

NUGGETS FOR YOUR TRIAL TOOL BOX

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I. **Preface:**

These materials are a compilation of the best strategies, tactics, and tips I have observed in practice. Almost nothing is original. Take it and use it.

II. **General:**

- A. Meet with clients before court to assess emergencies, needs, and provide them a forecast.
- B. Attend calendar call, say what is important, and let the judge triage the case. Consider docket size, judge's predilections, approach of opposing counsel, client needs, and case intricacies in deciding what can be accomplished.
- C. Check in with the DA, opposing counsel, and court periodically. Let the court and client see your presence.
- D. Meet with the client briefly before trial to cover trial strategy, key points, prepare exhibits, and streamline the trial.
- E. Watch the judge. Your gauge is right in front of you. Tips unfold throughout the trial.
- F. If the case is close, consider making legal arguments, suppression issues, or motions to dismiss. Give the judge various reasons to find for you.
- G. Never make a weak argument. Make your points count.
- H. If the judge believes your position is irrelevant or unimportant, move on.
- I. Acknowledge your weaknesses. Argue your strengths - whether factual, legal, or equitable.
- J. Cases rise or fall on two or three points. Recognize and address them.
- K. Closing argument must be compelling. Start with powerful truths, weave the facts into your points, and close with clout.

- L. Try cases when you believe you have a legitimate chance to win.
- M. Beware open pleas. Request a pretrial conference, outline both positions, and ask the judge to forecast the sentence. Then tell the client.

III. Evidence Tips:

- A. Does the evidence seem marginally relevant, duplicative, or just unfair? Argue the purpose of the rules: fairness in administration, eliminating expense and delay, promoting the ascertainment of truth, and just results. N.C. R. Evid. 102(a).
- B. Relevance is broad, including any tendency to make any fact of consequence more or less probable. N.C. R. Evid. 401.
- C. Cite conditional relevance if you introduce anything out of order. N.C. R. Evid. 104(b).
- D. Use the rule of completeness with writings or recorded statements. N.C. R. Evid. 106.
- E. Judicial notice is required when requested and the court is supplied with necessary information. It is conclusive in civil actions and must be instructed in criminal cases. Prior court filings, adjudications (even where the burden of proof was lower), statutes, dates, and distances are proper. N.C. R. Evid. 201.
- F. Always argue *substantial* prejudice, confusion, deception, delay, or duplicative evidence when arguing Rule 403, particularly if it arouses emotional sympathies, evokes a sense of horror, appeals to an instinct to punish, or appeals to emotions rather than intellect.
- G. Proper character traits are allowed via reputation and/or opinion and include truthfulness/untruthfulness, honesty/dishonesty, peaceful/violent, law-abiding, and other isolated traits. Expert testimony on character is not admissible. Generally, phrases like “consistent with” a certain diagnosis are fine, and testimony a person is “believable, credible, [and] abused” are not. N.C. R. Evid. 405.
- H. Rule 412 is intricate. It applies to rapes, sex offenses, and lesser-included offenses and precludes sexual activity of the complainant other than the act at issue. The proponent must first apply to the court for a determination of relevance. A transcribed offer of proof is conducted *in camera*, and the court determines admissibility, enters an order, and states the nature of questions permitted. For probable cause hearings, the court takes judicial notice of the *in camera* hearing.

- I. Witnesses are presumed competent, and case law supports findings of competency at age six. The witness must speak so as to be understood and understand the duty to tell the truth. N.C. R. Evid. 601.
- J. Object if a witness testifies without first establishing requisite personal knowledge. N.C. R. Evid. 602.
- K. Beware when counsel impeaches one's own witness under the pretext of refreshing recollection; if past recollection recorded, it requires the element of once, but no longer, having memory. N.C. R. Evid. 607 & 803(5).
- L. Witnesses may be attacked (or supported) by reputation or opinion evidence for truthfulness or untruthfulness, and specific instances of this trait may be elicited on cross examination but not proved by extrinsic evidence. N.C. R. Evid. 608.
- M. The ten year look-back period in Rule 609 applies from the date of conviction or release from confinement, and an appealed conviction is admissible.
- N. Credibility of the witness is always at issue, and a witness may be examined on any relevant issue, including credibility. The case law supports a wide scope of cross-examination. N.C. R. Evid. 611(b).
- O. You may examine any writing or object at trial, hearing, or deposition where a witness refreshes memory before or during one's testimony. I routinely ask this question first on cross-examination and request permission to read the witness's notes. A fabulous tool. N.C. R. Evid. 612.
- P. When you believe multiple witnesses may parrot or tailor their testimony, use Rule 615 to exclude them from the courtroom. Ask the court to order the witnesses not to discuss their testimony after called as a witness.
- Q. Expert evidence has changed dramatically. See my accompanying paper. N.C. R. Evid. 702 through 705.
- R. The best hearsay exceptions: present sense impression, excited utterance, state of mind, statements for purposes of medical diagnosis or treatment, recorded recollection, business record, learned treatises, and the catch-all exception. Remember admissions by a party opponent. Be prepared for the proposition that computer reports are not hearsay as they are not statements made by a person (i.e., not subjectively intended by that person to be an assertion). N.C. R. Evid. 801, *et seq.*

