THE ART OF WAR: PRACTICAL CROSS-EXAMINATION FOR LITIGATORS

Oliver Wendell Holmes once said, "The life of the law has not been logic. It has been experience." As a trial lawyer in federal and state courts throughout North Carolina for over a quarter of a century, this paper evolves from the rudiments of law school through the labyrinth CLE's, teaching, and extensive training; consulting with and observing great lawyers; and trial experience examining an array of experts including DRE's, those trained in SFST's, chemical and lab analysts, pharmacologists, medical examiners, DNA geneticists, ballistics and handwriting experts, psychiatrists, psychologists, and more in countless bench trials and approximately 100 jury trials ranging from capital murder, personal injury, torts, to an array of civil trials. I have had many and diverse experts excluded; received not guilty verdicts in capital murder, habitual felon, rape, trafficking, and countless other criminal trials; and won substantial monetary verdicts in criminal conversation, alienation of affection, malicious prosecution, assault and other civil jury trials. I have felt the thrill of victory and the dagger of defeat, nonetheless yearning for—and panicking over—the next knock at the jury room door. I attribute any success to those willing to help me, the courage to try cases, and God's grace. My approach to seminars is simple: *if it does not work, I am not interested*. Largely in outline form, the paper is crafted as a practice guide.

This paper[1] covers the scope and limitations of cross-examination per statute, case law, and constitutional provisions; use of leading questions; rebuttal and surrebuttal evidence; reopening proof; specific applications of evidence rules; introducing evidence, opening the door, invited error, and the right to present a defense; fourteen impeachment techniques; expert testimony; principles gleaned from Sun Tzu, Francis Wellman, and Patrick Malone; and my personal model for cross-examination. Pronouns are referenced in the masculine.

Cross-examination is formidable and fearful. After all, we face three opponents: the opposing lawyer, the sometimes difficult judge, and the witness wanting to frustrate his examiner. It is a high-risk, high-reward game, filled with moments for humiliation and triumph.[2]

I. PRACTICAL ADVICE:

The accomplished cross-examiner works to hone his skills. He works hard to stay polite, keeping his composure to the outside observer. He is neither obsequious nor ornery, striving to remain genuine throughout. He listens, then listens more, waiting for the wayward or nonsensical comment. Not overly cautious, he takes prudent risks. Rather than accusing the witness of lying, he asks facts which let jurors reach their own conclusions. He starts nice and, if appropriate, finishes with a sword; never the opposite. He appreciates the art of a death by a thousand nicks. If emotions rise, he segues to a sip of water, a pause, or a recess. He appreciates the incredible

[1] Many thanks to Timothy J. Readling, Esq., for his able assistance in drafting and editing this paper.
[2] *See* PATRICK MALONE, THE FEARLESS CROSS-EXAMINER 12 (Tina Ricks, ed., Trial Guides 2016).

stress of trial, managing it via his personal palette of diversions, often exercise, entertainment, or edibles.[3]

II. THE LAW:

A. RULES OF EVIDENCE

The masters of our craft know the rules of evidence. They are the courtroom Bible. Read them—study them—periodically, at least several times a year. Be a virtuoso of the following:

1. N.C. R. EVID. 611: MODE AND ORDER OF INTERROGATION AND PRESENTATION

The rule governs the court's control over the manner and order of interrogating witnesses and presenting evidence, scope of cross-examination, and the use of leading questions. For our purposes, Rule 611(b) states a threshold principle: "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." The scope of cross-examination is broad by design, intentionally admitting evidence having *any* tendency to make a fact of consequence more or less likely to be true.[4] Our courts have consistently held cross-examination serves four purposes: to expand on details offered on direct, to develop new or different facts relevant to the case, to impeach the witness, or to raise issues about a witness's credibility.[5] When an objection is made, the judge must overrule the objection if "relevant to any issue in the case, including credibility."[6]

Rule 611(c) provides that leading questions "ordinarily . . . should be permitted on cross-examination." The general trial practice principle is that all questions on cross-examination should be leading.[7] Although the rule preserves some discretion for the trial judge to limit leading questions in extraordinary situations, he should not limit the use of leading questions on cross-examination.[8]

If the trial judge allows counsel to elicit new matters on redirect, re-cross should be allowed, but otherwise the trial judge, in the exercise of reasonable discretion, may disallow a second cross-examination.[9] As explained by the North Carolina Supreme Court more than a century ago,

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[3] *See id.* at 15–17.
[4] BLAKEY, LOVEN & WEISSENBERGER, NORTH CAROLINA EVIDENCE 2016 COURTROOM MANUAL 99 (Matthew Bender 2016); *see* N.C. R. EVID. 401 (emphasis added).
[5] Penny J. White, *Examination, Cross-Examination, and Redirect Examination* 2–3 (May 2015) (unpublished manuscript) (on file with author); BLAKEY 2016, *supra* note 4, at 610–11 (Matthew Bender 2016).
[6] *Id.*
[7] *See* White, *supra* note 5, at 4.
[8] *Id.*
[9] *See generally* State v. Cummings, 352 N.C. 600 (2000).

fairness may necessitate an opportunity for re-cross.[10] Another ground for re-cross is the court's inherent authority.[11]

2. N.C. R. EVID. 612: WRITING OR OBJECT USED TO REFRESH MEMORY

Recollection of a witness may be refreshed through the use of a document, reviving his memory and providing a sufficient stimulus for him to have a present, independent recollection of the matter.[12] The rule allows an adverse party to have "the writing or object [used to refresh memory] produced at the trial, hearing, or deposition in which the witness is testifying."[13] Part (b) of the rule provides similar relief if the writing was used prior to testifying.[14] Once an item is used to refresh, the adverse party may seek to admit the same into evidence.[15] Opposing counsel may argue parts of the writing are privileged or irrelevant and should be excluded from production. Part (c) of the rule provides the court "shall examine the writing or object *in camera*, excise any such portions, and order delivery of the remainder to the party entitled thereto."[16] Excised portions "shall be preserved and made available to the appellate court in the event of an appeal."[17]

Factors for the court's consideration to require production include the degree or extent of the witness's reliance on the writing, the significance of the information recalled, the burden on the adverse party, and the potential disruption production might cause.[18]

It is common for an officer or witness to read from a report or notes. Do not allow the same. First, the document is often hearsay. Second, when the witness's testimony is "*clearly* a mere recitation of the refreshing memorandum," it is not admissible.[19]

Appreciate important points about the rule: the previous statement may be written or oral; the witness need not be shown the statement before interrogation; if the prior statement is offered for the truth, it is substantive evidence and admissible only with a proper hearsay exception, and otherwise is only admitted to impeach credibility;[20] and opposing counsel has the right to be shown a copy of the document upon request.

