controls the cadence and there is no confusion by anyone about the facts with which the witness agrees. Questions that are overly wordy risk being confusing. They give the witness the opportunity to take control of the pace of the examination by asking the questioner to repeat the question without seeming evasive. This gives the witness more time to formulate an answer that s/he thinks will benefit the state without looking like s/he is stalling for time.

Because many of us are scared of silence, we talk and think at the same time, causing us to utter excess verbiage while we struggle to formulate the question. It is far better to simply pause for a couple of seconds to come up with an effective question than to add excessive words to avoid a perceived awkward pause. The pause probably isn't noticeable to the jury. The confusing question surely will be. So, before asking a question like:

> *Now, as far as the streetlights go, the illumination from those lights were really not a factor that night, because there weren't any lights at all in the area where the robbery occurred, isn't that right?"*

Take a moment, collect you thoughts, and say:

> *There were no streetlights in the area where the robbery occurred?*

Rule # 4: Never ask a question to which you can't prove up the answer you want

One of the most important commandments of cross examination is that you know the answer to any question before you ask it. A corollary is that you be able to prove the answer you want if the witness tries to be evasive. Few things are more terrifying to a new lawyer than having a witness give you a harmful answer on cross examination. The terror is warranted if the lawyer is unable to show that the witness is wrong and to compel the witness to either admit his mistake or be proven a liar. However, when the lawyer is able to demonstrate that the s/he was correct in making the assumption underlying the question, and that the witness was being evasive, the credibility of the witness is brought down a notch and that of the lawyer increased.

The ability to demonstrate that the witness is either mistaken, lying, or being difficult should he be unwilling to agree with the lawyer's question is critical to

"taming" the difficult witness. The goal is to get the witness to simply agree with the lawyer's question. If the witness refuses, the lawyer must "punish" the witness by impeaching him, or revealing his deceit. After a couple times of being impeached, the witness will become much more cooperative and the jury will look to the lawyer as the person to whom they should look for the truth. Conversely, every time the lawyer asks a question that the witness denies and goes unimpeached, the attorney loses credibility.

There is often a "dance" that goes on between the witness and the questioner at the beginning of the cross-examination as the witness tries to feel out how much he can get away with. Therefore, the beginning lawyer may wish to start off with a line of questioning that will invite less resistance from the witness as s/he eases into the cross-examination. Nevertheless, the lawyer must be ready to prove up the desired answer if called upon to do so.

Rule # 5: LISTEN!

As we will discuss later on in this article, preparation is the key to a successful cross-examination. A good lawyer considers every question s/he might ask and plans out the sequence to most effectively make the desired point. However, witnesses sometimes give us answers that are unexpected. The lawyer cannot be so wed to a script that, in anticipation of the expected answer s/he doesn't listen and instead focuses on the next question. The lawyer must not lose the flexibility to listen and respond. Sometimes the unexpected answer is harmful, and the lawyer must be prepared to confront the damaging evidence. Other times the witness may throw out a helpful nugget that a conscientious lawyer will be able to build on if s/he is alert. For example, imagine the following exchange:

Q: *It was nighttime?*

A: *Well, it was dusk, but it was kinda hard to see because I didn't have my glasses*

Q: *The moon was dim?*

A: *Yes*

Q: *There were no streetlights?*

A: *True*

The lawyer above did not expect the answer about the witness not having his glasses. Rather than adapt and emphasize that point, the lawyer moved onto the next planned question. To the extent that any juror either did not hear the part about the glasses or failed to appreciate the significance, the lawyer missed an opportunity to emphasize the point.

Rule # 6: Each question must have a purpose

If the question does not help to advance your defense theory, don't ask it! Jurors have short attention spans. The longer the examination, the more likely they are to not process part of it. Every unnecessary exchange increases the chance that a juror will zone out on an important question. In addition, each question is a potential opportunity for the witness to find some way to interject damaging information. The less the witness is talking, the better. After you prepare each chapter, read over your questions and ask yourself if it is necessary or merely surplus.

Rule # 7: Drop the tags

We all have the bad habit of adding tags to either the beginning or end of questions. It serves as a crutch but can be very distracting. If you listen to most cross-examinations, you will hear a litany of tags like: and, right, correct, true, o.k., etc. I have had jurors tell me that they stopped paying attention to the questions and began counting the number of times a lawyer said, "correct?"

Ending every question with "o.k" or beginning each question with "and" obviously serves no purpose. However, some judges, and most prosecutors, believe that a leading question is only a question if the lawyer appends "correct?" or "right?" to the end. Sometimes a prosecutor will object when a defense attorney simply makes a short, declaratory statement. "Is that a question?" is the usual objection, although no such objection exists. Sometimes the judge will respond, "please ask a question counsel." This is the time that the lawyer may use a tag to make the point that it was clearly a question, and then revert back to the litany of declaratory statements that make for an effective cross-examination. The scenario usually plays out like this:

Defense: *It was nighttime?*

Prosecution: *Objection, is that a question?*

Judge: *Counsel, please ask a question.*

Defense: *It was nighttime, <u>wasn't it</u>?*

Witness: *Yes*

Defense: *The moonlight was dim?*

Witness: *Yes*

Defense: *There were no streetlights in the area?*

Witness: *True*

Everyone will understand that the prosecutor's objection was merely due to frustration over an effective cross examination and after a couple times, the prosecutor will stop interfering.

Rule # 8: Loop when possible

Looping, or building a previous answer into the next question, is a very effective technique that allows the examiner to repeat the good part of the previous answer and tie it into the next question. It is a way to emphasize good facts. The following cross examination snippet designed to bring out the witnesses motive to help the prosecution is an example of looping:

Q: *You are pending sentencing on a murder charge?*

A: *Yes*

Q: *Because of this murder charge you are looking at spending the rest of your life in prison?*

A: *True*

Q: *Spending the rest of your life in prison is not something you want to do?*

A: *No*

Q: *Because you don't want to spend the rest of your life in prison, you would be grateful for a way out?*

A: *Yes*

Q: *The person who can offer you a way out is the prosecutor?*

A: *Yes*

Q: *So in an effort to find a way out, you met with the prosecutor?*

A: *Yes*

Q: *When you met with the prosecutor you talked about what she could do for you?*

A: *Yes*

Q: During that same conversation where you talked about what the prosecutor could do for you, you discussed what you could do for the prosecutor in return?

Rule # 9: Be mindful of language

Language is very important. It is through language that we connect, or fail to connect, with the jury. It is through language that we convey, or fail to convey, important information to the jury. Although advocacy is the lawyer's craft, many of us do not sufficient appreciate language.

1. Talk like a "regular" person

It is easy for the lawyer to slip into the habit of talking like a lawyer, or a police officer. Some lawyers think it is important to convey a superior understanding of law and of language. These lawyers pepper their questions with words that they believe make them sound lawyerly. You may hear, "what was the ancillary impact of your decision?" in stead of "What happened when you told that to Joe?" Or, "You will admit that you engaged in odious behavior?" versus, "What you did was not very nice?"

Other lawyers adopt law enforcement language in their lexicon. These lawyers ask whether the suspect "alighted from his vehicle" instead of whether he "got out of his car," or whether the officer "responded to the vicinity" rather than "went to the crime scene."