- S. Authentication and identification requirements are in Rule 901 *et seq.* Ask the court to examine a handwriting exemplar, consider distinctive characteristics, or admit public records.
- T. Rules of evidence apply to all civil and criminal court proceedings *except* extradition, first appearance, probable cause hearings, probation violations, sentencing, bond hearings, summary contempt, grand jury, issuance of criminal process and search warrants, and preliminary questions of fact. N.C. R. Evid. 101 & 1101.

IV. Procedural Tips:

- A. District court generally contemplates oral motions but for DWI motions to suppress evidence or dismiss charges. N.C. Gen. Stat. §§15A-953, 973, & 20-38.6. Superior court generally requires written motions within certain time frames. N.C. Gen. Stat. §§15A-951 & 971, *et seq.*
- B. The proponent of the evidence has the burden to prove admissibility, if challenged. N.C. R. Evid. 104.
- C. The prosecution often forgets to amend the criminal process. The law is clear. Argue fatal defect when the allegation varies significantly from the proof. Remember case law requires victims to be properly named and capable of possessing property with larceny charges.
- D. Move orally to *voir dire* a legal issue when it arises during a district court trial (e.g., stop, frisk, custody, etc.). N.C. Gen. Stat. §15A-953.
- E. If the case is close at the end of the prosecution's case-in-chief, consider last argument. Principles of primacy and recency work.

V. Substantive Tips:

- A. Argue rules of interpretation, canons of construction, and rules of construction.
- B. Statutes are to be construed "*in pari materia*," or as a whole and having a common purpose.
- C. Constitutional due process standards always apply even when rules of evidence do not. *Holmes v. South Carolina*, 547 U.S. 319 (2006) (defendant has a due process right to present a defense); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (due process requirements apply to parole revocation proceedings).

- D. Criminal statutes are punitive in nature and are strictly construed. *State v. Reaves*, 142 N.C. App. 629 (2001).
- E. Know the Rule of Lenity: Ambiguities in criminal statutes defining crimes and punishments shall be interpreted and strictly construed in favor of the accused. *State v. Linton*, 361 N.C. 207 (2007).

VI. **Tool Box:**

- A. Admit evidence for any proper purpose including substantive, limited, impeachment, illustrative, corroborative, etc.
- B. Do not let the opposition use an exhibit until it is properly authenticated and introduced.
- C. Do not let the opposition repeat a witness's testimony. The attorney may not interpret or paraphrase the witness's testimony; the judge, or jury, must remember and weigh the evidence.
- D. Look for improper character evidence (e.g., "He is a liar," "I am afraid of him," or "He is telling the truth"). Look for the predicate foundation, a proper character trait, and whether testimony about a trait is required before it is at issue. *State v. Owen*, 130 N.C. App. 505 (1998); N.C. R. Evid. 608(a).
- E. If a question is rhetorical or has no real answer, object as argumentative and not evidentiary.
- F. For "possession" cases, look for the power and intent to control, the presence of other persons, the registered owner of the vehicle and the driver (which, when the same person, allows an inference of possession), other incriminating circumstances (required when more than one person is present), and whether the defendant knowingly had a controlled substance. Know *State v. Tuggle*, 109 N.C. App. 235 (1993) (insufficient evidence to convicted for possession of pills where there is no evidence tablets were not issued per a prescription or the quantity was larger than amounts normally prescribed).
- G. District attorneys do not represent law enforcement: The Attorney General does. Important to know when a motion to quash your subpoena is filed.
- H. The rules on text messages remain but have been gutted by technology. Look up "fake-a-text," "spoof guard," and "phone gangster."
- I. Always file an objection to lab reports. You can always withdraw them.