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[10] *See generally* State v. Glenn, 95 N.C. 677, 679 (1886).
[11] *See* State v. Davis, 317 N.C. 315, 318 (1986) (holding authority to allow a party to reopen a case stems from the trial court's "inherent authority to supervise and control trial proceedings").
[12] N.C. R. EVID. 612(a) and (b); *see* BLAKEY 2016, *supra* note 4, at 491.
[13] N.C. R. EVID. 612(a).
[14] N.C. R. EVID. 612(b).
[15] N.C. R. EVID. 612(c).
[16] *Id.*
[17] *Id.*
[18] *See* 1 MCCORMICK ON EVIDENCE § 9 (Kenneth S. Broun et al., eds., 5th ed. 1999).
[19] *See* State v. Smith, 291 N.C. 505, 518 (1977) (emphasis in original).
[20] Ask for a limiting instruction per N.C. R. EVID. 105.

Beware of land mines: statements suppressed under the exclusionary rule and inadmissible in the prosecutor's case-in-chief are often admissible to impeach a declarant's inconsistent testimony.[21] If the prior inconsistent statement is used only for impeachment purposes, the fact finder should be instructed as to its limited use. Refer to the Pattern Jury Instructions for helpful language.[22] Finally, statements admitted solely to impeach may not be considered by the court in weighing the sufficiency of the evidence and have restricted use in closing argument by counsel.[23]

3. N.C. R. EVID. 613: PRIOR STATEMENT OF WITNESS

A witness may be impeached with an inconsistent statement made by him prior to trial.[24]

Foundational requirements are that the witness made the prior statement and the statement may be seen as inconsistent with the prior testimony.[25] The rule does not contain a test that determines when a statement is inconsistent and the degree of necessary inconsistency is covered by prior case law. A general test endorsed by McCormick follows: "It is enough if the proffered testimony, taken as a whole, either by what it says or by what it omits to say, affords some indication that the fact was different from the testimony of the witness which it sought to contradict." MCCORMICK, *supra* note 17, at § 34.

Counsel may interrogate the witness about any discrepancy in a prior statement and his testimony at trial without showing the witness the statement; however, opposing counsel has the right to be shown a copy of the document upon request.

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[21] *See* Harris v. New York, 401 U.S. 222, 226 (1971) (holding impeachment is limited to defendant's own testimony and furthers the truth-seeking function of the court); Michigan v. Harvey, 494 U.S. 344 (1990) (Defendant's excluded statements are admissible for impeachment purposes and not as substantive evidence).

[22] North Carolina Pattern Jury Instruction—Civil 101.35

> When evidence has been received tending to show that at an earlier time a witness made a statement which may be consistent with or may conflict with his testimony at this trial, you must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe that such earlier statement was made, and that it is consistent with or does conflict with the testimony of the witness at this trial, then you may consider this, together with all other facts and circumstances bearing upon the witness's truthfulness, in deciding whether you will believe or disbelieve his testimony at this trial.

North Carolina Pattern Jury Instruction—Criminal 105.20

> Evidence has been received tending to show that at an earlier time a witness made a statement which may conflict or be consistent with the testimony of the witness at this trial, you must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe the earlier statement was made, and that it conflicts or is consistent with the testimony of the witness at this trial, you may consider this, and all other facts and circumstances bearing upon the witness's truthfulness, in deciding whether you will believe or disbelieve the witness's testimony.

[23] *Id.*

[24] N.C. R. EVID. 613; BLAKEY 2016, *supra* note 4, at 505.

[25] *See* White, *supra* note 5, at 7.

Where the prior inconsistent statement is not admissible as substantive evidence through a hearsay exception, opposing counsel should seek a limiting instruction to its proper purpose (e.g., corroborative, impeachment, etc.) under Rule 105.

Certain statements are incompetent as a matter of law: statements secured from a hospital patient in shock or appreciably impaired from drugs in insurance claims;[26] statements made in the course of plea negotiations or withdrawn pleas;[27] and statements protected by privilege.[28] Other statements may be inadmissible based on a substantial violation of Chapter 15A of the North Carolina General Statutes, titled the Criminal Procedure Act, or certain state and federal constitutional protections.

Case law is illustrative regarding the use and application of the rule, particularly if a collateral matter, extrinsic evidence, used as corroborative or impeachment evidence, and addressing the degree of difference required between a prior statement and trial testimony: *State v. Stokes*, 357 N.C. 220 (2003) (holding where the inconsistencies of a witness's prior statement are material to the issue at hand, the prior statement is not *collateral* and may be used to contradict the witness's testimony) (emphasis added); *State v. Moore*, 236 N.C. App. 642 (2014) (*holding where differences* between a prior statement and trial testimony *are slight* and agree as to the major elements, the statement is properly admitted even if it contains new or additional information) (emphasis added); *State v. Taylor*, 775 S.E.2d 927 (2015) (unpublished) (holding that the test for admission for *extrinsic evidence* of prior inconsistent statements to impeach a witness on cross-examination is whether such evidence would be admissible for some purpose other than contradiction and therefore material as opposed to collateral) (emphasis added); *State v. Gosnell*, 228 N.C. App. 569 (2013) (unpublished) (holding video of defendant's interrogation was admissible to *corroborate* the testimony of another witness as a similar description of events) (emphasis added); and *State v. Boston*, 191 N.C. App. 637 (2008) (holding defendant's post-arrest but pre-Miranda warning *silence* may be used to *impeach* him at trial).

4. N.C. R. EVID. 803(5): RECORDED RECOLLECTION

The law prioritizes unaided memory, then refreshed recollection. If both fail, then counsel may offer independent evidence of a recorded recollection. This rule is properly used when the present recollection of the witness is insufficient to allow him to testify "fully and accurately."[29] If the memory device is the writing of another, counsel must establish admissibility via a proper hearsay exception. If the writing of the witness, counsel must show the witness once had personal knowledge, the document was made or adopted while fresh in memory, and it reflected that knowledge correctly. Per the rule, the writing is read into evidence and not received as an exhibit. This limitation prevents its priority above other testimonial evidence.[30]

[26] N.C. GEN. STAT. § 8–45.5
[27] N.C. R. EVID. 410
[28] N.C. R. EVID. 501
[29] BLAKEY 2016, *supra* note 4, at 698.
[30] *Id.* at 698–99.

