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The Criminal Defense Trial From Start to Finish

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THE CRIMINAL TRIAL FROM START TO FINISH IN NORTH CAROLINA: THE DEFENSE

I. GETTING STARTED by Charles E. Mellies *4*

1. A. Preparing for Voir Dire **4**
A. "Best" and "Worst" Juror Profiles 4
B. Community Standards and Local Attitudes 4
C. Preparation and Practice for Voir Dire 5

2. Conducting Voir Dire **6**
A. Purpose of Voir Dire 6
B. Questioning the Jury Panel 6
C. Proper versus Improper Questions 8

3. Practical Tips **9**

4. Evaluating Potential Jurors **9**
B. Peremptory Challenges 10
C. Challenges for Cause 10

II. EFFECTIVE OPENING STATEMENTS by Stephanie Goldsborough *12*

1. Developing Your Defense Theory and Case Theme **12**
A. Organization & Presentation 12
B. Defense Theory 13
C. Case Theme 13

2. Simplifying the Theme to Enhance Juror Understanding ("If It Doesn't Fit, You Must Acquit!") **14**

3. Structure: How to Use the Opening Statement as a Roadmap for the Jury (The 1,2,3's and A,B,C's) **15**

4. Use of Exhibits (How to Deal with the Snoozing Juror After the Lunch Break) **15**

5. Presentation Pointers (Some Oldies but Goodies from A to Z or, Mistakes I've Made Along the Way) **16**

III. Cross by Clarke Dummit *18*

1. Cross can be the best opportunity **18**
A. Begin with the end in Mind 18
B. The Trained Witness 18
C. “Guerilla Warfare” not kamikaze 20
D. SELECTING A PURPOSE 20
E. Goals for Cross 22
F. Preparation 25
G. STYLISTIC SUGGESTIONS: 29
H. Basics and Practical Tips Checklist 30

2. Expert Witnesses **31**
A. Direct Examination 31

3. Handling Objections During Direct and Cross-Examination **35**
A. Should you ask objectionable questions? 35
B. Don't lead your own witness. 35
C. Use a mantra that repeats accepted facts. 35
D. Settling clear and contentious issues via pretrial motions *in limine* 36
E. Practical Tips and Basics Worth Remembering 36

IV. ETHICS AND PROFESSIONALISM IN CRIMINAL LAW by Michael R. Haigler *37*

1. Avoiding Conflicts in Representation ("No fee is large enough...") **37**

2. When You Suspect a Client May Be Lying (Don't Become the Liar Yourself.) **40**

3. Duty to the Client vs. Duty to the Court ("Who Wins?") **43**

4. Witness Contact (Don't you become the witness?) **45**

V. PRESENTATION OF DEFENSE EVIDENCE by Charles E. Mellies ***49***

1. Consistency of Evidence with Theory of Defense **49**

2. Using Drama Effectively **49**

3. Organizing the Order of Evidence **50**

4. Using Demonstrative Evidence **51**

5. Direct Examination Tips and Basics **52**

VI. DYNAMIC USE OF CLOSING ARGUMENTS by Stephanie Goldsborough ***53***

1. Setting a Clear Goal for Closing **53**

2. Choosing an Appropriate Tone and Style ("Mr. Boyce, I know Johnnie Cochran, and you're No Johnny Cochran.") **53**

3. Using Graphics to Help the Jury Understand Your Theme **54**

4. Structuring the Flow ("Let it Flow, Let it Flow, Let it Flow!) **55**

5. Effective Presentation Tactics (The Three "E's") **55**

VII. CONCLUDING THE TRIAL by David M. McCleary ***57***

1. Jury Instructions **57**

2. The Verdict **57**

VIII. SENTENCING ***58***

1. Don't be Caught Flat Footed **58**

A. Review the Statutory Checklist with Client and Client's Family 58

B. Be Prepared for State's Aggravating Factors 58

C. Have a Witness List for Mitigating Factors 58

D. Put on Evidence 58

2. Aggravating Factors Must be Proven "Beyond a Reasonable Doubt" **58**

A. Must be Prepared Ahead of Time 58

I. GETTING STARTED BY CHARLES E. MELLIES

1. A. Preparing for Voir Dire

Jurors do not decide cases in a vacuum. You will often hear people say that the opening statement is the most important part of the trial because it is the jury's first opportunity to hear your client's side of the story. However, while you may have a broader scope and narrative context for telling your client's story, it is actually the voir dire process which is the first opportunity you will have to introduce not only your client to the jury, but your theme and argument of the case. Successful voir dire occurs when you have picked a jury of twelve persons and two alternates who can be fair to your client and who will listen to all of the evidence and law presented in the case. The key to a successful voir dire is preparation. Demographics alone will not enable you to pick a fair jury. Rather, a fair jury is the result of carefully tailoring the facts and themes that will be presented in the case to the juror's individual attitudes and personal characteristics.

Before conducting voir dire, indeed before trying a case, you must first develop the theme of your case. Once you have developed the theme of your case, you can then begin to determine what people will form an "ideal" jury. Keep in mind that you are trying to weed out those jurors who will poison the jury panel. It is unrealistic to expect that you will be able to select twelve jurors who are one hundred percent in your corner. Therefore, you must pay attention to what type of juror you would ultimately like to sit on the jury panel, but also keep in mind the type of juror you absolutely do not wish to hear your case.

A. "Best" and "Worst" Juror Profiles

After developing the theme of the case, make a list of juror characteristics that will make a juror more likely to keep an open mind toward (or to accept) your arguments and evidence in the case. For example, a member of MADD, someone who is very religious, a parent, or a person who does not drink may not be a helpful juror in a driving while impaired case. By contrast, a person who drinks socially or who owns a bar or restaurant that serves alcohol may be willing to listen to all of the evidence rather than judging a defendant solely upon the defendant's consumption of alcohol.

There are no consistently "best" jurors for every criminal case. Juror profiles must be tailored to the facts and theme of your case, or you may end up picking a juror that will be less inclined to give your client the benefit of the doubt. For example, a single mother whose teenage child has had trouble with the law may be a good juror in a case involving a young defendant charged with felony possession of stolen goods. That same single mother could end up hurting your client in a child abuse case with a male defendant. Let the circumstances and needs of the case guide your voir dire.

Profiling characteristics that make the "best" and "worst" jurors will give you a starting point and can serve as a cautionary guiding tool. However, jurors who have "worst" characteristics may in fact turn out to be a good juror for your case. In every criminal case, it is imperative that you question prospective jurors individually regarding their economic and personal backgrounds in order to discern whether that juror will be a liability or asset to your client.

B. Community Standards and Local Attitudes

Personal experiences, local attitudes, and community standards will color juror perceptions of every aspect of your case. It is important to question a prospective juror not only on personal issues relating to the juror's background, but also to question the juror about their attitudes regarding any relevant prevailing community standards and/or concerns.

Read your local paper, and know your own community; while events in the world at large may color a prospective juror's perspective, events occurring closer to home may have a greater affect upon the potential juror. If your community is undergoing a rash of home invasions, you will need to address specific fears of each juror and distinguish your client from any prevailing news articles relating to similar crimes. Current events can, in certain cases, cause heightened sensitivity on the part of a potential juror, and this may work for or against your client in any given situation. Thus, it is imperative to delve into a potential juror's thoughts on relevant current local events. Remember that North Carolina is an increasingly diverse state. Community attitudes in the suburbs of Raleigh will be very different than attitudes in western farm counties, and they are both very different from twenty years ago. Local knowledge can be a very effective tool in choosing your jury.

In light of the events of September 11, 2001 and the continuing unrest and escalating violence in the Middle East, criminal cases involving defendants and/or State witnesses of Middle Eastern heritage has become increasingly complex. In such cases, voir dire takes on a unique importance. In any case involving a defendant or witnesses of Middle Eastern heritage, it is imperative that you question each and every juror about the events of September 11, 2001, security, and immigration. You must distinguish the defendant or witness from the terrorists involved in the September 11 attacks and other violent attacks on Israel in recent months.

C. Preparation and Practice for Voir Dire

In a perfect world, your client will have unlimited time and financial resources to allow for mock trial, focus groups, and jury consultants. If your client has the financial resources to allow you to gather focus groups, you will be provided with an invaluable opportunity to evaluate specific issues in your trial and to determine the most palatable approach to sell your theme to the jury on each issue. Focus groups are generally best when made up of randomly selected individuals rather than attempting to conduct a focus group of your friends and peers. A focus group can be surprisingly inexpensive and creative. Civil trial attorneys often assemble focus groups by performing randomly selected mailings and offering modest compensation to invitees for their time. Likewise, mock trials can also provide an invaluable opportunity for you to hone your trial strategy while gathering valuable feed back on the substance of your approach on specific issues as well as your presentation of the case.

Opinions are divided as to the overall benefit of a jury consultant. In counties that allow for juror questionnaires, a jury consultant can certainly be useful in gathering and evaluating jury information. Furthermore, it is always useful to have a second opinion. However, your instincts or those of your client may often be better and more cost-effective than any jury consultant. Ultimately, the best way to make voir dire a helpful tool for the criminal attorney is to practice your technique and always seek insights into human behavior and attitudes.

2. Conducting Voir Dire

North Carolina General Statute §§15A-1211 through 15A-1217 embody the procedures for selecting and empanelling a jury. Furthermore, the provisions of Chapter 9 of the North Carolina General Statutes pertaining to jurors are relevant to criminal cases and apply except where Chapter 15A provides a different procedure. N.C. Gen. Stat. §15A-1211(a)(1999).

It is in the discretion of the trial judge to determine all challenges to the jury panel and all questions concerning the competency of jurors. N.C. Gen. Stat. §15A-1211(b) (1999). In all non-capital criminal trials, each defendant is allowed six (6) peremptory challenges. Likewise, the State is allowed six (6) challenges for each defendant. N.C. Gen. Stat. §15A-1217(b) (1999). In all capital cases, each defendant is allowed fourteen (14) challenges. Likewise, the State is allowed fourteen (14) challenges for each defendant. N.C. Gen. Stat. §15A-1217(a) (1999). In addition to any unused challenges, each party is entitled to one peremptory challenge for each alternate juror. N.C. Gen. Stat. §15A-1217(c) (1999).

Pursuant to North Carolina General Statutes §15A-1241, all proceedings in a criminal trial must be recorded except: (1) selection of the jury in non-capital cases; (2) opening statements and final arguments of counsel to the jury; (3) and arguments of counsel and questions of law. N.C. Gen. Stat. §15A-1241(a) (1999). However, voir dire must be recorded if a motion for recording is made by any party or on the Judge's own motion. N.C. Gen. Stat. §15A-1241(b) (1999). If you have a racially charged trial, you will certainly want to make a motion to record jury selection to preserve a challenge for appeal. *See generally, Batson* v. *Kentucky,* 476 U.S. 79 (1986). In any other case, it is personal preference whether to ask the Court to record jury selection. Certainly recording jury selection has its benefits in that any impropriety is preserved and can be made part of the Record on Appeal. However, since jury selection is often a time in which you want to push the limits to educate the jury on the merits on your case, you may wish to stay off of the record and build your facts.

A. Purpose of Voir Dire

Other than the obvious aim of picking a jury in your trial, voir dire accomplishes two goals. First, voir dire allows you an opportunity to present and preview for the jury your theory of the case. Second, voir dire provides an invaluable opportunity to introduce yourself and your client to the jury. Keep in mind that the jury is always watching you. How you present yourself and your client during voir dire is equally as important as the evidence in the case. Always refer to your client by name - preferably by first name. Do not refer to your client as "the Defendant". Without appearing as if you are overly sappy, touch your client on sporadic occasions when referring to him or her. This personalizes your client to the jury.

This is also an important opportunity to get the jury to like you. A presentation of artful persuasion can be far more important than the uncertain art of jury selection. During jury selection, more specifically through voir dire, you can attempt to persuade the prospective jury to accept your view of the case and honestly express their views of the issues. It is your opportunity before the trial even begins to persuade the individual jurors to like and, more importantly, trust you.

B. Questioning the Jury Panel

The trial judge will conduct the initial questioning of the jury panel. During the initial questioning, the trial judge will elicit from the jury panel basic biographical information and will likely delve into issues of pretrial publicity. The judge must also identify to the jury the parties, counsel, other court personnel, the charges and dates of alleged offense, victim names, the defendant's plea, and any affirmative defenses. N.C. Gen. Stat. § 15A-1213 (1999). This disclosure will allow notice to any potential challenges based on knowledge or bias based upon a juror's prior dealings with any person involved in the case.

After the Trial Judge finishes the initial questioning of the twelve selected prospective jurors, the jury panel will be turned over to the State for questioning. The State has the first opportunity to question each individual juror. N.C. Gen. Stat. § 15A-1214 (d) (1999). You can be certain that during this time, the State will also be putting forth their theory of the case. Listen carefully to the questions asked by the State and jot down any misinformation or misstatements made by the State. It happens all the time. You will need to use your jury selection and questioning to make corrections to and emphasize misstatements made by the State. The State will have the opportunity to strike any jurors from the panel and new jurors will be called and selected from the jury pool to replace the spots vacated by the dismissed jurors. *Id.* The trial judge will likely ask these new additions initial questions, and the newly selected jurors will once again be turned over to the State for questioning. Once the State informs the court that they are satisfied with the jury panel, the jury panel will be turned over to you for questioning. N.C. Gen. Stat. § 15A-1214 (e) (1999). Before asking any questions, introduce yourself to the jury. Then, introduce your client to the jury. Movies and television have popularized the notion that Defendants are by and large scumbags who are unemployed and of no value to society. This is your first chance to tell the jury good things about your client. If your client is and has been employed for several years, your first question to the jury could be, "Now, Mr. Doe is currently employed as an emergency room physician at North Carolina Baptist Hospital and has been employed there for the past 15 years. Do any of you know him? Have any of you ever been treated by him? To you knowledge, have any of your family members been treated by him?" In these few questions, you have just set your client apart from the perception that all persons charged with a crime are the dregs of society. This tactic also works well if your client is a long-standing member of any church or other social group. Unless your client truly has no redeeming personal qualities, there is almost always one bit of personal information that can be presented to the jury pool as a "do you know my client" type of question.

For basic issues of jury questioning, group questions are generally appropriate. As an example, questions pertaining to any law enforcement ties, prior jury experience, and other broad based questions can be posed to the group. However, most of these group questions will already have been answered by the Judge's initial questioning and the State's initial questioning. Therefore, the voir dire of your client should remain on a relatively personal level throughout.

Make sure that your questioning of each individual juror is consistent with your questioning among the group. You may know that you hate juror number six. You may know that at the end of the questioning you will be striking juror number six. Unless you know that juror number six is an absolute jerk and will do everything in his power to sway the panel in his responses against your client, ask questions of juror number six. You must remember, however, that no one likes to be put on the spot. If you are targeting a potentially unfavorable juror with specific questions, try to ask the same questions of other jurors who you are not targeting. Unless it appears from that juror's demeanor that his responses will hurt your client, try to ask the same questions of each juror

without omission. Most importantly, you could be pleasantly surprised to find that a juror you had anticipated to be a hostile or a "worst" juror, could be an asset to your case. Regardless, avoid the risk alienating other potentially beneficial jurors by showing your dissatisfaction or treating one juror differently than the other members of the pool.