2. Choose words that advance the defense theory

Our audience is a jury of regular people. We want the jury to see us as a regular person with whom they can connect. Language plays an important role. However, not only do we need to be mindful to speak like a "regular" person, but the "regular" words we choose are critically important. If our defense is self-defense we want to be sure to ask how "big" the complaining witness is instead of how "small." If we are trying to emphasize that the witness could not have been close enough to see what they claim they saw, we should ask how "far away" the witness was rather than how "close" they were. To describe a violent beating use the word "pounded" instead of "hit." We must make sure that we choose words that will help the jury to create the mental image that is most consistent with our defense theory. Words are descriptive and we must choose those that best advances our case.

Rule # 10: Don't argue with the witness / Don't cut the witness off

Sometimes the lawyer will confront a combative witness. These are witness who either refuse to answer the question posed or ramble on after answering the

question in an effort to add what they want to say. There are four rules of thumb when dealing with this type of witness:

a. Do not argue with the witness – This detracts from the lawyer's professionalism and brings him or her down to the witness' level. No witness is worth trading the stature the lawyer has worked hard to build for the jury.
b. Do not cut the witness off – As a general proposition you do not want to interrupt the witness as it appears that there is information that you are trying to keep from the jury. Particularly, where the information is testimony the prosecutor will likely elicit on redirect, there is little to gain by cutting off the witness. Of course if the witness is about to reveal inadmissible and damaging information that has been excluded from trial, the lawyer may want to find a way to politely interrupt the witness and ask to approach the bench to deal with the issue at hand.
c. Never appear flustered – The jury is always watching to determine who appears to be winning the battle before them. Even when a witness is being difficult, the lawyer should not express frustration or angst. The better course of action is to calmly let the jury know that the witness is trying to avoid the question. This will convey that the witness has something to hide, not the lawyer.
d. Do not ask the judge for help – It is critical to convey to the jury that we are in control of the courtroom. We want the jury to see us as the party to whom to look to get answers. If we start a battle with a witness we must finish it. Asking the judge to bail us out will be seen as our having lost the battle by the jury. Besides, in most instances the judges do not want to help the defense demolish the witness on cross-examination, so they may make matters worse.

When a witness is being difficult, calmly wait for him or her to stop talking and repeat the question. If you have to do this more than once, the message will be clear to the jury that the witness is being difficult, implying that they have something to hide. You may preface your repeated questions with, "let me repeat the question" or "Now sir, can we try my question?" By making clear to the jury that the witness is being evasive and wasting their time, you will come out of the fray viewed as the reasonable person. Because the party who calls the witness is seen as endorsing him, the prosecution will lose points with the jury as the witness becomes more insistent in his refusal to cooperate.

Rule # 11: Do not treat all witnesses the same

Our natural instinct as defense lawyers is often to attack every witness. Some witnesses obviously deserve to be attacked, like the witness who, according to our defense theory, is lying about our client's involvement for his own benefit. But, other witness will appear far more sympathetic to the jury. We will have to

take a gentler approach with these witnesses. Politely pointing out that a witness is mistaken may be the right approach in some instances. Others may start off sympathetic but grow more combative as the cross proceeds. A good rule is to never attack a witness until you have the jury's permission. In other words, if the jury does not believe the witness deserves to be attacked, they will resent you for being hostile.

Preparation – The Key to a Winning Cross-Examination!

Nothing is more important to a successful cross-examination than preparation! Given the mandate that we not ask a question to which we cannot prove up the answer we want, investigation is critical to a successful cross. This, and other methods of gathering information, allows us to know what information is out there as well as provides us the sources through which to prove it if needed. Knowing the rules of evidence is equally essential to a great cross-examination. This will allow us to figure out how to get the facts we need to build our theory into evidence. Preparing the documents we need to support the questions we ask is also necessary so that we are able to effortlessly impeach the witness if needed and maintain control of the examination. We will discuss each of these in turn.

1. Investigation and other fact gathering

During the pretrial period it is essential that we use every tool at our disposal to gather as much information as possible. Through investigation, Brady requests, discovery, client interviews, motions practice, and other pretrial litigation, we must endeavor to learn all we can about the case. This will give us the greatest flexibility in developing a defense theory by giving us a greater universe of facts from which to build it. Certainly, through this process, we will learn facts essential to our theory that we will bring out through cross-examination. However, in addition to thinking about how to affirmatively build a defense case, we also want to consider how to undermine the prosecutions case. Most of our cross examination will focus on discrediting the prosecution's story of guilt. Through the fact gathering process, we must always look for four broad categories of evidence or impeachment that will allow us to discredit prosecution witnesses.

a. Evidence that the witness is mistaken/unreliable

Obviously we need to be vigilant in identifying any information that can be used to demonstrate that a prosecution witness' testimony is unreliable. To this end we should always investigate the witness' perception at the time of the incident and his or her memory about the relevant facts. With respect to perception, we should look into factors like eyesight and hearing, distance, any potential distractions, obstructions, lighting, and evidence that impacts state of mind (drug use, alcohol, fear, etc.). As to the witness' memory we should explore the time between the event and the report, intervening events that may influence memory,

and substance abuse that could impact recollection. Facts that help undermine the reliability of a witness' testimony are obviously critical to any cross-examination. However, in addition to investigating reliability, we have to also explore the credibility of the witness. To do this we explore the witness' motive to lie (bias), factors that suggest lack of trustworthiness (prior convictions and character evidence), and direct evidence of a willingness to lie (prior inconsistent statements). These are discussed below.

b. Evidence that the witness has a bias

The Sixth Amendment guarantees us the right to bring out a witness' motive to be untruthful, or his "bias." Therefore, when there is information that we want the jury to hear, it is always preferable to develop a theory under which it reveals a witness' bias. While a judge may not allow us to bring up the fact that a witness has three recent arrests for theft which resulted in dismissals to show that they are not trustworthy, if there is a viable argument that the witness could fear having the charges reinstituted, the judge must allow us to question him about his motive to curry favor with the prosecution. Likewise, if we discover that a witness on probation was smoking marijuana, the judge may not let us use the fact of his crime to show that he is a bad guy but s/he will have to let us explore whether the witness hopes his cooperation may help prevent his probation from being revoked.

While the most obvious bias cross examination is the witness who has made a deal with the prosecution, bias should be considered whenever a witness has a pending charge/sentencing, when there is evidence that a witness potentially broke the law and could therefore possibly fear prosecution, when a witness has a family member who is in trouble who they could conceivably believe they might be able to help, when the witness has any reason to dislike the client, when the witness has a relationship with law enforcement, when the witness has a friend or family member with an interest in the case, or when a witness has a motive to lie to cover up a potentially embarrassing fact. The right to confront a witness with his or her bias trumps a statutory protection like the privacy of juvenile or neglect cases or rape shield statutes. Therefore, when there is reason to believe that evidence of bias may be contained in records that are statutorily protected, the lawyer should consider requesting access to these records from the judge. The witness also may be able not hide behind a Fifth Amendment privilege if cross-examination into criminal behavior reveals bias. Therefore, a line of questioning that would inquire into criminal behavior could force the prosecution to either grant the witness immunity or decide not to call the witness. In short, whenever possible, the lawyer must consider a theory under which facts that will help the defense can be articulated as evidence of bias.

c. Evidence of prior convictions to challenge credibility

While there is always the potential that a witness on probation, parole, or supervised release may have engaged in behavior that could lead to revocation, and therefore give rise to bias cross-examination, even witnesses with convictions who have completed their sentence may be impeached with the fact of the conviction. Many prior convictions are admissible to demonstrate the a witness is not credible. Therefore, it is essential that the lawyer use all available tools to get a complete record of each witness' criminal history.