- J. For controlled substances, sufficiently trained officers may give an opinion on marijuana. Expert evidence is otherwise required, and the new rules on experts are more demanding. Chain of custody typically only goes to weight of the evidence, but increases in importance when the substance is fungible.
- K. HGN evidence is fertile for cross-examination, particularly by exploring the underlying science, use of estimates, and abundance of natural or legal causes for same.
- L. Beware of federal charges when a defendant has one or more prior felony convictions, ammunition or guns were found, and sizable quantities of drugs are involved. Do not proceed with state criminal charges until a determination is made about federal prosecution.
- M. Immigration consequences are hot. Statuses (i.e., lawful permanent resident, non-immigrant visa, entry without inspection/removal, etc.), concepts (e.g., aggravated felony conviction, crime involving moral turpitude, etc.), and consequences (i.e., deportation, inadmissibility, ineligibility for citizenship/asylum, etc.) are myriad. My advice is to refer “undocumented persons” to an immigration specialist, keep such persons out of jail, understand certain charges are more likely to trigger notification to ICE (DWI, felonies, etc.), and realize the absence of a driver’s license raises suspicion and possible notification. The baseline is *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010) (lawyers must advise non-citizens about the risk of deportation prior to acceptance of a guilty plea, and failure to do so constitutes IAC).
- N. Know the recent U.S. Supreme Court decision on cell phones. Cell phones, due to advanced technology, are likened to computers, and warrantless or non-consensual searches are illegal. *Riley v. California*, __ S.Ct. ___, (June 25, 2014) (generally, police may not search digital information on a cell phone seized from an arrestee without a warrant).
- O. File a motion seeking constitutional exculpatory evidence in district court. Cite *Brady* (requires prosecutor to produce and disclose evidence not available to the defense which is material and favorable to the defendant regarding guilt, impeachment, or punishment); *Kyles* (prosecutor has an affirmative duty to ask for, seek, and investigate exculpatory or impeachment material favorable to the defense); *Agurs* (prosecutor has a duty to disclose exculpatory evidence absent defendant’s request), and much more. I have a comprehensive motion available upon request.
- P. Know and appreciate the case law on anonymous tips, continuous transaction doctrine, consent, possession, merger doctrine, frisk, scope of stop, and more.

- Q. Know and use the heightened defensive force presumptions and protections which apply to the unlawful and forceful entry of a home, motor vehicle, or work place. The law presumes an intent to commit an unlawful act involving force or violence, presumes the defendant had a reasonable fear of imminent death or seriously bodily harm, and eliminates any duty to retreat. N.C. Gen. Stat. §14-51.2.
- R. Remember law enforcement is required to make an electronic record of the entire custodial interrogation of any person in a criminal investigation conducted at any place of detention involving any Class A through C felony of rape, sex offense, or assault with a deadly weapon with intent to kill inflicting serious injury. N.C. Gen. Stat. §15A-211.
- S. Contempt basics: Motions require either verification or show cause orders. A show cause order changes the burden of proof and requires the contemnor to go first. If you call the contemnor as a witness, you forfeit criminal contempt. One found in civil contempt may not be found in criminal contempt for the same conduct. Understand criminal and civil, direct and indirect, and summary and plenary. Punishments vary from thirty, ninety, and one hundred and twenty days; six months; twelve months; and indefinite confinement, including fines and other consequences. N.C. Gen. Stat. §5A-11, *et seq.*
- T. Understand tools of impeachment: prior inconsistent statements, self-contradiction, contradiction (other evidence), first aggressor (victim), prior bad acts, convictions, character (untruthful, violent, etc.), specific instances (untruthful), mental incapacity, perceptual incapacity, lack of personal knowledge, learned treatises, bias, interests, motive, or prejudice. Credibility is always at issue, and you can use anything (e.g., witnesses' writings, social media, loan and job applications, applications for criminal process, etc.) to impeach.
- U. Know and use the local rules.
- V. Plea agreements are contracts. Remember traditional contract principles like ambiguity which may unravel a meeting of the minds and allow parole evidence, unilateral or mutual mistake may be grounds for rescission, and a motion to withdraw consent requires analysis under *State v. Handy*, 326 N.C. 532, 536 (1990).
- W. When surprised or unsure what to do, ask for a recess. Call someone you respect. I routinely call fine lawyers in other counties (when I have a case elsewhere), the School of Government, Appellate Defender, Capital Defender, and other specialists or experienced attorneys.

- X. A subpoena is a court order. Objections must be filed by notice of objection or motion to quash within ten days (or, if served with less than ten days before compliance, before the time specified). Failure to object is a waiver. Remedies include motions to compel or for contempt. Consider grounds to object (unreasonable time for compliance, privilege, etc.); if your client has “possession, custody, or control”; or if you are asked to create (vs. obtain) a document. Remember to issue a subpoena for an expert witness if you are seeking reimbursement for an expert witness fee, that you may be required to pay the cost of a subpoenaed expert, to consider the Medico-Legal Guidelines of North Carolina (in the Rules of Court), the rule precluding an out-of-state subpoena, and a subpoena in a criminal case requires notice to the opponent of all information received. N.C.R. Civ. Pro. 45. Subpoenas issued to a treatment provider for confidential medical information of a non-client is difficult. Considerations include the HIPPA privacy rule, privilege laws (Chapter 8), health department confidentiality law (N.C. Gen. Stat. §130A-12), and communicable disease confidentiality law (N.C. Gen. Stat. §130A-143). This subject matter requires client consent or a proper court order in compliance with federal law, including a required hearing and obscure findings. *See* 42 U.S.C. §290dd-2, 42 C.F.R. Part 2. I suggest issuing a subpoena *duces tecum* to the party directly.
- Y. Conflicts of interest: Notify the court if you have ever represented a witness. Let the court address any potential conflict. If the court enters an order, the State Bar will dismiss a complaint against you.
- Z. Do not make an admission without the client’s informed and written consent. Understand *Harbison*. IAC as a matter of law.