Jury selection is for the most part an uncomfortable procedure. Jurors do not want to talk to you about their beliefs or to give out too much personal information. Always ask open questions. Asking a yes or no question will elicit no information and may in fact cause a misunderstanding. After all, while there are the honest ones, most jurors simply aren't going to answer no to a question posed like, "Can you be fair and impartial in this case?" A more meaningful question may be "This case is about X. What aspects about this case would trouble you or make it difficult for you to be fair and impartial?" Open-ended questions are the only way in which to elicit information that will allow you to delve more deeply into determining whether the juror is one who you wish to keep or to strike. However, if after asking the open ended questions, you feel as if one of the jurors will not be favorable to your case, do not be afraid to ask leading questions of that juror. You may be able, through leading the juror, to get them to admit to a position which would enable you to strike them for cause, without necessitating the use of one of your preemptory challenges. Likewise, you may be able to get them to commit to an issue which is favorable to your case.

Listen to what each juror says. Write down their responses if you are able to. Write down the responses of the jurors to questions posed by the State and by the trial judge. Do not ask the same questions posted by the judge and the State, even though repetition is allowed. N.C. Gen. Stat, 15A-1213 (1999). It is extremely annoying to a juror to do so. Furthermore, you are unlikely to gain any new information.

C. Proper versus Improper Questions

The scope of voir dire is in the discretion of the trial court. N.C. Gen. Stat. 15A-1211 (b) (1999). Blatantly pandering to the jury will not only annoy the jury but could cause an embarrassing rebuke by the trial judge. Likewise, questions containing incorrect statements of law or referring to inadmissible evidence will cause objection by the State as well as a reprimand by the judge. Assume the jury is *always* watching you. The impression you would like to present to the jury is one of an experienced professional rather than that of a naughty child or, worse yet, an inexperienced or unprepared attorney.

Indoctrination or "stake out" questions are improper. State v. Jones, 339 N.C. 114, 134, 451 S.E.2d 856, 835 (1994). Most judges will not allow you to ask a prospective juror "If the evidence is X, what are you going to do?" *Id* The trial judge is certainly not going to allow you to ask a potential juror "How do you think you are going to come down on this?" There are ways, however, in which to pose "stake out" questions in a form that may be acceptable to the court. Frame your questions in a manner to show a juror's ability to respond impartially to certain conditions: "If the evidence showed X, would you be able consider a not-guilty verdict?" If such a question solicits an objection, one can argue that it simply goes to show the juror's capacity to consider all verdicts under the law, especially the requisite presumed verdict of innocence. Avoid asking the reverse question, "Could you also consider a finding of guilt?" Do not do the prosecutor's work for her!

"Proper" questions are typically thought to include the following: (1) knowledge of or relationship to parties, witnesses, attorneys, victims, or families; (2) abilities to follow Court instructions and the law; (3) ability to consider exclusively circumstantial evidence; (4) pretrial knowledge of case and controversy; (5) prior opinions or judgments; (6) religious or personal beliefs relating to relevant issues; (7) prior experience with crime or justice system; (8) prior jury service; (9) occupation, education, background; (10) ties to law enforcement or military background. It would also be good to know if anyone on the panel is responsible or ever has been responsible for hiring and firing decisions, and whether or not they occupy a supervisory position at work. This list is not exhaustive. Be prepared to justify your questions to the court. If you can illustrate to the court that your question is in proper form and for a proper purpose, a judge will be more likely to allow even a "questionable question". Frame your reasoning as favorable to the interest of the court and all parties. If you believe that your question is appropriate but likely to raise the ire of the trial judge without prior notice, ask for a conference and seek approval on the question in advance.

3. Practical Tips

1. Have two or three fall back "junk" questions to be used when you need time to think or when you need time to breeze by an answer that may have hurt you.
2. Carefully listen to the State's questions of potential jurors. Invariably the DA will overstate some aspect of the case. Rephrase the State's question with corrected facts.
3. Always refer to your client personally: "Mr./Mrs. Doe" or "John/Jane." Never refer to your client as the Defendant.
4. When excusing a juror, never say "I don't like juror number six, please dismiss him". Always "thank and excuse" Ms. Johnson. If your juror that you are attempting to excuse had a conflict, incorporate the conflict into your dismissal. For example, "I would like to thank and excuse Ms. Johnson because she has a funeral to attend tomorrow." Be careful though, this could go both ways. Almost every juror is going to have some important conflict, or at least conflict they deem important in their life. If it is a truly simple conflict like a doctors appointment, "thank and excuse" the juror and leave it at that.
5. There is one question that will depend on your judge; ask it if you can. "If you had to take a vote right now, do you understand that you must find my client not guilty?" Be very careful with this. This question can get you in trouble with the wrong judge.

4. Evaluating Potential Jurors

If demographics were all that were necessary to the art of jury selection, a computer could pick a jury. However, picking from the venire based upon demographics and stereotypes alone will lead to an unknown group of twelve. While demographics and certain stereotypes may present concerns that require more individual focus and questioning, never make your judgment based upon a stereotype or demographic feature over specific and personal evidence to the contrary.

1) Potential Leaders or Forepersons

Identify potential leaders or forepersons. They are fairly easy to discern during the questioning; look for individuals with strong personalities. They will likely end up as your foreperson. A juror with

an agenda or strong preconceived notions can be an asset or a liability. Find out what makes that individual tick. If you can't get a handle on that person, seriously consider excusing that juror.

2) Powerful Jobs or Positions of Authority

Potential jurors with powerful jobs or positions of authority may also prove to be hard to handle. Furthermore, jurors with specialized knowledge in areas relevant to your case may discount the evidence presented at trial and proceed based upon their own personal knowledge. Even worse, they may seek to persuade other jurors to disregard the evidence and to listen to their own "expert" opinions.

However, in certain situations, a prospective juror with individualized and specialized knowledge may be an asset to your case. For example a computer "teckie" may be extremely useful on an embezzlement case involving computer records. Likewise, a medical technician can be extremely useful in a driving while impaired trial. An accountant, or someone with a similar mathematical background, may a helpful juror to the defense in a highly circumstantial case. Always remember to question each juror as to any specialized background to make sure his or her specialized background does not interfere with presentation of your case.

3) Consult With Your Client

Defendants are acquitted or convicted based upon a variety of reasons and factors outside of the evidence presented at trial. You can be sure that if you kept someone on the jury panel that your client did not like, and your client is subsequently convicted, he will be convinced that it was that one juror that caused his conviction. Always consult with your client, especially on "borderline" jurors. Listen to your gut *and your* client. Consult with the client to learn whether or not they wish to keep each juror. Ultimately, fully advise but allow your client to pick *their* jury.

4) Jury Selection

Do not hesitate to fully utilize all of your peremptory challenges to the jury pool. Always remember, once you have made your decision and informed the court which jurors you wish to excuse, the clerk will fill those spots with new prospective jurors and the process begins again. If you have just "burned" your six (6) peremptory challenges on the first panel, you will be at the mercy of the State's choices for jurors, absent any challenges for cause.

B. Peremptory Challenges

In a non-capital case, the defense has six (6) peremptory challenges. In a capital case, a defendant has fourteen (14) peremptory challenges. A peremptory challenge may be exercised against any juror for any reason other than a race or gender based reason. *Batson,* at 84; *see also, J.E.B. v. Alabama,* 511 U.S. 127 (1994). When exercising peremptory challenges keep in mind that your number of peremptory challenges is limited and you will always need to consider the make up and risks of the remaining pool of prospective jurors.

C. Challenges for Cause

1. N.C.G.S. § 15A-1212 governs challenges for cause. Any party or the trial judge may make a challenge for cause to an individual juror on the following grounds:
2. Does not have qualifications required by N.C.G.S. § 9-3.
3. Is incapable by reason of mental or physical infirmity of rendering competent jury service.
4. Has been or is a party, a witness, a grand juror, a trial juror or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge against the defendant. Has been or is a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.
5. Is related by blood or marriage within the sixth degree to the defendant or the victim of the crime. Has formed or expressed an opinion as to the guilt or innocence of the Defendant. It is improper for counsel to elicit whether the opinion formed is favorable or adverse to the Defendant.
6. Is presently charged with a felony.
7. As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.
8. For any other cause is unable to render a fair and impartial verdict.
9. Challenges for cause are unlimited. The trial court can remove any juror who has health problems or a family member who has health problems. State v. Davis, 325 N.C. 607, 386 S.E.2d 418, cert, denied (1989); State v. Dalton, 206 N.C. 507, 174 S.E.2d 422 (1934). As previously noted, it may be possible to identify unfavorable jurors and cultivate a challenge for cause based on some conflict. Conversely, if you have a juror who seems favorable based on preliminary questions but who may have some type of conflict, avoid following up on the circumstances of conflict to avoid losing a good panel member to dismissal by the court.

While voir dire allows counsel to inquire about a juror's employment, occupation alone is not an adequate challenge for cause. *State* v. *Hunt,* 37 N.C. App. 315, 246 S.E.2d 159 (1978). This is true even if the prospective juror was himself an Assistant Attorney General! *State* v. *McNeil,* 99 N.C. App. 235, 393 S.E.2d 123 (1990). Defense counsel must still show that a juror is prejudiced and not able to follow the court's instructions on the law. Needless to say, if the cause challenge fails, this is the poster-child for peremptory dismissal.

II. EFFECTIVE OPENING STATEMENTS BY STEPHANIE GOLDSBOROUGH

1. Developing Your Defense Theory and Case Theme

(All the World's a Stage; Especially the Courtroom...)

As an introduction, the information contained in this section of the manuscript comes numerous articles and information collected over almost twenty (20) years. The information is not necessarily original. Instead, it is a compilation based on the wisdom and experiences of some of the great criminal defense trial lawyers in North Carolina. Mark Twain once said: "Adam was the only man who knew, when he said something great, that nobody had said it before him." That being said, the first rule for developing your defense theory and case theme is to listen to other people; use other outlines; and emulate the "masters" of trial practice.

A. Organization & Presentation

One of the first steps in preparing an opening statement is to get organized. How you present your opening statement could have an impact on how jurors react for the rest of the trial. The first rule is to tell the story. If you don't, the jurors will. You should make the story organized and understandable. As is stated below, the opening statement is a roadmap for the jurors. You do not want them heading down the wrong path. Therefore, tell the facts as a story that is clear, concise and understandable.

Throughout this manuscript, I will refer to the professor's rules. These are rules given by a professor regarding different guidelines relating to opening statements and closing arguments (Section VI). The professor's first rule is the opening tells the story of the case; evidence proves that story; and the closing argument explains what the story means. Tell the story during opening in a memorable way. One way is to give the jurors three things to remember. People remember things in "3's". For instance, how easy is it to remember ABC, 123 and Doe-Ray-Me? People tend to remember things in 3's such as Moe, Larry and Curley; faith, hope and love, etc. If it is possible to organize the presentation in groups of 3's, the opening will be more memorable.

The opening should also have symmetry with the closing. The openings and closings are called the "bookends for your case." You should always use your opening statement with your closing argument in mind.

Again, clarity includes clear and concise statements that summarize only the important evidence, builds suspense and highlight significant events. Because you want to capture the attention of the jurors, it is important to summarize only the important evidence. A forecast of the evidence that includes every miniscule piece of evidence is a waste of time. You must build suspense to keep the jury interested in your side of the case. That is why you should highlight only the significant events. Moreover, you may want to leave out certain obvious facts so the jury can figure out those facts later on.

A jury opening statement should only contain facts, not arguments. One of the most common objections in an opening statement is that it is argumentative, not a presentation or forecast of

the evidence. Moreover, facts will be more persuasive than an argument. In the opening, when you are telling the story of the case, it will be followed by evidence that proves that story. If you highlight the facts, rather than make an argument, you will build credibility with the jury.

It has often been said that jurors resent lawyers who force conclusions on them too quickly. Again, if you focus on the facts rather than arguments, you will earn credibility with the jury.

B. Defense Theory

In developing your defense theory, you have to consider the facts of the case. Facts might not be in dispute, but instead it is an interpretation of the facts. If that is the case, you can consider making such a statement to let the jury know that although the facts are important, it is the interpretation of the facts that will make the difference between a guilty and not guilty verdict.

In other cases, the state of mind is the key. Lack of motive, knowledge, intent, willfulness, ignorance or mistake, voluntary intoxication (although usually not a complete defense) or maliciousness may be the crux of the case. If so, you need to determine whether you should ask the jury to focus on those factual issues. However, keep in mind that by doing so, you will "red flag" it for the prosecutor so the prosecutor can rebut your defense.

Another type of defense is a technical defense. A defense might rely on an expert's advice, self-defense, defense of others, defense of property, public authority, prevention of crime, insanity, unconsciousness or automatism, duress or entrapment. Again, you need to consider how much to reveal in your opening statement. Does the prosecution know what the defense is? Does the prosecution understand the defense? Is the prosecution prepared for the defense? Are you better off alerting the jury to the issue or waiting until closing argument? If the prosecution already knows what the defense is, and has mentioned it in the opening, it may be important to present facts that support the defense as early as your opening statement.

Finally, most defense attorneys mention presumption of innocence and burden of proof beyond a reasonable doubt. Oftentimes, this is also done in the jury selection process, but most defense attorneys believe it is important to remind the jury to test the Government's ability to prove every element of each count. If you may not present testimony or evidence at trial, it is important to remind the jury that if the defense does not offer any evidence that should not impact their decision-making process. Instead, they are to presume the defendant is innocent and realize that the Defendant has an absolute right not to present any evidence. Moreover, the burden is on the Government to prove each and every element of each count beyond any reasonable doubt. If they have a reasonable doubt as to an element, they are legally bound to find a defendant not guilty of that count.

C. Case Theme

Part of the organization and presentation also requires thinking through the facts of the case and developing a case theme. After you have developed your defense, you must ask yourself several questions. How can the jurors relate to that defense? Does the defense make sense? Can the jurors accept the defense? One way to make that determination is by the use of jury focus groups. On a number of occasions, our firm has used jury focus groups to determine what defenses might work and what the chances are of a not guilty verdict. I highly recommend jury focus groups.

There are trial consultants who provide jury focus groups. Trial consultants will also consult with you and you can prepare a jury focus group in-house. We have conducted several jury focus groups in-house, to keep the costs down. They have been extremely helpful in developing our defense and our themes.

A very inexpensive method to determine whether your defense and case theme work is the "supper club" method. Although you need to be extremely careful, considering attorney-client privileges as well as all the ethical issues that may be involved, you can present a "hypothetical" to friends who are not involved in the judicial process. You can then ask questions about your theme or defense. Oftentimes, such dinner table discussion will provide a theme that had not occurred to you before. Jurors are regular people, just like our friends and neighbors. If they have a good roadmap, understand the case and have a theme to go back to, it will make it easier for them to rule in your favor.

2. Simplifying the Theme to Enhance Juror Understanding ("If It Doesn't Fit, You Must Acquit!")

The facts and the law oftentimes are complicated. This is especially the case in complex white-collar cases where a line of defense may involve understanding tax issues or regulations within various bureaucratic governmental entities. Put yourself in the juror's chair. Would you prefer to hear a simple and concise case or a complicated case that is difficult to follow and understand? Brevity and simplicity in today's society is important. Look at the children of the television age. They hear everything in a "sound bite." Information must be condensed for today's television society. Therefore, a simplified theme will help today's society understand it.

With that being said, there are some attorneys who believe complicating things can help. For instance, in determining whether a client had the necessary mental state, are the facts so complicated that a reasonable person had no way of understanding the potential violation of a technical rule or regulation? Such is the case relating to Medicare and Medicaid fraud. Numerous "professional" clients have struggled understanding the different rules and regulations of state and federal government. Moreover, the constant change in Medicare/Medicaid regulations has compounded the problem. It may be that in those types of cases, the jury needs to understand how complicated it really is. For that reason, your simplified theme may be that this case is so complicated that no reasonable person could ever understand it.