d. Discovering existing, and creating additional prior inconsistent statements

Along with evidence of bias, prior inconsistent statements are the most powerful form of impeachment. By showing that a witness previously said something that is inconsistent with his trial testimony, the lawyer can demonstrate that the witness is not believable. When the prior statement is helpful to the defense theory, the lawyer may also be able to establish the truth of the out of court statement. Because we never know what a witness will say at trial, every prior statement is potentially inconsistent. Therefore, it is critical that the defense attorney use discovery, Brady, and subpoena authority to access every prior statement of each witness. Additionally, the lawyer should independently try to obtain his or her own witness statements from every witness and consider litigation that will force prosecution witnesses to testify under oath prior to trial. Memorialized witness statements and recorded pretrial testimony both help the lawyer to know what questions to ask the witness and are often rife with impeachment.

e. Character evidence

Finally, the lawyer must look into any possible evidence that might be admissible to demonstrate a relevant trait that will undermine the character of the witness. In every case the defense should look into all witnesses character for untruthfulness. In self-defense cases, the character of the complaining witness for being violent may be admissible. Depending on the case, and the jurisdiction, other relevant character traits may be admissible as well.

In conclusion, the conscientious lawyer will use every tool available to try to uncover evidence of bias, prior convictions, prior statements, and character evidence. Once helpful facts are learned, the lawyer must think strategically about how to make that evidence admissible.

2. Anticipate objections

It is always safest for the defense attorney to assume that every line of questioning will draw an objection. For each line of questioning, the prudent lawyer will consider every possible objection and be prepared with a response. This obviously involves knowing constitutional law and the rules of evidence. While a theory that evidence is constitutionally admissible, like bias, is preferable, it is not always available. The lawyer must know the law that governs when convictions are impeachable and the forms of character evidence that are admissible. The lawyer must also know how to lay the proper foundations to impeach a witness with a prior inconsistent statement or admit character evidence. In short, one cannot be a great cross-examiner without being a master of the law and rules that govern the admissibility of evidence.

3. Writing the cross – Being prepared to impeach if needed

Now that we have developed our defense theory, gathered the facts necessary to advance that theory (and undermine the prosecution case), written and ordered our chapters, and anticipated all objections and considered our responses, we must organize all of our documents so that we can be prepared to prove any answer if the witness is difficult. In order to do this, we not only write out each question that will lead us to the inescapable conclusion of the chapter (as discussed above) but we also have to ensure that we can seamlessly access the evidence needed to confront the witness if proves uncooperative. This is a three-step process:

a. Compile all documents relating to the witness

Before you write the cross examination of any witness you should first compile all documents that relate to the witness. Some of these may be documents prepared by, read, or signed by the witness himself and others may be documents that indicate the witness made statements to other people or that a relevant fact about the witness is true (prior conviction, on probation, got into a fight at school, etc). These will be the universe of documents from where you pull the facts that allow you to ask questions to which you know you can prove the answers. The former category of documents can be used to confront the witness directly if he denies a fact contained within. The latter category may need to ultimately be proven through a different witness, but the lawyer will need to lay the proper foundation with the witness s/he wishes to impeach at the point that the witness becomes uncooperative.

By compiling these documents, the lawyer can easily compile the facts that are available to him or her and decide which advance the defense theory. From there the facts can be categorized under the various chapters and ordered in the most effective way to demonstrate the point of the chapter.

b. Organize the documents so they are easily accessible and identifiable

Once you have all of the documents relevant to the witness, you need to organize them so they are easily accessible and identifiable. Some lawyers do this using a trial notebook, with a section for each witness and every relevant document labeled within the section. Others use folders, with a larger accordion folder for each witness that has manila folders inside for each document. In either event, you should be able to easily pull out only those documents relevant to the witness you are cross-examining so that you do not confuse them with those unrelated to the task at hand.

I personally use the folder method. With an accordion folder for each witness, I can easily pull out the relevant accordion folder as each witness is called to the stand. In the front of the accordion folder is my cross examination (one page for each chapter that lists the facts I need to elicit for the chapter and where I can find each fact in the supporting documentation if necessary (see below). Behind the cross examination are several manila folders, one for each document relevant to the witness. Each folder is clearly marked so I can easily access any of the documents if necessary.

For example, suppose in a hypothetical case the primary prosecution witness is Joe Witness. Through our pre-trial efforts, we have been able to gather the following documents related to Joe: a police statement containing a narrative about an interview with Joe on the night of the incident (police statement), a statement taken by our defense investigator sometime later (defense statement), a transcript of Joe's testimony before a grand jury (GJ), and a transcript of Joe's testimony at the preliminary hearing (PH). We will have four manila folders (one clearly labeled "police statement," one "defense statement," one "GJ," and one "PH"). These four manila folders will be placed inside an accordion folder BOLDLY labeled "JOE WITNESS." At the front of the accordion folder will be our cross-examination of Joe. Assume we have three chapters in our cross of Joe and the first chapter is meant to show that Joe could not see what happened that night. There will be three pages (conceivable a chapter could be longer than one page) with each marked "Chapter X" and the point to be made.

When the examination begins we can reach for the accordion folder (or notebook if we prefer) labeled Joe Witness, assured that we have everything we need for cross.

c. Identify where impeachment can be found in each chapter

The final step in preparing to cross is to index directly in each chapter where the point can be found if we need to prove it up. To do this we take each chapter and draw a line down the middle of the page. On the left hand side we write the facts we need to establish in order to prove the point of the chapter. On the right

hand side we list the document, page, and line or paragraph where that fact can be found. For example:

CROSS OF JOE WITNESS

CHAPTER 1

POOR OPPORTUNITY TO OBSERVE

It was nighttime	Statement to police / p. 2 paragraph 1
It was cloudy	Statement to police / p. 2 par. 1
The moonlight was dim	Statement to defense / p.3 par. 4
No streetlight in area	GJ / p.6 line 7
No artificial light at all	PH / p.3 line. 5

Now, suppose we get to the moment that we are going to elicit that the moonlight was dim. We ask, "The moonlight was dim?" to which Joe responds, "No, it was very bright." We can now easily see that Joe previously said the moonlight was dim in his grand jury testimony on page 3 at line 4. We reach for the manila folder containing the grand jury transcript, pull out the document, and turn to page three as we begin to lay the foundation to impeach Joe. With everything at our fingertips, this can be done seamlessly and effortlessly.

It is worth noting that sometimes we cannot complete the impeachment with witness because the fact comes from a document the witness did not personally create, adopt, or approve. A witness' account listed in a police report is often an example. However, if the witness denies the fact we need to prove, we must still lay the foundation to show that the witness told this to the police. In laying the foundation we allow ourselves to later call the officer who wrote the report to establish that Joe Witness did indeed tell the officer the fact. We also signal to the jury at the critical moment that Joe is lying and they will soon find that out. So, assume we ask Joe, "It was cloudy?" to which he responds, "No, it was as clear as glass that night." We can now reach for the police statement and begin to lay the foundation, referring to the document so both the witness, and the jury, know that we have evidence of what we are asserting. The witness will then either agree that he told the police that it was cloudy, or be proven to be a liar when the officer is later called to complete the impeachment.

