LAW DAY 2023

GUIDANCE FROM THE BENCH: ETHICS, PROFESSIONALISM, AND TRIAL PRACTICE

Program Materials

Presented by the Walton County Bar Association.

GUIDANCE FROM THE BENCH:

ETHICS, PROFESSIONALISM, AND TRIAL PRACTICE

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Foreward

In addition to his years of service to the Superior Courts of the Alcovy Circuit, the Walton County Bar Association is especially grateful to The Honorable Samuel Ozburn for providing the necessary leadership, organization and supervision that has brought this program into reality. Further, the bar recognizes the distinguished jurists who will preside over this program. The focus of 2023's Law Day is *Civics, Civility, and Collaboration*. The Walton County Bar Association, hopes that through this CLE, attorneys in and around Walton County, Georgia, may glean insights from our Superior Court Judges to better model the tenets of this Law Day in our own lifes and practices.

April, 2023

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PROGRAM

Presiding: *The Honorable Samuel D. Ozburn*, Senior Judge, Superior Courts, Alcovy Circuit

8:30 Registration

8:45 Introduction and
Opening Remarks
The Honorable Samuel J. Ozburn

9:00 Guidance from the Bench:
Ethics: What You Need to Know to Win the Battle of Good vs. Evil
The Honorable Cheveda D. McCamy, Judge, Superior Courts, Alcovy Circuit

9:50 Break

10:00 Guidance from the Bench:
Professionalism: Advocates, not Enemies
(Modeling the ability to respectfully disagree)
The Honorable Jeffery L. Foster, and
The Honorable G. Kevin Morris, Judges, Superior Courts, Alcovy Circuit

10: 50 Break

11:00 Guidance from the Bench:
Trial Practice: Effective Trial Advocacy: The Pursuit of Truth
The Honorable W. Kendall Wynne, Jr. Chief Judge, Superior Courts, Alcovy Circuit

11:50 Questions and Answers

12:00 Adjourn

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Ethics: What You Need to Know to Win the Battle of Good vs. Evil
Chapter 1

The Honorable Cheveda D. McCamy, Judge, Superior Courts, Alcovy Circuit

ETHICS

WHAT YOU NEED TO KNOW TO WIN THE BATTLE OF GOOD VS. EVIL.

ETHICS

WHY?

- CLE requirement
- Ensure fairness
- Improve Perception of Our Profession
- Lose livelihood

ETHICAL BREAKDOWN

WHAT TO EXPECT

1. Identify the rules of ethics
2. Explain purpose of the rules
3. Apply rules to real life

CANNONS OF ETHICS

- The Georgia Rules of Professional Conduct help define a lawyer's obligations to clients, to the judicial system, and to the public.
- Supreme Court of Georgia ultimate authority to regulate the legal profession
- State Bar of Georgia's Office of the General Counsel investigates and prosecutes claims
- https://www.gabar.org/barrules/ethicsandprofessionalism

ETHICS HELPLINE

Lawyers who would like to discuss an ethics dilemma with a member of the Office of the General Counsel staff should contact the ***Ethics Helpline at 404 - 527-8741, 800-682-9806*** or log in and submit your question by email .

PURPOSE OF OUR ETHIC RULES

In this State, where the stability of courts and of all departments of government rests upon the approval of the people,

it is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency

and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration.

The future of this State and of the Republic, of which it is a member, to a great extent, depends upon our maintenance of justice pure and unsullied.

It cannot be so maintained unless the conduct and motives of the members of our profession are such as to merit approval of all just men.

CANON 1

A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession.

CANON 1

EC 1-5 A lawyer should

- maintain high standards of professional conduct
- encourage fellow lawyers to do likewise
- be temperate and dignified, and
- refrain from all illegal and morally reprehensible conduct.

CANON 1

- Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession.

CANON 1

- Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

CANNON 3

A lawyer should assist in preventing the unauthorized practice of law.

- DR 3-101. Aiding Unauthorized Practice of Law.
  - (A) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.
  - (B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

WHAT DO YOU THINK?

You trust your paralegal to respond to discovery requests on all your cases as well as file supplemental discovery. Your paralegal is experienced and knows a lot about the law. A client emails you and your paralegal to tell you she has a potential piece of evidence and wants to know if it will be relevant to the trial. You're busy preparing for trial and motions, do you let your paralegal answer the question?