Require conformity to the rule; appellate courts do. Counsel's failure to object has resulted in plain error review confirming a conviction.[31]

B. CASE LAW

The breadth of Rule 611(b) on cross-examination is illustrated by *State v. Whaley*, holding criminal defendants must be afforded wide latitude to cross-examine witnesses regarding credibility.[32] The North Carolina Supreme Court reversed a conviction based upon limitations imposed on cross-examination of the victim. The defense sought to cross the victim about her answers to a questionnaire completed during a visit to a counseling center, arguing the answers were relevant to credibility. The trial court excluded the evidence based on absence of proof the victim suffered from a mental defect as well as Rule 403. Reversing the decision, the Supreme Court emphasized the scope of cross-examination, the importance of the testimony on a key issue in the case, and the presence of contradictory evidence. Although there was no evidence the witness suffered from a mental defect, the court held the questions nonetheless *might* "bear upon credibility in other ways, such as to cast doubt upon the capacity of a witness to observe, recollect, and recount."[33]

The rule is implicated in various contexts. *See State v. Williams*, 330 N.C. 711 (1992) (holding a witness may be examined on any matter relevant to any issue in the case, including credibility); *see also State v. Hunt*, 324 N.C. 343 (1989) (holding if witness either denies or testifies differently from a prior inconsistent statement, you may impeach the witness with the substance of the prior inconsistent statement);

Trumpet the robustness of the rule. In *State v. Short*, the North Carolina Supreme Court has recognized the right to cross-examine is "absolute and not merely a privilege" and that its denial is "prejudicial and fatal error."[34]

C. CONSTITUTIONAL PROVISIONS

The right to confront your accuser, or any adverse witness, is a bedrock constitutional principle.[35] The right of cross-examination is protected by the Due Process Clause to confront and cross-examine witnesses in civil cases and both the Due Process Clause and Confrontation Clause in criminal cases.[36] If a witness has testified on direct examination but is unavailable for cross-examination because of death, illness, or refusal to answer questions, the direct testimony of the witness is stricken and the jury instructed to disregard it.[37] Authorities commonly cite the

[31] State v. Harrison, 218 N.C. App. 546 (2012).
[32] State v. Whaley, 362 N.C. 156 (2008).
[33] *Id.* at 161.
[34] *See* State v. Short, 322 N.C. 783 (1988) (internal citations omitted).
[35] U.S. CONST. amends VI, XIV; N.C. CONST. art. 1 § 23.
[36] U.S. CONST. amends V, VI, and XIV; N.C. CONST. art. 1 §§ 1, 19, and 23.
[37] State v. Perry, 210 N.C. 796 (1936); Citizens Bank & Trust Co. v. Reid Motor Co., 216 N.C. 432 (1994).

right to cross-examination is an express and essential element of a defendant's constitutional right under the Sixth Amendment of the U.S. Constitution.[38]

A common constitutional claim of defense counsel is that an evidentiary ruling deprives the defendant of the right to present a defense, typically when the court sustains an objection which limits defense evidence in its case-in-chief or restricts the defense during cross-examination.[39] The United States Supreme Court has recognized the constitutional right of a criminal defendant to present a defense, although not tethering the right to any particular constitutional provision.[40] *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (holding that "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense").

In *Holmes v. South Carolina*, the trial court applied a state evidence rule precluding evidence of third party guilt "where there is strong evidence of [a defendant's] guilt, especially where there is strong forensic evidence."[41] While the Supreme Court noted rulemakers have broad constitutional latitude to establish rules of evidence in criminal trials, "this latitude is limited by the guarantee that criminal defendants have a meaningful opportunity to present a complete defense . . . . This right is violated by rules of evidence that 'infringe upon a weighty interest of the accused' and are arbitrary or 'disproportionate to the purposes they are designed to serve.'"[42] Our highest court found the South Carolina rule violated the defendant's right to present a meaningful defense.

The right to present a defense, however, is far from absolute.[43] The Supreme Court has noted "the accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence," and that the mere invocation of a right "cannot automatically and invariably outweigh countervailing public interests." *Taylor v. Illinois*, 484 U.S. 400, 414 (1988); *see also Nevada v. Jackson*, 133 S.Ct. 1990 (2013) (holding a state rule that restricted admission of extrinsic evidence of specific instances of conduct to impeach a key witness did not violate the right to present a defense).

Make the argument. Our appellate court has held the trial court abused its discretion by preventing a defense expert from testifying Google Maps files had been planted on a defendant's laptop. Noting the court's ruling prevented the defendant from challenging arguably the strongest piece of State's evidence, the court found reversible error and granted a new trial. *State v. Cooper*, 229 N.C. App. 442 (2013).

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[38] *See* White, *supra* note 5, at 4.
[39] *Id.* at 10.
[40] *Id.*
[41] 547 U.S. at 319, 324, 326 (2006).
[42] *Holmes*, 547 at 324.
[43] *See* White, *supra* note 5, at 11.

III. FOURTEEN IMPEACHMENT TECHNIQUES OF CROSS-EXAMINATION:

While cross-examination has many purposes, including pursuit of new details, explanations, or facts, a central aim of cross is to impeach the witness. Evidentiary methods of impeachment include: (1) prior inconsistent statement; (2) impeachment (self-contradiction); (3) contradiction; (4) first aggressor (victim); (5) prior bad acts; (6) convictions; (7) character impeachment (lack of truthfulness); (8) specific instances (untruthfulness); (9) mental incapacity; (10) perceptual incapacity; (11) lack of personal knowledge; (12) opinion and/or reputation; (13) learned treatises; and (14) bias, interest, motive or prejudice.

It may be helpful to think of impeachment categorically:

- **B**ad acts
- **B**ias (interest, motive, or prejudice);
- **C**haracter (reputation/opinion, lack of truthfulness, specific instances)
- **C**ompetency (personal knowledge, mental and perceptual incapacity)
- **C**onvictions
- **First** aggressor
- **Learned** treatises
- **Statements** (contradiction, inconsistent)

I use the mnemonic "B^2C^3 First Learned Statements."