Conclusion

Cross examination is, perhaps, the most difficult and terrifying aspects of trial work. There is always the potential for the witness to "run away" from the lawyer, leaving the lawyer shell shocked. However, by putting in the preparation on the front end, keeping the examination simple, asking questions in a form that allow you to maintain control, and having your ducks lined up to tame the runaway witness, the lawyer can conduct a winning cross every time. Do not expect that Perry Mason moment when the witness breaks down crying as he admits that he is a liar. That does not happen. You do not need to destroy every witness. The key is to simply not let the witness win. A successful cross examination is one that methodically elicits the facts necessary to advance the defense theory in a way that is organized and tells a persuasive and coherent story. You will succeed in doing this consistently with preparation, organization, and control!

North Carolina Defender Trial School
Sponsored by the UNC School of Government and
North Carolina Office of Indigent Defense Services
Chapel Hill, NC

Impeachment

Ira Mickenberg
6 Saratoga Circle
Saratoga Springs, NY 12866
(518) 583-6730
iramick@worldnet.att.net

I. Some General Principles for Impeachment

A. Plan Your Impeachment

1. Make sure you have done a complete investigation and have obtained all discovery and Brady/Kyles materials before trial. Remember -- the U.S. Supreme Court has explicitly held that anything in the State's possession that can be used to impeach a State's witness must be disclosed under Brady. This applies even if the impeachment material does not in any way exculpate the defendant. As long as it can be used to impeach, contradict, or discredit a prosecution witness, it is Brady material.

2. Before the witness takes the stand, you should know what information you have about the witness's convictions, bad acts. and bad character that you can use to impeach. Plan this impeachment in advance. Write out the questions in advance, if necessary.

3. Before the witness takes the stand, you should know what information you have about the witness's biases and interests in the case that you can use to impeach. Plan this impeachment in advance. Write out the questions in advance, if necessary.

4. Although you cannot know in advance what the witness will say on direct, you must know in advance exactly what prior testimony and statements the witness has made. Make sure you are completely familiar with all of these prior statements, so if the witness testifies to something inconsistent, you are ready to impeach.

5. Be familiar with your theory of defense. That way you will know if you should be doing an impeachment. If the witness testifies to something inconsistent with a prior statement, only use the prior statement to impeach if the prior statement is more favorable to your theory of defense than the statement the witness just made on direct.

B. Never Ask an Impeaching Question That Calls For an Opinion or Explanation

C. Keep Your Questions Short and Simple

1. No multi-sentence questions.

2. No questions with a long preface or "wind up."

3. Use normal, clear language – no lawyer talk, no cop talk.

4. Don't be a wise ass. Let the impeachment material stand for itself.

E. The Ethics of Cross-Examination

1. You must have a good faith basis for every impeaching question you ask.
2. It is unethical to insert innuendo based on untrue facts.

3. It is unethical to ask accusatory questions for the purpose of embarrassing or rattling a witness if the answer to the question is irrelevant to the case at hand.

EX: The witness has a son who is in prison for child abuse. Unless this is somehow relevant to your case, it is improper to cross-examine the witness about this just for the purpose of embarrassing him or getting him to lose his temper on the stand.

F. Stop When You Are Done

1. Don't ask one too many questions.

2. If the witness refuses to answer the impeaching question, don't rush in with another question. Every moment of silence just emphasizes that the witness is stuck.

3. Resist the urge to ask the conclusory question after the witness has been impeached. Save the conclusions about the witness for your closing argument.

II. Impeachment With Prior Inconsistent Statements

A. Know the Witness's Prior Statements Inside Out Before You Reach Trial

B. Listen Carefully to the Witness's Answers on Direct. If you Don't Remember What He Said on Direct, You Won't Know If He Can Be Impeached

C. There is a formula for impeaching someone with a prior inconsistent statement. If you follow the simple formula in asking impeachment questions, you can't go wrong.

D. The Formula For Impeachment By Prior Inconsistent Statement

1. Get the witness to repeat the statement he just made at trial

2. Ask the witness if he made a prior statement (Don't ask about the substance of that prior statement, just about whether he made one – you will get to the substance in a minute)

3. Mark the prior statement for identification (don't try to introduce it into evidence yet).

4. Confront the witness with the substance of the prior statement and ask the witness if he made that statement.

a. If the witness admits making the prior statement, stop there. You have established the inconsistency and are not allowed to actually introduce the prior statement in evidence – the inconsistency is already before the jury. [Under North Carolina law, you also may be able to offer the statement itself into evidence if it bears on a material fact in the case, but you are not required to do so.]

b. If the witness denies making the prior statement, move to have the statement admitted into evidence as a prior inconsistent statement. Then read it to the jury or have the witness read it aloud to the jury. [Under North Carolina law, you are not bound by the witness's denial and may introduce extrinsic evidence of the statement (e.g., the statement itself or testimony by another witness about the statement) if the statement bears on a material fact in the case or goes to bias. You may need to call another witness to authenticate a written statement that is not self-authenticating—for example, a letter or other written statement by the witness may require additional testimony to authenticate it.]

5. *Do NOT give the witness a chance to explain the inconsistency.*

EXAMPLE: At a preliminary hearing, the witness testified that the light was green. At trial, he testified on direct examination that the light was red. Here's how to impeach.

NOTE: Which is better for your theory of defense, a green light or a red light? If a red light is better, DON'T IMPEACH. If, on the other hand, a green light is better, use the preliminary hearing transcript to impeach the witness.

1. Q: Did you testify on direct examination that the light was red?
   A: Yes.

2. Q: Do you remember testifying at a preliminary hearing on March 15th of this year?
   A: Yes.

Defense counsel then marks the relevant lines of the preliminary hearing for identification.

3. Q: And at that preliminary hearing do you remember being asked the following question and giving the following answer? "Question: 'What color was the light?' Answer: 'Green'"
   A: Yes

Stop Here. The Witness Has Acknowledged the Inconsistency, and is Impeached

OR

A: No.

Now Offer the Relevant Lines of the Preliminary Hearing Transcript Into Evidence Then Read Them to the Jury, or Have the Witness Read Them to the Jury

NOTE: Do not offer the entire transcript into evidence:

a. Everything except the inconsistent statement is both irrelevant and hearsay.
b. It probably contains a lot of other stuff that you don't want the jury seeing.

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.

Caveat: 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 <u>what</u> you told them but <u>why</u> 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.

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 *higher* 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 *without* 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 *principle* rather than to the *technicality*!

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 your battle for you in the jury room.*

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

1. **Trilogies** -- For reasons known only to those folks who study such things, the human mind seems to hang on to things that come in threes *longer* than it does to things that come solo or in any other combination. There is something poetic and memorable about trilogies, so look for opportunities to build trilogies into your argument. Those who doubt the power of the trilogy need only look at those built into their own history:

Ex: "drugs, sex, and rock & roll"

"blood, sweat, & tears"

"red, white, & blue"

2. **Metaphors** - 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. **Alliteration** - 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. **Quotations** -- 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. **Analogies** -- 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. **Silence** -- 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;

b) *Pause*;

c) Announce your next chapter heading; (ask your question, flip your chart, etc.)

d) *Pause* briefly again to give your jurors time to make that move with you, then begin.

TIP: One excellent transition technique is to tie each of your chapters back to your theme. Not only does this give you added opportunity to repeat your theme, it also helps jurors understand that the various chapters of your closing are simply different branches of the same tree.