It is great to have a theme for the case. Johnny Cochran was made famous by his quote, "If it doesn't fit, you must acquit." However, the most important part of that theme is that it was interwoven throughout the facts of the case. Cochran used that statement in discussing the prosecutor's blunder when he attempted to have the defendant, O.J. Simpson, slip on a glove. However, he used that theme to show that much of the evidence did not fit the prosecution's case. The important message is that the theme must work with the defense. A clever or interesting theme will have no impact if it doesn't apply to the defense. You must make sure that the jury can accept both the theme and the defense.

3. Structure: How to Use the Opening Statement as a Roadmap for the Jury (The 1,2,3's and A,B,C's)

Most every prosecutor will at one time in his/her career use an opening line such as this: "The opening statement is my opportunity is to provide you a roadmap or a blueprint to the evidence . . .." The opening statement is indeed the roadmap or the blueprint for the evidence. In order to be persuasive, an attorney must provide structure to the trial. The attorney must use the opening statement as a roadmap for his or her case. It is important to show the jury the way to the verdict that you want.

If the prosecution has made such a statement regarding the roadmap or blueprint to the evidence, the defense attorney might consider mentioning the fact that the prosecution's road map does not take you all the way to the end of the road. Many defense attorneys have used Paul Harvey's "The rest of the story . . .." This is effective to show that there is more information out there than the prosecution might want you to believe.

In structuring the opening statement, much has been said about how to organize the facts. One might use chronological order of presentation. This makes it easy to follow. Many people think better in terms of a timeline. In presenting information in a chronological order, the chronological facts lead to an ultimate conclusion. However, some attorneys present an opening statement in chronological fashion with flashbacks. Still, others start with a conclusion and support it with facts. You must consider your defense's strengths and weaknesses and organize the facts accordingly.

Many question whether there is ever any reason to waive or reserve an opening statement. The professor's rule is that strategy rarely succeeds. However, you must consider several different matters before determining whether to make an opening statement. Oftentimes, everything that can be said was already said during jury selection. Do you want to re-emphasize what you already have told them? Will they view it as a waste of time? Are you not sure exactly how the evidence will actually be presented and you do not want to stake yourself out in front of the jury? Is there a reason to reserve opening until after the presentation of the state /government's case? The professor's rule is that waiving or reserving opening should rarely be used. However, there may be an exceptional case where such a strategy could work.

4. Use of Exhibits (How to Deal with the Snoozing Juror After the Lunch Break)

The use of exhibits in opening statements is an interesting topic because not all judges allow the use of exhibits in opening statements. Some judges believe that the opening statement is a road map for the jury, but it should not include presentation of evidence. Accordingly, when considering whether to use exhibits, consider your judge and make sure that judge allows the use of exhibits during opening statements.

With that being said, there is an interesting contrast between people of different ages that you should consider. You may have read the book, The Greatest Generation, by Tom Brokaw. The book focuses on the heroes of WWII and their many accomplishments. You may have also heard the phrase, "The X Generation", which refers to young adults in their 20's. Obviously, these

two generations of people grew up in very different informational environments. People in their 20's, 30's, and even 40's grew up receiving information through television. People in their 50's, 60's and 70's may have received their information through newspapers and books. As a result, they may have different backgrounds on how they receive and process information. However, most adults are exposed to TV in some capacity. Therefore, visual presentation is an important factor to consider in preparing your opening statement.

Assuming a judge allows the use of exhibits during an opening statement, you might want to consider using charts, blow-ups, flip charts or overhead projectors. The main thing is not to provide "TMI" - too much information. Instead, you should keep it simple and add variety to your presentation. If you put up chart after chart, the jury will become bored with it, and they will not be able to absorb all the information. Therefore, make your use of exhibits limited and interesting.

Many attorneys are using PowerPoint and new computer technology in the presentation of their cases. In a recent high profile murder case, the attorney effectively used a presentation in which much of his opening statement consisted of referring to pictures of the evidence contained in a PowerPoint type of presentation. The first time I experienced a PowerPoint presentation was actually when the Assistant U.S. Attorney used one in a multi-defendant conspiracy case. The impact was overwhelming. The attorney was able to present the case with little or no use of notes. It captivated the attention of the jury. The presentation was understandable. The attorney avoided too much information, and the attorney added variety to the presentation.

So far, you have received a great deal of information. However, this information has been organized with one of the earlier made principles. This presentation was organized in groups of three. Again, if you can make presentations in groups of 3's, you can refer back to them in closing arguments and at the same time add symmetry to your argument.

5. Presentation Pointers (Some Oldies but Goodies from A to Z or, Mistakes I've Made Along the Way)

I have had the opportunity to watch some of the best trial lawyers in the State. Each "master" of trial advocacy has his or her own strengths. However, many have similar traits that make them persuasive advocates. I have come up with a list from A to Z of some of those presentation pointers which I believe are effective reminders for persuasive opening statements. I try to think about these presentation pointers when I am preparing my opening statement. It might be helpful to you, if you agree with this list, to make a copy of it, and keep it in your trial notebook. I highly recommend a trial notebook in which you put articles, lists and examples of different parts of a trial. When you are preparing for a trial, you can refer back to that notebook to obtain information, ideas and reminders. This will make you a more effective advocate.

1. Begin with a Bang.
2. Brevity (avoid TMI-Too Much Information).
3. Believable- you believe it and make them believe it.
4. Chronological Order (Avoid the witness-by-witness account).
5. It's a story, so tell a good one—with Clarity (Be clear, interesting & concise).
6. Active not Passive: Present Tense & Action Words (with no legalese!).
7. Organization & Pauses to break up the story,
8. Group in 3's (1 2 3, ABC, Doe/ Ray/Me).
9. Eye contact... "He never would look me in the eye..."
10. Honesty... is a good policy...always....
11. The Golden Rule: Do unto others, as you would have them do unto you. (including no pandering or condescending attitude, etc.)
12. Acknowledge your weaknesses-in the middle or end? Steal their thunder!
13. Undersell, don't oversell your case,
14. Make sure the evidence will come in before you refer to it in opening.
15. Pretrial Instruction on the Law: Help the jury understand, but don't invade the province of the judge.
16. Remind them of the presumption of innocence and duty to find beyond any reasonable doubt.
17. Visual and Variety: Exhibits, charts and demonstrative evidence- make it interesting (with court permission).
18. Never call him/her a liar...
19. If the judge sustains an objection, stop pause, gather your thoughts and decide whether to go back to your script or move on to something else.
20. Never let them see you sweat...
21. Ask the jury to require the prosecution to show them certain evidence or require that certain questions be answered (But only if you know that can't show it or answer it).

III. CROSS BY CLARKE DUMMIT

1. Cross can be the best opportunity

Cross-examination is one the best opportunities you will have to affect the outcome of the State's message. The evidence presented by the State must run the gauntlet of an effective cross-examination before it can be properly considered, and your ability to undermine such evidence goes directly to the State's ability to carry its burden of proof.

In many cases your cross will be very simple and for the limited purpose of developing a few useful points for your jury argument. This means you cross with a predesigned purpose, covering what you need to cover, sometimes more than one point, to provide content for your close.

There are many witnesses where you are better off telling the jury you have no questions:

- The witness has no helpful or corroborating testimony to offer.
- The witness has testified on an uncontested issue or otherwise has not hurt your theory of the case.
- Even if the witness has hurt you, you have no ammunition for an attack.
- If you are not certain of any specific way to help your case you are better not opening doors.

During the State's direct you must also be a control freak, constantly monitor the horizon for any and all possible threats and ready to object during direct or pounce during cross.

A. Begin with the end in Mind

1) Prepare! Make it look easy, but it is HARD WORK!

2) What are the most important skills for cross examination?

a. Learning to shut up!

Don't ask dangerous questions unless you are on a Hail Marie!

b. Allow answers. (Don't argue)

Remember the old adage: "Don't argue with a fool, the jury may not be able to tell the difference."

c. LISTEN! THINK! CROSS CHECK!

Make certain you know where you are going before you ask the next question, and make certain you want to go there.

B. The Trained Witness

First, understand that police officers and expert witnesses are generally very capable witnesses. In the eyes of the jury, they are typically professional, authoritative, and **all too often they will have more courtroom experience than you**. Do not be discouraged.

They can also be seen as:

- Hired Guns,
- bungling oafs,
- short sighted "hammers" (where everything looks like a nail)
- mean-spirited and vengeful bullies, or
- simply overworked with inadequate resources.

Each of these characterizations has some truth to it. Depending on the facts of your case, you can effectively mitigate the impact of police testimony and at times even get some mileage out of it for your own purposes. The key thing is to **adapt your style** to the reality of the situation. Don't try to paint the officer with the wrong brush!

1) Pandora's Box

Cross-examination is extremely dangerous because you can unintentionally open a **Pandora's Box** of information. Many times you have a hostile judge who is very friendly to the State's case, and they may have ruled for you in a preliminary hearing with regard to suppression of certain evidence. They may simply be waiting on you to crack the door to allow the State to bring in evidence that has already been ruled inadmissible. Police officers are also trained to open doors whenever possible, so know your witness well before you begin open-ended cross-examination. Judges enjoy ramming it down your throat if you open a door!

If you know your officer well and you have taken precautions against opening a dangerous door, it may be possible for you to ask questions in such a way that you can begin to support your own contentions. Be very careful in this tactic! Again, you are using cross-examination for a very dangerous and volatile purpose. It is imperative that you state your contentions in simple yes/no imperatives and not allow elaborate testimony that could be very damaging to your case. The trained witness will eat you alive with "explaining" their answer!

2) Set reasonable goals

Overall, be wary of trying to accomplish too much with your cross-exam. While you may be impeaching the State's case, it is very rare that you are able to build your own theory during cross-examination. It is rarely possible to build your theory with an experienced officer. Most often the best you can hope for is a draw.

Still, if you have begun with well-crafted voir dire questions, the way you phrase questions may allow to you begin to build your own contentions through cross-examination. You may be able to show that the State's theory is not the only possible theory. If you can show their theory is patently impossible then fortune has smiled upon you, but do not expect such luck.

C. “Guerilla Warfare” not kamikaze

Read *GUERILLA WARFARE* by Che Guevara, and as you do, concentrate on cross examination!

“Guerilla” is the diminutive form (conveying the smallness) of "war" in Spanish, and is usually translated as "little war." The use of the diminutive evokes the differences in number, scale, and scope between the guerrilla army and the formal, professional army of the state. Just as we face with the prosecution having vast resources (and docket control)

The basic goal of cross-examination should be to **get in and get out**, while **doing as much damage as possible, without also mortally wounding yourself**. You should hope to penetrate the structure and substance of the State’s case, wreak havoc, and retreat to watch the fireworks while the client looks on with satisfaction.

That said, attorneys know that witnesses only break down and confess their sins on **Hollywood sets in front of Perry Mason**. If such drama ever unfolds in a real courtroom, it will probably be ***your* witness**. Still, having a well-crafted strategy for cross-examination can yield substantial results for your case.

Above all, have **clear targets** for your cross-exam, and **if you lack a target, be twice as careful**.

Do not go wandering into the witness’ testimony searching aimlessly. You must maintain control of the scope and direction of the testimony at all times. If you find yourself lost, **ask for a five-minute break to <u>speak with your client</u>**. The client will always have something he or she wants you to ask, not that you should ask it, but a brief break will give you time to collect and adjust. Similarly, the client may amaze you with some new fact or inconsistency that she has previously neglected to mention. After conferring, you can return to the testimony with command and focus.

Just as the Guerilla does not fight every battle the State attempts, you do not have to respond to everything that was said on direct. **Choose your battleground carefully.** Determine whether some potential legitimate cross would blunt the force of other potential legitimate cross.

Avoid kamikaze cross.

D. SELECTING A PURPOSE

1) Constructive vs Destructive Cross

Determine if you need a Constructive Cross-Examination to add facts or a Destructive Cross-Examination to question facts. These are two very different purposes and need to be distinguished in your mind. The most common constructive cross is to elicited favorable testimony on a contested issue. But it can also be used to bring out testimony corroborating your main witnesses or testimony consistent with your theory of the case.

With Destructive Cross you are proving a likelihood that the witness is wrong or even better proving the witness has in fact testified incorrectly

Advocates job is to make small favorable points seem big (make mountains out of mole-hills). Use your attitude, tone and demeanor to let jurors know that a specific point is important. If you don't convey points are important jury won't believe they are, unless you are sandbagging until closing.

2) Identify and prioritize the targets for your cross-examination

Do not try to do everything with one witness if there are other witnesses who will be able to give you what you need. Many times you do not want to ask the Chemical Analyst many questions at all. If you are trying to show an error in the police investigation, consider using one officer (e.g., a more junior arresting officer) who is of little value to your case to show that the defendant was cooperative while in custody. Then show the investigative mistakes through cross-examining another officer (e.g., the senior officer in charge of the investigation).

3) Stay focused - Too much peripheral information

Get the most value out of each respective target while not distracting the jury with **too much peripheral information**. If you have a case (e.g., a DWI charge) where there is only one officer to cross-examine, you can structure your questioning to emphasize the important points while still not omitting the helpful information. Continuing the previous example, you could begin the cross-exam by asking if your client was forthright and cooperative (but only if you know the answer you will get). Then you may go on later to attack the officer's methods and investigation. In both examples the cross-examination reveals each point the attorney is trying to make while also structuring them for maximum effect.

4) Blend in, don't look like the enemy – have a Civil Tone

The **tone** of the cross-examination should be **civil** whenever possible. Avoid being unnecessarily hostile. Too often attorneys try to assert command and control of the witness **by being overtly hostile** right away. This approach is generally ineffective, especially in front of a jury. The jury knows that the State's witness is adverse to your client. Immediately lunging at the witness like a dog on a chain may (will) alienate the jury. Remember a basic principle of human nature – people are more likely to help someone they like, or at least respect.

A better approach with a jury is to be direct and professional when confronting an adverse witness.

Or as Che explained, you can be most effective when you blend in with the local population, and you are not seen as an enemy force.

5) Focus on the facts

Focus on the facts, the issues, and the content of the testimony. Do not try to simply shame or attack the witness. Instead of being the lunging dog, be the savvy dog who knows how to get what he wants: approach the witness, get what you want out of him, and walk away. You can still bite – just wait until you are close enough to make it really hurt!

6) Do not go half way

There will be circumstances where a more adversarial and overtly hostile approach is warranted. In times that call for more antagonism, do not go half way. Be a mercenary and take no prisoners. As long as you don't totally sacrifice your credibility, you can still do your job and get out. The composition of the jury you have selected and the way the jury reacts to a given witness will guide you in dealing with a more appropriately hostile situation.

E. Goals for Cross

It is very dangerous to begin a cross-examination without knowing where you are going. **You should have already known roughly what facts the witness is going to testify**. During his direct examination, make notes then have a short list of only the weaknesses in the case. Seek to have one, two or at most three potential targets to go in and cross-examine. **With a target in mind, it is very easy to go in and do damage**. A full frontal assault on the witness is very difficult and can many times backfire very strongly against you. **Remember Guerilla Warfare!**

The basic goals of any cross-examination will vary with the circumstances, but they can be described generally. Please be aware that these are very broad; there may be other specific to your case that should be custom tailored.

First and most generally, you may be **questioning the State's evidence**.

Second, you may be trying to **erode witness credibility** by showing bias, or by making testimony appear unreliable.

Third, you may be **preparing specifically for impeachment**.

Fourth, you can **elicit testimony supportive** of your contentions and theory of the case.

1) Questioning Evidence

a. The Rest of the Story

One of your goals may be to question the evidence the State is putting on. In addition to eliciting information that is supportive to your contentions by phrasing or rephrasing questions which the State has already brought out, it is sometimes possible for you to bring out new information that the officer may not have given on direct examination.

Be careful to never ask **why** and officer believes something. Also be very careful not to become argumentative with the officer, as this often leads to a quagmire.

b. Insufficiency – Not enough evidence

However, in many criminal cases the goal is not so much to question the evidence itself but instead whether there is sufficient evidence. Be very careful to determine whether you are arguing that

the evidence is **inconclusive or whether there is an insufficiency** of evidence. If you are going to be making an argument for insufficiency of the evidence, the last thing you want to do is add more evidence to what the jury has already heard by extensive cross-examination.

2) Witness Credibility

a. Biased

A second and potentially effective goal in cross-examining a police officer or other State's witness will be to focus on witness credibility. The most obvious way to erode credibility is to show they are biased, they have an interest in the outcome, or they have a motivation to lie. Be very careful about trying to discredit officers in a generalized sense, as jurors tend to believe police officers. It is sometimes very difficult to discredit witnesses in a criminal situation when you are dealing with law enforcement officers who are, in theory, impartial. Officers are reluctant to expressly declare their bias.

b. Incomplete

One credibility example would be to get an officer to agree that his job is simply to present the evidence and that he has no interest in the outcome of the case. He simply wants to see that justice is done. You can then begin with a very general question. Since officers are trained to take notes for the state, one avenue may be to see whether or not anything in their notes is exculpatory. Begin with questions about the exculpatory evidence that may not have been brought out. Depending upon what the issue is, you might suggest, "You didn't find any finger prints of the defendant on any of the bags of evidence which you inventoried?" This can then lead down a line of questioning in which the officer will generally blurt out that **he did not check for fingerprints**.

c. Don't give opportunities for them to explain

Depending upon how confident you are with your cross-examination abilities and your rapport with the officer, you may want to leave missing pieces alone and simply come back during closing arguments. There you can argue that he is a well-trained officer, and if he believed fingerprints would be present he would have checked for them. The fact that he did not check for fingerprints is conclusive that he did not believe that there would be any fingerprints. You have just established some evidence of innocence for your client. Cross is not Close!

d. Ability to hear, see, or recollect details

If you do not have a specific target, sometimes it is necessary to simply attempt to cross-examine the witness generally in terms of their **ability to hear, see, or recollect details**. You may be able to show the testimony is either **unbelievable or unreliable**. This tactic is common in criminal cases. The witness may have claimed direct and unobstructed view, while cross-examination shows that they were able to observe only from great distances.
Watch My Cousin Vinny! BUT remember it is Hollywood!

The witness might also claim an event occurred at one time, while you can demonstrate that it could not have been the claimed time because of some contradictory fact. This line of questioning is most helpful with fact witnesses who are not law enforcement, unless you can show the implausibility of the police theory. Ultimately, **be twice as careful when you are cross examining on general issues such as these because many times you can open the door to something that the State did not deal with**.

e. Cagey

Another tactic involves getting officer **to agree with very generalized factual assertions**. Many times they will **disagree with very generalized** facts and begin to look unreasonable. I have found that asking very, very simple questions of the officer makes them become cagey and believe you are going to play a trick on them. Thus, **they answer in very cautious terms rather than with straightforward answers, and may appear paranoid to the jury**. Allow the jury to make this determination on their own. **Do not begin to become argumentative with the witness** about their cageyness. Simply make an exact quote of something outrageous that the officer refused to admit and bring that up again in closing statements.

3) Impeachment

There are times when you can greatly damage a witness' testimony, and those moments might be the reason you went to law school. Impeachment is a powerful tool and the primary goal for most cross-examination. It is also the most difficult thing to do. In essence, you are trying to get the witness himself to admit that he was wrong or lying. It bears repeating that you are unlikely to have any real "Perry Mason moments." Be very guarded in attempting to get impeachment.

While there are many different types of impeachment the two most basic are prior inconsistent statements or very blatant omissions which tend to discredit the previous testimony.

A prior inconsistent statement may be available from the evidence in a police report, where the officer specifically contradicts herself. The key to capitalizing on this type of error is preparation and knowledge of the facts. The good news is that the officer may have only a vague or partial recollection of the events surrounding her testimony. You may be able to guide her incrementally into impeaching herself by proper leading and incremental questions.

More often, a defense attorney is not able to show a specific contradiction but can show inconsistency by omission. For example, the officer could testify that your client appeared nervous, hesitated in answering questions and fumbled those answers when interviewed. Yet if no such evidence is indicated in the police report, you can attempt to impeach on this omission. The omitted information must be relevant to some aspect of the case, and you must make absolutely sure that the information was not otherwise supported in some other documentation.

Continuing the example, if you try to impeach one officer for omitting your client's nervous hesitation, make sure that the damaging information does not appear in a narrative supplement submitted by another testifying officer. If it does appear, the State will take great pains to embarrass you with this other information. Obviously, this is not good for your stature with the

judge or jury. Above all, be careful with attempting impeachment and err on the side of caution if you do not know the witness or the information she or he will give. Remember that effective tactics require that you be guerilla (not mortally wound yourself while fighting) rather than a kamikaze.

4) Elicit testimony supportive

If there are small tidbits that your know the officer has that may help your theory it is best to begin cross with a friendly set of questions. Before you attack the officer, start by getting the officer to repeat things which are supportive to your theory of the case. Get them to add small details which can help support you theory.

F. Preparation

1) You can't cross-examine in a vacuum.

You must know the facts covered by the testimony better than the witness. However even with all of the preparation in the world, the reason many of us love cross examination more than any other element of the case is that invariably it must be done live and is completely dependent upon what is actually testified to in the courtroom. The natural tendency is to investigate only those matters which are obviously important 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. Witnesses say the darndest things.

All too many times an inexperienced attorney will start asking questions which they prepared based upon notes, but the State missed the issue on direct examination. Recognize that in the real world the actual evidence that the jury hears is substantially different from the State's best case scenario based upon the reports and all of the details the State could put forward. You have spent hours more time on this case than the prosecutor. You know details they may not have seem, plus you know what your client told you, so you have a more complete picture than the prosecutor.

Before you begin to cross-examine, be certain that the evidence you are cross-examining on has come in during the State's main case.

In preparing for cross-examination, always have two items at your fingertips ready and highlighted.

2) The elements! Have the Jury Instructions as a Checklist.

Start by getting the Jury Instructions and make certain you have which officers are going to provide facts as to which element.

Like most other aspects of trial practice, cross-examination is almost invariably won or lost in preparation. The amount of time spent preparing for cross will usually reflect your success. There

are many very practical things a defense attorney and her staff can do to ensure a favorable outcome.

3) Highlighted Reports

One is the officer's report. In most counties the State will turn over all reports as part of an open file, however you might not be able to get your hands on some reports until during direct examination. It is a good idea to make a pretrial motion that all reports be turned over. If the State refuses to give you a copy explain to the Judge your first view of the report is **the reason it is taking so long to do your cross-examination**.

If you have a motion ordering all reports be turned over, you are better protected if a new report surfaces. If you did not specifically ask in writing, you may have to deal with it live.

4) Tabula Rosa

It is vital that during the State's direct examination you listen ***and listen carefully*** to the evidence that the jury is actually hearing. What the witness says on the stand will many times be different from what you were expecting or what is in the reports.

The jury is hearing this evidence for the very first time. You already know a multitude of facts and points and have a broad visual image in your mind of what the police version of the story is and what your client's version of the story is.

It is imperative that you block all of this prior knowledge out and try to listen to the evidence that is being presented to the jury with a clean slate – a "Tabula Rosa". This way you can keep a third version of the story, that which is presented to the jury, separate and distinct from the State's alleged version and the defense version. You need to be able to pick up on details and pay attention to the slightest variation of what the jury has actually heard from what you projected the evidence to be.

5) Prepare quotes and index reports.

Anyone with experience can tell you that there is no worse feeling than having a witness who has impeached himself and you cannot find the contradictory statement you need to nail him. This is avoidable by thoroughly indexing all the trial materials and being organized. Preparation of trial notebooks and organization of materials show how support staff can be worth their weight in gold. If you use your staff for this type of preparation, consider bringing them with you to court to provide ongoing assistance, since they may be more familiar with the material than you.

Try practicing your cross-examination in your office with staff to make sure that you are paying attention and hitting all your points. This is best done by filming yourself and at least have someone critique you. This exercise will show you what your jury sees, and you might notice aspects of questioning that you previously missed from this new perspective.

6) Take Notes & get quotes

Take extensive notes during direct examination of exactly what you have heard rather than relying on your previously made outline. Have an outline but also have notes!

Sometimes it is helpful to draw a line from the margin of the paper so that one side is your prepared cross-examination, and the other side will be new issues that pop up during direct examination. The quicker that you can move through cross-examination the more effective you are likely to be. You need to move slow enough to be methodical and get it right but fast enough so that the witness must constantly be thinking of new things and new ideas.

Do not get too far ahead of the witness during cross-examination. They may give you a softball response that you can hit out of the park. If they make a mistake, **you have to hear it** in order to capitalize. It is very helpful to take exact quotes out of the police report, rearrange the order that they are in and be able to quote from them out of context in many different scenarios. This will show if the witness can verify a version of the quote that substantiates your position of what the facts show.

7) Pin down which of the five senses was used –

A fundamental issue on cross-examination is to look at the very basics of how the witness came to know what they are testifying about, so remember to evaluate a witness' **ability to know** a fact.

Very frequently a witness will testify to something that is beyond their capacity to know. This is a foundational skill for trial practice, but like many other skills it is hard to do with real expertise. You can have that expertise through good preparation and simply paying attention.

Ask yourself:

- Which of the five senses did the witness use to learn the evidence?
- Do any of the other senses corroborate the fact?
- How was the evidence recorded or remembered (or refreshed)?
- In what time sequence did the witness learn of the information?

Based upon the time sequence, witnesses presuppose facts based upon something they already know that they have not actually perceived themselves. An example would be the wind blowing a door shut after a witness has just told their spouse off in a heated argument. Most witnesses will testify very clearly that their spouse left and slammed the door. Whether or not the door was slammed or the wind caught it is based entirely upon the witness's preconceived notion and not upon anything which their five senses actually saw or could detect. Use this to identify a possible inconsistency in the State's case.

Adapt your questioning to the circumstances, and vary your approach. This allows you to control the rhythm and style of the questioning and thus control the witness. There are a number of generic question types below that should be utilized. The types may be something that you want to review prior to examination.

8) Use Different forms of questions

Always refresh yourself on the basics whenever preparing my cross-examination. Think of exactly how you want to phrase the question or statement depending upon which type of answer you want to get.

a. Interrogatory or Fact-finding

"Mr. Jones, did you see my client, Mr. Smith?"

b. Accusatory

"You didn't even see Mr. Smith, did you?"

c. Anticipatory

"Of course you couldn't see Mr. Smith yet, could you?"

d. Restricting

"But you couldn't see Mr. Smith at that time, could you?"

e. Assertion and Agreement

Q: "You didn't see Mr. Smith."

A: "Uh, no."

Q: "You didn't see any drugs either."

A: "No."

When using assertion-agreement style, you should try to work your way into them. Begin the cross-examination with actual questions and then at some point you can subtly begin making direct statements and the witness will follow on cue.

If you do it too early before establishing a rhythm, the witness may not follow along with his response or the State may object that counsel is testifying. For all questions (but especially assertion-agreement), use small steps to get the witness to commit. If the witness will not agree, keep backing up the slippery slope. Keep your questions clear and simple. Address only one fact per question; be very methodical. Finally, consider holding accusatory questions back to prevent appearing too hostile at the outset, as previously noted.

9) Use different techniques:

a. Stretch-out Technique

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

Example:

- So the victim did not mention that to you!
- And she did not mention that to the first officer on the scene
- And she did not mention that when you met with her later…

b. "Things not done," Cross-Examination

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

c. Back-Down

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

To do this you need to set up the witness by confronting him with facts which show an inconsistency 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… or that the witness has only heard… or 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. Make certain you know the psychology of the witness first, or stay away from this and save it for close.

G. STYLISTIC SUGGESTIONS:

1) You must have your own style

You must develop your own style and be able to adapt it from the rookie to the experienced officer. It can work to be condescending and sarcastic to them in a friendly way with a smile. This may set them off their game. But jurors don't like or trust what they perceive as nasty, mean or power hungry cops or lawyers, so make certain you can pull off the style and not lose ground

2) To use the Colombo technique or not?

It is generally effective to establish your authority and supremacy from outset with knowledge of police procedure, how system works and knowledge and familiarity with paperwork. This will generally make a witness less likely to stretch what is not there. But some have used the affected ignorance to set an officer at easy before setting a trap.

3) Don't Start weak

Start cross with compelling point you can't lose. This will help shake the witness up right off the bat. It puts you in a position of authority with both the Jury and the officer. It can also immediately show the witness it's easier to cooperate with you than not. Allow them to take the path of least resistance.

Every witness is uncomfortable on the witness stand, even the experience officer. They want to get on and off the stand as quickly as possible, so show them you will make it easier if they agree.

4) Never let them see you sweat

Never let them see you sweat. Part of this is to thank the judge when he sustains an objection against you. Always appear as if answer you got was one you wanted and expected.

Always maintain calm demeanor and good poker face, it builds confidence with the jury. Appearing to believe in the points you're making will convey that message to jurors that they too can believe your points.

H. Basics and Practical Tips Checklist

After considering cross as guerilla warfare, going through a few of the basic goals of cross examination, and preparing your exhibits it is important to reiterate the basics:

- Prepare jury instructions and exhibits
- Listen – to the direct, to the replies – listen!
- Get quotes from reports or direct examination.
- Tip: Pick quotes apart word by word to use to your advantage. Also, take quotes and place them in a new light.
- Do not repeat harmful testimony: The State does not need your help, and you do not want the jury to hear damaging information more than once.
- Remember to keep your tone measured and to portray yourself and the court proceedings as seeking the truth. Avoid appearing quarrelsome unless aggressive questioning is really necessary.
- Keep control of your witness.
    - Do this by using leading questions,
    - Being patient and
    - Methodical. Don't ask random questions.
- If you go step-by-step, you can get some witnesses to follow you nearly anywhere you want to take them.
- Use the witness' own wording whenever possible.
    - Remember – Listen!
- Avoid asking a question to which you do not know the answer.
    - This should only be done if you are positive any possible answer will not hurt you.
- Save credibility attacks for the end.
- You can get helpful testimony out early and discredit the witness later.
    - "Yes, Mr. Smith was cooperative."
    - Later, "Yes I am a biased, unreliable witness out to get Mr. Smith."
    - Message: Even though I'm untrustworthy, your client is still a decent guy.
- Hit your important points and finish strong.

- Remember the primacy and recency of testimony will impact the way the fact-finder processes information.
- Deal with Facts, not Conclusions
- Don't Ask the One Question Too Many
- Use demonstrative evidence.

2. Expert Witnesses

If you are going to be calling an expert witness in your case, it is imperative that you review all of the evidentiary and procedural rules - this is only a brief outline. I have attempted to focus on the three basic rules that deal with admission, however this paper is not exhaustive on the topic.

A. Direct Examination

The Rules of Evidence require that an expert be properly qualified. Fed.R.Evid., 28 U.S.C.A. § 7, Rule 702 (2002); R.Evid., N.C. Gen. Stat. § 8C-1, Rule 702 (2001); (hereinafter collectively, *Rules).* The Rules require special knowledge, skill, experience, training or education that *"will assist the trier of fact to understand the evidence . . .."* *Id.* (emphasis added). The determination of the status of a witness is a matter of law for the court. *U.S. v. Kilpatrick,* 16 F. 765 (1883). Make sure that any witness you tender as an expert can be shown to render assistance the jury.

Defense attorneys should review the qualifications of the expert for the benefit of the jury even if a witness has already been stipulated as an expert. This is important because it can influence the jury's weighing of the evidence. The jury is more likely to give greater weight to testimony from a person whose qualifications they have heard themselves. Do not miss this opportunity to impress the jury with the quality of your witness. Conversely, you may want to stipulate to a State witness' expertise, but do so with care. This can gain a slight psychological advantage if the jury knows how impressive your expert's credentials are and the state has merely stipulated but made no effort to enhance the stature of their own expert witness. Still, use great caution about the scope of any stipulation to prevent wide-ranging opinions. Do not leave any room for doubt as to whether a witness is an expert or merely giving lay testimony. The best practice is always to explicitly tender the witness as an expert. *Dickens* v. *Everhart,* 284 N.C. 95, 199 S.E.2d 440 (1973).

The first goal for your own expert is to establish the suitability of his or her methods. This also goes to the credibility of testimony and is especially important if you are disputing the reliability of the State's expert or certain methodology of the investigation. Rule 703 requires a basis for the expert opinion. *Rules,* 703. An expert must show personal knowledge of facts, or more commonly, knowledge of facts properly admitted in evidence. *Id.* Understand that not every opinion a witness gives is necessarily an "expert opinion." The specific opinion must be grounded in special expertise, and it is not a general license to give improperly founded opinions. *Textron Inc. by and through Homelite Div. V. Barber-Coleman Co.,* 903 F. Supp. 1546 (1995).

Testimony of inferences and opinions are not objectionable if they involve an issue that is ultimately for the trier of fact. *Rules,* 704. This means that a State expert can offer one opinion, a

defense expert can offer a contradictory opinion, and both are admissible. Much like any other conflicting testimony, the ultimate decision is for the fact finder based on the credibility of the differing testimony. An important limitation on expert testimony prevents an expert from making a legal conclusion or determining if a legal standard has been met. *State* v. *Weeks,* 322 N.C. 152, 367 S.E.2d 895 (1988). This standard is relevant in criminal charges that include a *mens rea* component. Experts *can* testify as to whether a defendant had the required state of mind. *See e.g., State* v. *Purdie,*

93 N.C.App. 269, 377 S.E.2d 789 (1989). Therefore, you can call an expert that will refute a defendant's capacity for *mens rea* or his actual state of mind. This can be a powerful tool toward reaching an acquittal and is common in homicide cases.

Below are some general tactics for direct examination of expert witnesses in criminal trials:

1. Qualify the basis for expertise and tender her or him formally as an expert.
2. Include helpful opinions offered for ultimate decision by the trier of fact.
3. Get the expert to state their opinion first. (Tell the jury the answer they should reach.)
4. Follow with questioning that shows how and why the expert reached that opinion. (Tell the jury why the expert thinks this way.)
5. Retrace methods and give layperson reasons or explanations for each step taken in the process of reaching the conclusion. (Tell them why they should reach the same conclusion.)
6. Reinforce the opinion by restating after the process is described. (Tell them again what the final answer should be.)
7. Address alternatives or defects in the theory supporting the expert opinion. (Show the jury the answer is believable by conceding reasonable limitations.)
8. Reinforce the propriety of the opinion despite other issues. (Tell the jury why your answer is still the best answer.)
9. Cross-Examination

Expert witnesses give fertile ground for cross-examination because of the basis in opinion rather than fact. I have laid out nine different potential methods of cross-examination. This list is not exhaustive by any sense but will cover the fundamentals approaches. I do not recommend attempting to use all nine, but pick the ones most effective for your particular case. If the witness does not hurt you, consider not cross-examining at all. Many times the State must put on an expert witness to prove a particular point in a case which you are not necessarily objecting to, but you have not consented to. The following is a general list of considerations you should review before cross-examining an expert witness.

1) Limit the scope of the expert's testimony.

Prior to the cross beginning you should be certain that you have limited the scope of the expert witness' testimony to that which is specific to their training and expertise. You may well stipulate that the person is an expert with regard to a specific thing. Be very careful in your stipulation to limit their expertise as much as possible lest you open the door to broader opinions. Do not allow for example, a child psychologist to open the door for all types of conclusions or speculations about a child's behavior. Be certain to limit, and possibly contest the expert witness' expertise in

other unrelated or even other related fields if they have not demonstrated an expertise in the specific area in which they are going to venture the opinion.

2) Show expert as an opinion for hire.

This is a very generic and over-used attack on expert witnesses, but can be very effective. It involves demonstrating professional fees and frequency of testimony. I don't believe that it is helpful in most criminal cases since the State's witnesses are typically State employees who are not benefiting from coming in to venture their expert opinion. In fact, this is most likely to come up when the prosecution cross-examines your own experts. Nonetheless, be aware that it is one potential cross-examination issue for both sides.

3) Use opposing experts to support your own evidence.

Even when you can't afford to hire expert witnesses on your own many times you can get the State's expert to agree to many issues which you would like to put before the jury. This effectively allows you to get some expert testimony on the State's dime! One place to begin would be to review the actual materials that the State's expert may have published. If the State's witness has not published anything, many times you can call the expert up and ask them about the articles that they based their opinion upon. The expert might also indicate some of the things they have used for training. You can then cross-reference those materials and ask specific questions to elicit contradictory evidence that would not necessarily come out unless you ask the question specifically.

4) Get expert to support your theory of the case by proposing favorable circumstances.

In many situations, expert opinion testimony is based upon a very specific set of facts that an investigator or police officer has given to the expert witness. You can begin to change the expert's opinion based upon different facts which they are taking as stipulated to be true. Be careful in building this scenario, but be prepared to cross-examine the expert by having hypothetical questions that call for a different fact scenario and thus a different expert conclusion.

5) Highlight competing theories or differences of opinion among other experts.

There is frequently contradictory expert opinion within a field, and many times you can get the expert to agree that the facts are too broad to draw a narrow conclusion. As a general rule, realize that the broader the opinion is, the easier it is to come up with counter points which are inconsistent with that broad opinion. On the other hand, if the opinion is very narrowly drawn to be specific to this case, a better approach is to change some of the disputed facts. Use differing facts within the case to show how the narrowly drawn opinion becomes incorrect if the jury finds reasonable doubt as to any facts the expert based their opinion on.

6) Show unreliable sources of information and lack of first-hand knowledge or data collection.

Most expert opinions are based upon facts that the expert reviews in documents and/or reports; testimony is often not based upon any first-hand knowledge or examination. Even if the expert has examined some facet of the tangible evidence, they will have to make a multitude of assumptions about how that evidence came to be in the state that it is in. Think of the chain of custody of evidence - the expert can only speak to the significance of an object that was given to him. Here they will have to rely upon the reports, data, or objects given to them. It is very easy to create a check list and get an expert to agree that if fact A was incorrect then their opinion would be different; if fact B was incorrect then their opinion would be different; if fact C was incorrect then their opinion would be different. You can go through a litany of questions to show a huge variable in the outcome of their opinion. Many times you are able to get the expert to say that there are as many as 10 or 15 or 20 variables in their opinion and that if any one of these factors were different their opinion would necessarily change. You do not need to know what their opinion would be, but simply that their opinion is contingent upon a sequence of factors. The more broadly you can draw this list of factors, the more questionable and limited the application of the opinion becomes.

7) Identify any lapses in methodology.

I have left the attack on methodology as one of the last few issues on cross-examination. It is what I consider the riskiest tactic because you are going to tackle the expert head on in their area of expertise. This is by far the most effective means of cross-examination, or the most deadly. If you are able to show that there was a lapse in the methodology the expert used, you have accomplished your goal. Yet if you simply give the expert an opportunity to show you why you are wrong and re-explain their theory one more time you have actually ended up doing more damage to your own case. If you do try to attack methods, show variability and risk of error at multiple points in the expert's process. You will occasionally find the prosecution trying to rely upon a new method to establish evidence that has a high error rate. Here you can demonstrate the inherent unreliability of the method regardless, especially if other traditional methods contradict the "new science." Use attacks on methodology only with forethought and discretion.

8) Avoid debating with experts about matters in their field.

While this is obvious, it is probably good to remember that you do not want to debate experts in their own field. Even when you have studied a great deal about a subject, avoid the temptation to fight experts on their own turf. Remember, the witness is an *expert* for a reason, so the odds are stacked against you.

9) Read and present publications they have not read.

Even if you do not have other treatises directly on point, it is a good idea to have two or three published expert opinions that you can use as a prop to waive around in the courtroom. In fact, if the expert says that he has read or is familiar with the article you can create hypothetical questions to show that it is inconsistent with his opinion. If the expert has not read it (which is more likely than not) then you can simply leave it up to the jury to conclude that he is not up to date on all of the issues, which he should be. They generally will not go out on a limb, and disagree with an unknown article. You do not have to have anything harmful actually in the article -just show that they do not know it all.

3. Handling Objections During Direct and Cross-Examination

A. Should you ask objectionable questions?

YES, push the limit if the DA lets you! If the prosecutor is not going to object, then push the limits in this area. A question is not objectionable until an objection is made and sustained. In the event that the prosecutor does object to the form of your question you always have an opportunity to rephrase it.

B. Don't lead your own witness.

Even if the DA lets you, you want your witness to tell the jury, not you. It is important if you have an expert witness to let the jury hear the words of that expert witness. Therefore, it is best not to lead your own expert unless you absolutely have to. If you have to lead, practice with the expert more or find a new expert.

C. Use a mantra that repeats accepted facts.

Come up with a mantra of the assumed facts which help your case, then repeat them over and over in the hypothetical question. This accomplishes two things: *your* facts get drilled into the jury's collective memory *and* the expert witness will begin to anticipate the answer. The witness will begin to accept the facts and anticipate a "yes" response. This is especially helpful during cross-exam because you are in total control of the witness going right along with you. The mantra enables you to tap the power of repetition to affect juror's memory and perception.

Consider:

Doctor, because you were not present when Mr. X was charged with this crime were you?

Because you were not present you cannot determine if the symptoms related by the officer were due to a medical condition or an undiagnosed diabetic attack, can you.

Doctor, if a man of 170 pounds is having an undiagnosed diabetic attack you cannot form an opinion to any degree of medical certainty about the amount of keytones which he will be blowing off, can you?

Doctor, if a man of 170 pounds is having an undiagnosed diabetic attack you cannot form an opinion to any degree of medical certainty about his ability to walk a straight line, can you?

Doctor, if a man of 170 pounds is having an undiagnosed diabetic attack you cannot form an opinion to any degree of medical certainty regarding what if anything could be contributing to his mental acuity, can you?

Doctor, if a man of 170 pounds is having an undiagnosed diabetic attack you cannot form an opinion to any degree of medical certainty about _____, can you?

D. Settling clear and contentious issues via pretrial motions *in limine*

If the law is strong on your side and the issue is clear, file pretrial motions to be sure you are covered. Note that this can backfire because the DA can prepare the witness to circumvent your legal issue. Given this risk, it is usually better to have these issues prepped and waiting, but not to show your hand before the issue comes up. Also, if the issue is slippery and the witness can shift around it, then a pretrial motion only makes the DA better prepared.

E. Practical Tips and Basics Worth Remembering

Avoid compound questions. Do not make the jury work hard to get your point; Unless they are repetitive, and help your theory.

Use simple, parsed questions for clarity and specifically to avoid objections of asked and answered. There is no need to lose face to the jury by losing on a junk objection when it is entirely avoidable.

Preserve record of excluded evidence or improperly included evidence for appeal.

Know the case law and be prepared to support your position. This task is easily accomplished by developing quick-reference guides to cases and issues. Add to your list as often as possible. This is the type of tactic that can separate a really good trial lawyer from the rest of the competition.

Use a form to track all your objections. A sample is provided in the Appendix.

Get good statements repeated. Ask the witness to repeat any good statement. It may be that you are not even sure you heard it correctly. Then make a production over writing it down word for word. The Jury will realize the statement was important.

Use the elements. Make a brief outline of the elements of each offense to cross-examine. Keep this outline in the margin of your notes, and then highlight the issues that you can attack with each witness.

Use case notes. Check the case notes at the end of the statute to come up with quick and easy possible cross-examination issues and grounds for objections. Thousands of people have already litigated each and every issue in most cases. The case notes will frequently raise important issues or at least give you new ideas on issues that are secondary to the main defense. They can be ripe for enhancing your cross.

Skip all around. Bouncing around will have the witness seem disjointed and allow you to get candid answers without the usual self-serving drivel. Use closing arguments to tie the threads of cross-exam together.

IV. ETHICS AND PROFESSIONALISM IN CRIMINAL LAW BY MICHAEL R. HAIGLER

("I Don't Have Too Many Talents. In Fact, Lawyering Might Be the Only One...")

Some of us grew up knowing we wanted to be lawyers. Some of us fell into the practice quite accidentally. Either way, there are some (like me) who acknowledge that we don't have too many talents other than practicing law. Accordingly, ethics should be of paramount importance. My boss, Mr. Dummit has represented a number of attorneys before the N. C. State Bar. From what he has observed, there is nothing more traumatic or consuming for an attorney than having to respond to a grievance or prepare for a hearing before a disciplinary commission. Just consider how traumatic a speeding ticket can be for some of your clients. Imagine one's only source of income, dream, talent, etc. going down the drain because of a mistake made in a case or with a client. I firmly believe that the State Bar's requirement that we receive Continuing Legal Education is one of the most important aspects of the practice of law. We must stay current and educate ourselves on changes in the regulations. Moreover, we must remind ourselves of the nuances of the rules and regulations of the North Carolina State Bar. Much of the rules and formal ethics opinions are based on plain old common sense. However, when you have to make an instant decision for yourself or for your client, some particular fact or issue may cloud your judgment or your perception of what actually makes good common sense.

There are four topics in this paper relating to ethics and professionalism in criminal law. I have listed some of the rules, ethics, opinions and cases that might be applicable to the four issues. However, this list is not exhaustive and should only be used as a starting point when trying to resolve a particular issue in a particular matter.

1. Avoiding Conflicts in Representation ("No fee is large enough...")

One of the greatest comments made by one of my friends regarding whether to take a case, even if it involves a lot of money was, "No fee is large enough if it involves losing your law license." This is a simple statement that makes sense. Who wants to go through the loss of business, pain, humiliation and everything else that would go with losing your law license? The beginning of any case starts with representation. The first thing you must do whenever that call comes into your office is to determine whether there might be a conflict of interest in representing that person or entity.

Rule 1.7 of the Rules and Regulations of the North Carolina State Bar provide that a lawyer shall not represent a client if the representation of that client will be, or is likely to be, directly adverse to another client. However, there are exceptions to that rule. If the lawyer reasonably believes the representation will not adversely affect the interest of the other client and each client consents after consultation, which shall include explanation of the implication of the common representation and the advantages and risks involved, an attorney might be able to represent two parties. However, it is my humble opinion that undertaking such dual representation causes more problems than it is worth. If at all possible, obtain a second attorney for one of the two clients.

Rule 1.7 also provides that a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person

or by the lawyer's own interests. Again, however, there are exceptions. If the lawyer reasonably believes the representation will not be adversely affected; the client consents after consultation that shall include explanation of the implications of the common representation and the advantages and risks involved, the attorney may be able to represent that client. However, the rules note the lawyer has a continuing obligation to evaluate all situations involving potentially conflicting interests and shall withdraw from representation of any party the lawyer cannot adequately represent without using confidential of another client or former client (unless there is an exception under Rule 1.6.) Again, the safest way of handling such matters is not to undertake the representation.

The commentary to Rule 1.7 includes topics such as loyalty to a client, a lawyer's interest, conflicts in litigation and interest of persons paying for a lawyer's service. The commentary provides a laundry list of examples where conflicts may arise either because of other clients or because of information received. Under the commentary on conflicts of litigation, the commentary provides that potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. Again, when at all possible consider having one of the prospective clients retain separate counsel. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Opposing counsel may also raise a question. Thus, if the issue is removed upfront by separate representation, both clients will benefit.

Rule 1.8 relates to conflicts of interest for prohibited transactions and other specific applications. Rule 1.8 provides that a lawyer who represents two or more clients shall not participate in making an aggregate settlement in a criminal case. However, if each client consents after consultation, including disclosure of the existence and nature of all the claims and pleas involved and of the participation of each person in the settlement, a lawyer can aggregate an agreement as to guilty or *nolo contendre* pleas.

Rule 1.8 also refers to a third party paying attorney fees for a client. Rule 1.8 provides that a lawyer may be paid from a source other than the client. However, the Rule requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflicts of interest. An excellent example of this issue is when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests. The corporation may provide funds for separate legal representation of the directors or employees if the client consents, after consultation and the arrangement insures the lawyer's professional independence. One disciplinary hearing note (79 DHC 26), noted that an attorney who accepted compensation from someone other than his client without the knowledge or consent of his client was reprimanded. Therefore, one must be very careful in making sure that before accepting compensation from someone other than the client, the client is provided information and consents to that arrangement.

Rule 1.9 covers conflicts of interest with a former client. The Rule provides that a lawyer who has formally represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interest of the former client unless the former client consents after consultation. The Rule and

commentary cover a large group of issues including lawyers moving between firms, confidentiality and adverse positions.

The Ethic Opinions Notes have a number of situations that should be considered. CPR 93 provides that a firm may not continue to represent a husband charged with his wife's murder after the Public Defender who had represented a co-defendant who had agreed to testify against the husband in the same case joined the firm. CPR 195 provided that an attorney may not act as a special prosecutor against a former client who sought his advice concerning domestic problems that culminated in the subject homicide.

Rule 1.10 covers imputed disqualifications. Where lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone will be prohibited from doing so under the other rules. Moreover, when a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm unless the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any lawyer remaining in the firm has information protected by the rules that is material to the matter. The rules also provide that a disqualification may be waived by the affected client under the conditions of Rule 1.7 (Conflicts of Interest: General Rule).

Several Ethics Opinions Notes relate to criminal practice. CPR 93 provided that a law firm may not continue to represent a husband charged with his wife's murder after the Public Defender who had represented a co-defendant who had agreed to testify against the husband in the same case joined the firm. CPR 96 provided that when different attorneys in the same firm are employed to represent conflicting interests in related cases, such as a criminal defendant in a homicide case, both must withdraw.

CPR 274 noted that attorneys who merely share office space are not automatically disqualified. However, this is an extremely touchy area, and no information should be shared between the attorneys in an office sharing arrangement if there is a potential for one attorney representing a client with interest different from a second potential client.

Rule 1.16 relates to declining or terminating representation. These rules cover mandatory withdrawal, discharge, optional withdrawal and assistance of the client upon withdrawal. Important to criminal defense attorneys are Ethics Opinions Notes CPR 3 which provides that a client is entitled to his file upon withdrawal of his attorney and RPC 153 which provides that in case of multiple representations, a lawyer who has been discharged by one client must deliver to that client, as part of that client's file, information entrusted to the lawyer by the other client.

In the event of declining or terminating representation, a review of Rule 1.16 is highly recommended. Also, the North Carolina State Bar has attorneys on staff who will assist in applying the State Bar regulations to the facts of your case. I highly recommend a call to the State Bar when any issue arises relating to any of the above issues including declination or termination in representation.

2. When You Suspect a Client May Be Lying (Don't Become the Liar Yourself.)

How many criminal defense lawyers can say they have never had a client who they suspected might be telling them a lie? I suspect that there are very few. When a client first enters my office, I give them several rules: (1) The attorney-client privilege is in effect. (2) In order to assist you and give you the best legal advice possible, I need you (the client) to be entirely honest with me no matter how embarrassing, frightful, or horrifying it may be to tell the truth. (3) If you cannot tell me the truth, I would rather you just tell me that you do not wish to respond. The worst situation is when you have been relying on bad information provided by your client for weeks, months, or years. Then, at trial, you learn for the first time that your client was not telling you the truth.

A number of rules regulate these situations. Rule 1.2(d) provides that a lawyer shall not counsel a client or assist a client in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law. Obviously, this Rule serves as a reminder that we cannot assist a client or encourage a client to engage in criminal or fraudulent conduct. As noted in the Commentary, a lawyer is required to give an honest opinion about the actual consequences that appear likely to result from the client's conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct in recommending that means by which a crime of fraud might be committed with impunity. (There is also a distinction between giving a client legitimate advice about asset protection and assisting in the illegal or fraudulent conveyance of assets. At least one attorney has been prosecuted regarding such advice, and it is a slippery slope to say the least). The Commentary notes that when a client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing except where permitted by Rule 1.6 (Confidentiality of Information). However, the lawyer is required to avoid furthering the purpose. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent when he/she realizes continued assistance might be inappropriate.

So what do you do when you suspect a client may be lying? Can you reveal that information to anyone? Rule 1.6 provides that confidentiality of information refers to information protected by the attorney client privilege under applicable law, and other information gained in the professional relationship that the client has request be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. (The word "client" refers to present and former clients.) There are exceptions to the rule of confidentiality. A lawyer may reveal confidential information under certain circumstances including when he has the implied consent of the client or when the client or clients affected has consented. Confidential information when permitted under Rules of Professional Conduct is allowed as well as when required by law or court order. Confidential information concerning the intention of a client to commit a crime and the information necessary to prevent the crime is allowed. Also, an attorney can reveal confidential information to the extent the lawyer reasonably believes it is necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used.

The commentary to Rule 1.6 regarding confidentiality of information notes the fundamental principle and client-lawyer relationship that the attorney maintains confidentiality information relating to the representation. The premise is to encourage communication: discussing fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. However, the commentary notes two related bodies of law the attorney-client privilege (which includes the work product doctrine) in the law of evidence as well as a rule of confidentiality established in rules pertaining to professional ethics.

The commentary to Rule 1.6 also discusses the exception where an attorney becomes aware of a client who intends to commit a future crime. The commentary notes that to the extent a lawyer is prohibited from making disclosure, the interest of the potential victim are sacrificed in favor of preserving the client's confidences even though the client's purpose is wrongful. However, to the extent a lawyer is required or permitted to disclose a client's purpose, the client will be inhibited from revealing facts that would enable the lawyer to counsel against a wrongful course of action. Therefore, a rule governing disclosure of threatened criminal activity thus involves balancing the interests of one group of potential victims against those of another. In addition, if the integrity of the lawyer's own conduct is involved, the principle of confidentiality may have to yield, depending on the lawyer's knowledge about and relationship to the conduct in question as well as the seriousness of that conduct.

The commentary sets a series of rules on what an attorney should do if the attorney determines criminal or fraudulent conduct matter could appear. First, the attorney may not counsel or assist a client in conduct that is criminal or fraudulent. Similarly, the attorney cannot use false evidence. Second, the attorney may learn that a client intends prospective conduct that is criminal. The lawyer has professional discretion to reveal information in order to prevent such consequences. It is difficult for a lawyer to "know" when such a purpose will actually be carried out for the client may change his mind. Third, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation, the lawyer may not have violated the rules because he did not know the wrongful or fraudulent nature of the conduct. However, the fact remains a lawyer's professional services may have been made the instrument of the client's crime or fraud. Therefore, the attorney has a legitimate interest in attempting to rectify the consequences of such conduct, and has the professional right, although not a professional duty, to rectify the situation. The attorney has some professional discretion to reveal such information to accomplish rectification. Here, I would highly recommend that an attorney not take any action until seeking advice of other counsel as well as representatives of the North Carolina State Bar and undertaking, a thorough review of Rule 1.6, the Commentary and Ethics Opinions notes.

Comment 20 to Rule 1.6 provides for disclosures otherwise required or authorized. For instance, if an attorney is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (c) requires the lawyer to invoke the privilege when it is applicable. The lawyer must then comply with the final orders of a court even if requires the lawyer to give information about the client. Comment 22 reminds us that the duty of confidentiality continues after the client-lawyer relationship is terminated.

A number of Ethics Opinion Notes relate to issues involving criminal defense attorneys and Rule 1.6. CPR 284 states that an attorney who, in the course of representing one spouse, obtains confidential information bearing upon the criminal conduct of the other spouse must not disclose

such information. RPC 33 provides that an attorney may not disclose confidential information concerning the client's identity and criminal records without the client's consent nor may an attorney misrepresent such information to the court. In response to a direct question from the court concerning such matters, an attorney may not misrepresent the defendant's criminal record but is under no ethical obligation to respond. If the client misrepresents his identify or record under oath, the attorney must ask the client to correct the misstatements. If the client refuses, the attorney must seek to withdraw.

FEO 5 provides that a defense lawyer may remain silent while the prosecutor presents an inaccurate driving record to the court provided the lawyer and the client did not criminally or fraudulently misrepresent the driving records to the prosecutor or the court. Furthermore, the application for a limited driving privilege must not contain a misrepresentation to the court about the client's prior driving record. Therefore, if the prosecutor misses the prior conviction, an attorney cannot apply for a limited driving privilege that is based on false information regarding the client's eligibility.

FEO 15 provides that a lawyer with knowledge that a former client is defrauding the bankruptcy court may reveal the confidences of the former client if required by law or if necessary, to rectify the fraud. Again, great caution should be used when dealing with such a situation.

If termination of representation is appropriate, Rule 1.16 should be considered. The one thing that you do not want to have happen is that if you have to remove yourself from representation because a client has misrepresented information, you do not want additional issues caused by your termination of representation.

Rule 3.3, Candor Toward the Tribunal, makes the broadest statements regarding an attorney's responsibilities to the court. A lawyer shall not knowingly make a false statement of a material fact or law. Moreover, failure to disclose the material fact to the court when disclosure is necessary to avoid assisting a criminal or fraudulent act by the defendant is improper. Moreover, an attorney may not offer evidence that the attorney knows to be false. If an attorney has offered material evidence and comes to know of its falsity, the attorney should take reasonable remedial measures.

The commentary has guidance regarding Rule 3.3's requirement of candor to the court. Comment Note 4 provides that when evidence that a lawyer knows to be false is provided by a person who is not the client the lawyer must refuse to offer it regardless of the client's wishes. A lawyer, who receives the information clearly establishing that a person other than the client has perpetrated fraud upon a tribunal, should reveal the fraud to the tribunal. Also, Note 5 provides that when false evidence is offered by the client a conflict may arise between a lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered, or if it has been offered, that its false character should be disclosed.

Comment 6 under Rule 3.3 provides that the attorney should seek to persuade a client from refraining from providing perjured testimony. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible because

the trial is imminent, or the confrontation with the client does not take place until the trial itself or no other counsel is available. This presents a dilemma with the attorney, and guidance should be sought.

Comment 7 under Rule 3.3 provides guidance for the difficult situation where an accused insists on testifying and the lawyer knows the testimony is perjury. Needless to say, an attorney's efforts to rectify the situation could increase the likelihood of the client being convicted as well as the possibility of perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception before the court. Three resolutions are suggested. One is to permit the accused to testify by a narrative without guidance through the lawyer's questions. Another suggested resolution is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. But this makes the advocate a knowing instrument of the perjury. The final resolution suggested is that the lawyer may reveal the client's perjury if necessary to rectify the situation.

Comment 10 relates to perjured testimony or false evidence that has been offered and the proper course for the attorney. Obviously, the attorney's first course of action is to meet confidentially with the client and attempt to persuade the client not to use the false testimony or evidence. If that fails, the attorney should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or it is impossible, the attorney can make disclosure to the court. Upon making such disclosure, it is up to the court to determine what needs to be done. Again, these situations are so fact specific, guidance should be sought from other attorneys and the State Bar. A list of cases are set forth below regarding situations where perjured testimony or false information and the attorney's duty are in conflict.

Several Ethics Opinion Notes apply to these types of situations. CPR 92 provides that an attorney who knows that a criminal client gave an arresting officer fictitious names should call upon the client to disclose his true identity to the court and, if the client refuses, seek to withdraw. RPC 33 provides that if an attorney's client testifies falsely regarding a material matter such as his or her name or criminal record, the attorney must call the client to correct the testimony. If the client refuses, the attorney must seek to withdraw. However 98 FEO 5 provides that a defense attorney may remain silent while the prosecutor presents an inadequate driving record to the court provided the lawyer and the client did not criminally or fraudulently misrepresent the driving record to the prosecutor or the court. Further, it is provided that an application for a limited driving privilege cannot contain a misrepresentation to the court about the client's prior driving record. As a practical consideration, if an attorney knows a client is not eligible for a limited driving privilege, an attorney should not tender a limited driving privilege to the court for its consideration.

3. Duty to the Client vs. Duty to the Court ("Who Wins?")

As we have seen in recent cases, oftentimes a duty to the client conflicts with the duty to the court. The most obvious examples occur when the client intends to do something contrary to the appropriate administration of justice. Examples include client who is intent on providing false information to the court. An attorney has a duty of candor to the court system and a duty of loyalty and confidentiality to the client. When these two duties collide, one should be very careful

in setting the following course of conduct. The rules set forth below list a number of other rules that come into play when the duty to the client versus duty to the court occurs. Needless to say, candor to the tribunal versus responsibility of loyalty and confidentiality for the client often conflict.

An excellent example of the appropriate conduct by an attorney can be found at *In re the Investigation of the Death of Eric Dwayne Miller,* 357 N.C. 316, 584 S.E.2d 772 (2003).

This case is ongoing in nature, but the recent Supreme Court opinion provides a chronology of the appropriate conduct to take when faced with the requirement of exposing confidential information to the court. In that case, the criminal defense attorney represented Mr. Willard in a homicide investigation. Dr. Miller was the decedent. Mr. Willard was suspected of having an affair with Dr. Miller's wife. Mr. Willard retained counsel after Dr. Miller's death that was ruled a possible homicide. Mr. Willard advised his wife that his attorney had instructed him that he could be charged with the attempted murder of Dr. Miller. Thereafter, Mr. Willard committed suicide. The widow, Mrs. Willard, revealed this information to law enforcement. The prosecutor was attempting to obtain information regarding statements made by Mr. Willard to his attorney.

The Supreme Court noted that the case presented a question of whether during a criminal investigation; there could be a legal basis for the application of an interest of justice balancing test or an exception to the attorney-client privilege which would allow a trial court to compel the disclosure of confidential attorney-client communications when the client is deceased. This case was one of first impression for the North Carolina Supreme Court and it contains an excellent review of case law and statutes in this state and other states. Ultimately, the court rejected most of the State's arguments relating to the disclosure of the information. However, the court required that the case be reversed and remanded for additional findings. The court held that when a client is deceased, upon a non-frivolous assertion that the privilege does not apply, with proper, good faith showing by the party seeking disclosure of communications, the trial court may conduct an *in camera* review of the substance of the communications. To the extent that any portion of the communications between the attorney and the deceased client relates solely to a third party such communications are not within the purview of the attorney-client privilege. Therefore, if the trial court finds that some or all of the communications are outside the scope of the attorney-client privilege, the trial court may compel the attorney to provide the substance of the communications to the State for its use in the criminal investigation, consistent with the procedural formalities as set forth in the opinion. To the extent the communications relate to a third party but also affect the client's own rights or interests, and thus remain privileged, such communications may be revealed only upon a clear and convincing showing that their disclosure does not expose the client's estate to civil liability and that such disclosure would not likely result in additional harm to loved ones or reputations.

The court did not reach the issue of whether any such information provided by an attorney would be admissible in any future criminal prosecution. The court held that in the event a subsequent criminal investigation ensues, the trial court would apply the rules of evidence to the information in the event it is tendered into evidence and determine then what is admissible against a defendant. The Supreme Court further noted that any portion of the communications made between the client and the attorney is either not subject to attorney-client privilege, or though privileged no longer serves the purposes of the privilege and may be disclosed, the attorney's

affidavit and the information contained therein must nevertheless remain sealed and preserved in the records of the trial court for appellate review in the event of an immediate appeal. The Supreme Court held that the trial court's determination of the applicability of the privilege or disclosure affects a substantial right and is therefore immediately appealable.

This case is continuing and additional appeals are anticipated. If this situation arises for you, you should be very careful not to waive the privilege until ordered by the court. Thereafter, cautious steps should be taken to make sure you comply with this Supreme Court ruling.

Another recent case involving the duty to the client versus duty to the court involves a Supreme Court justice. The Alabama Chief Justice of the Supreme Court was suspended and ultimately removed because of an ethics complaint for defying a federal court order to move the Ten Commandments monument from the rotunda of the Alabama Supreme Court Building. This case involved an interesting conflict between a number of First Amendment issues as well as responsibilities when one's moral position differs with his ethical duties. Chief Justice Roy Moore was suspended based on an ethics complaint for defying a federal court order to move a Ten Commandments monument. As noted in the 11th Circuit Court of Appeal's opinion:

"The rule of law does require that every person obey judicial orders when all available means of appealing them have been exhausted. The chief justice of a state Supreme Court, of all people, should be expected to abide by that principle. We do expect that if he is unable to have the district court's order overturned through the usual appellate processes, when the time comes, Chief Justice Moore will obey that order. If necessary, the court order will be enforced. The rule of law will prevail." *Glassroth v. Moore,* 335 F.3d 1282, 1303 (2003). Obviously, the Chief Justice was very principled and moral person who believed he was doing the right thing. However, when he defied a court order, it cost him his job. The ultimate decision an attorney (or judge) must make in this type of situation is whether his moral position so out rides the ethical position that he must obey his moral position. If he takes this position, he must realize it could cost him his job or license.

4. Witness Contact (Don't you become the witness?)

There are numerous rules and regulations under the Revised Rules of Professional Conduct relating to witness contact. Needless to say, the safest route is not to have any contact with a witness outside the courtroom. But this is not always possible, especially considering one's duty to fully investigate a case. Whenever possible, a deposition of the witness is probably the safest route. If there is an ongoing civil action related the criminal case, notices of depositions and subpoenas can be used. Also, there are certain situations where a sworn statement of a witness can be obtained. As a last resort, someone other than you can conduct an interview (a private investigator, a third party, another attorney, secretary of staff, family member of your client, but not your client). If it is absolutely necessary for you to conduct the interview, by all means have someone else present. If your client can afford a private investigator, this is a better route. One of the reasons an attorney should not interview a witness alone is the possibility the person's prior statement may become important (prior inconsistent statement or prior consistent statement). Rule 3.7 provides that a lawyer shall not act as an advocate at trial in which the lawyer is likely to be a necessary witness, except when the testimony relates to an uncontested issue; the testimony relates to the nature and value of legal services rendered; or disqualification of the lawyer would work a substantial

hardship on the client. The commentary discusses the fact that combining the role of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client. Throughout the commentary, lawyers are strongly discouraged from serving as both witnesses and advocates. RPC 19 held that an attorney may represent a client even though his secretary must be called as a witness.

Rules 1.7 and 1.9 deal with conflicts of interest. Obviously, an attorney should determine if there is any conflict of interest the attorney might have with a potential witness.

Rule 3.4, which deals with fairness to opposing parties and counsel, provides that a lawyer shall not request a person, other than a client, to refrain from voluntarily giving relevant information to another party unless the person is a relative or a managerial employee or other agent of the client and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information. Numerous cases have discussed this issue. In *State v. McCormick,* 298 N.C. 788, 259 S.E.2d 880 (1979), the Supreme Court held that it is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation, and to go over before trial the attorney's questions and witness' answers so that the witness will be ready for his or her appearance in court, will be more at ease because he or she knows what to expect and will his or her testimony in the most effective manner he can. The Court ruled that nothing improper occurred, so as long as the attorney prepared the witness to give the witness testimony at trial and not the testimony the attorney has placed in the witness' mouth or false or perjured testimony.

Moreover, the North Carolina Court of Appeals has ruled that it is appropriate to advise a potential witness that the witness has the right to assert his/her 5th Amendment privilege against self-incrimination or to stay away from court unless subpoenaed is not unethical. Certainly no rule provides an attorney from informing a potential witness of his legal rights. See *North Carolina State Bar v. Graves*, 50 N.C. App. 450, 274 S.E.2d 396 (1981). However, in an older disciplinary hearing note, the State Bar ruled that an attorney who advised a potential State's witness that his client would not testify against him if he did not testify against his client and also counseled the witness that he could plead the 5th, the North Carolina State Bar gave a public censure. See 79 DHC 10.

CPR 2 notes that an attorney generally does not need the consent of the adverse party to talk to a witness. Also, RPC 225 provides that a lawyer for a defendant in a criminal and civil action arises out of the same event may seek the cooperation of a crime victim on a plea agreement provided the settlement of the victim's civil claim against the defendant is not contingent upon the content of the testimony of the victim or the outcome of the case.

Rule 4.1 provides that in the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.

Rule 4.2 deals with the communication with persons represented by counsel. The rule provides that during the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized by law to do so. However, a lawyer may communicate about the subject of representation with elected officials who have

authority over a government agency or body even if the lawyer knows the government agency or body is represented by another lawyer in the matter. However, such communications can occur only after notification in writing, orally upon adequate notice to opposing counsel, or in the course of official proceedings.

Comment Note 2 provides that the rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matter outside the representation. Also, a lawyer having an independent justification or legal authorization for communicating with a represented person is permitted to do so. Comment 4 provides that parties to a matter may only communicate directly to each other. The purpose of this rule is to prohibit a lawyer or the lawyer's agents from undermining an opponent's client-lawyer relationship through direct contact with the client in the absence of opposing counsel. However, this does not prohibit a lawyer from encouraging a client to communicate with the opposing party with the view toward the resolution of their dispute. However, in a criminal setting, this often times could result in allegations of witness tampering or harassment. Therefore, although parties may be allowed to communicate directly with each other, such advice is ill advised in a criminal case. Also, sometimes the Court will enter orders prohibiting a client from contacting any witnesses in the matter.

Comment 5 provides that after a lawyer for another person or entity has been notified that an organization is represented by counsel in a particular matter, this rule would prohibit communications by the lawyer concerning the matter with persons having managerial responsibility on behalf of the organization and with any other person whose act or omission may be imputed to the organization.

There are numerous Ethics Opinions cover several matters related to witness contact and Rule 4.2. RPC 30 provides that a district attorney may not communicate or cause another to communicate with a represented defendant without the defense lawyer's consent. RPC 61 provides that a defense attorney may interview a child that is a prosecution witness in a molestation case without the knowledge or consent of the district attorney. RPC 67 provides that an attorney generally may interview a rank and file employee of an adverse corporate party without the knowledge or consent of the corporate party or its counsel. RPC 81 provides that a lawyer may interview an unrepresented former employee of an adverse corporate without the permission of the corporation's lawyer. RPC 87 provides that a lawyer wishing to interview a witness who is not a party but who is represented by counsel must obtain the consent of the witness' lawyer. RPC 219 provides that a lawyer may communicate with a custodian of public records pursuant to the North Carolina Public Records Act for the purpose of making a request or to examine public records related to the representation. This is the case even though the custodian might be an adverse party whose lawyer does not consent to the communication.

RPC 249 provides that a lawyer may not communicate with a child is represented by a guardian ad litem and an attorney advocate unless the attorney obtains the consent of the attorney advocate. This rule is not inconsistent with RPC 61 because RPC 61 does not take into consideration the appointment of a guardian ad litem or attorney advocate.

97 Formal Ethics Opinion 2 provides that lawyer may interview an unrepresented former employee of an adverse represented organization about the subject of the representation unless the former

employee participated substantially in the legal representation of the organization in the matter. As can be seen above, witness contact must be considered on a case-by-case basis under Rule 4.2.

Rule 4.3 relates to dealing with unrepresented individuals. An attorney must be careful not to give advice to a person other than the advice to secure counsel if the interests of such person are in conflict with the interests of the client. An attorney also should not imply that the lawyer is disinterested. When the attorney knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the attorney should make reasonable efforts to correct the misunderstanding.

Rule 4.4 requires the respect for rights of the third persons. In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or use methods of obtaining evidence that violate the legal rights of such person.

Rule 5.1 requires that a partner in a law firm shall make reasonable efforts to ensure that others in the law firm follow the Rules of Professional Conduct. Therefore, any responsibility of a partner or supervisory lawyer is also applicable if another attorney in the firm is involved in inappropriate conduct. Rule 5.3 provides that those responsibilities are applicable to non-lawyer assistants also. A lawyer having direct supervisory authority over a non-lawyer shall make reasonable efforts to ensure that non-lawyer's conduct is compatible with the professional obligations of the lawyer. Therefore, a paralegal cannot do something that an attorney is not allowed to do.

There are a number of Ethics Opinions related to witness contact not set forth above. RPC 132 provides that a lawyer for a party adverse to the government may freely communicate with government officials concerning the matter until notified that the government is represented in the matter. RPC 87 provides that a lawyer wishing to interview a witness who is not a party but who is represented by counsel must obtain the consent of the witness' lawyer. RPC 162 provides that an attorney may not communicate with the opposing party's non-party treating physician about the physician's treatment of the opposing party unless the opposing party consents. However, this particular opinion applies to personal injury cases. RPC 180 also provides that a lawyer may not passively listen while the opposing party non-party treating physician comments on his or her treatment of the opposing party consents.

Finally, an attorney cannot use a subpoena that contains misrepresentations as to the pendency of an action, the date or location of a hearing, or lawyer's authority to obtain documentary evidence. Therefore, a false subpoena cannot be used to coerce a statement out of a perspective witness.

V. PRESENTATION OF DEFENSE EVIDENCE BY CHARLES E. MELLIES

Do you really want to put on any evidence? OK, maybe you do, but do you really have to? In deciding whether to or how to present evidence, defense counsel should carefully weigh the advantages and disadvantages. First, can you get the evidence you need through the State's case? As described in some detail above, there are many ways to use the State's presentation of evidence for your client's benefit. Many of these strategies involve minimal risk and are techniques that can give you good results.

The second consideration should be whether there is a need to preserve certain evidence for appeal. Sometimes you will not need to have evidence from the Defense to bring your appeal. If your case circumstances dictate that you look toward an appeal, evaluate whether or not it is really necessary or advisable to present evidence. Other times you might want to put forward evidence its sex appeal for the sake of the jury. Determine which evidence is your "Record on Appeal" evidence and which is you "Jury Appeal" evidence. There is a difference!

The choice as to whether to present a case is ultimately a judgment call. You must educate your client, confer, have a joint discussion as to what will best serve his or her interests, but ultimately it is the client's call. Make the critical decision about whether to present evidence only after close consultation with the client, and be willing to follow the client's direction if you disagree. This will empower the client in the case and can foster loyalty no matter what the final verdict.

Many times presenting an affirmative case for the Defense is the "Hail Mary" play only if you see the case is otherwise lost.

1. Consistency of Evidence with Theory of Defense

Make sure every piece of evidence has a purpose and that your purposes generally reflect your theory of the case. Again, much of this topic has already been discussed in the specific tactics previously outlined. The principle message to remember is do not try to give the jury unnecessary information. It will only dilute the effectiveness of the information to which you really want them to pay attention. Be thoughtful and attentive to the details. It will make a difference for your clients, and other members of the local bar will notice too.

2. Using Drama Effectively

Let's face it - none of our trials seem to quite stack up to what we see on *Law and Order* every week. Clients, jurors and even you may be disappointed by the comparative lack of drama that goes on in court. Do not let this keep you from trying. One of the most important ways to enhance the drama of a case is to simply remember that trial practice is one part law and one part theater. If you approach your trials (jury trials and bench trials) with your mind on the theater and performance, you will naturally infuse your practice with a sense of excitement and drama. Above all, remember that the jury is your audience, and that they should be drawn into the story you are there to portray.

Let your witnesses be the center of attention. The Defendant may or may not be the best person to serve as the lead character or protagonist in your story, so do not be afraid to cast another player

as the lead. You can often promote a particular witness or a certain aspect of the story from sub-plot to the main story line. It will all depend on how you tell the tale. The same classic devices that have proven successful in drama and literature are already they're waiting for you: conflict and character. Every legal action revolves around a conflict populated by a cast of characters. Imagine how these raw materials can be used for effect and turned into an interesting show.

Above all, be sure to have prepared all of your witness well for both direct and cross examination. Let your witnesses know questions that you or the DA are likely to ask. Always emphasize at the beginning and end of their preparation that the most important thing they can do on the stand is to tell the truth. It is important to always emphasize the need to tell the truth to your witnesses for two reasons: 1) you obviously want them to be telling the truth; and 2) more importantly, if the prosecution questions the witness as to whether or not they were prepped by defense counsel, the witness can honestly answer, yes, and counsel instructed me to always answer truthfully. Importantly, you should use direct examination to expose all of the negative issues surrounding your witness. If you do not, the prosecution surely will, and it will appear as if your witness is hiding something – it is better to have your skeletons in the living room than in the closet. However, this is a double edged sword: How much does the other side really know about my client's skeletons? Am I just undermining my own case, or am I averting a time bomb. Use your instincts, but if in doubt, disclose!

Finally, make sure that your witness looks at the jury when they are answering questions. It seems counterintuitive. They will naturally want to look at the person asking the questions, either yourself or the D.A. However, the jury is actually the one they are answering the question to. They will appear more credible if they look at the jury when answering.

Just like the theater, you should use evidence and physical objects as props. Criminal trials lend themselves to dramatic physical evidence by their very nature. Guns, knives, drugs, clothing, photographs abound! Rest assured that the Prosecution would make full use of these props to convict your client. You can have the same impact with some creative thinking. If you have helpful physical evidence, make sure the jury gets full exposure to it. Publish it to the jury. In fact, after you examine a witness, then publish your evidence to the jury. Make photocopies for everyone in the box and the bench. Distract the jury from the cross-examination with something more interesting. Be creative. Judges will let you get away with more than you think because they are bored too!

3. Organizing the Order of Evidence

Use a definite structure for presenting your evidence. When you are presenting you want to be organized, just the opposite from when you are cross-examining. For that reason, avoid jumping around and other distractions. Chronological ordering is probably the most common and often most helpful organizing scheme. It helps to have a timeline your witness can refer to. If you present an aid like a timeline to the jury, they will almost assuredly come to rely on it. It does not necessarily have to be flashy, detailed, or expensive. Indeed too much detail will typically work against you. Instead, trim the story to the simplest sequence most beneficial to your case. One universal human truth is that people like things that are easy. If you over-complicate the story, you may lose the jury and they will look toward the State's case to find a more comprehensible version of what happened. Make your story the easiest and most obvious choice.

You should focus on building coherent subgroups and categories whether you are using a chronological structure or not. Good ways to achieve this involve grouping evidence by subject or relatedness. This can also be done with witnesses. As an illustration, imagine a case involving a defendant who is alleged to have been drinking and driving. There is a fatal accident with no eyewitnesses, but the two people in the car each say the other one was driving and it was your client's car. You have a witness who was a co-worker and was drinking with the Defendant earlier in the evening but did not see who was driving when the two men left together. You also have the Defendant's cousin who frequently joined the group, although not on the night in question. The cousin will testify that your client never drove when the pair was together - his friend always drove even though is was your client's car. It would make the most sense to begin by having the co-worker testify nobody saw who was driving when they left the bar. Once a possibility of doubt is established, then offer the cousin's testimony to fill in the doubt with a more credible story even though he wasn't even there that night. If the order is reversed, both the dramatic elements of the story are diminished, as is the overall attractiveness to the jury. Notice the difference: if the cousin says your client usually didn't drive, and then much later the co-worker says nobody knew who was driving, there is less of an automatic inference available for the jury. The cognitive leap is much greater.

Use structure to tie together topics (and witnesses) within the case where possible. Also note the "Rule of Threes:" things are more psychologically comfortable when presented in groups of three. Utilize these subtle details to enhance the overall quality of your case. When taken together, they really make a difference.

Trust other basic tenets you have forgotten in your practice. KISS: Keep It Simple Stupid. A lawyer should simplify, simplify, and then make it easier. Think in precisely the opposite from when you are on cross-examination. On cross you need to show that it is more complicated than the DA is making it, but if presenting your own evidence, you want to show a simple beauty to draw in the jurors in.

4. Using Demonstrative Evidence

Demonstrative evidence requires that you have something to show. Recalling the discussion on dramatic effect, it is hard to publish documents or other interesting exhibits if there is nothing there to show. Since you cannot use evidence you did not preserve, it will be important to remember the impact when you first encounter the case, not simply the day before your on the docket. Get you client to go take pictures early on, or see an expert. It makes the client involved, and you never know what you may find. Of course the evidence must be a true and accurate depiction of what it is intended to portray. Moreover, the evidence must render assistance in illustrating the witness' testimony. Even if the witness does not need the demonstrative evidence, use some anyway. A maxim of demonstrative evidence that can help you: "Never just tell when you can show and tell." Reinforce witness testimony with demonstrative evidence whenever feasible.

The reasons for using demonstrative evidence are clear. It improves memory reinforcement for the jury, but it also preserves evidence you may need later and did not know you needed at the time. You can also utilize easy and low-cost methods for demonstration, thus removing any excuse not to use them. Overheads, photocopies (use them as handouts) and digital photos on foam board are all quick and cheap but remarkably effective. Elements on foam board can also be very serviceable. Use the high-tech methods when you need to, but never under-estimate the power

of the good old-fashioned reliables. To analogize from a civil case, ask yourself: "Do I really need a 3-D digital animation of an auto accident that costs hundreds or thousands of dollars, when a simple plastic toy model will do? Especially when you can crunch the little plastic car right in from of the jury?"

Again, publish evidence to jury when appropriate. Keep them interested and prevent boredom. There is no escaping the cliche, "a picture is worth a thousand words." Understand though that your picture had better elicit the right thousand words!

5. Direct Examination Tips and Basics

1) Don't ask boundless, narrative questions. Be tight, focused, and have a point that is clear to everyone in the courtroom, especially the twelve in the box.
2) Have the witness tell a story through dialogue. You can weave a dramatic and compelling story that way.
3) Use simple questions and practice simple answers. The witness will typically mirror your style. No matter what, your job is to gently guide the evidence and make sure to get the information the jury needs to find in your favor.
4) Be methodical. This goes with simplicity and organization. Use lists and issues outlines to help you slow down.
5) Tease out the details.
6) Don't let the story come out in one short lump.
7) Engage all the senses,
8) Could you smell it?
9) Time of day? Time of year?
10) Which sensory perception helps your theory?
11) Avoid using "What happened next?" too often.
12) Make the witness interesting (or at least their story).
13) Appear involved in the story and use active listening skills.
14) Focus the witness to the facts important to your theory
15) Use elements of the crime.
16) Cover all the important facts you need.
17) Make a checklist and again allow the elements to help guide you.
18) Preempt damaging information and spin in your favor.
19) Practice and prepare - both counsel and witnesses.
20) When all is said and done, there is no substitute for practice. Actual trial experience can be a good teacher, but mock practice will teach you the same things without all the nasty consequences. Make your mistakes in your own office, not in the courtroom.

VI. DYNAMIC USE OF CLOSING ARGUMENTS BY STEPHANIE GOLDSBOROUGH

1. Setting a Clear Goal for Closing

As was stated in the section on opening statements, the opening statement tells the story of the case; the evidence is proof of that story; and the closing tells the jury what the story means. A dynamic closing does not just summarize all the evidence. An attorney must pick and choose the most important evidence and emphasize and argue those points. Three simple rules include:

1. Closings do not win cases for you.

2. Jurors' minds are already made up.

3. You can't persuade jurors.

Obviously, these rules beg the question, "If I can't win at closing, why even give one?"

Because the facts and jurors can win it for you!

In other words, one juror can persuade another juror or even the entire panel. That is why it is so important to pay attention to a juror's reaction during a trial. If possible, you should have someone taking notes for you so that you can watch the reaction of jurors to certain evidence. Others take notes themselves but have another attorney or paralegal (or third party) watch the jurors to attempt to ascertain any body language or show of emotion relating to evidence. This will help you in closing arguments.

Once all the evidence is in, you should begin organizing the evidence for that juror or jurors whom you believe are on your side. You need to interpret all the facts and argue how they compel a verdict in your client's favor. You should explain the law and apply the law to the facts in your case. You should also be prepared to draw all logical inferences and conclusions (including credibility of witnesses) that are favorable to your case. If you organize the evidence in such a manner, you can empower the juror: give the juror a reason he/she should fight for your verdict.

Again, a regurgitation of all the facts in closing arguments has no impact. A more dynamic use of closing arguments is to organize the evidence that is favorable to your case and make a forceful presentation that show why your argument is the appropriate outcome.

2. Choosing an Appropriate Tone and Style ("Mr. Boyce, I know Johnnie Cochran, and you're No Johnny Cochran.")

I once observed an obscenity case involving four of the best trial lawyers in the state. I marveled at the artistry of the closing arguments. The first attorney was the tactician. He explained the basics of the criminal trial process including the burden of proof being on the government, the presumption of innocence and the requirement that each element of each crime be proven beyond any reasonable doubt. The second attorney who appeared was the attorney who challenged the

government. His personality fit perfectly into this role. He growled at the jury, "How dare the government come into our bedrooms!" He strongly criticized the tactics used by the government and questioned the appropriateness of certain tactics. The third attorney who spoke also played to his personality. He was passionate and emotional in his argument. He brought in analogies with great compassion for people who were not even in the courtroom. Then the final attorney, whom the previous attorney referred to the "granddaddy of the criminal defense bar" got up and spoke. With compassion and sincerity, he closed with his hands in his coat pockets. He talked about his friends and colleagues (the prosecutors) and the fact that they were only doing their jobs. He talked about the fact that this business might be an unseemly business to some. He talked about the fact that the criminal justice system must handle these types of difficult cases, and he made the jury (and everyone in that courtroom) feel that it might be okay to come back with a not guilty verdict. That is exactly what the jury did.

The point of this story is that each of the attorneys chose an appropriate tone and style for his closing argument although they were all arguing in the same case. Each attorney chose the tone and style that worked best for him. Not all of us can be a Johnnie Cochran. Not all of us can be an attorney who effectively challenges law enforcement. Instead, each of us should consider the tone and style that works best for us as well as the particular facts of the case. The closing argument should be tailored accordingly. Again, by watching the jurors' reactions throughout the trial, you may determine the appropriate tone and style for different portions of your argument. It would be senseless to be passionate about some point of law or fact that makes absolutely no difference in the ultimate resolution of the case.

3. Using Graphics to Help the Jury Understand Your Theme

As discussed in the opening statement, our society is enamored by television. We receive information visually. There are a number of items you can use in closing arguments to help the jury understand your theme.

Flip charts or chalkboards can be used in basic cases. You can write things on the board as you go to reemphasize certain points. Timelines are effective to put everything into perspective. As mentioned previously, the closing argument tells the jury what the story means. If you can provide the information in time line fashion, it may make sense of the defense and tell the jury the meaning of the story.

Overhead projectors can be used (with the permission of the court). Exhibits can be shown overhead or you can outline your closing argument.

I always use some of the exhibits from the trial. This breaks the monotony of having to listen to an attorney talk for 30 or 45 minutes. Demonstrative evidence can also be used.

A PowerPoint presentation or other computer technology is probably the best device we have seen in the last decade. An entire closing argument can be used by PowerPoint presentation. This frees you up to focus in on particular points and it captivates a jury's attention. Remember, not to provide too much information (TMI) in such a presentation. Also, variety works wonders. You may want to use a PowerPoint presentation along with several of the exhibits and charts.

Finally, summary charts of voluminous information are crucial to the understanding of evidence. The Rules of Evidence allow summary charts to be used for voluminous information.

4. Structuring the Flow ("Let it Flow, Let it Flow, Let it Flow!)

In structuring the flow of your information there are a number of important points to make. Here are 15:

1. Pause First (to get their attention).
2. Don't read your closing (hide your notes).
3. Plan and Memorize the opening and closing of the Close.
4. Write out the close with a dictionary and thesaurus.
5. Your closing argument should be the first thing you prepare.
6. Motivate them: be passionate; make them care.
7. Emotion first, but then support with logic.
8. Argue your strengths first; then the opponent's weaknesses.
9. Break it down into small segments: four chapters of 5 minutes each is a lot shorter than a 20 minute story.
10. The Professor's rule: 10 minutes for each day of trial; the shorter the better; no more than 30 minutes and rarely more than 60 minutes... (But there are exceptions... & know how much time the judge is giving you).
11. Don't argue everything-just key points.
12. Argue the facts, don't just recite them.
13. Real life analogies work—but be careful of the response in rebuttal
14. Challenge the other side to answer questions that you know they can't answer.
15. Don't let your ego or anger get in the way of what's best for your client.

5. Effective Presentation Tactics (The Three "E's")

As stated above, an effective presentation depends on your personality. However, I think there are three rules, called the "Three E's" that are applicable to all.

Number one is emotion. I believe you should be earnest, sincere, compassionate and passionate. In order for a jury to accept your side, you should strive to make them believe in you. If you are earnest and sincere, they will react accordingly. If you are compassionate, that may breed compassion on their part. If you are passionate about an issue, they may share that passion.

Oftentimes, I have seen jury arguments where there is no application of the law to the facts. Keep in mind, this might be the first time some of the jurors have ever even been in the courthouse. It is important to explain how the law is applied to the facts in your case. Obviously, the judge will instruct them on the law, but showing a jury how a particular jury instruction applies to the facts is extremely important.

Also, exhibits and demonstrative evidence are important. The jury can only hear so much. But, if they see the exhibits that were introduced into evidence, and if they are able to understand the demonstrative evidence, they have a better feel for the case. It puts them at the scene so they can make their own judgments.

The "Three E's", emotion, explaining and exhibits, are effective presentation tactics all attorneys should consider in drafting their closing arguments.

VII. CONCLUDING THE TRIAL BY DAVID M. MCCLEARY

1. Jury Instructions

N.C.G.S. §§15A-1231 and 15A-1232 govern the procedure and content of jury instructions. At the close of the evidence or at any earlier time directed by a judge, any party can tender written instructions. N.C. Gen. Stat. §15A-1231 (1999). Prior to closing arguments for the jury, a trial judge must hold a recorded conference on the instructions out of the presence of the jury. §15A-1231(b). The Judge must also inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. *Id.* You must ensure that this jury instruction conference is on the record in order to preserve and record your objections for appeal. The North Carolina Institute of Government has compiled pattern jury instructions for criminal cases. *See e.g.,* N.C.P.I. Crim.101.35 Concluding Instructions. In every case you will need to adapt those pattern jury instructions to comport with your case theory and theme. With any specific intent crime, make sure that you have included a jury instruction on the issue of intent. N.C.P.I. Crim.120.10 Definition [of Intent].

Make sure that your jury instructions also comport with current case law regarding the elements of the crime for which your client has been charged. Watch the State's instructions and read them carefully. Inevitably, the District Attorney will attempt to slip in a jury instruction which they claim is supported by case law. It is likely that such a jury instruction has already been covered by the pattern jury instructions and is simply redundant or a restatement for the purposes of repetition for the jury and the benefit of the prosecution.

2. The Verdict

N.C.G.S. §15A-1237 sets forth the requirements for the jury verdict. The verdict must be unanimous, and must be returned by the jury in open court. The verdict must also be in writing, signed by the foreman, and made part of the record of the case. N.C. Gen. Stat. §15A-1237(a) (1999); §15A-1237(b). Additionally, the trial judge is prohibited from commenting upon the verdict of a jury in open court in the presence or hearing of any member of the jury panel. N.C. Gen. Stat. §15A-1239 (1999). If a prospective juror in a separate case hears comments by a trial judge on another jury's verdict, counsel can make a motion for continuance of the second case that must be granted. N.C. Gen. Stat. §15A-1239 (1999). This prevents prejudice of the venire from comments by the court in a separate case.

You may request that the jury be polled regarding their verdict. A poll can be conducted by the presiding judge or by the clerk by asking each juror individually whether the verdict reflects his or her own verdict. N.C. Gen. Stat. §15A-1238 (1999). If there is not a unanimous concurrence after the poll, the jury should then be directed to retire for further deliberations. Jury polling is mandatory in capital cases and in all cases must be conducted before the jury is discharged. It is always in the best interest of your client to poll the jury in any conviction. There is always the off chance that one individual was bullied into their verdict or a mistaken vote was taken or some other occurrence happened in the jury room which may come to light during the jury poll.

One can always challenge or attempt to impeach the verdict. The procedures for such are set forth in N.C.G.S. §15A-1240. When attempting to impeach a verdict, the trial judge may conduct an

inquiry into the validity of a verdict but the parties may not introduce evidence to show the effect of any statement, conduct, event, or condition upon the mind of the juror. Simply put, you will not be allowed to question a juror as to what made them find your client guilty. You can question a juror to determine whether the verdict was reached by chance or by lot. *Id.*

In limited situations, the testimony of a jury may be received to impeach the verdict of the jury even after the jury has been disbursed. *Id.* However, this only occurs under two circumstances: (1) matters not in evidence which came to the attention of one or more jurors under circumstances which would violate the Defendant's constitutional right to confront witnesses against him; or (2) bribery, intimidation or attempted bribery or intimidation of a juror.

If one of the jurors did a "drive by" of the crime scene or conducted their own investigation and then brought the fruits of that investigation back to the jury pool, it would likely be prejudicial. In such a situation, an individual juror may be questioned and ultimately the verdict should be impeached under such circumstances. Publicity and/or personal investigation are generally the reasons for which N.C.G.S. §15A-1240(c) are implicate.

VIII. SENTENCING

David M. McCleary

1. Don't be Caught Flat Footed

    A. Review the Statutory Checklist with Client and Client's Family

    B. Be Prepared for State's Aggravating Factors

        1) Run Down the Statutory Checklist (the State Should Have Alleged Them)

        2) Contesting Out of State Convictions

    C. Have a Witness List for Mitigating Factors

    D. Put on Evidence

2. Aggravating Factors Must be Proven "Beyond a Reasonable Doubt"

    A. Must be Prepared Ahead of Time

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