IV. SPECIFIC AREAS AND TECHNIQUES:

A. EXAMINATION OF EXPERT WITNESSES:

Few moments in the practice of law evoke more fear, fuzziness, and brain fog than the daunting cross-examination of a geneticist on nuclear DNA in a capital murder. Or just an expert in any case. The law has changed, the factors are fluid, and the rules are restrictive. How does one simplify cross-examination of an expert?

Skillful cross-examination begins with the rule itself.

1. N.C. R. EVID. RULE 702 (SINCE OCTOBER 1, 2011):

(a)"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

(1) The testimony is based upon sufficient facts or data.
(2) The testimony is the product of reliable principles and methods.
(3) The witness has applied the principles and methods reliably to the facts of the case."

(a1)"In an impaired driving action under Chapter 20 of the General Statutes, a witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:

(1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

(2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances. A witness who has received training and holds a current certification as a Drug Recognition Expert, issued by the State Department of Health and Human Services, shall be qualified to give the testimony under this subdivision."

Amended Rule 702(a) raises the bar for expert testimony and is substantively similar to its federal corollary, Fed. R. Evid. 702. The rule expressly states, if a qualified witness has specialized knowledge which assists the trier of fact, he may testify in the form of an opinion only if the testimony is based upon sufficient facts, is the product of reliable principles/methods, and the witness applied the principles/methods in a reliable manner to the facts. The rule requires sufficiency, reliability, and application to the facts. The rule governs admissibility, performing four distinct functions: (1) it expressly authorizes expert testimony; (2) establishes standards to be applied in determining whether expert testimony should be admitted; (3) provides criteria to be applied in determining whether an individual qualifies; and (4) governs the form of expert testimony.[44]

Rule 702 (a1) specifically allows two types of expert testimony on impairment: (1) results of a HGN test by a witness who successfully completed such training; and (2) DRE testimony by a witness who has received training and holds a current certification issued by DHHS. For both, testimony is admissible only on the issue of impairment and not a specific alcohol concentration. Training and expertise are based upon standardized curricula developed by the National Highway Transportation Safety Administration (NHTSA).

The current state of the law: State judges are now gatekeepers who, at the outset, hear proffers of expert testimony and determine admissibility. *See State v. McGrady*, 368 N.C. 880 (2016); *see also State v. McGrady*, 753 S.E.2d 361 (N.C. Ct. App. 2014) (amended Rule 702(a) implements the standards set forth in *Daubert*); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) (defines the judge's gatekeeping role under Fed. R. Evid. 702); *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999) (recognized *Daubert* principles apply to all types of expert testimony under Rule 702). As a threshold, expert testimony must be relevant and reliable. *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999) (judges "make certain that an expert…employs

[44] BLAKEY, LOVEN, WEISSENBERGER, NORTH CAROLINA EVIDENCE COURTROOM MANUAL 325 (2014).

in the court room the same level of intellectual rigor that characterizes the practice of an expert in the relevant field"). *Id.* at 152. The judge's gatekeeping obligation includes not only scientific testimony, but all expert testimony, and traditional fields of knowledge may be subject to review as well as novel or unconventional subject matter. *Id.* at 137. *McGrady* outlines the predominant factors for the court's consideration, although the court's ruling is subject to an abuse of discretion standard. *Howerton v. Arai Helmet,* 358 N.C. 440, 469; *State v. Cooper*, 229 N.C. App. 442 (2013); *see also General Electric Co. v. Joiner*, 522 U.S. 136, 138 (1997).

The court must preliminarily assess whether (1) the methodology is scientifically valid, and (2) then determine if the methodology can be applied reliably to the facts. Reliability is the touchstone. Judges consider if the expert is testifying about matters "growing naturally and directly out research they have conducted"; there is "too great an analytical gap between the data and the opinion proffered"; there is consideration of other causes or alternative explanations; the expert's opinions are sufficiently supported by the studies or grounded in the scientific methodology upon which they rely; the expert "employs in the court room the same level of intellectual rigor" as practiced in the relevant field; the field of expertise is known to have reliable results consistent with the opinion given; and if the subject matter has a sufficient logical connection to the facts, requiring more than the ipse dixit of the proffered expert. *See Daubert*, 509 U.S. at 1317; *Joiner*, 522 U.S. at 144, 146; *Kumho Tire Co.*, 526 U.S. at 1175–76.

2. EFFECTIVE DATE OF THE CURRENT RULE 702

Amended N.C. R. Evid. 702 applies to criminal and civil actions "arising on or after" October 1, 2011 in both criminal and civil contexts. N.C. R. EVID. 1101(a); *State v. Meadows*, 752 S.E.2d 256 (N.C. Ct. App. October 1, 2013) (holding amended Rule 702(a) governed admissibility of expert testimony in a criminal case); *Pope v. Bridge Broom Inc.*, 770 S.E.2d 702 (2015) at n.1 (in civil cases, the filing of the complaint controls); *Swartzberg v. Reserve Life Ins. Co.*, 252 N.C. 270, 276 (1960) [a civil action "arises" when a party has a right to apply to the court for relief (or when the statute of limitations begins)].

In a criminal case, specific rules apply:

A. A criminal action arises when the defendant is indicted. *State v. Gamez*, 745 S.E.2d 876, 878 (N.C. Ct. App. 2013).

B. The date of indictment determines which version of the rule applies.

C. The new rule applies to new or superseding indictments obtained on or after October 1, 2011. *State v. Walston*, 747 S.E.2d. 720 (N.C. Ct. App. 2013) (amended Rule 702(a) applies on date of the superseding indictment, not the original indictment), *reversed on other grounds, State v. Walston*, 367 N.C. 721 (2014).

D. A second bill of indictment (filed after October 1, 2011) joined with the first indictment does not trigger application of the new rule as "the criminal proceeding arose on the date of the filing of the first indictment." *Gamez*, 745 S.E.2d at 879.

3. TIPS FOR CROSS-EXAMINATION OF EXPERTS

a. MY OUTLINE FOR *VOIR DIRE* EXAMINATION

I suggest you begin by examining the expert witness's qualifications.

Consider filing a "Motion for a Rule 702(a) hearing" to *voir dire* proposed experts. This will allow you and the judge to consider the expert's credentials, knowledge of the case facts, application of principles or methods to the case, validity of the expert's field, and avert a mistrial. The outline below is designed for a *voir dire* examination. Variations may be necessary based on the judge, field of expertise, and stage of the examination.