VII. New Legislation:

- A. Jail credit is, or may be, applied to CRV’s differently. Ninety day CRV’s for felonies are no longer reduced by jail credit, and jail credit is applied to the suspended sentence. For misdemeanors, the judge decides. This change took effect October 1, 2014, and applies to probation violations occurring on or after that date. N.C. Gen. Stat. §15A-1344(d2).
- B. Presumptive child support guidelines now include retroactive child support obligation. Effective July 22, 2014, the statute requires the guidelines to include retroactive support obligations.
- C. The rules have changed where certain inmates serve their time. All misdemeanants serving sentences in excess of ninety days; all terms of special probation imposed for misdemeanors; and all DWI sentences, regardless of length, are served through the State Misdemeanant Confinement Program (local confinement facilities), effective October 1, 2014.

- D. Court costs continue to rise. Convicted defendants must now pay fees for (1) a private hospital performing toxicological testing (alcohol or controlled substances) under contract with a prosecutorial district, and (2) an expert witness employed by a private hospital performing toxicological testing under contract with a prosecutorial district who completes a chemical analysis (under N.C. Gen. Stat. §20-139.1) and testifies at trial. Each fee is \$600.00. N.C. Gen. Stat. §7A-304(a).
- E. Mopeds will soon be required to be registered with DMV. On or after July 1, 2015, mopeds must be registered with DMV and the owner must pay the same base fee and be issued the same type of registration card and plate as for a motorcycle. N.C. Gen. Stat. §20-53.4. In order to operate a moped on a highway or PVA, the moped must have a manufacturer's certificate of origin and be designed and manufactured for use on highways and PVA's.
- F. Expunctions are expanded. Felony breaking or entering, breaking or entering a motor vehicle, breaking or entering with intent to terrorize, and any attempt under N.C. Gen. Stat. §15A-145.5(a)(1) through (8) are added to the list of offenses allowing expunction of certain misdemeanors and felonies with no age limitation, effective September 18, 2014. N.C. Gen. Stat. §15A-145.5.
- G. New conditional discharge provisions. Effective December 1, 2014, a defendant convicted of a Class H or I felony or misdemeanor may, with consent of the defendant and prosecutor, have proceedings deferred by the court for conditional discharge. Certain findings are required including the defendant has not been convicted of a felony or misdemeanor of moral turpitude, has not previously been placed on probation, etc. On fulfillment on the terms and conditions, the court must discharge the defendant and dismiss the proceedings. N.C. Gen. Stat. §15A-1341.
- H. Effective December 1, 2014, misdemeanor possession of marijuana paraphernalia is a Class 3 misdemeanor. N.C. Gen. Stat. §90-113.22A.
- I. Effective December 1, 2014, the giving or selling to an inmate, or an inmate possessing, a cell phone (or other device) at a state or local confinement facility is a Class H felony. N.C. Gen. Stat. §14-258.1.
- J. Carrying concealed weapons punishment enhanced and clarified. On or after December 1, 2014, a second or subsequent offense of carrying concealed gun is a Class H felony, and failing to disclose that one is carrying a concealed handgun when a person holds a permit is an infraction. N.C. Gen. Stat. §14-269(c).

- K. Remote video testimony by forensic and chemical analysts is coming. Effective September 1, 2014, such testimony is authorized if the state has provided a copy of the report, provides notice of its intent to use remote testimony at least fifteen business days before proceeding, and the defense fails to file a written objection with the court and the state at least five days before the proceeding. N.C. Gen. Stat. §§15A-1225.3 & 20.139.1.
- L. IDS is required to develop and implement a plan to make certain information in fee applications by attorneys publicly available online with a report due October 1, 2014.
- M. For those of you who enjoy the unusual, the unlawful taking of any Venus flytrap is now a Class H felony. N.C. Gen. Stat. §14-129.3.

Epilogue: “The day may come when we are unable to muster the courage to keep fighting . . . but it is not this day.”

Attributed to: The Lord of the Rings: Return of the King (2003).