Ex: [Closing of Chapter One] *The victim's description does not match Joe Defendant because the police have the wrong man.*

<pause>

[Heading of Chapter Two] *What's the second piece of evidence you heard from that stand that shows the police have the wrong man?*

And then launch into your second chapter.

step seven: DECIDE YOUR OPENING HOOK

the first few moments of your closing is the most attentive your jury will be throughout your argument. *Do not waste it with thank-you's or apologies for how long the trial has taken.* Start with something strong and attention-grabbing that will make your jurors want to stay with you beyond your opening 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 read 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 and every one of them.

Then reduce your argument to a **one-page outline form** 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!

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.

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

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North Carolina Office of Indigent Defense Services
Chapel Hill, NC

PRESERVING THE RECORD AND MAKING OBJECTIONS AT TRIAL:

A Win-Win Proposition for Client and Lawyer

Ira Mickenberg
Public Defender Trainer and Consultant
6 Saratoga Circle
Saratoga Springs, NY 12866
(518) 583-6730
iramick@worldnet.att.net

I. The Prime Directive For Preserving the Record and Making Objections at Trial

WHEN IN DOUBT -- OBJECT

A. This cannot be overstated. If you do not object, you have lost -- regardless of whether you are right or wrong about the issue. If you do object, two things can happen, and both of them leave your client in a better position than if you were silent:

1. The objection will be sustained. Whatever you were objecting to has been excluded, and some prejudice has been kept out of the trial. You have also seized the moral high ground for future objections if the prosecutor violates the judge's ruling.

2. The objection will be overruled. This is not great, but at least you have preserved the issue so that on appeal or habeas, your client will have a chance for reversal. Almost as important, you have begun to educate the judge on the issue, which maximizes your chances of limiting the prosecution's ability to expand the prejudice later in the trial.

B. Many lawyers are afraid to make objections because they think the court may get angry at them for daring to object. There are two answers to this:

1. It is more important to preserve your client's right to appellate and habeas review than it is to have the court happy with you.

2. If a judge is going to get upset with you for objecting, he or she is probably the kind of judge who is already upset with your very existence as a defense lawyer. It's part of our job, so we have to learn to live with it.

MYTH ALERT #1 Objecting too much will make the jurors angry:

When I took trial advocacy courses in law school, I was advised not to object too much, because it will make the jury angry. This is nonsense for two reasons:

1. Jurors don't get angry because you are objecting. They get angry if you are behaving like a jerk when you object. Whining, eye-rolling and other stereotypical lawyer histrionics might offend a jury. Making your objection in an intelligent, calm, sincere, and respectful-sounding way lets the jury know you are doing your job and care about your case.

2. The law professors who keep advising you not to object have never gone to jail because they were procedurally barred from raising a winning issue on habeas. Your client will.

II. How to Prepare For Objections and Record Preservation

MYTH ALERT #2: You can't prepare for trial objections. You just have to be very smart and very fast on your feet.

This is also nonsense. It was probably made up by a trial attorney who was invited to teach at an advocacy seminar and wanted to convince the audience that he was smarter and faster than they were. Like every aspect of a trial, knowing your theory of defense, thinking about your case critically, and doing your homework in advance will allow you to make effective objections even if you are really slow on your feet.

A. Know your theory of defense inside out. Go through the exercise of writing out your theory of defense paragraph. Know what story you are going to tell the jury that will convince them to return the verdict you want.

B. Then ask yourself four questions:

1. What evidence, arguments, and general prejudice might the prosecutor come up with that will hurt my theory of defense?

2. What legal objections can I make to those tactics?

3. What evidence and arguments will the prosecutor offer in support of his or her theory of the case?

4. What legal objections can I make to the prosecutor's evidence and arguments?

C. Once you have answered these four questions, take the following steps:

1. Go to the law library and research the law on those objections.

2. If you find supportive law, make copies of the relevant cases or statutes. Bring them to court with you and cite them if you make a motion in limine.

D. If appropriate, make a motion in limine, in writing and on the record, to obtain the evidentiary ruling you want before trial.

E. If a motion in limine is not appropriate, bring the copies of the law you have found with you to trial. This will guarantee that when you make the objection, you will be the only one in the courtroom who is able to cite directly relevant law.

MYTH ALERT #3: You have to choose between preserving the record and following a good trial strategy.

Baloney. If you know your theory of defense, you will know whether an objection advances the theory or conflicts with it. Object when it advances your theory. Don't object if it conflicts with your theory. Just make sure you know the difference.

III. How to Make Objections

A. Whenever you anticipate a problem, consider making a motion in limine to head off the difficulty and get an advance ruling.

B. When you are unsure whether to object, DO IT. You have far less to lose if you have an objection overruled than if you allow the damaging evidence in without a fight.

C. Be unequivocal when you object, don't waffle.

1. RIGHT: I object.
   WRONG: Excuse, me your honor, but I think that may possibly be objectionable.

2. Don't ever let the judge bully you into withdrawing an objection. If the judge goes ballistic because you have made an objection, just make sure you get it all on the record -- including his ruling.

D. If the objection is sustained, ask for a remedy.

1. Mistrial.

2. Strike testimony.

3. Curative instruction.

E. If you realize that you have neglected to make an objection which you should have made:

1. DON'T PANIC -- but don't just forget about it.

2. Make a late objection on the record.

3. Ask for a remedy that the court can grant now.

   a. Curative instruction/strike testimony.

   b. Mistrial.

IV. If You Happen To Have A Capital Case, Remember To Make Objections On Non-Capital Issues

NOTE: This is particularly important because in many jurisdictions death penalty law is so bad that if a reviewing court feels that an injustice is being done, you have to give the court a non-death penalty issue on which to peg its reversal.

A. If you are objecting to the admission of evidence, raise every possible ground:

EX: If you are objecting to admission of a photo array, don't just cite your state's equivalent of Wade. You may also wish to raise:

1. Suggestive behavior by police
2. Photo array unreliable based on nature of the witness
3. Right to counsel.
4. Fruit of an illegal arrest or other police misconduct.
5. Fruit of an illegally obtained statement
    a. Coerced statement
    b. Miranda
    c. Right to counsel
6. The photo array is biased, based on the latest scientific research on photo arrays.
7. State law regulating lineups and photo arrays.

B. If you are relying on scientific or technical information as the basis for your objection, give the court a copy of the relevant articles in advance of the court proceeding. This not only helps your chances of winning the objection, but it educates the judge about the issue.

C. Prosecutorial Misconduct in Summation

1. In General

a. ***It is not impolite to interrupt opposing counsel's summation -- it is mandatory to preserve error and stop the prejudice.***

b. Be sure to ask for some remedy any time an objection is sustained to remarks in a prosecutor's closing argument.

1. Admonish the jury to ignore the statements.
2. Admonish the prosecutor not to do it again.
3. Mistrial.

2. Some common objections to prosecutorial summations.

a. Distorting or lessening the burden of proof.

b. Negative references to the defendant's exercise of a constitutional or statutory

right.

1. Pre- and post- arrest silence.
2. Requests for counsel.
3. Not testifying at trial.

c. Religious or patriotic appeals -- particularly now that the government is asserting that everything it doesn't like (including your client) is tied to terrorism.

d. Appeals to sympathy, passion or sentiment.

e. Name-calling or other invective directed at either the defendant, defense counsel, or the defense theory.

f. References to evidence that has been suppressed or not introduced.

g. Attacks on the defendant's character, when character has not been made an issue in the case.

D. Some Common Objections in the Evidentiary Portion of the Trial

1. Improper introduction of uncharged crimes or bad acts attributed to the defendant

2. The court improperly limited the defense right to cross-examine witnesses.

3. The court wrongfully permitted the prosecutor to cross-examine the defendant in a prejudicial manner or about improper subjects.

a. The defendant's pre- and post-arrest silence.

b. The defendant's request for a lawyer and consultation with counsel.

4. The prosecutor tried to have a police officer testify about the defendant's invocation of his right to silence or his request for a lawyer.

5. Improper use of expert testimony.

a. There was no need for an expert because a lay jury could understand the subject on its own.

b. The opinion evidence was given outside the area of the expert's expertise.

c. The expert is unqualified.

d. The expert's opinion is so far outside the mainstream of current thought as to be junk science. Make a *Daubert* (in North Carolina, *Howerton* and revised Evidence Rule 702(a)) challenge.

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Workshop Aids

Compiled by John Rubin, based on materials by Ira Mickenberg, Alyson Grine, Ann Roan, Susan Brooks, Jon Rapping, Fred Friedman, Kendall Hill, Mary Moriarty, and many other defenders

Brainstorming Basics

1. Be factual and specific

- Not law
- Not conclusions
- Not endless rounds of questions (although do keep a list of matters requiring more investigation)

2. Be Inclusive

- Crime facts, events, actions
- People (personalities, motivations, interrelationships, influences)
- Places, objects
- Investigative and other procedures

3. Be non-judgmental

- Facts are not good, bad, or beyond change . . . yet

4. Be associative

- Develop additional facts and ideas from facts that have been identified

5. Be literal

- Write down facts as close to verbatim as possible; don't paraphrase

6. Be ready to investigate further

- Keep a list of facts, ideas, possibilities that require further interviews, discovery, etc.

A Template/Worksheet for Developing a Persuasive Story/Theory of Defense

1. In factual terms, identify why your client is innocent in one or at most two sentences—in other words, what really happened in this case?

2. Decide which genre of factual defense applies to your client's innocence.

    a. The criminal incident never happened.

    b. The criminal incident happened, but I didn't do it.

    c. The incident happened, I did it, but it wasn't a crime.

    d. The criminal incident happened, I did it, it was a crime, but not the crime charged.

    e. The criminal incident happened, I did it, it was the crime charged, but I'm not responsible.

    f. The criminal incident happened, I did it, it was the crime charged, I'm responsible, but who cares?

3. Craft the story that shows why your client is innocent.

    a. Who are the three main characters in the story of innocence?

    b. What are the three main scenes in the story of innocence?

    c. When and where does the story of innocence start?

4. What emotions do you want the jury (and/or judge) to feel when they hear your story?

5. Write out a paragraph distilling your client's story/theory of defense. Incorporate the key aspects of your responses to the above questions.

Storytelling (by which we mean tell your client's story, not make stuff up)

1. Characters

Before every trial, ask yourself, "Who are the characters in the story I am telling to the jury (or judge), and how do I want to portray them to the jury (or judge)? What are their roles?"

- Who is the hero and who is the villain? Who are the other characters?
    - What role does my client play?
    - What role does the complainant/victim play?
    - What role do the police play?

2. Setting and Scenes

Where do the most important parts of YOUR story take place?

- What are the key scenes?
- What scenes must be included to make your story persuasive?

3. Sequence

In what sequence do you want to tell the events of YOUR story?

- Decide what is most important for the jury (or judge) to know
- Follow principles of primacy and recency:
    - Front-load the strong stuff
    - Start on a high note and end on a high note

4. From whose perspective do you want to tell the story?

5. What emotions do you want the jury (or judge) to feel when hearing your story? What character portrayals, scene settings, sequence, and perspective will help the jurors (or judge) feel that emotion?

Voir Dire

How to Ask Life Experience Questions on Voir Dire

A. Start with an **IMPERATIVE COMMAND**:

"Tell us about," "Share with us," "Describe for us"

The reason we start the question with an imperative command is to make sure that the juror feels it is proper and necessary to give a narrative answer, not just a "yes" or "no."

B. Use a **SUPERLATIVE** to describe the experience you want them to talk about:

"The best," "The worst," "The most serious"

The reason we ask the question in terms of a superlative is to make sure we do not get a trivial experience from the juror.

C. Ask for a **PERSONAL EXPERIENCE**

"That you saw," "That happened to you," "That you heard of," "That you know of"

This is the crucial part of the question where you ask the juror to relate a personal experience. Be sure to keep the question open-ended, not leading.

D. Or ask for an **EXPERIENCE OF A FAMILY MEMBER OR SOMEONE CLOSE** to the juror

"That you or someone close to you saw," "That happened to you or someone you know"

This gives the jurors the chance to relate an experience that had an effect on their perceptions but may not have directly happened to them. It also lets the jurors avoid embarrassment by attributing one of their experiences to someone else.

E. **PUTTING THE QUESTION TOGETHER**

See sample questions, below.

Some Sample Life Experience Voir Dire Questions

A. Race

1. Tell us about the most serious incident you ever saw where someone was treated badly because of his or her race (or gender, religion, etc.).

2. Tell us about the worst experience you or someone close to you ever had because someone stereotyped you or someone close to you because of your race (or gender, religion, etc.).

3. Tell us about the most significant interaction you have ever had with a person of a different race.

4. Tell us about the most difficult situation where you, or someone you know, stereotyped someone, or jumped to a conclusion about them because of his or her race (or gender, religion, etc.) and turned out to be wrong.

B. Alcohol/Alcoholism

1. Tell us about a person you know who is a wonderful guy when sober, but changes into a different person when drunk.

2. Share with us a situation where you or a person you know of was seriously affected because someone in the family was an alcoholic.

C. Self-Defense

1. Tell me about the most serious situation you have ever seen where someone had no choice but to use violence to defend himself or herself (or someone else).

2. Tell us about the most frightening experience you or someone close to you had when threatened by another person.

3. Tell us about the craziest thing you or someone close to you ever did out of fear.

4. Tell us about the bravest thing you ever saw someone do out of fear.

5. Tell us about the bravest thing you ever saw someone do to protect another person.

D. Jumping to Conclusions

1. Tell us about the most serious mistake you or someone you know has ever made because you jumped to a snap conclusion.

E. False Suspicion or Accusation

1. Tell us about the most serious time when you or someone close to you was accused of doing something bad that you had not done.

2. Tell us about the most difficult situation you were ever in, where it was your word against someone else's, and even though you were telling the truth, you were afraid that no one would believe you.

3. Tell us about the most serious incident where you or someone close to you mistakenly suspected someone else of wrongdoing.

F. Police Officers Lying/Being Abusive

1. Tell us about the worst encounter you or anyone close to you has ever had with a law enforcement officer.

2. Tell us about the most serious experience you or a family member or friend had with a public official who was abusing his authority.

3. Tell us about the most serious incident you know of where someone told a lie, not for personal gain, but because he or she thought it would ultimately bring about a fair result.

G. Lying

1. Tell us about the worst problem you ever had with someone who was a liar.

2. Tell us about the most serious time that you or someone you know told a lie to get out of trouble.

3. Tell us about the most serious time that you or someone you know told a lie out of fear.

4. Tell us about the most serious time that you or someone you know told a lie to protect someone else.

5. Tell us about the most serious time that you or someone you know told a lie out of greed.

6. Tell us about the most difficult situation you were ever in where you had to decide which of two people were telling the truth.

7. Tell us about the most serious incident where you really believed someone was telling the truth, and it turned out he or she was lying.

8. Tell us about the most serious incident where you really believed someone was lying, and it turned out he or she was telling the truth.

H. Prior Convictions/Reputation

1. Tell us about the most inspiring person you have known who had a bad history or reputation and really turned himself around.

2. Tell us about the most serious mistake you or someone close to you every made by judging someone by his or her reputation, when that reputation turned out to be wrong.

I. Persuasion/Gullibility/Human Nature

1. Tell us about the most important time when you were persuaded to believe that you were responsible for something you really weren't responsible for.

2. Tell us about the most important time when you or someone close to you was persuaded to believe something about a person that wasn't true.

3. Tell us about the most important time when you or someone close to you was persuaded to believe something about yourself that wasn't true.

J. Desperation

1. Tell us about the most dangerous thing you or someone you know did out of hopelessness or desperation.

2. Tell us about the most out-of-character thing you or someone you know ever did out of hopelessness or desperation.

3. Tell us about the worst thing you or someone you know did out of hopelessness or desperation.

How to Lock in a Challenge for Cause

Step #1. Mirror the juror's answer: "So you believe that . . . ."

a. Use the juror's exact language

b. Don't paraphrase

c. Don't argue

Step #2. Then ask an open-ended question inviting the juror to explain (no leading questions at this point):

> "Tell me more about that"
>
> "What experiences have you had that make you believe that?"
>
> "Can you explain that a little more?"

Step #3. Normalize the impairment

a. Get other jurors to acknowledge the same idea, impairment, bias, etc.

> "Ms. Smith feels that the police would not arrest a person if he were not guilty. Do you feel that way as well, Mr. Barnes?"

b. Don't be judgmental or condemn it.

> "I see. Thank you for sharing that, Ms. Smith."

Step #4. Now switch to leading questions to lock in the challenge for cause:

a. Reaffirm where the juror is:

> "So you would need the defendant to testify that he acted in self-defense before you could decide that this shooting was in self-defense"

b. If the juror tries to weasel out of his impairment, or tries to qualify his bias, you must strip away the qualifications and force him back into admitting his preconceived notion as it applies to this case:

> Q: "So you would need the defendant to testify that he acted in self-defense before you could

decide that this shooting was in self-defense."

A: "Well, if the victim said it might be self-defense, or if there was some scientific evidence that showed it was self-defense, I wouldn't need your client to testify."

Q: "How about where there was no scientific evidence at all, and where the supposed victim absolutely insisted that it was not self-defense. Is that the situation where you would need the defendant to testify before finding self-defense?"

c. Reaffirm where the juror is not (i.e., what the law requires).

"And it would be very difficult, if not impossible, for you to say this was self-defense unless the defendant testified that he acted in self-defense."

d. Get the juror to agree that there is a big difference between these two positions.

"And you would agree that there is a big difference between a case where someone testified that he acted in self-defense and one where the defendant didn't testify at all."

e. Immunize the juror from rehabilitation

"It sounds to me like you are the kind of person who thinks before they form an opinion, and then won't change that opinion just because someone might want you to agree with them. Is that correct?"

"You wouldn't change your opinion just to save a little time and move this process along?"

"You wouldn't let anyone intimidate you into changing your opinion just to save a little time and move the process along?"

"Are you comfortable swearing an oath to follow a rule 100% even though it's the opposite of the way you see the world?"

"Did you know that the law is always satisfied when a juror gives an honest opinion, even if that opinion might be different from that of the lawyers or even the judge? All the law asks is that you give your honest opinion and feelings."

A Rating System for Non-Capital Jurors

1. LEGALLY EXCLUDABLE AS BIASED FOR THE DEFENSE. This juror openly expresses the view that he will or cannot vote for conviction.

2. This juror overtly expresses views favorable to accused people in general ("I see the police shooting/framing too many people in my community"), or favorable to what your client is accused of doing ("I don't think anyone should go to jail for marijuana,"), but also says she will follow the judge's instructions and convict if the evidence warrants.

3. This juror comes across as truly open-minded. He is willing to convict, but is aware of and concerned with the effect of a conviction on the client's life. He may be an intelligent abstract thinker, or a less analytical but compassionate, person. He will be tolerant of and listen to the views of those he disagrees with.

4. Moderately pro-prosecution. This juror believes that crime is a serious problem and generally thinks the police do a good job. She does not, however, have any particular axe to grind concerning your client or the kind of crime your client is accused of committing. She wants to be sure of guilt before convicting and can recount experiences/stories of someone being falsely accused about a serious matter.

5. Pro-prosecution. This juror not only believes that crime is a serious problem, but has a personal experience, connection, or belief that gives him an axe to grind concerning your client or the kind of crime your client is accused of committing. Often, she will have had very little personal contact with members of your client's racial or ethnic group and, if she has had contact, she recalls it in the context of a negative experience. This juror is often afraid: afraid of crime, afraid of people of different races and backgrounds, afraid of poor people. It is important to get these jurors talking about their experiences. They will often say something that establishes a challenge for cause.

6. Very pro-prosecution. This juror is a version of #5 on steroids. She not only believes crime is a very serious problem, but talks aggressively about the need to do something about it. She speaks in cop-talk (as derived from television) and speaks in general terms about the importance of holding people responsible for their actions. These jurors may also associate themselves (at least figuratively, sometimes literally) with law-enforcement issues, institution, and people. They may get their news and information from right-wing talk radio and may blame specific classes of people (liberals, minorities) for problems of crime and lawlessness.

7. LEGALLY EXCLUDABLE AS BIASED FOR THE STATE. This juror either openly expresses the view that he will vote for conviction or will not follow the judge's instructions; or has some factual characteristic that makes him automatically disqualified (involved with the prosecution or police investigation of this case, etc.).

Drafting Your Opening Statement: A Short Template

The Hook -- Start with a thirty to sixty second statement that encapsulates your theory of defense and establishes the emotional themes that will make the jury feel it is right to accept your theory. The hook should tell the jurors in factual terms exactly why you should win. It should not be an argument.

> EXAMPLE: John Smith is not guilty of murder. Yes, he shot Bob Green. But only because Bob Green started the fight, pulled his own gun, and fired the first shot at John. John shot back because it was the only way to save his life. He is not guilty because he acted in lawful self-defense.

QUESTION: WHAT IF THE PROSECUTOR OR JUDGE OBJECTS, SAYING THAT THIS IS TOO ARGUMENTATIVE? (They would be wrong, but being wrong never stopped a judge or prosecutor in the past).

> ANSWER: RE-START YOUR OPENING LIKE THIS:
> John Smith is not guilty of murder. Yes, the evidence will show that he shot Bob Green. That same evidence will also show that the only reason he fired was that Bob Green started the fight, pulled his own gun, and fired the first shot at John. The evidence will conclusively show that John Smith is not guilty because he acted in lawful self-defense.

The Story -- The main part of your opening, in which you tell the jury the factual story of your client's innocence or reduced culpability. Your opening should not contain the entire story of the case, in all its detail. It should, however, hit the high points and tell the jury everything that is essential to acquitting.

> EXAMPLE: Five minutes before the shooting, John Smith was sitting quietly at the bar, drinking a beer and watching Monday night football. He was not drunk. He was not loud. He had never even heard of Bob Green. . . . etc.

The Conclusion -- In which you tell the jury what you want them to do.

> EXAMPLE: After hearing all the evidence, you will find that John Smith shot Bob Green only because Green pulled his gun and fired the first shot. You will find that John Smith acted in lawful self-defense. And you will find that the only fair verdict is not guilty.

After your hook, story, and conclusion, sit down. Don't waste your first opportunity to hold the jurors' attention by introducing yourself again, thanking them for doing their civic duty, or discussing legalities like burden of proof.

The Three P's of Direct Examination

1. PLAYERS

   - Select witnesses who advance your theory of the case

2. PREPARATION

   - Think about your questions
     - Open-ended
       - Who
       - What
       - When
       - Where
       - How
       - Why
       - Tell us about/Describe

       --Tap all of the senses. What did you do, think, feel, see, smell? Place your witness in important scenes to bring them to life.

       EXAMPLE: When Bob Green came up to you in the bar, what did you see? [He got right up on me, he glared at me, he had his hand in his jacket pocket, etc.] What did you smell? [He reeked of alcohol; it was on his breath, his clothes, etc.] What did you feel? [I was scared, the hair on the back of my neck stood up, etc.]
     - With a purpose and direction

       --Mix general and specific questions to direct your witness to the information you want to emphasize and to control the examination

       EXAMPLE: When Bob Green came up to you in the bar, what went through your mind? What did you do? NOT: When you arrived at the bar, what happened? And, what happened next? And, after that?

   - Prepare and practice with the witness

3. PRODUCTION

   - Remember primacy & recency. Start and end on a strong point.
   - Arrange your direct through "chapters" and "signposts"

     EXAMPLE: "Mr. Witness, now I want to ask you about the night Mr. Green came up to you in Smiley's bar." AND "Mr. Witness, now I want to go back to the last time you saw Mr. Green before the incident in the bar."
   - Elicit factual details of scenes you want to emphasize
   - Tap into your frustrated inner actor. You are a part of the scene.
   - Have a conversation with the witness
   - Listen. The witness may give you a gold nugget that you can expand on; you don't want to miss it because you are focused on your next question.

Cross-Examination

1. **Purpose** – cross-examination must advance the defense theory by eliciting answers that provide facts that either:
    a. Affirmatively advance your defense theory, or
    b. Undermine/discredit the prosecution's evidence that hurts your defense theory (not scattershot)

2. **Structure**
    a. Compile the facts that are the building blocks of the defense theory. For example, one block might be "the witness did not have a good chance to identify the defendant."
    b. Identify 3-5 important points you wish to make with these facts. For example, one point might be "the streetlight was broken."
    c. Write chapters
        i. each of the 3-5 points is a chapter
        ii. order the facts (for example, from general to specific) to lead logically to the conclusion you want the jury to draw
        iii. do not ask the ultimate question about the conclusion you want the jury to draw (you'll almost always be disappointed)
    d. Organize the chapters
        i. primacy and recency
        ii. tell a persuasive and coherent story
    e. Transition between chapters with headlines

3. **Control**
    a. Leading questions
    b. One fact per question
    c. Keep questions short and simple
    d. Never ask a question that calls for an answer you don't know
    e. Listen
    f. Each question must have a purpose

g. Avoid tags (e.g., saying “ok” after every answer or “and” at the beginning of every question)
h. Loop. For example, If your client didn’t have facial hair at time of offense, you might ask: “The man you saw had a beard?” “When the man with the beard came in the store, you were behind the cash register?” etc.
i. Consider language
    i. talk like a “regular” person
    ii. use words that advance your defense theory
j. Do not argue with/cut off the witness. If a witness gives a non-responsive answer, be sure you asked a leading question containing one fact and, if so, repeat the question. For example, “Thank you. But, my question is “The man you saw had a beard?”
k. Do not treat all witnesses the same. Do not beat up grandma (unless she is a villain in your story).

4. Preparation

a. Investigation (and other forms of fact gathering)
    i. Evidence of unreliability (perception, memory)
    ii. Evidence of lack of credibility (bias, prior inconsistent statements, prior convictions, character evidence)
b. Anticipate objections
c. Have impeachment ready

Formula for Impeachment by Prior Inconsistent Statement

1. **Recommit the witness to her testimony**

Get the witness to repeat the statement he just made at trial (for example, you testified on direct that the light was green, correct?).

2. **Validate the prior statement**

a. Ask the witness if she made a prior statement (don't ask about the substance of that prior statement, just about whether he made one – you will get to the substance in a minute).

b. Accredit the prior statement (e.g., ask about the importance of the prior statement, the witness's duty in making it, the opportunity to review/edit/sign it, the proximity in time between the events and prior statement, etc.).

3. **Confront the witness with the prior statement**

a. Mark the prior statement for identification (don't try to introduce it into evidence yet).

b. Confront the witness with the substance of the prior statement and ask the witness if he made that statement. You should read the statement aloud to the witness, rather than have the witness read the statement, to maintain control over the volume, emphasis, inflection, etc. of the statement.

i. If the witness admits making the prior statement, stop there. You have established the inconsistency and do not need to do anything else. (Under North Carolina law, you also may be able to offer the statement itself into evidence if it bears on a material fact in the case, but you are not required to do so.)

ii. If the witness denies making the prior statement, move to have the statement admitted into evidence as a prior inconsistent statement. Under North Carolina law, you are not bound by the witness's denial and may introduce extrinsic evidence of the statement (e.g., the statement itself or testimony by another witness about the statement) if the statement bears on a material fact in the case or goes to bias. You may need to call another witness to authenticate a written statement that is not self-authenticating—for example, a letter or other written statement by the witness may require additional testimony to authenticate it.

c. *Do NOT give the witness a chance to explain the inconsistency.* That's up to the prosecutor on redirect.

EXAMPLE: At a preliminary hearing, the witness testified that the light was green. At trial, he testified on direct examination that the light was red. Here's how to impeach.

NOTE: Which is better for your theory of defense, a green light or a red light? If a red light is better, DON'T IMPEACH. If, on the other hand, a green light is better, use the preliminary hearing transcript to impeach the witness.

1. **Recommit**

Q: You testified on direct examination that the light was red?

A: Yes.

2. **Validate**

Q: Do you remember testifying at a preliminary hearing on March 15th of this year?

A: Yes.

Q: Before testifying, you were asked to take an oath to tell the truth at the preliminary hearing?

A: Yes.

Q: You took that oath?

A: Yes

3. **Confront**

Defense counsel then marks the relevant lines of the preliminary hearing for identification and shows the exhibit to the prosecutor if the prosecutor has not already seen it.

Q: At that preliminary hearing, you were asked the following question and gave the following answer? "Question: 'What color was the light?' Answer: 'Green'"

A: Yes

Stop Here. The Witness Has Acknowledged the Inconsistency and Is Impeached

OR

A: No.

Now Offer the Relevant Lines of the Preliminary Hearing Transcript Into Evidence (the transcript is self-authenticating as an official record and no other witness is required to authenticate it)

NOTE: Do not offer the entire transcript into evidence: Everything except the inconsistent statement is both irrelevant and hearsay. And, it probably contains a lot of other stuff that you don't want the jury seeing.

Final Argument

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