Background.
Education.
Employment.
Training in related area(s) of expertise? Discipline(s)/Sub-discipline(s)?
Licensed?
Published?
Membership in professional organizations?
Qualified as an expert? Appeared in or consulted with the courts? Prosecution and/or defense? Denied expert status? Fact witness?
Describe the area of expertise. Explain what you do.
At this point the witness is only qualified. Object if tendered as an expert.

* The **new rule requires** coverage of the following:

***** Cover case facts ("sufficient facts or data").

***** Discuss principles and methods utilized.

***** Discuss the reliability of the principles and methods used. Use "indices of reliability": (e.g., professional background in the field, use of established techniques, relevant studies, independent research, theory(ies) tested, subject to peer review, publications, visual aids, is the theory deemed reliable in the relevant scientific community, what is the known or potential rate of error, etc.).

***** Demonstrate how the expert applied the principles and methods reliably to the facts.

Tender as an expert.
Do you follow a standard procedure? Describe the process for the jury.
Know defendant?
Describe your history with defendant. Did you follow your standard procedure?
Summarize your findings.
Render opinion.

b. Fertile Areas of Expert Impeachment

Fertile areas of expert impeachment include: (1) lack of knowledge of material case facts; (2) published articles; (3) prior testimony; (4) employment with and history as an expert witness for one side; (5) publications by other experts in the field contrary to the position espoused by the testifying expert; (6) reliability of the principles and methods cited by the expert; and (7) the expert's application of the principles and methods used in a reliable manner to the facts.

c. General Advice for Cross-Examination of Experts

Do your own research on the subject. Consult with other experts in the field. Get your expert's view of the State's expert's analysis and opinion. Then frame your cross-examination.

In a criminal case, call the State's expert in advance. Most will talk to you, alerting you to unseen problems or fertile areas of cross. Some will not talk with you, a fact that tilts the judge's or jury's view once exposed.

Consult with other experienced attorneys, including the Appellate Defender, Capital Defender, UNC-School of Government, IDS, board certified specialists, and great trial lawyers.

Critically analyze the expert's report. Limit the expert from testifying beyond the scope of his expert status as well as his report. Expert reports are routinely sparse. Use it. Argue embellishment is a discovery violation infringing confrontation and due process rights. The highest art form.

Object to the admission of the opponent's expert evidence. Failure to do so defaults to appellate review under the plain error standard.

If the expert takes materials to the stand and either reviews the same while testifying or admits to earlier review to refresh his recollection, ask the court for permission to examine the expert's notes/materials before you begin your cross. The occasional gold mine.[45]

Frame the examination to gain admissions. Lead the witness. Listen to the answers. I repeat, listen to the answers. Nuggets come unexpectedly. Administer the witness's demise by a thousand nicks.

Style your cross-examination using closing argument themes. Craft closing argument with quotes, concessions, and principles gleaned from cross.

Recast the expert's technical terms/esoteric language into plain and simple terms.

[45] N.C. R. Evid. 612(a) and (b).

If the expert is evasive and nonresponsive, be more patient than with a lay witness. Keep redirecting and simplifying. The judge gets it sooner; juries get it later.

If the expert is arrogant, capitalize and contrast. Pause for effect, ask for forgiveness, and ask the expert to help you (and the jury) to understand. But be genuine, not obsequious.

Do not quarrel with the expert. Be humble and gracious. The jury will love you – and learn with you.

Do not write out your cross-examination. I use bullet-point, topic reminders in the right hand margin. This technique allows you to listen, armed with a master checklist.

Generally, a question that elicits an explanation is too long or too complex.

Stop when you either obtain concessions or discredit the witness. End well.

Ask the judge for a moment to review your materials before ending your examination. Scan your notes. Take a moment with your client. A valuable technique.

Be mindful of rebuttal testimony. Consider keeping your expert around.

Consider how expert testimony may infringe upon evidence rules, statutes, and constitutional protections. *See State v. McGrady*, 368 N.C. 880 (2016); *see also State v. McGrady*, 232 N.C. App. 95, 106 (2014) [the constitutional right to present a defense is not absolute but is constrained by the rules of evidence (citing *Taylor v. Illinois*, 484 U.S. 400 (1988)]; N.C. R. Evid. 405(a) (expert testimony on character is not admissible as circumstantial evidence of behavior); *State v. Kennedy*, 320 N.C. 20 (1987) (expert cannot testify to credibility of a witness); N.C. R. Evid. 609 [convictions prescribed by the rule shall be elicited from the witness on cross-examination or thereafter (and not during the State's case-in-chief)].

Constitutionalize all objections: cite due process, confrontation clause, right to obtain witnesses in the defendant's favor, effective assistance of counsel, fundamental fairness, etc. Always raise comparable state and federal constitutional provisions. Constitutional objections reverse the standard of appellate review such that error must be harmless beyond a reasonable doubt.

V. DANGERS:

A. OPENING THE DOOR

"Opening the door refers to the principle where one party introduces evidence of *a particular fact*, the opposing party is entitled to introduce evidence *in explanation or rebuttal*."[46] Even if the evidence is otherwise inadmissible, it may be introduced to rebut or explain.[47]

At common law, the analytical foundation was that by raising a subject at trial, a party expands the realm of relevance, entitling the opposing party to introduce evidence on the subject.[48] Thus, the doctrine functions as a rule of expanded relevance.[49]

In determining whether a party has opened the door, the judge must determine whether fairness requires responsive evidence be allowed.[50] *See, e.g.*, *State v. Bishop*, 346 N.C. 365 (1997) (defendant's misleading testimony about prior conviction opened the door for State to cross-examine about details of prior conviction); *State v. Jefferies*, 333 N.C. 501 (1993) (State's direct exam of officer related to arrest of accomplice opened door for defendant's cross-exam that charges had been dismissed); *State v. Reavis*, 207 N.C. App. 218 (2010) (defense opened door to cross-examination of expert about defendant's record, when expert reviewed defendant's mental health history and mentioned time in prison); *State v. Mason*, 159 N.C. App. 691 (2003) (defense cross-exam of officer about why other leads were not followed opened the door for re-direct about other potential suspects and reasons they were not pursued).