WHAT DO YOU THINK?

"Paralegals," "legal assistants," "law clerks," "paraprofessionals," "litigation assistants,"etc., are laymen who are not entitled to practice law and who are not entitled to membership in the State Bar of Georgia.

WHAT DO YOU THINK?

If a member of the State Bar allows a paralegal in his employ to perform functions that amount to the unauthorized practice of law, the Bar is authorized to discipline the member under DR 3-101(A) of State Bar Rule 4-102.1.

CANON 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

CANON 5

- EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

CANON 5

- EC 5-2 A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

WHAT DO YOU THINK?

You represent a husband in a divorce case. The husband and wife are wealthy and well known because of the business they run. They have 3 teenage children that are social media influencers. The husband tells you that they are doing a reality show about the family and the divorce. He offers you a portion of the television rights. He expects the show to be very profitable. Do you accept?

WHAT DO YOU THINK?

- EC 5-4 If, in the course of his representation of a client, a lawyer is permitted to receive from his client a beneficial ownership in publication rights relating to the subject matter of the employment, he may be tempted to subordinate the interests of his client to his own anticipated pecuniary gain.

WHAT DO YOU THINK?

- For example, a lawyer in a criminal Case who obtains from his client television, radio, motion picture, newspaper, magazine, book, or other publication rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of his publication rights to the prejudice of his client. To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though his employment has previously ended.

WHAT DO YOU THINK?

- DR 5-103. Avoiding Acquisition of Interest in Litigation
  - (A) A lawyer shall not acquire a proprietary interest in the cause or action or subject matter of litigation he is conducting for a client, except he may
    - (1) acquire a lien granted by law to secure his fee or expenses
    - (2) contract with a client for a reasonable contingent fee is a civil case.

CANON 7

A Lawyer Should Represent a Client Zealously Within the Bounds of the Law

CANON 7

- EC 7-36 Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties.
- Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings.

- While maintaining his independence, a lawyer should be respectful, courteous, and above - board in his relations with a judge or hearing officer before whom he appears.
- He should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration.

CANON 7

Directory Rule 7-107. Trial Publicity.

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

CANON 7

- (1) information contained in a public record;
- (2) that the investigation is in progress;
- (3) the general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim;
- (4) a request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto;
- (5) a warning to the public of any dangers.

CANON 7

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not,. . . . . make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

CANON 7

(1)the character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused;

(2)the possibility of a plea of guilty to the offense charged or to a lesser offense;

(3)the existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement;

(4) the performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests;

(5) the identity, testimony, or credibility of a prospective witness;

(6) any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

CANON 7 GONE WRONG

Former District Attorney Nifong (Duke Lacrosse Case)

CANON 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety

CANON 9

- EC 9-6 Every lawyer owes a solemn duty to uphold the integrity and honor of his profession;
  - to encourage respect for the law and for the courts and the judges thereof;
  - to observe the Code of Professional Responsibility;
  - to act as a member of a learned profession, one dedicated to public service;

- to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit;
- to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public;
- and to strive to avoid not only professional impropriety but also the appearance of impropriety.

CONCLUSION

- REMEMBER
  - YOU are the protectors of the court system
  - YOU are the administers of justice

QUESTIONS

Contact
Judge Cheveda D. McCamy
Superior Court, Alcovy Judicial Circuit
cmccamy@co.newton.ga.us; 770-784-2080

Guidance from the Bench
Professionalism: Advocates, not Enemies
(Modeling the ability to respectfully disagree)
Chapter 2

The Honorable Jeffery L. Foster, and
The Honorable G. Kevin Morris, Judges, Superior Courts, Alcovy Circuit

Advocates, not Enemies

Civility in the Practice of Law

(Modeling the ability to respectfully disagree)

1. What is professionalism, especially compared to ethics:

a. Professionalism is meant to address the aspirations of the profession and how we as lawyers should behave.

> Chief Justice Harold Clarke of the Maryland Supreme Court: ". . . the idea that ethics is a minimum standard which is required of all lawyers while professionalism is a higher standard expected of all lawyers."

> Chief Justice Benham of the Georgia Supreme Court says, "We should expect more of lawyers than mere compliance with legal and ethical requirements."

b. Fundamental premises of lawyer professionalism -- competence, ***civility***, integrity, and commitment to the rule of law, to justice, and to the public good.

- Inculcate a habit of talking with colleagues and engaging in dialogue that is essential to a healthy professional life.

- Encourage the habit of reflection (or the *"stop and think"* rule of morality).

- Acquaint lawyers with the harsher realities of the profession, but also will equip them with a variety of strategies for coping with these realities.

c. The Florida Memo – Antithetical Professionalism

2. Civility

a. Defined: Politeness, Courteous behavior; *Civilis* (lt.) befitting a citizen, relating to public life

b. Practical and contextual definition:

> ''Clearly, civility has to mean something more than mere politeness. The effort to promote civility will have accomplished little if all it does is get people to say, 'excuse me, please', while they (figuratively) stab you in the back. Civility also cannot mean 'roll over and play dead.'"

> "…Any reasonable definition of 'civility' must recognize that the many differences which divide our increasingly diverse society will produce an endless series of confrontations over difficult moral, distributional, status, and identity issues. Often these issues will have an irreducible win-lose character and, hence, are not be amenable to win-win agreement. While continuing confrontation is inevitable, the enormous destructiveness which commonly accompanies these confrontations is not.''

c. Constructive Conflict (efficient and professional process of arriving at the end game: trial or settlement)

> Separate the people from the problem - be "soft" on the people, but "hard" on the problem.

Utilize the best available facts to narrow the disagreement and minimize misunderstandings – Limit the amount of "opinion", engage in serious fact-finding, and use mutually disclosed, objective facts as much as possible.

Objectively evaluate the opposing viewpoints. Confront deliberate distortions of the opposing position or party, especially with your client!

Limit Escalation – know when to step back and resume the discourse and a later time. (The Cook Lesson)

Reframe issues, in whole or in part, from win-lose scenarios to win-win scenarios.

Limit the backlash or negative reactions – Be able to justify as many positions and proposals as objective fair.

More persuasion and exchange, less force – parties should arrive at as many solutions as possible and minimize their efforts to impose solutions.

Burgess, Heidi and Guy M. Burgess. "The Meaning of Civility." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: 2019<http://www.beyondintractability.org/essay/civility>.

3. Practical Impacts of incivility: Inability to work amicably and professionally can negatively affect client's results and your professional reputation:

a. Appearing unnecessarily combative and unprofessional to the court and colleagues (think attorney's fees and costs award at the end of the case, and impact on future cases);

b. Driving up a client's expenses with repetitive motions or rigid discovery approaches (sure, you can come to my office and review the documents you want, but I am not furnishing you copies! when

and where are the depositions? Why won't you mediate, this case should settle?);

c. Creating longer-term animosity between parties that eventually need to heal from their own hurts and for the good of others (think domestic relations)

4. Discussion/Question & Answer - Practical Tips and Responses to Situations

5. Closing Thoughts:

Too many practitioners have bought into the lie that if you say something loud enough and often enough, it means you are right.

We live in a culture that has lost the ability to disagree respectfully, and to agree to disagree, without ascribing the worst of intentions to other because of that disagreement.

The law, the Court and the attorneys should set the bar high and demonstrate respect and civility, and engage in constructive conflict.

Guidance from the Bench:
Trial Practice: Effective Trial Advocacy
The Pursuit of Truth
Chapter 3

The Honorable W. Kendall Wynne, Jr. Chief Judge, Superior Courts, Alcovy Circuit

WALTON COUNTY BAR ASSOCIATION
CLE PRESENTATION
April 28, 2023

EFFECTIVE TRIAL ADVOCACY: THE PURSUIT OF TRUTH

W. Kendall Wynne, Jr.
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Special thanks to Pete Skandalakis and the Prosecuting Attorneys Council of Georgia for the excerpt on voir dire questions that have been allowed and disallowed from the Council's Trial Practice Manual, Vol. 5, and to Professor James Alexander Tanford, Professor of Law, Indiana University—Bloomington, for his permission to use "Everything You Ever Wanted to Know About Trial Procedure and Tactics."

THE GOAL: TRUTH

The end of our work as lawyers and judges is the truth. The people of Georgia have written it into law:

> The object of all legal investigation is the discovery of truth. Rules of evidence shall be construed to secure fairness in administration, eliminate unjustifiable expense and delay, and promote the growth and development of the law of evidence *to the end that the truth may be ascertained* and proceedings justly determined.

O.C.G.A. § 24-1-1 (emphasis supplied).

Consider how the Court of Appeals responded when a defendant took issue with this "time honored principle":

> Defendant complains of the giving of the following charge: "[t]he object of every legal investigation is the discovery of the truth." That was given in the context of what followed: "By your verdict in this case, you are to speak the truth, as to the facts and issues tried before you. The word 'verdict' comes down to us from an old Latin term that means to speak the truth.[1] Your sworn duty as jurors is to return a verdict that is a true verdict. You have no responsibility for and you should not consider in any way any possible consequences of that verdict, whatever it may be, only that it is a true verdict." The court also fully charged the jury on "reasonable doubt."
>
> …
>
> The objection voiced was that the object of a criminal trial is to determine whether or not the state has proven the defendant's guilt beyond a reasonable doubt, regardless of whether defendant actually committed the act. Defendant argued, "I don't think that time honored principle really applies in a criminal case." Defendant cites *Daniel, Ga. Criminal Trial Practice*, § 25-1, fn. 4 (1986 ed.). See also subsequent editions. Cf. *Groves v. State*, supra, fn. 1.
>
> The objected-to instruction is verbatim the first part of OCGA § 24-1-2, which continues: "The rules of evidence are framed with a view to this prominent end, seeking always for pure sources and the highest evidence." This section of the evidence code capsulizes the raison d'etre for the rules which govern trials. It is not limited by its terms to *civil* trials. The precept given to the jury states the goal for which the trial process has been developed and continues to be refined, with

[1] "Verdict" originated from the Latin "veredictum." It does not literally mean "to speak the truth," but translates "a true declaration." Black's Law Dictionary, p. 1730 (4th ed. 1968). *Groves v. State,* 162 Ga. 161, 162, 132 S.E. 769 (1926).

> innumerable safeguards such as the rules of evidence to assure accuracy and fairness. The "reasonable doubt" principle is the standard by which the evidence is measured. It is a very high standard, a stern and demanding guard against mistake of fact. This tool, which is a burden on the State, was given to the jury with an unconditional mandate that it be used in the jury's search for truth.
>
> It was not incorrect to give the objected-to charge. As stated by the United States Supreme Court, "'the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence,' *Delaware v. Van Arsdall*, 475 US 673, 681, 89 LEd2d 674, 106 SCt 1431 [1436] (1986)...." *Colorado v. Connelly*, 479 U.S. 157, 166, 107 S.Ct. 515, 521, 93 L.Ed.2d 473, 484 (1986). See also *Montgomery v. State*, 156 Ga.App. 448, 451(1), 275 S.E.2d 72 (1980). The manner in which it is done must pass the test alluded to by defendant, as explained in *Jackson v. Virginia*, supra. It is his right to have this test applied. But the test is the means and not the end. The end is truth.
> *Judgment affirmed.*

Holcomb v. State, 198 Ga. App. 547, 547, 402 S.E.2d 520, 521–22 (1991).

But the problem for us and the whole nation is that truth seems to be in short supply these days. According to Gallup, confidence in all U.S. institutions is down, and the average is a new low. https://news.gallup.com/poll/394283/confidence-institutions-down-average-new-low.aspx (last accessed April 7, 2023). Why is that? I suspect it is because people no longer believe what they hear from these institutions, and they just want someone to tell them the truth.

And the problem exists in our profession. This is from an attorney's website: "Cross-Dimensional Awareness—I detect actions and decisions available in *alternate realities* to help my clients make informed decisions about how to move forward." (Emphasis supplied.) There is only one reality, and truth is that which corresponds to it.

What does all this have to do with trial practice? Everything. It's your job as an advocate to make the fact-finder's job easy by making the case that your client's case is true and just. Jurors are just like everyone else: they just want someone to tell them the truth. But because people have less confidence in our institutions these days–and that includes the judiciary and the law–your job is much harder than it used to be.

The good news is that, as lawyers, we can lead the way in recovering the ground lost to public skepticism and cynicism by renewing our dedication to the pursuit of truth in the courtroom. The best way to do that is through effective advocacy in pursuit of truth. If your client's cause is true and just, and you can prove it, then let that drive you. However, if, after a thorough investigation of your client's case, you determine that it is lacking, then try to persuade your client to let you negotiate the best outcome for him or her and then do it.

THE MEANS: EFFECTIVE TRIAL ADVOCACY

Where to Start

Effective advocacy begins before the client walks in the door. It starts with your reputation among the bar, the bench, and the community in general. Do you have a reputation for honesty and trust, for thorough work, for concern for your clients, for dependability, for timely responses to inquiries, for good client care?

Effective Factual Investigation

Effective advocacy starts with the client interview or, in the case of the prosecutor, opening the case file. Either way, that is only the starting point. Do not limit yourself to what your client tells you or what is in the police report. Do not limit yourself to the witnesses your client names. There are almost always collateral sources of information that lead to other sources of information (e.g., the internet, specifically, social media).

Do not choose to remain blissfully ignorant, because opposing counsel is already hard at work doing his or her own investigation. You want to know **all** of the facts—the good, the bad, the beautiful, and the ugly. Avoid tunnel vision and confirmation bias. Test what your client says and engage in critical thinking in pursuit of truth so you can represent your client most effectively. The sooner you determine the truth, the greater your chances of achieving the best outcome for your client.

Effective Legal Investigation

Regardless of the case, start now to master the Rules of Evidence. I've never seen a case tried without them. A thorough working knowledge of them will serve you well by enhancing your credibility with the court, the jury, and your client by winning meaningful objections or responding correctly to a meaningless objection.

Specifically, know thoroughly the law that applies to your case. It's still true: if you have the law and the facts, you've won the case. If you have one, the other, or neither, start negotiating. The sooner you know all the fact and the law, the sooner you can achieve the best outcome for your client at a cost savings to him or her.

Effective Voir Dire

Challenges for Cause (O.C.G.A. § 15-12-63)

(a) When each juror is called, he shall be presented to the accused in such a manner that he can be distinctly seen.

(b) The state or the accused may make any of the following objections to the juror:

(1) That the juror is not a citizen, resident in the county;

(2) That the juror is under 18 years of age;

(3) That the juror is incompetent to serve because of mental illness or intellectual disability, or that the juror is intoxicated;

(4) That the juror is so near of kin to the prosecutor, the accused, or the victim as to disqualify the juror by law from serving on the jury;

(5) That the juror has been convicted of a felony in a federal court or any court of a state of the United States and the juror's civil rights have not been restored; or

(6) That the juror is unable to communicate in the English language.

(c) It shall be the duty of the court to hear immediately such evidence as is submitted in relation to the truth of these objections; the juror shall be a competent witness for this purpose. If the judge is satisfied of the truth of any objection, the juror shall be set aside for cause.

Challenges for Favor (O.C.G.A. § 15-12-134)

In all civil cases it shall be good cause of challenge that a juror has expressed an opinion as to which party ought to prevail or that he has a wish or desire as to which shall succeed. Upon challenge made by either party upon either of these grounds, it shall be the duty of the court to hear the competent evidence respecting the challenge as shall be submitted by either party, the juror being a competent witness. The court shall determine the challenge according to the opinion it entertains of the evidence adduced thereon.

Disqualification by Relationship to Party or Interest in the Case (O.C.G.A. § 15-12-135)

(a) All trial jurors in the courts of this state shall be disqualified to act or serve in any case or matter when such jurors are related by consanguinity or affinity to any party interested in the result of the case or matter within the third degree as computed according to the civil law. Relationship more remote shall not be a disqualification. (See Appendix B.)

(b) Notwithstanding subsection (a) of this Code section, any juror, irrespective of his relationship to a party to the case or his interest in the case, shall be qualified to try any civil case when there is no defense filed unless one of the parties to the case objects to the related juror.

Questions on Voir Dire for Felony; Setting Aside Juror for Cause (O.C.G.A. § 15-12-164)

(a) On voir dire examination in a felony trial, the jurors shall be asked the following questions:

(1) “Have you, for any reason, formed and expressed any opinion in regard to the guilt or innocence of the accused?” If the juror answers in the negative, the question in paragraph (2) of this subsection shall be propounded to him;

(2) “Have you any prejudice or bias resting on your mind either for or against the accused?” If the juror answers in the negative, the question in paragraph (3) of this subsection shall be propounded to him;

(3) “Is your mind perfectly impartial between the state and the accused?” If the juror answers this question in the affirmative, he shall be adjudged and held to be a competent juror in all cases where the authorized penalty for the offense does not involve the life of the accused; but when it does involve the life of the accused, the question in paragraph (4) of this subsection shall also be put to him;

(4) “Are you conscientiously opposed to capital punishment?” If the juror answers this question in the negative, he shall be held to be a competent juror.

(b) Either the state or the accused shall have the right to introduce evidence before the judge to show that a juror's answers, or any of them, are untrue. It shall be the duty of the judge to determine the truth of such answers as may be thus questioned before the court.

(c) If a juror answers any of the questions set out in subsection (a) of this Code section so as to render him incompetent or if he is found to be so by the judge, he shall be set aside for cause.

(d) The court shall also excuse for cause any juror who from the totality of the juror's answers on voir dire is determined by the court to be substantially impaired in the juror's ability to be fair and impartial. The juror's own representation that the juror would be fair and impartial is to be considered by the court but is not determinative.

> The law governing the issue of excusing a juror for cause is well-settled. Whether to strike a juror for cause lies within the sound discretion of the trial court. For a juror to be excused for cause, it must be shown that he or she holds an opinion of the guilt or innocence of the defendant that is so fixed and definite that the juror will be unable to set the opinion aside and decide the case based upon the evidence or the court's charge upon the evidence. A prospective juror's doubt as to his or her own impartiality does not demand as a matter of law that he or she be excused for cause. Nor is excusal required when a potential juror expresses reservations about his or her ability to put aside personal experiences. A conclusion on an issue of bias is based on findings of demeanor and credibility which are peculiarly in the trial court's province, and those findings are to be given deference.

Truong v. State, 340 Ga. App. 186, 187–88, 796 S.E.2d 912, 914 (2017) (quoting Brittian v. State, 299 Ga. 706, 708 (3), 791 S.E.2d 810 (2016).

Challenges for Cause; Time (O.C.G.A. § 15-12-167)

If known to a party or his counsel, any objections to a juror for cause shall be made before the juror is sworn in the case. After a juror has been found competent, no other or further investigation before triers or otherwise shall be had, provided that newly discovered evidence to disprove the juror's answer or to show him incompetent may be heard by the judge at any time before the prosecuting counsel submits any of his evidence in the case. If the juror is proved

incompetent, the judge shall order him to withdraw from the jury and shall cause another juror to be selected.

Effective Opening Statement

Opening statements are an opportunity for each side to outline what each expects the evidence to show.

Don't discuss the law.

Don't argue the case.

Make eye contact with each and every juror.

Avoid distracting movements.

Deal with the weaknesses in your case from the start. Jurors will trust you if you are honest with them about the weak points.

Avoid the temptation to exaggerate; just stick to the facts you can prove (and reasonable inferences you can argue later from those facts). Here's the risk you run if you don't:

> We have held that a prosecutor should confine his opening statement to an outline of what he expects admissible evidence to prove at trial, and that if a prosecutor departs from these guidelines, a conviction will not be reversed *if the prosecutor acted in good faith* and if the trial court instructs the jury that the prosecutor's opening statement is not evidence and has no probative value.
>
> Alexander v. State, 270 Ga. 346, 349, 509 S.E.2d 56, 60 (1998) (reversing conviction where prosecutor offered no explanation as to why he failed to introduce evidence of gang-related nature of the crime he promised in opening statement) (emphasis supplied).

Effective Cross-Examination

The hardest part of trying a case because it requires you to have an almost instant recall of every fact in the case. But here are some things you can do to help:

- Know the facts better than anyone else does.
- Listen. Listen. