



2011 Defender Trial School
July 11-15, 2011 / Chapel Hill, NC

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

ELECTRONIC COURSE MATERIALS

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NORTH CAROLINA DEFENDER TRIAL SCHOOL

Monday, July 11 through Friday, July 15, 2011
UNC School of Government, Chapel Hill, NC

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

AGENDA

Monday, July 11

- 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
- 10:30-12:00 **BRAINSTORMING (WORKSHOPS)**
- 12:00-1:00 Lunch (provided in building)
- 1:00-2:45 **BRAINSTORMING (WORKSHOPS)**
- 2:45-3:00 Break
- 3:00-4:00 **THEORY OF DEFENSE (PLENARY)**
Alyson Grine, Defender Educator, UNC School of Government, Chapel Hill, NC
- 4:00-5:00 **THEORY OF DEFENSE (WORKSHOPS)**



Tuesday, July 12

- 9:00-11:00 **THEORY OF DEFENSE (WORKSHOPS)**
- 11:00-11:15 Break
- 11:15-12:00 **STORYTELLING (PLENARY)**
Ira Mickenberg, Attorney & Consultant, Saratoga Springs, NY
- 12:00-1:00 Lunch (provided in building)
- 1:00-3:00 **STORYTELLING (WORKSHOPS)**
- 3:00-3:15 Break
- 3:15-4:30 **JURY SELECTION (PLENARY/DEMONSTRATION)**
Mike Howell, Assistant Capital Defender, Durham, NC
- 4:30-5:00 **BRAINSTORM VOIR DIRE (WORKSHOPS)**
- 6:00-???? Dinner @ Top of the Hill Restaurant & Brewery, Chapel Hill (Individual Pay)

Wednesday, July 13

- 8:00-9:00 Breakfast for Jurors (provided in building)
- 9:00-10:25 **JURY SELECTION (WORKSHOPS)**
- 10:25-10:40 Break
- 10:40-12:00 **JURY SELECTION (WORKSHOPS)**
- 12:00-1:15 Lunch and debrief jury selection (box lunches provided in breakout rooms)
- 1:15-2:00 **WHO WILL TELL WHICH PARTS OF YOUR STORY AT TRIAL
(PLENARY/DEMONSTRATION)**
Ira Mickenberg
- 2:00-2:45 **OPENING STATEMENTS (PLENARY/DEMONSTRATION)**
David Singleton, Executive Director, Ohio Justice & Policy Center, Cincinnati, OH
- 2:45-3:00 Break
- 3:00-3:30 **BRAINSTORM OPENING (WORKSHOPS)**
- 3:30-5:30 **OPENINGS (WORKSHOPS)**



Thursday, July 14

- 9:00-9:45 **DIRECT EXAMINATION (PLENARY/DEMONSTRATION)**
 John Rubin
- 9:45-10:00 Break
- 10:00-10:30 **BRAINSTORM DIRECT EXAMINATION (WORKSHOPS)**
- 10:30-12:30 **DIRECT EXAMINATION (WORKSHOPS)**
- 12:30-1:30 Lunch (provided in building)
- 1:30-2:30 **CROSS-EXAMINATION (PLENARY/DEMONSTRATION)**
 Kevin Tully, Chief Public Defender, Charlotte, NC
- 2:30-2:45 Break
- 2:45-3:15 **BRAINSTORM CROSS-EXAMINATION (WORKSHOPS)**
- 3:15-5:15 **CROSS-EXAMINATION (WORKSHOPS)**

Friday, July 15

- 9:00-10:00 **CLOSING ARGUMENTS (PLENARY/DEMONSTRATION)**
 Fred Friedman, Office of the Public Defender, 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 2011 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, a post-conviction case, a case you have already tried, 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're co-counsel, as you will not know the facts as well as in one of your own cases.
 - You should already have 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 John Rubin (919-962-2498 or rubin@sog.unc.edu) or Alyson Grine (919-966-4248 or agrine@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 conference.
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 learning 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 of Government
Monday, July 11 to Friday, July 15, 2011

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, any 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.)

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PLENARY SESSION FACT PROBLEM

Ira Mickenberg
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State v. Forbes

Your client, John Forbes, is charged with second-degree forcible rape and rape of a 13, 14, or 15 year-old by a person more than four but less than six years older. John is 20 years old. The victim, Darlene Hampton, is his fifteen year old niece. They are slightly less than five years apart in age.

At trial, the State will call as witnesses Darlene Hampton; her mother, Tiffany Hampton; police detective Jill Carter, who made the arrests and took statements from the defendant and the victim; police officer Bob Young, who accompanied Detective Carter; and Dr. Alice Mack, a gynecologist who examined Darlene Hampton.

Information from the police complaint report dated 5/13/2010

Darlene lives with her 30 year old mother, Tiffany Hampton, and her mother's boyfriend, Rollo. Rollo has prior convictions for assaulting and sexually abusing a former girlfriend. Although Tiffany has never filed any charges against Rollo, she has checked in at the local battered women's shelter twice during the three years she has lived with him. Both times she went back to him in less than a week. Darlene's father disappeared when she was two, and neither Tiffany nor Darlene has seen him since. Tiffany Hampton is John Forbes' sister.

Darlene, Tiffany, Rollo, and John Forbes are all white people. They all live in the same working-class/poor neighborhood, in a mid sized city. The neighborhood is about 70% white, and 30% black.

On May 12, 2010, Darlene went to a neighborhood park, where she ran into her uncle, John Forbes. They returned to her home together for dinner. Darlene and Tiffany both say nothing unusual happened at dinner. The next morning, when Tiffany was doing the laundry, she noticed what she thought were semen stains on Darlene's underwear. They had a loud argument, and Tiffany threatened to throw Darlene out of the house if she didn't "stop fooling around with those boys at school." Darlene denied having sex with anyone. The next day, Tiffany again warned Darlene. Darlene responded by telling Tiffany that John Forbes had raped her in the park. Tiffany immediately called the police.

Police Officer Carter interviewed Darlene that afternoon, with Officer Young also present. But Darlene refused to talk to Carter about any of the sexual details, saying only that she met John at the park, that "he slapped my face a few times," and that he "kissed me on the lips." After hearing this, the officer went to the house John shares with his grandmother. Carter spoke with John, who denied hitting Darlene but said that he had kissed her. Carter's report notes that John Forbes "appears slow mentally and is very quiet and reluctant to speak, but was able to understand and answer questions. His grandmother refused to allow him to talk with us unless she was present."

The officer took no action against anyone.

Information from the police complaint follow-up report dated 5/15/201

Two days later, at Tiffany's request, the police again interviewed Darlene. This time she told the officers that John raped her. After a few minutes, though, Darlene changed her story, saying that she and John had consensual sex in a public bathroom at the park and that "I knew he wanted it, but the retard was so dumb, I had to show him what to do."

Police officers then telephoned John Forbes, and asked if he would mind coming to the stationhouse so they could ask him a few more questions about Darlene. John said that he would speak with them, and about an hour later he walked to the station. They read him his *Miranda* warnings, and he signed a waiver. The officers then asked him, "what really happened between you and Darlene?" John told them that he and Darlene were in love, that they were going to get married, and that he would never treat her as badly as "the others did." He insisted that he never hit her. John admitted "having sex" with Darlene at the park and said that she told him it was OK, because they were going to be married. He signed a written statement to that effect. After speaking with the officers for about an hour, John went home.

The next day, the officers met with the prosecutor. At the prosecutor's direction, they returned to John's home and arrested him for rape. John has been released to the custody of his grandmother pending trial.

Your first interview with John Forbes

John Forbes gives you the following information:

He is 20 years old, and has lived with his grandmother all his life. He now works at a neighborhood McDonald's, where he has been employed for about three years. He went to school until the 5th or 6th grade, but didn't like it, so he left to go to work.

Tiffany Hampton is his older sister. He likes Darlene and says they are going to be married someday. He denies ever hitting her, and doesn't want to talk about sex, except to say "sex is OK if you are going to be married."

The Medical Report of Dr. Alice Mack

Dr. Alice Mack, is a gynecologist who does forensic examinations of sex crime victims for the police department. Dr. Mack examined Darlene three or four days after the alleged crime. Dr. Mack testified that Darlene had previously had sex, but there was no physical evidence that could identify any particular partner. The doctor also mentioned bruises and abrasions all over Darlene's body, but none on her face.

The Medical Report of Dr. Frank Liu

Dr. Liu is a psychiatrist who examined John Forbes on June 14, 2010, at your request. Dr. Liu reports that John Forbes has an IQ of 56, which places him in the mentally retarded range. Forbes is functionally illiterate, and dropped out of school in 7th grade when he was 16 years

old. He can barely write his name and cannot read at all. He works full-time at a neighborhood McDonald's and lives with his grandmother. The court held that he was competent to stand trial.

The response to your discovery requests and motions

You received a police report and a public school incident report that reveal the following:

In March, 2010, Darlene was suspended from school for a month because of several incidents of "promiscuous behavior" on school grounds. She was told that if she was caught again, she would be permanently expelled. When she told her mother about the suspension, Darlene had a screaming fight with her mother and Rollo. The fight was so loud that neighbors called the police. Darlene insisted that she was not sexually involved with any of the boys at school, but that she had been sexually assaulted at school by two teachers, the principal, and the school nurse. Rollo told her that "I don't care who did what. If you don't stop screwing around, you'll answer to me." The police investigated Darlene's accusations and determined that they were utterly unfounded. Neither teacher was at work on the day the abuse allegedly occurred. The principal and nurse were in a staff meeting with ten other people for the entire time.

John Forbes's statement to the police

I am 20 years old and live with my grandmother. I work at McDonald's. I am making this statement voluntarily and of my own free will. Nobody has coerced me to make it. I want to help Darlene and help the police.

Darlene is my sister Tiffany's daughter. I know that she is 15 years old. I am 20 years old. On May 12, 2010, I was walking in the park when Darlene came up to me and said hello. We talked for a while and she kissed me. I kissed her back. Then we went behind the bathrooms at the end of the park and had sex. I love Darlene and would never treat her as bad as the others do. She says we are going to get married someday. Sex is OK if you are going to get married.

Your interview with John Forbes's grandmother

John has been slow since he was a little boy. He never did learn to read, and he got social promotions until he was old enough to drop out of school. I knew he wouldn't be able to get by on his own, so I guess he'll be living with me for the rest of my life. I've put away a little money to provide for him when I'm gone. I got John that job at McDonald's through this program they have to hire kids who are a little slow. He's worked there for three years, and they like him a lot.

I just don't know what's wrong with Darlene. Her mother got in trouble when she was real young and just keeps picking the wrong men. Darlene seems to be the same way. She's always making fun of John. Once she convinced him to eat a can of dog food by telling him it would make him run as fast as a dog. It just isn't right.

Your interview with the manager at McDonald's

I can't believe John would rape anyone. He's a nice kid, and he does a real good job here.

Always shows up on time and is always polite to everyone. He sweeps out the store and the parking lot, handles the garbage cans, and cleans up when the customers spill something or leave a mess. I wish I could give him a more responsible job, but he's a little slow and doesn't know how to make change, so I can't have him working the cash registers.

Your interview with Detective Jill Carter

I'm not happy about this case. I don't know what happened in that park, but this whole thing stinks. I have a 12 year old son, and I'm going to lock him in the basement if I hear that Darlene Hampton ever comes within a mile of him. I told the prosecutor about this, but he says they have a zero tolerance policy if the complainant is under age. So if there's a complaint, I have to make an arrest.

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**BRAINSTORMING:
DEVELOPING THE FACTS TO
BUILD A THEORY OF DEFENSE**

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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.

If You Build It, They Will Come: Creating and Utilizing a Meaningful Theory of Defense

by Stephen P. Lindsay



Stephen P. Lindsay is a senior partner in the law firm of Cloninger, Lindsay, Hensley & Searson, P.L.L.C., in Asheville. His firm specializes in all types of litigation. Lindsay focuses primarily on criminal defense in both state and federal courts. He graduated from Guilford College with a BS in Administration of Justice and earned his JD from the University of North Carolina School of Law. A faculty member of the National Criminal Defense College in Macon, Georgia, Lindsay dedicates between four and six weeks per year teaching and lecturing for various public defender organizations and criminal defense bar associations both within and outside of the United States.

So the file hits your desk. Before you open to the first page you hear the shrill noise of not just a single dog, but a pack of dogs. Wild dogs. Nipping at your pride. You think to yourself, “Why me? Why do I always get the dog cases? It must be fate.” You calmly place the file on top of the stack of ever-growing canine files. You reach for your cup of coffee and seriously consider upping your membership in the S.P.C.A. to “Angel” status. Just as you think a change in profession might be in order, your coworker steps in the door, new file in hand, lets out a piercing howl and says, “This one is the dog of all dogs. The mother of all dogs!” Alas. You are not alone.

Dog files bark because there does not appear to be any reasonable way to mount a successful defense. Put another way, winning the case is about as likely as a crowd of people coming to watch a baseball game at a ballpark in a cornfield in the middle of Iowa. According to the movie, *Field of Dreams*, “If you build it, they will come . . .” And they came. And they watched. And they enjoyed. Truth be known, they would come again, if invited—even if they were not invited.

Every dog case is like a field of dreams: nothing to lose and everything to gain. Believe it or not, out of each dog case can rise a meaningful, believable, and solid defense—a defense that can win. But as Kevin Costner’s wife said in the movie, “[I]f all of these people are going to come, we have a lot of work to do.” The key to building the ballpark is in designing a theory of defense supported by one or more meaningful themes.

What Is a Theory and Why Do I Need One?

Having listened over the last 20 years to some of the finest criminal defense attorneys lecture on theories and themes, it has

become clear to me that there exists great confusion as to what constitutes a theory and how it differs from supporting themes. The words “theory” and “theme” are often used interchangeably. However, they are very different concepts. So what is a theory? Here are a few definitions:

- *That combination of facts (beyond change) and law which in a common sense and emotional way leads a jury to conclude a fellow citizen is wrongfully accused.*—Tony Natale
- *One central theory that organizes all facts, reasons, arguments and furnishes the basic position from which one determines every action in the trial.*—Mario Conte
- *A paragraph of one to three sentences which summarizes the facts, emotions and legal basis for the citizen accused’s acquittal or conviction on a lesser charge while telling the defense’s story of innocence or reduces culpability.*—Vince Aprile

Common Thread Theory Components

Although helpful, these definitions, without closer inspection, tend to leave the reader thinking “Huh?” Rather than try to decipher these various definitions, it is more helpful to compare them to find commonality. The common thread within these definitions is that each requires a theory of defense to have the same three essential elements:

1. a factual component (fact-crunching/ brainstorming);
2. a legal component (genre); and
3. an emotional component (themes/archetypes).

In order to fully understand and appreciate how to develop each of these elements in the quest for a solid theory of defense, it

is helpful to have a set of facts with which to work. These facts can then be used to create possible theories of defense. The Kentucky Department of Public Advocacy developed the following fact problem:

State v. Barry Rock, 05 CRS 10621 (Buncombe County)

Betty Gooden is a “pretty, very intelligent young lady” as described by the social worker investigating her case. Last spring, Betty went to visit her school guidance counselor, introducing herself and commenting that she knew Ann Haines (a girl that the counselor had been working with due to a history of abuse by her uncle, and who had recently moved to a foster home in another school district).

Betty said that things were not going well at home. She said that her stepdad, Barry Rock, was very strict and would make her go to bed without dinner. Her mother would allow her and her brother (age 7) to play outside, but when Barry got home, he would send them to bed. She also stated that she got into trouble for bringing a boy home. Barry yelled at her for having sex with boys in their trailer. This morning, she said, Barry came to school and told her teacher that he caught her cheating—copying someone’s homework. She denied having sex with the boy or cheating. She was very upset that she wasn’t allowed to be a normal teenager like all her friends.

The counselor asked her whether Barry ever touched her in an uncomfortable way. She became very uncomfortable and began to cry. The counselor let her return to class, then met her again later in the day with a police officer present. At that time, Betty stated that since she was 10, Barry had told her if she did certain things, he would let her open presents. She explained how this led to Barry coming into her room in the middle of the night to do things with her. She stated that she would try to be loud enough to wake up her mother in the room next door in the small trailer, but her mother would never come in. Her mother is mentally retarded, and before marrying Barry, had quite a bit of contact with Social Services due to her weak parenting skills. She stated that this had been going on more and more frequently in the last month and estimated it had happened 10 times.

Betty is an A/B student who showed no

sign of academic problems. After reporting the abuse, she has been placed in a foster home with her friend Ann. She has also attended extensive counseling sessions to help her cope. Medical exams show that she has been sexually active.

Kim Gooden is Betty’s 35-year-old mentally retarded mother. She is a “very meek and introverted person” who is “very soft spoken and will not make eye contact.” She told the investigator she had no idea Barry was doing this to Betty. She said Barry made frequent trips to the bathroom and had a number of stomach problems that caused diarrhea. She said that Betty always wanted to go places with Barry and would rather stay home with Barry than go to the store with her. She said that she thought Betty was having sex with a neighbor boy, and she was grounded for it. She said that Betty always complains that she doesn’t have normal parents and can’t do the things her friends do. She is very confused about why Betty was taken away and why Barry has to live in jail now. An investigation of the trailer revealed panties with semen that matches Barry. Betty says those are her panties. Kim says that Betty and her are the same size and share all of their clothes.

Barry Rock is a 39-year-old mentally retarded man who has been married to Kim for five years. They live together in a small trailer making do with the Social Security checks that they both get due to mental retardation.

Barry now adamantly denies that he ever had sex and says that Betty is just making this up because he figured out she was having sex with the neighbor boy. After Betty’s report to the counselor, Barry was inter-

viewed for six hours by a detective and local police officer. In this videotaped statement, Barry is very distant, not making eye contact, and answering with one or two words to each question. Throughout the tape, the officer reminds him just to say what they talked about before they turned the tape on. Barry does answer “yes” when asked if he had sex with Betty and “yes” to other leading questions based on Betty’s story. At the end of the interview, Barry begins rambling that it was Betty that wanted sex with him, and he knew that it was wrong, but he did it anyway.

Barry has been tested with IQs of 55, 57, and 59 over the last three years. Following a competency hearing, the trial court found Barry to be competent to go to trial.

The Factual Component

The factual component of the theory of defense comes from brainstorming the facts. More recently referred to as “fact-busting,” brainstorming is the essential process of setting forth facts that appear in discovery and arise through investigation.

It is critical to understand that facts are nothing more—and nothing less—than just facts during brainstorming. Each fact should be written down individually and without any spin. Non-judgmental recitation of the facts is the key. Do not draw conclusions as to what a fact or facts might mean. And do not make the common mistake of attributing the meaning to the facts that is given to them by the prosecution or its investigators. It is too early in the process to give value or meaning to any particular fact. At this point, the facts are simply the facts. As we work through the other steps of creating a theory of defense, we will begin to attribute meaning to the various facts.

Judgmental Facts (WRONG)	Non-Judgmental Facts (RIGHT)
Barry was retarded	Barry had an IQ of 70
Betty hated Barry	Barry went to Betty’s school, went to her classroom, confronted her about lying, accused her of sexual misconduct, talked with her about cheating, dealt with her in front of her friends
Confession was coerced	Several officers questioned Barry, Barry was not free to leave the station, Barry had no family to call, questioning lasted six hours

The Legal Component

Now that the facts have been developed in a neutral, non-judgmental way, it is time to move to the second component of the theory of defense: the legal component. Experience, as well as basic notions of persuasion, reveal that stark statements such as “self-defense,” “alibi,” “reasonable doubt,” and similar catch-phrases, although somewhat meaningful to lawyers, fail to accurately and completely convey to jurors the essence of the defense. “Alibi” is usually interpreted by jurors as “He did it, but he has some friends that will lie about where he was.” “Reasonable doubt” is often interpreted as, “He did it, but they can’t prove it.”

Thus, the legal component must be more substantive and understandable in order to accomplish the goal of having a meaningful theory of defense. Look at Hollywood and the cinema; thousands of movies have been made that have as their focus some type of alleged crime or criminal behavior. According to Cathy Kelly, training director for the Missouri Public Defender’s Office, when these types of movies are compared, the plots, in relation to the accused, tend to fall into one of the following genres:

1. It never happened (mistake, set-up);
2. It happened, but I didn’t do it (mistaken identification, alibi, set-up, etc.);
3. It happened, I did it, but it wasn’t a crime (self-defense, accident, claim or right, etc.);
4. It happened, I did it, it was a crime, but it wasn’t this crime (lesser included offense);
5. It happened, I did it, it was the crime charged, but I’m not responsible (insanity, diminished capacity);
6. It happened, I did it, it was the crime charged, I am responsible, so what? (jury nullification).

The six genres are presented in this particular order for a reason. As you move down the list, the difficulty of persuading the jurors that the defendant should prevail increases. It is easier to defend a case based upon the legal genre “it never happened” (mistake, set-up) than it is on “the defendant is not responsible” (insanity).

Using the facts of the Barry Rock example as developed through non-judgmental brainstorming, try to determine which genre fits best. Occasionally, facts will fit

into two or three genres. It is important to settle on one genre, and it should usually be the one closest to the top of the list; this decreases the level of defense difficulty. The Rock case fits nicely into the first genre (it never happened), but could also fit into the second category (it happened, but I didn’t do it). The first genre should be the one selected.

But be warned. Selecting the genre is not the end of the process. The genre is only a bare bones skeleton. The genre is a legal theory, not your theory of defense. It is just the second element of the theory of defense, and there is more to come. Where most attorneys fail when developing a theory of defense is in stopping once the legal component (genre) is selected. As will be seen, until the emotional component is developed and incorporated, the theory of defense is incomplete.

It is now time to take your work product for a test drive. Assume that you are the editor for your local newspaper. You have the power and authority to write a headline about this case. Your goal is to write it from the perspective of the defense, being true to the facts as developed through brainstorming, and incorporating the legal genre that has been selected. An example might be:

Rock Wrongfully Tossed from Home by Troubled Stepdughter

Word choice can modify, or entirely change, the thrust of the headline. Consider the headline with the following possible changes:

<i>Rock</i> →	<i>Barry, Innocent Man, Mentally Challenged Man</i>
<i>Wrongfully Tossed</i> →	<i>Removed, Ejected, Sent Packing, Calmly Asked To Leave</i>
<i>Troubled</i> →	<i>Vindictive, Wicked, Confused</i>
<i>Stepdaughter</i> →	<i>Brat, Tease, Teen, Houseguest, Manipulator</i>

Notice that the focus of this headline is on Barry Rock, the defendant. It is important to decide whether the headline could be more powerful if the focus were on someone or something other than the de-

fendant. Headlines do not have to focus on the defendant in order for the eventual theory of defense to be successful. The focus does not even have to be on an animate object. Consider the following possible headline examples:

Troubled Teen Fabricates Story for Freedom

Overworked Guidance Counselor Unknowingly Fuels False Accusations

Marriage Destroyed When Mother Forced to Choose Between Husband and Troubled Daughter

Underappreciated Detective Tosses Rock at Superiors

Each of these headline examples can become a solid theory of defense and lead to a successful outcome for the accused.

The Emotional Component

The last element of a theory of defense is the emotional component. The factual element or the legal element, standing alone, are seldom capable of persuading jurors to side with the defense. It is the emotional component of the theory that brings life, viability, and believability to the facts and the law. The emotional component is generated from two sources: archetypes and themes.

Archetypes, as used herein, are basic, fundamental, corollaries of life that transcend age, ethnicity, gender and sex. They are truths that virtually all people in virtually all walks of life can agree upon. For example, few would disagree that when one’s child is in danger, one protects the child at all costs. Thus, the archetype demonstrated would be a parent’s love and dedication to his or her child. Other archetypes include love, hate, betrayal, despair, poverty, hunger, dishonesty and anger. Most cases lend themselves to one or more archetypes that can provide a source for emotion to drive the theory of defense. Archetypes in the Barry Rock case include:

- The difficulties of dealing with a stepchild
- Children will lie to gain a perceived advantage
- Maternity/paternity is more powerful than marriage
- Teenagers can be difficult to parent

Not only do these archetypes fit nicely into the facts of the Barry Rock case, each serves as a primary category of inquiry during jury selection.

In addition to providing emotion through archetypes, attorneys should use primary and secondary themes. A primary theme is a word, phrase, or simple sentence that captures the controlling or dominant emotion of the theory of defense. The theme must be brief and easily remembered by the jurors.

For instance, a primary theme developed in the theory of defense and advanced during the trial of the O.J. Simpson case was, "If it doesn't fit, you must acquit." Other examples of primary themes include:

- One for all and all for one
- Looking for love in all the wrong places
- Am I my brother's keeper?
- Stand by your man (or woman)
- Wrong place, wrong time, wrong person
- When you play with fire, you're going to get burned

Although originality can be successful, it is not necessary to redesign the wheel. Music, especially country/western music, is a wonderful resource for finding themes. Consider the following lines taken directly from the songbooks of Nashville (and assembled by Dale Cobb, an incredible criminal defense attorney from Charleston, South Carolina):

Top 10 Country/Western Lines (Themes?)

10. Get your tongue outta my mouth 'cause I'm kissin' you goodbye.
9. Her teeth was stained, but her heart was pure.
8. I bought a car from the guy who stole my girl, but it don't run so we're even.
7. I still miss you, baby, but my aim's gettin' better.
6. I wouldn't take her to a dog fight 'cause I'm afraid she'd win.
5. If I can't be number one in your life, then number two on you.
4. If I had shot you when I wanted to, I'd be out by now.
3. My wife ran off with my best friend, and I sure do miss him.

2. She got the ring and I got the finger.
1. She's actin' single and I'm drinkin' doubles.

Incorporating secondary themes can often strengthen primary themes. A secondary theme is a word or phrase used to identify, describe, or label an aspect of the case. Here are some examples: a person—"never his fault"; an action—"acting as a robot"; an attitude—"stung with lust"; an approach—"no stone unturned"; an omission—"not a rocket scientist"; a condition—"too drunk to fish."

There are many possible themes that could be used in the Barry Rock case. For example, "blood is thicker than water"; "Bitter Betty comes a calling"; "to the detectives, interrogating Barry should have been like shooting fish in a barrel"; "sex abuse is a serious problem in this country—in this case, it was just an answer"; "the extent to which a person will lie in order to feel accepted knows no bounds."

Creating the Theory of Defense Paragraph

Using the headline, the archetype(s) identified, and the theme(s) developed, it is time to write the "Theory of Defense Paragraph." Although there is no magical formula for structuring the paragraph, the following template can be useful:

Theory of Defense Paragraph

- Open with a theme
- Introduce protagonist/antagonist
- Introduce antagonist/protagonist
- Describe conflict
- Set forth desired resolution
- End with theme

Note that the protagonist/antagonist does not have to be an animate object.

The following examples of theory of defense paragraphs in the Barry Rock case are by no means first drafts. Rather, they have been modified and adjusted many times to get them to this level. They are not perfect, and they can be improved upon. However, they serve as good examples of what is meant by a solid, valid, and useful theory of defense.

Theory of Defense Paragraph One

The extent to which even good people will tell a lie in order to be accepted by others

knows no limits. "Barry, if you just tell us you did it, this will be over and you can go home. It will be easier on everyone." Barry Rock is a very simple man. Not because of free choice, but because he was born mentally challenged. The word of choice at that time was "retarded." Despite these limitations, Barry met Kim Gooden, who was also mentally challenged, and the two got married. Betty, Kim's daughter, was young at that time. With the limited funds from Social Security Disability checks, Barry and Kim fed and clothed Betty, made sure she had a safe home in which to live, and provided for her many needs. Within a few years, Betty became a teenager, and with that came the difficulties all parents experience with teenagers: not wanting to do homework, cheating to get better grades, wanting to stay out too late, experimenting with sex. Mentally challenged, and only a stepparent, Barry tried to set some rules—rules Betty didn't want to obey. The lie that Betty told stunned him. Kim's trust in her daughter's word, despite Barry's denials, hurt him even more. Blood must be thicker

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than water. All Barry wanted was for his family to be happy like it had been in years gone by. "Everything will be okay, Barry. Just say you did it and you can get out of here. It will be easier for everyone if you just admit it."

Theory of Defense Paragraph Two

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. Full of despair and all alone, confused and troubled, Betty Gooden walked into the guidance counselor's office at her school. Betty was at what she believed to be the end of her rope. Her mother and stepfather were mentally retarded. She was ashamed to bring her friends to her house. Her parents couldn't even help her with homework. She couldn't go out as late as she wanted. Her stepfather punished her for trying to get ahead by cheating. He even came to her school and made a fool of himself. No—of her!!! She couldn't even have her boyfriend over and mess around with him without getting punished. Life would

be so much simpler if her stepfather were gone. As she waited in the guidance counselor's office, *Bitter Betty* decided there was no other option—just tell a simple, not-so-little lie. *Sex abuse is a serious problem in this country.* In this case, it was not a problem at all—because it never happened. *Sex abuse was Betty's answer.*

The italicized portions in the above examples denote primary themes and secondary themes—the parts of the emotional component of the theory of defense. Attorneys can strengthen the emotional component by describing the case in ways that embrace an archetype or archetypes—desperation in the first example, and shame towards parents in the second. It is also important to note that even though each of these theories are strong and valid, the focus of each is from a different perspective. The first theory focuses on Barry, and the second on Betty.

The primary purpose of a theory of defense is to guide the lawyer in every action

taken during trial. The theory will make trial preparation much easier. It will dictate how to select the jury, what to include in the opening, how to handle each witness on cross, how to decide which witnesses are necessary to call in the defense case, and what to include in and how to deliver the closing argument. The theory of defense might never be shared with the jurors word for word; but the essence of the theory will be delivered through each witness, so long as the attorney remains dedicated and devoted to the theory.

In the end, whether you choose to call them dog cases, or to view them, as I suggest you should, as fields of dreams, such cases are opportunities to build baseball fields in the middle of cornfields in the middle of Iowa. If you build them with a meaningful theory of defense, and if you believe in what you have created, the people will come. They will watch. They will listen. They will believe. "If you build it, they will come . . ." ■



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Leonard T. Jernigan, Jr., attorney and adjunct professor of law, is pleased to announce that the 4th edition of *North Carolina Workers' Compensation - Law and Practice* is now available from Thomson West Publishing (1-800-328-4880).

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**STORYTELLING:
PERSUADING THE JURY TO
ACCEPT YOUR THEORY OF DEFENSE**

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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.

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VOIR DIRE AND JURY SELECTION

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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. Our 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 QUESTIONS

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General Principles and Procedure (pp. 1-2)

Permissible substantive areas of inquiry (pp. 2-6)

Accomplice Liability
Circumstantial Evidence/Lack of Eyewitnesses
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Defenses (i.e., Specific Defenses)
 a) Accident
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Drug-Related Context of Non-Drug Offense
Eyewitness Identification
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Improper Questions or Purposes (pp. 7-11)

Answers to Legal Questions
Confusing/Ambiguous Questions
Inadmissible Evidence
Incorrect Statements of Law
Indoctrination of Jurors
Overbroad and General Questions
Rapport Building
Repetitive Questions
Stake-Out Questions (and examples of both "stake out and non-stake-out questions")
 "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).

Death Penalty Cases (pp. 12-25)

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).

“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).

Each defendant is entitled to full opportunity to face the prospective jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him. State v Thomas, 294 N.C. 105, 115 (1978).

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).

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).

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 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...?"

Circumstantial Evidence/Lack of Eyewitnesses:

Prosecutor informed prospective jurors that *"only the three people charged with the crimes know what happened to the victims."* He stated that *"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)

Co-Defendant/Accomplice/Snitch Witnesses:

Proper questions (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).

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 about 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, 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 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 (not a 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.

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, 263, 475 S.E.2d 202, 210 (1996).

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).

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).

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); see also State v. Cunningham, 333 N.C. 744,

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, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981). Such questions must be asked 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?]

Confusing/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); 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 further repetitious questions. Vinson.

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) “Will the defendant have to prove anything to you before you would be entitled to a verdict of not guilty?” State v. Phillips, 300 NC 678, 268 SE2d 452 (1980).

2) “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).

3) What would your verdict be:

a) if the evidence were evenly balanced?

b) if you had a reasonable doubt about the defendant's guilt?

c) 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).

4) 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).

5) 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).

6) 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).

7) 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).

8) 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).

9) 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), 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).

10) 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?, or*

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).

11) Improper “Hold-out” Juror Questions: 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?”*

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).

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.”* He stated that *“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?*

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 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 an 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).

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.” Voir dire must be available “to lay bare the foundation” of a challenge for cause against a prospective juror.

Morgan v Illinois, 504 U.S. 719, 729, 733 (1992)

We deal here with petitioner's ability to exercise intelligently his complimentary challenge for cause against those biased persons on the venire who as jurors would unwaveringly impose death after a finding of guilt. 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 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). [Nice quote of the above general principle but the Court 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.]

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 SE2d at 907-08 (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” (1) that they would “automatically vote against the death penalty” no matter what the facts of the case were, or (2) that “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 prospective jurors 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.

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 would 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 N.C. Supreme Court has upheld 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 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 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, 430 SE2d at 908-09; 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.]

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 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?

In 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.

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 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)

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?; and

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) Examples of improper questions that were **argumentative, incomplete statement of the law, and “stake-outs”** are found in Simpson, 462 SE2d at 203-04 (Although “some of the questions” listed on pp. 203-04 were proper under Morgan and Conner, the Court found it harmless error.)

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.

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). “Morgan questions” can be divided into 5 categories: 1) **abstract questions**, i.e., would a juror always impose death without consideration of the specific facts, 2) **defendant’s status questions** do not raise facts about the alleged crime but they address the defendant’s status separate and apart from the crime such as race, 3) **case categorization questions** ask jurors about their ability to consider life or death for a particular category of capital case such as murder-for-hire, rape-murder, or felony-murder, 4) **case-specific questions**, and 5) **stake-out questions** seek to ask jurors how they would precommit to a decision under certain facts. 366 F.Supp. 2d at 834-844.

The court in Johnson decided that, while the Morgan decision approved of the abstract question “...would you automatically vote to impose the death penalty no matter what the facts are?,” the Supreme Court 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 since they provide the parties with an adequate opportunity to question jurors and secure a fair and impartial jury. 366 F.Supp. 2d at 845-846. The Johnson court speculated that 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:

"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.

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)

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)).

Possible Introductory Question for Mitigation:

“Can you imagine a set of circumstances in which...your personal beliefs [about __?] conflict with the law? In that situation, what would you do?”

The Supreme Court had the following to say about the above question and 2 others originally asked by a prosecutor: 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)

See, Simpson, 341 N.C. 316, 462 S.E.2d 191, 205 (1995) for list of improper questions about whether jurors could consider certain aggravating and mitigating circumstances due to form or staking out. But some of the questions were proper, i.e., *Whether any prospective juror had a latent bias against any type of evidence which the defendant proposed to present in mitigation ?* 462 S.E.2d at 205.

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.

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).

Course of Conduct Aggravator:

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 (and 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.

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?]:

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):

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)

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 irrelevant 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)

Life Sentence:

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)

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 Robinson, 339 N.C. 263 (1994) (using an example from State v Skipper, 337 N.C. 1, 23 (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 ?; and*

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

Murder During Felony Aggravator:

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:

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).

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). This right of inquiry does not extend to all aspects of the jurors' private lives or of their religious beliefs. In State v. Laws, 325 N.C. 81, 109, 381 S.E.2d 609, 625 (1989).

Questions about jurors' "church affiliations and the beliefs espoused by others [about the death penalty] representing their churches" fell outside of appropriate questions regarding "the specific jurors' moral or religious views" [of capital punishment]. State v. Anderson, 350 N.C. 152, 171-172, 513 S.E.2d 296, 308 (1999). (See, State v. Fletcher, 354 N.C. 455, 467, 555 S.E.2d 534, 542 (2001), where defense counsel was allowed to inquire into a juror's religious affiliation and his activities with a Bible distributing group.)

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.*"

Sympathy for the Defendant [or the Victim?]:

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

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.

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Jury Selection: Challenges for Cause

(7-11-10)

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

Jury Selection (or Jury De-selection)

(6-29-11)

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

Three (3) Rules for the Courtroom

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

A Template For Telling The Story At Trial: Who To Call, What To Introduce

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1. Write out your theory of defense paragraph
2. Create a separate chapter for every point in your theory
3. Under each chapter, list the facts you need to prove to establish that chapter
4. Under each fact, list the witnesses who can testify to that fact
5. Under each witness make a list of:
 - a. The source of the witness's information
 - b. The anecdotes or personal observations the witness can testify to that establish that fact or facts

The following is an example of how to do this in a hypothetical child sex case:

(1) Theory of Defense

Bob was granted a divorce and full custody of his daughter on the grounds of his wife's adultery and on the grounds that he had been the sole caregiver for the child during the marriage. The enraged and vindictive ex-wife swore she would "do anything" to get her child back. Using threats, lies, and promises, she tricked their seven year old daughter into falsely accusing Bob of sexually touching her. When questioned by teachers, police, and social workers, the girl changed her story five times and ultimately admitted that she made it all up to please her mother.

(2) Chapter One: The Divorce Decree – Adultery And Full Custody

(3) Facts Needed To Establish The Divorce Decree:

- a. The divorce is final
- b. It was on grounds of her adultery

- c. She contested it
- d. Bob won
- e. Bob was given full custody

(4) Witnesses Who Can Establish These Facts

- a. The divorce is final
 - I. A certified copy of the decree
 - ii. Bob's testimony
- b. It was on grounds of her adultery
 - I. A certified copy of the decree
 - ii. Bob's testimony
 - iii. The testimony of anyone else who knew of the adultery
 - iv. Cross-examination of the wife
- c. Bob was the sole caregiver for the child during the marriage
 - I. Bob's testimony
 - ii. The testimony of any family members, neighbors, etc., who knew the family and had seen Bob taking care of the child or had seen the wife neglecting the child.
 - iii. Any social workers, etc., who visited and evaluated the family during the divorce proceedings
 - iv. Cross-examination of the wife
- c. She contested it
 - I. A certified copy of the decree
 - ii. Bob's testimony
 - iii. Cross-examination of the wife
- d. Bob won
 - I. A certified copy of the decree
 - ii. Bob's testimony
 - iii. Cross-examination of the wife
- e. Bob was given full custody
 - I. A certified copy of the decree
 - ii. Bob's testimony
 - iii. Cross-examination of the wife

(5) Source of the Witnesses' Information

- a. The certified copy of the decree – self authenticating

- b. Bob’s testimony – his personal observations
- c. Neighbors, relatives, teachers, social workers, etc. – personal observations, official visits.

(5a) Artifacts, Anecdotes, etc of the Witnesses

- a. Photos
 - b. Recordings of interviews
 - c. Personal anecdotes of the witnesses about interactions they have seen between Bob, his daughter and his wife
-

(2A) Chapter Two: The Wife Swore She “Would Do Anything” To Get Her Child Back

(3A) Facts Needed To Establish This:

- a. She said it
- b. The date, time and place she said it

(4A) Witnesses Needed To Establish This:

Etc. . . .

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IMPROVE YOUR OPENING STATEMENTS

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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"

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: "**Proper Preparation Prevents Piss Poor Performance!**" (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 reinforce 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 This 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 this witness 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 questions**

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 Your Witness:**

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 its **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 than "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 this 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 sometimes 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 is May 2, 1993 at 2 a.m. in Red Alley. What are 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 for 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 far 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 close 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 THE gun?" versus "Did you see A 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 you saw, you 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 jurors 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 Guastaferrro, 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.

CROSS-EXAMINATION SKILLS

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CROSS-EXAMINATION PURPOSES

Cross-examination is the process of questioning an adverse party or witness. Cross-examination questions should be limited to those which reveal information necessary to support statements made in the closing argument. Cross-examination usually consists of narrow, leading questions calling for "yes" or "no" or specific answers. There are exceptions to this generalization which are most likely to occur during supportive cross-examination. Careful consideration must be given, however, before open-ended questions are asked on cross-examination.

Cross-examination serves two primary purposes:

Destructive Cross. Cross-examination can be used to discredit the testifying witness or another witness. This may be accomplished in several ways including attacking the credibility of the witness or testimony. Most of the questions asked on cross-examination will be designed to reduce the credibility or persuasive value of the opposition's evidence.

Supportive Cross. Cross-examination can be used to bolster evidence that supports the cross-examiner's theory of the case. Cross-examination may be used to independently develop favorable aspects of the case not developed on direct examination.

PREPARATION AND ORGANIZATION

A. Background. Full preparation, including knowledge of the facts, evidence, law opponent, and witness, will facilitate cross-examination. All available discovery and investigation techniques should be used to learn everything there is to know about the case.

B. Anticipation. Anticipation of the opponent's side of the case is essential. Considerations include what all the witnesses will testify to, how the other side will try the case,

how both sides of the case can be attacked, and what evidence can be kept out under the rules.

C. Scope of Cross-Examination. The scope of cross-examination is limited to questions involving the subject matter of the direct examination or the credibility of a witness. The outside limits of cross-examination fall within the discretion of the trial judge.

If an area of inquiry extends beyond the scope of direct and does not involve credibility, the cross-examiner has at least two options. The attorney can request the judge to permit a broader inquiry, or the attorney can call the witness to testify as an adverse or hostile witness during the presentation of the case in chief or during rebuttal.

D. Credibility. Factors involved in evaluating and attacking the credibility of a witness include bias, interest, association with the other side, motive, experience, accuracy, memory, demeanor, candor, style, manner of speaking, background, and intelligence. See Section 815.

The following areas should be considered when weighing the credibility of the testimony:

1. Is the testimony consistent with common sense?
2. Is the testimony consistent within itself?
3. Is the testimony consistent with other testimony presented in the case?
4. Is the testimony consistent with the established facts of the case?

E. Should there be a Cross-Examination? The most important decision in cross-examination is whether to cross-examine. The following should be weighed in making that determination:

1. Has the witness hurt the case?
2. Is the witness important to the other side?
3. Will the jury expect cross-examination?
4. Will it affect the case if no cross-examination is done?
5. Was the witness credible?
6. Did the witness leave something out on direct examination that might get in if there is cross-examination? Was the omission set up as a trap for the inexperienced cross-examiner?

7. Will cross-examination unavoidably bring out information that is harmful to the case?
8. Are questions being asked only for the sake of questions?
9. Does the witness know more than the attorney does about the case?
10. Will the witness be very difficult to control?
11. Has the witness been deposed or given statements?

F. Preparing Written Questions in Advance. Cross-examination is most effective when questions are prepared in advance. Most prepared questions will not be significantly altered during the trial, but an attorney must retain flexibility to adapt to new material or inconsistencies as they arise.

G. Structure. The areas selected for cross should be structured in a way that clearly shows their purpose and helps the fact-finder remember that point. The attorney should begin and end the cross with strong points.

H. Attention. Close attention to the witnesses on direct examination may reveal signs of deception, lack of assurance, or bluffing that can be explored on cross-examination. The attention shown by the jury or judge may also be a clue.

PRESENTATION AND DELIVERY

A. Confidence. A confident attitude will assist in making the cross-examination effective and persuasive.

B. Not Repeating Direct Examination. Generally, repetition of the direct examination only emphasizes the opponent's case. Repetition of any part of the direct that is supportive of the cross-examiner's case, however, may be effective and justify the use of an open-ended question.

C. Leading the Witness. Questions that suggest or contain the answer should be asked on cross. Questions that require "yes," "no," or short anticipated answers help control the witness, so the testimony develops as anticipated. The questions "why" and questions requiring explanations should be avoided because they call for uncontrolled open-ended answers.

D. Simple, Short Questions. Short, straightforward questions in simple, understandable language are most effective. Broad or

confused questions create problems of understanding for witnesses, attorneys, the jury, and the judge.

E. Factual Questions. Questions that seek an opinion or conclusory response may allow the witness to balk or explain an answer. Questions which include fact words and accurate information force the witness to admit the accuracy of the question.

F. Controlling the Witness. The most effective way to control a witness is to ask short factual questions. Some witnesses must be politely directed to respond; some witnesses may require the intervention and control of the judge.

G. Maintaining Composure. An attorney who displays a temper or argues with a witness may irritate the court and the jury, causing them to side with the witness or the opponent and may draw objections.

H. Adopting Appropriate Approach. Some witnesses may require righteous indignation, others may be attacked, but most need to be carefully and courteously led. A cross-examiner can be very effective by being politely assertive and persistent without having to attack a witness.

I. Stopping When Finished. When the planned questions are asked and the desired information is obtained, the attorney should stop. The case may be harmed more by asking too many questions than by not asking enough.

J. Good Faith Basis. An attorney cannot ask a question on cross unless the attorney has proof of the underlying facts. An attorney cannot fabricate innuendos or inferences on cross-examination. The attorney must have a good faith basis which includes some proof of such facts.

K. Witnesses Requiring Special Consideration. Certain witnesses require special consideration in both the formulation and delivery of questions. These witnesses include children, relatives, spouses, experienced witnesses, investigators, experts, the aged, the handicapped, and those with communication problems. Outside resources may be used to assist in developing tactics to deal with special witnesses.

EXPERT WITNESSES

Areas for cross-examination of experts parallel areas for lay witnesses and permit additional areas of inquiry regarding:

1. Their fees
2. The number of times they have testified before
3. Whether they routinely testify for the plaintiff or defendant
4. Their failure to conduct all possible tests
5. The biased source of their information
6. Their lack of information
7. The existence of other possible causes or opinions
8. The use of a treatise to impeach

The cross-examiner must develop absolute mastery of the expert's field before examining the expert in a specific area. A well-constructed concise hypothetical question may be effective if it elicits an opinion contrary to the testimony on direct examination.

IMPEACHMENT

A. Factors. Impeachment discredits the witness or the testimony. To evaluate whether impeachment is appropriate, the following should be considered:

1. How unfavorable is the testimony and how much did it hurt the case?
2. Will impeachment be successful?
3. Is there a sound basis for impeachment and can it be accomplished?
4. Is the impeachment material relevant to the facts or the credibility of the witness?
5. Is the impeachment material within the court's discretion and not too remote or collateral?

B. Sources of Impeachment. The credibility of a witness may be attacked in any number of ways. Many witnesses, however, will not have obvious or apparent weaknesses in their testimony. The following factors represent the more common and frequent matters employed to reduce the credibility of a witness.

1. *Misunderstanding of Oath.* The witness may not understand the oath or know the difference between telling the truth and telling a lie. This situation rarely arises.
2. *Lack of Perception.* The witness may not have actually observed the event, or the witness may have perceived something through the senses (sight, taste, hearing, smell or touch). It can be shown that conditions were not favorable to that perception.
3. *Lack of Memory.* The witness may not have a sound, independent memory of what was observed.
4. *Lack of Communication.* The witness may be unable to adequately communicate what was perceived.
5. *Bias, Prejudice, or Interest.* The witness may have a personal, financial, philosophical, or emotional stake in the trial.
6. *Prior Criminal Record.* The witness may have a prior criminal conviction which may be admissible. See Fed.R.Evid. 609. Local law and practice may limit the use of the information.
7. *Prior Bad Acts.* The testimony concerning a witness' prior bad conduct may sometimes be used to impeach a witness if it is probative of untruthfulness.
8. *Character Evidence.* A witness may be impeached by a character witness who is familiar with the reputation of the witness for truth and veracity or who has an opinion regarding the truthfulness of the witness. See Fed. R. Evid. 608(a).
9. *Prior Inconsistent Statements or Omissions.* The witness may have made former contradictory or inconsistent oral statements or may have omitted some facts during previous testimony or in a prior statement. If the witness denies these prior statements, a copy of the statement or another witness may be needed to prove them.

C. Extrinsic Evidence and Collateral Matters. An attorney may be able to introduce extrinsic evidence if a witness denies a cross-examination impeachment question. Extrinsic evidence is evidence introduced through a source other than the witness, such as another witness or document. Whether extrinsic evidence is admissible depends on whether the facts are "collateral" or "non-collateral" to the case. A matter is collateral and not admissible if it has no connection to the case. A matter is non-collateral and admissible if it has a relationship to the case.

D. Use of Inconsistent Statements for Impeachment. The statements must be inconsistent or contradictory to be used. The document referred to must be available to prove the

inconsistency. Federal Rule of Evidence 613 provides the option of not showing the prior statement to the witness, but this option may be altered by tactical considerations or by local rule or practice.

The introduction of prior inconsistent statements or omissions usually include three phases:

1. The cross-examiner commits the witness to the direct examination testimony. This may be done by having the witness repeat the testimony to reaffirm the evidence.

2. The cross-examiner next leads the witness through a series of questions describing the circumstances and setting of the prior inconsistent statement.

3. The cross-examiner then introduces the prior inconsistency. This may be done in several ways. The attorney may read from the prior statement or have the witness read it.

A fourth possible stage involves the attorney exploring both statements with the witness, but this may provide the witness with a chance to explain the discrepancy.

If the witness admits the prior statement, the impeachment process is concluded. If the witness denies the prior statement, the exhibit should be marked, identified, and offered as evidence. Proper foundation must be laid for its admission.

The opposing lawyer can request that other portions of the prior statement be introduced contemporaneously with the impeaching testimony to prevent a cross-examiner from introducing selective facts out of context. See Fed. R. Evid. 106. On redirect the opposing lawyer will usually have the witness explain or clarify any discrepancy or rehabilitate the witness with a prior consistent statement, if available. See Fed.R.Evid.801(d)(1)(B).

e. Cross-examination of Character Witness. Character witnesses may be impeached like any other witness. They may also be cross-examined regarding their knowledge of specific instances of bad conduct by the person whose character they praised. Some jurisdictions limit the specific acts of areas that are probative of the untruthfulness of the person. See Fed.R.Evid.608(b).

ADDITIONAL CONSIDERATIONS--THE TEN COMMANDMENTS

Irving Younger's Ten Commandments for cross-examination are worth remembering:

1. Be brief
2. Ask short questions and use plain words

3. Never ask anything but a leading question
4. Ask only questions to which you already know the answers
5. Listen to the answer
6. Do not quarrel with the witness
7. Do not permit a witness on cross-examination to simply repeat what the witness said on direct examination
8. Never permit the witness to explain anything
9. Avoid one question too many
10. Save it for summation

These suggestions will not be applicable to all cases and all situations. The cross-examiner who has a legitimate reason for asking a question - whether or not that reason "violates" one of the ten commandments - will conduct an effective cross-examination.

AVOIDING MISTRIALS AND REVERSALS

A. Do Not Harass or Embarrass the Witness. Using accusatory questions to seek answers that would harass or embarrass witnesses, even though true, and which are irrelevant to the issues in the case is unethical. DR 7-106(C)(1),(2); Model Rule 3.4; see also Fed R.Evid.611(b). For example, in a motor vehicle accident case, defense counsel bringing out that the plaintiff's child is illegitimate is unethical.

B. Avoid Innuendoes Based on Untrue Facts. Since the lawyer is allowed to use leading questions during cross-examination, there is a great opportunity for abuse. Questions might be asked which discredit a witness before the witness even answers. This can be accomplished by sneers and innuendoes as well as by asking questions that the lawyer knows cannot be proved by any evidence.

C. Do Not Elicit Irrelevant and Prejudicial Responses. Other questioning may not be harassing or damaging to a particular witness, but may be irrelevant and so prejudicial as to warrant a new trial. For example, in a wrongful death action, it is unethical for the plaintiff's attorney to ask the defendant's expert witness if he didn't say to the plaintiff's attorney, off the record during the deposition, that plaintiff's attorney "had a good case and knew it."

A CHECKLIST OF WINNING CROSS-EXAMINATION CONCEPTS AND TECHNIQUES

by Stephen C. Rench

Most cross-examinations are conducted without real prior thought having been given to what is involved in cross-examination. Far too often a cross-examination consists of a number of unplanned questions without purpose filling in gaps in the prosecutor's case, repetition of direct testimony, and argument with the witness, all having the net effect of hurting rather than helping the cross-examiner's cause.

It is the purpose of this article to assist the cross-examiner in avoiding these difficulties by utilizing a systematic approach to this most challenging art.

I. GENERAL OBSERVATIONS

The only absolute rule in the trial of a case is that everything one does, including in cross-examination, must be done with consideration of the jury's belief in one's integrity and the integrity of one's case.

In this article will appear what might be considered to be rule of cross-examination. They are not to be considered as rules! They are to be considered more as red flags since experience demonstrates that most mistakes in cross-examination are made when these red flags are disregarded. However, there are circumstances when a violation is precisely the proper tactic. If these red flags are regarded not as rules but as presumptions and the reasons for them and the dangers to be avoided are understood, then the attorney can exercise the necessary judgment.

Judgment, not rules, must determine what the cross-examiner does.

Cross-examination is a very difficult art. No reading of this article can begin to make one proficient. It takes a very deep understanding of the considerations involved, experience and an ability to make immediate judgments, and the ability to execute without having time to think. None of this should be discouraging, however, as becoming an excellent examiner will come gradually with study and experience.

The concepts and techniques important to cross-examination are overlapping and not subject to being placed into neat categories or lists. This must be kept in mind while considering the concepts and techniques listed here. It is often a combination which is useful.

It should be noted that some techniques are designed to persuade a witness to answer a question a particular way. These techniques should not be employed except to elicit an answer the examiner believes to be the truth.

Behind the concepts and techniques discussed here is psychology. We deal with what the examiner can do to produce the desired conduct on the part of the witness.

The cross-examiner must have a considerable number of concepts and techniques which are a "part of him" and are "second nature".

It is felt that the attorney is aided in this process by having cross-examination analyzed and a terminology applied to the concepts and techniques which are recurring. This is done in sports and other endeavors and it is hoped that it can be useful in cross-examination as well, thus justifying the approach of this article.

II. PREPARATION IN GENERAL

At least 70% of the effectiveness of cross-examination is determined before the cross-examination begins. Preparation is that important!

A. The Process of Preparation

The trial attorney does not go down a list of things to do and then consider that he is finished because he has gone through the entire list. In a general way, he will go through preparation in this order listed here. However, all of these matters are being considered by the trial attorney simultaneously. Furthermore, some thought emerging during the last phases of planning the individual cross-examination may result in additional investigation or changes in the trial plan. The process never really ends until the closing argument is completed.

B. Background Development

1. General Knowledge

A knowledge of the area covered by the testimony is a first requirement. One cannot cross-examine in a vacuum. If the witness is an identification witness, a knowledge of identification in general is essential. The same applies to psychiatry if the witness is a psychiatrist, or to criminal investigation techniques if one is to cross-examine the investigating detective. It is, of course, not possible to attain expertise in all areas but the more general knowledge one possesses, the most efficient and successful one can expect the cross-examination to be.

2. Specific knowledge

Closer to home is the required knowledge of available approaches to the particular kind of testimony in question and methods of demonstrating weaknesses in that testimony. Criminal defense trial attorneys are sharing approaches as never before.

III. PREPARATION OF THE CASE

Learning everything possible about the individual case is absolutely vital. As that is dealt with elsewhere, we will only briefly discuss certain concepts particularly applicable to cross-examination. First, learn all facts possible. The natural tendency is to investigate only those matters the importance of which is obvious before the trial. This is not sufficient as prosecution witnesses unexpectedly testify at trial to things which could be refuted if the contrary facts were known.

A. Prepare a Trial Notebook

Important to cross-examination are separate pages in this notebook for each witness so that all points for the examination of that witness can be listed as they occur to the attorney.

B. Develop a Trial Plan

A coherent, consistent defense position must be determined prior to trial. Once the defense position is formulated, each individual part of the trial -- voir dire, opening statement, cross-examination, etc., -- is tailored to advance this trial plan.

C. Factual Analysis

As mentioned previously, one must know every fact possible. In addition, thought must be given to what might be termed latent facts -- facts which are not found in statements, etc., but which are available on thought. Much of what the defense relies on is what was not done. The fact that the detective completed three investigatory procedures is fact. The seven others which should have been completed and were not constitute latent facts. Consideration of that which was not done leads to a cross-examination demonstrating inadequacy of investigation.

Thought about motives, reasonableness of actions, etc., will reveal additional latent facts.

D. Relate Cross-Examination to Summation

Important to effective cross-examination is the realization that the cross-examination and summation go hand-in-hand. The most important purpose of cross-examination is to gather material for closing argument. The examiner must know what he intends to say in closing so the necessary supporting material will be gathered.

E. Panning for Gold

To insure that questions asked on cross-examination elicit only favorable or useful responses, much work before trial is required.

A useful concept is "panning for gold". In searching for gold, the prospector used a pan to lift material from the bed of a stream. He would swirl the pan, causing any gold nuggets to sink to the bottom and would then throw away the useless material, keeping only the nuggets. The defense attorney should utilize discovery, preliminary hearings, hearings on motions, witness interview, etc., to find out everything favorable to the defense (the nuggets) to which the witness will testify. The attorney can then ask about that which is favorable and nothing else.

F. Pinning Down the Witness

Once the "nugget" is at hand, it is important to "pin down" the witness. This means having a way of proving the witness stated the favorable thing in case the witness testifies differently on the stand. Written or signed statements, testimony at the preliminary or other hearing, and statements heard by other persons are all useful.

G. Create Inconsistencies

The fact that inconsistencies exist can be used with a telling effect in summation. The attorney needs to use a tough approach if the inconsistency shows calculated change in testimony and a more tolerant approach if the inconsistency merely shows lack of certainty in perception or in memory.

The word "create" is used because that is exactly what can be done at various stages before trial. Before trial, the defense must get the witness to talk often. Recollection of witnesses being as poor as psychology and our experience demonstrate it to be, inconsistencies will result. The attorney should not, however, leave the matter to chance. He should be sure the same subjects are brought up repeatedly as statements cannot be inconsistent unless on the same topic. For example, on preliminary hearing, bring up the items previously covered by the witness in his statement to the police. Bring up the same matters in interviewing the witness. By trial, the attorney will have various inconsistencies ready to be used. The important consideration is to be cognizant of the need to do this during preparatory phases of the case.

At this point, we have learned the facts, have a trial plan, have learned what is favorable to us and have the witnesses pinned down on the favorable material. We are now ready to plan the individual cross-examination.

IV. THE PREPARATION AND CONDUCT OF THE INDIVIDUAL CROSS- EXAMINATION

A number of factors must be kept in mind to insure a planned, disciplined, safe and effective cross-examination.

A. Cross-Examine by Objective -- Advance the Trial Plan

Management experts teach that "management by objective" is essential for achievement. The same applies to cross- examination. Many rambling and haphazard cross-examinations are so because the examiner is "just asking questions" without any apparent goal or objective in mind. If the examiner were stopped before the cross-examination and asked his goal or objective, he should have an immediate and clear answer. The overriding objective must be to advance the trial plan by getting favorable material to be used in the closing argument. If a proposed question does not advance the trial plan, it is unlikely to serve any useful purpose. Furthermore, by knowing the objective of a particular cross-examination the specific questions to be asked are apparent and it all falls into place.

B. Tailor-make Each Cross-Examination

The natural tendency of the trial attorney is to use the same manner and same technique for every cross-examination he conducts. This is analogous to the surgeon who uses the saw for everything he does. The examiner must develop a repertoire of devices, techniques, etc., and choose the appropriate instrument for the specific situation. Having his objective firmly in mind, the attorney chooses the proper tactic to elicit the testimony which satisfies that objective.

C. Make the Examination Psychologically Sound

The witness testifying is engaged in human behavior. Witnesses react differently. One witness if pushed may back down while another witness if pushed may remain firm and thus strengthen his testimony.

The examiner must choose the techniques to be used, the wording of the questions, the sequence of the questions, etc., which will cause the human behavior (the testimony) the attorney desires.

D. Get Favorable Facts

The term "favorable facts" refers to those facts which support the constructive position taken by the defense as opposed to impeachment. There are facts, for example, which would support a conclusion of

misidentification, if that were the defense. Obtaining the factorable facts from the opposing witness is often ignored in the zeal to destroy him by impeachment. Instead it should be first priority.

E. Be Conservative

Cross-examination is dangerous! It often happens in our courts that the defendant is convicted by evidence elicited by the defense attorney -- evidence which fills in the gaps in the prosecutor's case or is extremely prejudicial to the defense. The impact is several times as great when the harmful evidence comes on cross-examination.

Several of the succeeding points are designed to reduce mistakes of commission in cross-examination to a minimum. Also the suggestions in the section on Preparation will make gambling in cross-examining far less necessary.

F. Consider No Cross-Examination

If there are no favorable facts to be elicited, the presumption should be in favor of no cross-examination. Saying "No cross-examination, your Honor," effectively communicates to the jury that the testimony was not important.

If a witness is "solid," develop, if possible, a defense position which recognizes the testimony as true. Aim the defense attack against a weaker point of the prosecution so no cross-examination is needed of the "solid" witness.

G. Don't Question Without Purpose

It seems the natural tendency is to feel that it doesn't hurt to ask and "something might turn up." Occasionally something does turn up but the percentages are substantially against the good outweighing the bad. The attorney should be in a really desperate situation before he resorts to an "all-over-the-place", vigorous cross-examination.

H. Don't Permit Repetition of Direct Testimony

Once again the natural tendency results in emphasizing the prosecution's evidence. The attorney has just taken notes of the direct examination and uses those notes for the cross-examination. He starts out by saying, "Mr. Witness, you just testified that ----, is that correct?" and proceeds through the entire direct testimony cementing that testimony in the minds of the jurors.

I. Don't Fight Losing Battles

For various reasons, attorney ask questions knowing full well that the answers are likely to be harmful to the case. Often he does this because he wishes the witness to make extensive admission when such

wishes are not realistic. It is better to know what admission are possible and get just those than to try for too much and elicit denials. Furthermore, the attorney often feels that all testimony must be cross-examined or he is not doing his job. This results in emphasizing the damaging testimony and greatly increases the harmful effects from it.

It is essential to note here that the cross-examination which fails doesn't just accomplish nothing. It is harmful. It has the effect of making the testimony like cold hard steel because "it stood up under cross-examination." Testimony not cross-examined may attract less attention, may not be believed or may be considered of lesser importance, thus having less negative impact.

J. Don't Question Without Knowing Answer

This oft-repeated admonition is still violated in the vain hope that the answer will be something beneficial. It is a gamble which will likely produce results devastating to the examiner's case.

K. Don't Argue with the Witness

A large percentage of cross-examinations consists of an attorney arguing with the witness in an attempt to get the witness to agree with the attorney. Any dispassionate look convinces that this attempt is based on wishful thinking. The witness sticks to his previous conclusion and the attorney has fought a losing battle.

L. Deal with Facts, not Conclusions

A witness is highly unlikely to change his testimony and agree with the attorney on matters of conclusion. One can more easily get agreement with facts from which the attorney can reach his own conclusion on summation.

M. Don't Ask the One Question Too Many

The natural tendency when one has scored a point is to attempt to emphasize it at that time. It is important in cross-examination to know whether the witness is objective or wants the defense to lose. If the witness wants the defense to lose, there is great likelihood that the additional question will have given the witness time to recover and he will then explain or claim misunderstanding. The point is then lost.

To avoid this difficulty with this type of witness, as soon as the witness has provided that which is needed for closing argument, the attorney should stop on that point and leave the emphasis for summation.

N. Control the Witness

The examiner needs to maintain control of the witness particularly when the witness has prejudicial information and has a tendency to volunteer or wishes the defense to lose. A number of methods of control are available:

1. A training session before reaching the critical point. Utilize any possible in camera hearing or the preliminary cross- examination to teach the witness not to volunteer.
2. Use short, plain, unambiguous questions so as to give the witness no reasonable excuse for volunteering.
3. Ask only one new fact per question.
4. Use leading questions which legitimately call for only a "yes" or "no" answer.
5. Ask nothing which provides an excuse to "explain".
6. Utilize the aid of the court by requesting instruction to the witness to only answer the question.
7. Make a friend of the witness before the testimony. This makes him less likely to want to "get" the defense.

All of these methods must be used in a way which avoids the impression of withholding truth from the jury.

O. Decide the Manner of Cross-Examination

Thought needs to be given to what manner will best serve the cross-examiner. One must avoid the attorney's natural tendency to conduct every cross-examination in the same manner.

While there are others, the two basic ways are the friendly approach and an adversary approach. A combination in which the examiner elicits what he can with a friendly manner and then suddenly shifts to a firmer manner to disconcert the witness may be effective.

Another is the fumbling approach which leads the witness to believe that the attorney does not know critical information and therefore to decide that he, the witness, can get by with false statements.

P. Put the Cross-Examination in the Most Effective Sequence.

There is a most effective sequence for each cross-examination. The first point should ordinarily be an

effective one. One point may be used to "set up" another. If the witness is trying to outguess the examiner so that the witness can answer opposite to that which the examiner wants, the witness may be misled by the sequence.

Q. End on a High Note

Above all, the examination must end on a high note. The natural tendency is to cross-examine in the same order as the direct examination or to take up the strongest point first, the next strongest second, and so on ending with the weakest point of all.

To be sure of ending on a high note, select the ending point prior to examination and list it at the bottom of the cross-examination notes with space to fill in other notes above.

R. Word the Question to Achieve the Purpose

How one words questions will often determine what answers will be elicited. All witnesses wish their testimony to be reasonable. Therefore, if the question is worded with the implication that the only reasonable answer is the one the examiner expects, he will probably receive that answer. For example, if the question is worded, "Mrs. Jones, I suppose it's only natural then that you expected to see the robber among the pictures shown you?", one is likely to receive an affirmative answer.

S. Maximize the Impact

Be brief. Emphasis is far greater if not too much is attempted. Favorable responses may be forgotten and the impact is lessened.

Consider how to make your point or points most dramatically.

Use demonstrative evidence.

Ask leading questions only and only those questions to which there will be favorable answers. This list of questions has impact because it comes across as a "list of admissions" -- a useful concept.

Another effective impact device is "stretching out a point". Use several questions instead of one to make a point.

T. Sustain the Momentum

A cross-examination must move and "live" if it to be effective. Trial work must utilize the principles of show business in many respects. The examiner must know his subject so well that he does not have to study before each question and can "keep it moving".

Once again, short leading questions sustain momentum. Any response unfavorable to the examiner stops momentum and must be avoided. If, however, such an answer is given, the examiner must minimize the damage by completely ignoring what has just been said and immediately proceeding to the next question as though the response were not significant.

V. TACTICS FOR CROSS-EXAMINATION

Planning and conducting the individual cross-examination also requires careful selection of tactics. The choice of tactic depends on the objective to be attained, the evidentiary situation, and the personality of the witness. The choice of tactic may determine success or failure.

To be useful, the tactic must be well understood along with the psychology upon which it is based. It is hoped that the following discussion will be helpful in this understanding.

A. Short, Plain, Leading Questions

Witness situation: The witness would like the examiner to lose and will be in control if allowed.

Execution: Momentum, impact and control of the witness is gained by questions which are short (asking as to only one additional fact per question), plain (so unambiguous that the witness cannot reasonably answer other than yes or no), leading (the examiner testifies with the witness reduced to saying "yes" or "no"). Make the examination appear to be a series of damaging statements by the examiner to which the witness must admit the truth.

This is the basic technique which must be mastered.

B. Stretch-out Technique

Witness situation: The witness will or must admit a point for the defense and this point needs emphasis during cross- examination.

Execution: Take the point which could be made with one question (e.g., that the rape victim told no one around about the attack) and stretch the point into a number of questions bringing admissions which all make the same point with increasing emphasis (e.g., question as to each person or group she saw to which she did not complain).

C. "Things Not Done" Cross-Examination

Witness situation: Witness is an investigating detective, police officer, or expert.

Execution: Make a list of scientific tests, investigative leads, etc., that should have been done or followed up in proper investigation that the jury rightfully expects. As to the "things not done", go right down the list getting admission after admission of the failures to do a proper job.

D. Back-Down

Witness Situation: The witness is not confident of his testimony and his personality is such that if pushed, he will back down.

Execution: "Set up" the witness by confronting him with facts as to which he is wrong (inconsistencies, etc.), then go to the crucial point and push hard for an admission that this fact was not as the witness has said, that the witness has only assumed, that the witness has only heard, that the witness does not remember, or that the witness does not really know.

It should be noted that this tactic is attempted too often. The mistake is that it is employed with the witness who does not have a personality such that if pushed he will back down.

E. Minimalization

Witness situation: The heart of the testimony is true, but part of it is exaggerated, inaccurate, or otherwise subject to attack.

Execution: Decrease the significance of the evidence and reduce its effect by procuring admissions as to the exaggerations, inaccuracies, etc., rather than attacking the heart of the testimony.

F. Collateral Cross-Examination

Witness situation: A witness or two or more witnesses are expected to be prepared as to the central thrust of their testimony but are not likely to be prepared as to matters on the fringe.

Execution: Ask questions as to the fringe material, developing contradictions and hazy recollections. This may work well on police officers who prepare by reading their offense reports just before testifying.

G. Wedge (No Proof)

Witness situation: The witness probably has knowledge favorable to the defense but is reluctant and the examiner has little provable knowledge of the matter.

Execution: The little information available is stretched into several questions with a knowing attitude and the questions so worded as to lead the witness to believe the examiner knows all about the subject. A witness who believes the examiner already knows is likely to tell the whole story.

H. Wedge (With Proof)

Witness situation: The witness has knowledge favorable to the defense but is reluctant. The examiner has a document or other proof of the information desired.

Execution: Let the witness know of the proof and the witness will realize there is no point in withholding the information.

I. Trap

Witness situation: The witness is willing to lie or is lying and the examiner has the ammunition with which to demolish his testimony.

Execution: Get the witness thoroughly committed to the untruthful position and destroy him then or by later evidence. To get the witness committed:

1. Keep the objective hidden.
2. Use the fumbling approach -- pretend not to know.
3. Get the witness to take the untruthful position several times in different ways.
4. In general, go from the very general to the specific, camouflaging the objective by interspersing questions on other subjects.

J. Cross-Examination as to Probabilities

The witness is led into taking positions or making statements which the jury will regard as unreasonable or which can be demonstrated to be unreasonable. Examples of this technique are found in books containing cross-examination by F. Lee Bailey.

K. Impression Cross-Examination

Witness situation: There is no particular point with which to destroy the witness, but the total picture gives an impression favorable to the defense. Examples are that the witness does not remember, the

witness is making up a story as he goes along, there was a frame-up, etc.

Execution: There is no magic formula. Create the examination so that every question adds to the impression the jury sees as it unfolds.

L. Demeanor Cross-Examination

Witness situation: The witness is subject to showing characteristics which affect credibility.

Execution: Get into areas which will cause the witness to show hostility, overzealousness in convicting the defendant, prejudice, evasiveness, etc., to the point where it is clear to the jury.

M. Channeling

Witness situation: The witness is reluctant to testify favorably to the defense and the only thing the examiner has is reasonableness of the way he thinks the event occurred and the unreasonableness of the witness's story.

Execution: Ask each question in a way such that the only reasonable answer is the one desired and believed to be true. The witness does not want his testimony to appear unreasonable or illogical.

N. Shading

Witness situation: The witness testifies to a relative matter or any matter subject to interpretation.

Execution: As no basis exists for the witness's interpretation as opposed to one more favorable to the defense, the witness, if pushed, may agree with the examiner, e.g., the time involved could have been one minute rather than five minutes.

O. Opposing Fallacies in Logic

No attempt can be made here to discuss all the possible fallacies and how to expose them. Suffice it to say that such knowledge is an important part of the cross-examiner's repertoire.

P. Dilemma

Look for situations as to which the witnesses can take only certain positions, both or all of which are helpful to the defense.

Q. Fake

Witness situation: The witness attempts to adapt his testimony so as to testify contrary to that which he feels the examiner desires.

Execution: Keep the objective hidden and mislead the witness as to the facts wanted. This is often done by changing the sequence from that of normal conversation.

R. Undermining

Witness situation: The witness gives a firm opinion or conclusion, such as, "That is the man."

Execution: Do not try to get the witness to change his opinion or conclusion if this is unlikely (and it is seldom likely). Instead, bring out the underlying facts which show the lack of basis for the conclusion or that the conclusion is wrong. The opposite conclusion is then argued on summation supported by the undermining facts.

The technique is highly useful in identification cases. Undermine by getting evidence of suggestiveness, description given to police differing from that of defendant, etc.

S. Forging "I Don't Know"

Witness situation: Witnesses have a tendency to fill in details when they do not really remember and the proper answer would be "I don't know" or "I don't remember".

Execution: Give the witness tough questions and be firm. Then when the witness says, "I don't know," let him off the hook. Be considerate and say, "I understand, it was a long time ago," etc., to essentially teach the witness that the easy "out" is to say, "I don't know".

T. Tiptoeing Through the Minefields

Witness situation: The examiner does not know what answer the witness will give.

Execution: The examiner chooses as the first question in the area one which probably gains little ground but is fairly sure to gain at least some admission. The next question advances ever so slightly, and so on with the next, etc. If at any time the witness disagrees, use a backup question which will get the witness to agree the last favorable answer he gave and stop. This avoids the last question on the subject being a loss.

VI. METHODS OF IMPEACHMENT

Impeachment is an important part of cross-examination and the following may be shown as to any witness and must be part of any checklist. They can be shown in any appropriate way.

A. Bias, prejudice, or interest.

B. Convictions.

C. Bad acts.

D. "Setting" of the witness.

One may place the witness in his proper setting identifying him with his environment. *Alford v. United States*, 282 U.S. 687, quoted and relied on in *Smith v. Illinois*, 390 U.S. 129, 19 L. Ed. 2d 956, 88 S. Ct. 748 (1968)

E. Inconsistent statements.

F. Inadequate perception.

G. The combination of inadequate perception and bad memory makes it so that testimony in court is highly inaccurate providing great opportunity on cross-examination.

H. Bad memory.

I. Contradiction by other evidence best of all by physical evidence.

CONCLUSION

The concepts and techniques of cross-examination discussed here are, it is hoped, enough to show how much is involved in this very challenging and useful skill. It is sincerely desired that it will interest the reader in attempting its mastery. The future development of cross-examination is for each trial attorney as we make use of our constantly expanding knowledge of human nature to find better ways of arriving at the truth.

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Sponsored by the UNC School of Government and
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Impeachment

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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

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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 what you told them but why you told them.* Don't just set out the facts and fail to articulate the significance of those facts to your theory of the case. The close of each block of your argument is often an ideal place to repeat your *case theme* if you can make it fit smoothly.

PREPARATION TIP:

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

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.

North Carolina Defender Trial School
Sponsored by the UNC School of Government and
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**

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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*) 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, 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.

Creating a Theory of Defense

A theory of defense is a short written summary of the factual, emotional, and legal reasons why the jury (or judge) should return a favorable verdict. It gets at the essence of your client's story of innocence, reduced culpability, or unfairness; provides a roadmap for you for all phases of trial; and resolves problems or questions that the jury (or judge) may have about returning the verdict you want.

Steps in creating a theory of defense

Pick your genre

1. It never happened (mistake, setup)
2. It happened, but I didn't do it (mistaken id, alibi, setup, etc.)
3. It happened, I did it, but it wasn't a crime (self-defense, accident, elements lacking)
4. It happened, I did it, it was a crime, but it wasn't this crime (lesser offense)
5. It happened, I did it, it was the crime charged, but I'm not responsible (insanity)
6. It happened, I did it, it was the crime charged, I'm responsible, so what? (jury nullification)

Identify your three best facts and three worst facts

- Optional step to test the viability of your choice of genre

Come up with a headline

- Barstool or tabloid headline method

Write a theory paragraph

- Use your headline as your opening sentence
- Write three or four sentences describing the essential factual, emotional, and legal reasons why the jury (or judge) should return a verdict in your favor
- Conclude with a sentence describing the conclusion the jury (or judge) should reach

Develop recurring themes

- Come up with catch phrases or evocative language as a shorthand way to highlight the key themes in your theory of defense and move your audience

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.).

Who to Call, What to Introduce: A Template For Telling Your Story At Trial

1. Write out your theory of defense paragraph
2. Create a separate chapter for every point in your theory
3. Under each chapter, list the facts you need to prove to establish that chapter
4. Under each fact, list the witnesses who can testify to that fact
5. Under each witness make a list of:
 - a. The source of the witness's information
 - b. The anecdotes or personal observations the witness can testify to that establish that fact or facts

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

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

DO NOT THANK THE JURY FOR THEIR TIME

DO NOT SAY “MAY IT PLEASE THE COURT” (if you wanted to please the court you would not have had a trial)

VISIT WITH YOUR JURY, DO NOT LECTURE THEM

IF YOU COME OFF AS ARROGANT OR A TRICKSTER, YOU WILL LOSE NO MATTER HOW SOLID YOUR CASE IS

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

ASSERT YOUR CLIENT’S INNOCENCE

STATE YOUR THEME ONCE EARLY AND ONCE LATE

CONSIDER STATING YOUR THEORY

DO NOT DEVIATE FROM YOUR GENRE NO MATTER HOW APPEALING

WHAT IS NOT AT ISSUE

WHAT IS AT ISSUE

HUMANIZE YOUR CLIENT

WORK ON DELIVERING TWO STORIES

- A story with a moral

- The story of innocence in this case

MARSHAL THE FACTS

CONSIDER REFERENCE TO THE INSTRUCTIONS

BE QUICK AND SMART ENOUGH TO RESPOND TO A FOOLISH ARGUMENT OR A PERSUASIVE ARGUMENT OFFERED BY THE PROSECUTOR IN THEIR FIRST FINAL ARGUMENT

POSE A QUESTION FOR THE PROSECUTOR THAT HE/SHE CANNOT POSSIBLY ANSWER