Several rules of evidence provide for admission of otherwise inadmissible evidence because of the action(s) of a party as when: (1) a defendant may admit propensity evidence of his or a victim's character but, once introduced, the State has the right to rebut;[51] (2) a party opens the door for a witness's reputation for truthfulness once attacked by evidence of untruthfulness;[52] and (3) an adverse party may require any other part of a writing or recorded statement be introduced which ought in fairness to be considered.[53]

B. INTRODUCING EVIDENCE

Often, the cross-examiner is faced with a slippery slope: when does he cross the line by introducing evidence at trial? Rule 10 of the General Rules of Practice for the Superior and District Courts provides "if no evidence is introduced by the defendant, the right to open and

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[46] State v. Baymon, 336 N.C. 748, 753 (1994) (internal citation omitted) (emphasis added).
[47] State v. Johnston, 344 N.C. 596 (1996); *see also* White, *supra* note 5, at 9.
[48] *Id.* at 608
[49] *See* White, *supra* note 5, at 9.
[50] *Id.* at 9–10.
[51] N.C. R. EVID. 404(a)(1) & (2).
[52] N.C. R. EVID 608(b).
[53] N.C. R. EVID 106.

close the argument to the jury shall belong to him." The last argument is a treasured right, powerful to the mind and influential to the verdict.

Consider carefully the distinctions in the case law. In *State v. Lindsey*, 791 S.E.2d 496 (2016), defendant neither called any witnesses nor put on evidence but did cross-examine the State's only witness and sought during cross-examination to play a video of the entire traffic stop recorded by the officer's in-car camera. The appellate court held the video went beyond the officer's testimony and was different in nature from evidence presented in other cases that were determined not to be substantive evidence. Playing the video allowed the jury to hear exculpatory statements by defendant, introduced evidence of flashing police lights to attack reliability of the HGN test, and allowed the jury to make its own determinations concerning defendant's impairment apart from the officer's testimony, thereby serving as substantive evidence introduced by defendant.

In *State v. Hogan*, 218 N.C. App. 305 (2012), the trial court committed reversible error by denying defendant the right to final argument when defense counsel read aloud portions of the victim's earlier statement to an officer in an attempt to point out inconsistencies between the victim's trial testimony and his prior statement. Defense counsel never formally introduced the statement into evidence, and the appellate court held defendant never introduced evidence within the meaning of Rule 10.

In *State v. Matthews*, 218 N.C. App. 277 (2012), the trial court committed reversible error by denying defendant the final closing argument when defense counsel identified a defense exhibit, a report made by an officer, and elicited from the officer on cross that, after viewing video surveillance footage, a third party was identified as a possible suspect. Defense counsel did not introduce the officer's report into evidence, nor did he have the officer read the report to the jury. The appellate court held defense counsel's identification of other suspects by the police constituted evidence relevant to issues in the case and was therefore not introduction of evidence pursuant to Rule 10.

In *State v. English*, 194 N.C. App. 314 (2008), the trial judge erred in denying defendant final jury argument when defense counsel referred to the contents of the officer's report when cross-examining the officer, holding the same did not present new matters to the jury when considered with direct examination of the officer.

The appellate courts appears to disapprove when defense counsel introduces an exhibit or has an opposing witness read verbatim from a document; conversely, questions about content, third party guilt, or other areas of inquiry appear safe.

C. INVITED ERROR

"Ordinarily one who causes (or we think joins in causing) the court to commit error is not in a position to repudiate his action and assign it as grounds for a new trial. The foregoing . . . is

intended to point out the legal bar to the defendant's right to raise the question. Invited error is not grounds for a new trial." *State v. Payne*, 280 N.C. 170 (1971) (holding defendant's consent to reading a tape back to the jury while they were deliberating and thereafter objecting to reintroduction of the evidence is invited error). "Invited error means 'a defendant is not prejudiced . . . by error resulting from his own conduct.'" *State v. Roberts*, 767 S.E.2d 543 (2014). "Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law, and a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Steen*, 226 N.C. App. 568, 575 (2013) (holding introduction of statements on cross-examination were direct responses to the questions of trial counsel; based on the invited error doctrine there was no plain error); *see also* N.C. GEN. STAT. 15A-1443(c) (stating that a "defendant is not prejudiced . . . by error resulting from his own conduct.").

D. THE RUNAWAY WITNESS

We all fear what we cannot control, particularly the rambling, headstrong witness at trial. Experience has taught me to tempt him with a trap. Neither judges nor juries like the uncooperative, uncontrollable witness. He is perceived as jaundiced, one with an agenda and without respect for the court's personnel or time. Let the jury see and feel the witness's bias, and grudging admissions become even more valuable. Simply employ the following techniques: repeat the question; ask the witness if he understood the question; ask the witness if he will answer the question; object as unresponsive and move to strike the answer; and ask the court to order the witness to respond to the question.

VI. MODELS FOR CROSS-EXAMINATION:

A. IRVING YOUNGER'S TEN COMMANDMENTS

1. Be brief.
2. Use short questions, plain words.
3. Ask only leading questions.
4. Don't ask if you don't know the answer.
5. Listen to the witnesses' answers.
6. Don't quarrel with the witness.
7. Don't allow the witness to repeat.
8. Don't allow the witness to explain.
9. Don't ask one question too many.
10. Save the ultimate point for closing.

While much of the above is sound and sage, the message is clear: shut up and sit down before you make a fool of yourself.[54] In addition, these "commandments" tell us how to ask questions, not what to ask.[55] A sound starting point; now let us move on.

B. FRANCIS WELLMAN'S THE ART OF CROSS-EXAMINATION

This renowned lawyer heralds the likable litigator:

> The counsel who has a pleasant personality; who speaks with apparent frankness; who appears to be an earnest searcher after truth; who is courteous to those who testify against him; who avoids delaying constantly the progress of the trial by innumerable objections and exceptions to perhaps incompetent but harmless evidence; who seems to know what he is about and sits down when he has accomplished it, exhibiting a spirit of fair play on all occasions—he it is who creates an atmosphere in favor of the side which he represents, a powerful though subconscious influence with the jury in arriving at their verdict.[56]

Wellman thereafter derides the bumbling barrister:

> On the other hand, the lawyer who wearies the court and the jury with endless and pointless cross-examinations; who is constantly losing his temper and showing his teeth to the witnesses; who wears a sour, anxious expression; who possesses a monotonous, rasping, penetrating voice; who presents a slovenly, unkempt personal appearance; who is prone to take unfair advantage of witness or counsel, and seems determined to win at all hazards—soon prejudices a jury against himself and the client he represents, entirely irrespective of the sworn testimony in the case.[57]

C. THE ART OF TRIAL WARFARE BY MICHAEL S. WADDINGTON

> "If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle."
>
> - Sun Tzu, *The Art of War*

Sun Tzu provides timeless lessons on how to defeat your opponent. A fellow lawyer, Michael Waddington, in *The Art of Trial Warfare*, applies Sun Tzu's principles to the courtroom. I share

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[54] *See* MALONE, *supra* note 2, at 24.
[55] *Id.*
[56] FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION 32 (Touchstone 1997) (1903).
[57] *Id.* at 34.

a sampling for your consideration. Trial is war. To the trial warrior, losing can mean life or death for the client. Therefore, the warrior constantly learns, studies, and practices the art of trial warfare, employing the following principles: Because no plan survives contact with the enemy, he is always ready to change his strategy to exploit a weakness or seize an opportunity. He strikes at bias, arrogance, and evasive answers. He prepares quietly, keeping the element of surprise. He makes his point efficiently, knowing juries have limited attention spans and dislike rambling lawyers. He impeaches only the deserving and when necessary. He is self-disciplined, preparing in advance, capitalizing on errors, and maintaining momentum. He is unintimidated by legions of lawyers or a wealth of witnesses, knowing they are bloated prey. He sets up the hostile witness, luring misstatements and exaggerations for the attack. He does not become defensive, make weak arguments, or present paltry evidence. He focuses on crucial points, attacking the witnesses in his opponent's case. He neither moves nor speaks without reflection or consideration. He never trusts co-defendants or their counsel, for danger looms. He remains calm and composed, unflinching when speared. He neither takes tactical advice nor allows his client to dictate the trial,[58] recognizing why his client sits next to him. He is not reckless, cowardly, hasty, oversensitive, or overly concerned what others think. He prepares for battle, even in the midst of negotiation. He keeps his skills sharp with constant practice and strives to stay in optimal physical and emotional shape – for trial requires the stamina of a warrior. The trial lawyer understands mastery of the craft is an ongoing, lifetime journey.

D. PATRICK MALONE'S THE FEARLESS CROSS-EXAMINER: EXCERPTS INCLUDE

Malone, author of two best-selling books on cross-examination, shares his truths, revised commandments, and core concepts.[59]

1. TEN TRUTHS

a. A good cross can lock in a victory; a bad one can seal your fate.
b. Much wisdom about cross-examination is wrong, impossible to follow, and ill-focused.
c. Any smart, hardworking lawyer can become a good cross-examiner.
d. Cross-examination is a game of skill, rewarding practice and preparation.
e. Excessive caution has ruined far more cross-examinations than excessive vigor.

[58] *But see* State v. Ali, 329 N.C. 304 (1991) (when defense counsel and a fully informed criminal defendant reach an absolute impasse as to tactical decisions, the client's wishes must control).

[59] Patrick Malone and Rick Friedman, co-authors of *Rules of the Road: A Plaintiff Lawyer's Guide to Proving Liability*, coined the Rules of the Road theory which frames the defendant(s) or witness(es) in "should or must" types of conduct for examination. The approach requires the rule to be clear, the witness cannot argue with the rule, it is important to the outcome of the case, and the witness violated the rule. Rules generally come from common sense, jury instructions, statutes and regulations, or individual, case specific standards. Figure out the simple rules the adversary violated. In essence, a good rule attacks the witness's conduct.

f. Judgment and humility are key assets for the cross-examiner.
g. There is no such thing as an overly planned cross.
h. A tailored strategy is far more important than style.
i. While cross-examination is a game of wits, the jury rewards more points on the impression created.
j. The most persuasive cross is gaining witness agreement using their words.

2. REWRITTEN LIST OF TEN COMMANDMENTS

a. Be proportional.
b. Use short questions and plain words.
c. Ask simple, plain questions with narrow answers.
d. Ask only questions providing answers with which you can deal.
e. Listen to the entire answer; then follow up.
f. Don't quarrel with the witness, except when obviously deserved.
g. Stick with narrow, simple questions that deny witnesses a chance to explain or repeat their message. If a witness insists on explaining anyway, join the battle.
h. Don't chase small points on cross that can be crushed on redirect.
i. Make sure the jury understands every important point before discharging the witness.

3. FIVE CORE STRATEGIES FOR CROSS-EXAMINATION

a. Build your case by seeking agreement from the witness. Create the impression the witness has defected to your side.
b. Show the witness does not fit. Illustrate the witness is unfit by not having the right credentials.
c. Show the witness is ignorant or makes mistakes. Demonstrate the witness does not know important things that he should know.
d. Show the witness is biased. Get the witness to agree he must be fair, objective, and impartial, and then seek the impression the witness shades the truth, has self-interest, or lacks objectivity.
e. Show the witness contradicts himself, meaning he gives inconsistent opinions or agrees with the opinions of others which diminish his own.

VII. MY MODEL FOR CROSS-EXAMINATION:

A trial lawyer must understand human behavior. Studies abound.[60] Approximately twenty-five percent of your jury will be analytical thinkers, seventy-five percent emotional thinkers. You must put up evidence to satisfy both. Ignorance is not always bliss. Jurors "script" with unfamiliar situations like trial;[61] failure to appreciate scripting is akin to overlooking a looming cliff. The human brain has two cognitive modes: fast, or intuitive and emotional; and slow, or deliberative and logical. Our deliberative brains are lazy, meaning when faced with a complex question we often switch to the intuitive brain without realization.[62] Appreciate the white knight syndrome in a sex case: older men may put your young male defendant in prison faster than you realize.[63] Emotions affect verdicts more than you realize.[64] Legal jargon is ineffectual.[65] Understand primacy and recency.[66] A large percentage of the public believes a defendant is

[60] For example, jurors must express their willingness to kill the defendant to be eligible to serve in a capital murder trial. In one study, a summary of fourteen investigations indicates a favorable attitude toward the death penalty translates into a 44% increase in the probability of a juror favoring conviction. MIKE ALLEN, EDWARD MABRY & DREW-MARIE MCKELTON, IMPACT OF JUROR ATTITUDES ABOUT THE DEATH PENALTY ON JUROR EVALUATIONS OF GUILT AND PUNISHMENT: A META-ANALYSIS, LAW AND HUMAN BEHAVIOR, Dec. 1998, at 715–31;

[61] Humans have a built-in mechanism called scripting for dealing with unfamiliar situations like a trial. This mechanism lessens anxiety by promoting conforming behavior and drawing on bits and pieces of one's life experience—whether movies, television, friends or family—to make sense of the world around them. Unless you intercede, the script will be that lawyers are not to be trusted, trials are boring, people lie for gain, judges are fair and powerful, and the accused would not be here if he did not do something wrong. OFFICE OF THE STATE PUBLIC DEFENDER, JURY SELECTION, 2016.

[62] DANIEL KAHNEMAN, THINKING FAST AND SLOW (Farrar, Straus & Giroux, 2011).

[63] White knights are individuals who have a compulsive need to be a rescuer. *See* MARY C. LAMIA & MARILYN KRIEGER, THE WHITE KNIGHT SYNDROME: RESCUING YOURSELF FROM YOUR NEED TO RESCUE OTHERS (New Harbinger Publications 2009).

[64] Recent research has highlighted the important role of emotions in moral judgment and decision-making, particularly the emotional response to morally offensive behavior. JUNE P. TANGNET, JEFF STUEWIG, AND DEBRA J. MASHEK, MORAL EMOTIONS AND MORAL BEHAVIOR, ANNUAL REVIEW OF PSYCHOLOGY, 2007, at 345–72;

[65] Post-trial interviews reveal jurors lose interest and become disengaged with the use of technical terms and legal jargon, without an early and simple explanation of the case, and during a long trial. Susan J. MacPherson & Elissa Krauss, *Tools to Keep Jurors Engaged*, TRIAL, Mar. 2008, at 32. Studies by social scientists on non-capital felony trials reveal the following findings: (1) On average, jury selection took almost five hours, yet jurors as a whole talked only about thirty-nine percent of the time; (2) lawyers spent two percent of the time teaching jurors about their legal obligations and, in post-trial interviews assessing juror comprehension, many jurors were unable to distinguish between or explain the terms "fair" and "impartial"; and (3) one-half the jurors admitted post-trial they could not set aside their personal opinions and beliefs, although they had agreed to do so in voir dire. Cathy Johnson & Craig Haney, *Felony Voir Dire, an Exploratory Study of its Content and Effect*, 18 LAW AND HUMAN BEHAVIOR 487 (1991).

[66] The law of primacy in persuasion, also known as the primacy effect, was postulated by Frederick Hansen Lund in 1926 and holds the side of an issue presented first will have greater effect in persuasion than the side presented subsequently. Vernon A. Stone, *A Primacy Effect in Decision-Making by Jurors*, JOURNAL OF COMMUNICATION, 239 (1969). The principle of recency states things most recently learned are best remembered. Also known as the recency effect, studies show we tend to remember the last few things more than those in the middle, assume items at the end are of greater importance, and the last message has the most effect when there is a delay between repeated messages. The dominance of primacy or recency depends on intrapersonal variables like the degree of familiarity and controversy as well as the interest of a particular issue. Curtis T. Haughtvedt & Duane T. Wegener, *Message Order Effects in Persuasion: An Attitude Strength Perspective*, JOURNAL OF COMMUNICATION (1994).

guilty before the first juror is seated.[67] Jurors bring their good judgment and common sense: hence, ask the common sense question, "Do you think you should have . . . ?"

My primary principles for cross-examination follow:

1. Know your audience. *People save themselves.*[68] This includes judges and juries.
2. Seek common, ground first. Favorable answers next. Impeach last and only when necessary.
3. Appreciate the witness's role. If a lay witness, elicit favorable facts; if an expert, favorable concepts; and if a deceiver, disembowel. If he is meaningless, do nothing.
4. Have a cogent understanding of substantive and procedural law. They are your shield and arsenal.
5. Voir dire experts *except* when you show your hand or allow an opportunity to repair.
6. Elicit necessary evidence. Refer to your pre-trial, cross-examination notes in the margin.[69] Know your case and closing theme.
7. Know the fourteen impeachment techniques. Backwards.
8. Try cases. Practice aiming for perfection. Try the next one better. Experience enhances the craft.

My cross-examination model follows: Start well and end well. Use your style. Distill the law and facts for the fact finder. Remember the jury is always watching you and, when you get surprised or skewered, do not react. After you have prepared important topics for cross-examination and know your theory(ies) of the case, consider these fundamentals: (1) revisit my General Advice for Cross-Examination of Experts; (2) disarm the witness initially with a pleasant style; (3) start with basic facts, seeking areas of agreement. Build your position by asking questions the witness cannot refute; (4) lead the witness using short fact questions; (5) elicit favorable responses, looping them into your next question; (6) listen for unexpected or illogical responses, and consider if further inquiry leads the factfinder to question the witness's common sense. In voir dire, think like a judge. At trial, think like a juror. Jurors want evidence to be understandable and make sense. Use the lens of your audience; (7) simplify the responses; (8) near the end, impeach using strategies referenced above; (9) quit when you receive concessions or discredit the witness; and (10) unless obvious and timely, save the ultimate question for closing argument.

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[67] According to the National Jury Project, sixty-seven percent of jurors are unsympathetic to defendants, thirty-six percent believe it is the defendant's responsibility to prove his innocence, and twenty-five percent believe the defendant is guilty or he would not have been charged. Now known as National Jury Project Litigation Consulting, this trial consulting firm publicizes its use of social science research to improve jury selection and case presentation.
[68] In panic, most people abandon rules in order to save themselves, although some may do precisely the opposite. DENNIS HOWITT, MICHAEL BILLING, DUNCAN CRAMER, DEREK EDWARDS, BROMELY KNIVETON, JONATHAN POTTER &ALAN RADLEY, SOCIAL PSYCHOLOGY: CONFLICTS AND CONTINUITIES (1996).
[69] *See supra* text at IV.A.3.c.

Choose the weapons that fit you, whether preparation, wit, or specialized knowledge.[70] Remember David shunned heavy armor for a sling and a stone to slay Goliath.[71] Rebuff your opponent's invitation to fight with his weapons.[72] You may choose to fire your best shot early to disembowel the arrogant, rather than saving your salvo for the end.

VII. CONCLUSION:

I leave you with an old, tattered quote which eventually dissolved in my wallet:

> "Be mild with the mild, shrewd with the crafty, confiding to the honest, rough to the ruffian, and a thunderbolt to the liar. But in all this, never be unmindful of your own dignity."
>
> – John Brown, author

[70] MALONE, *supra* note 2.
[71] 1 *Samuel* 17:1–58.
[72] MALONE, *supra* note 2.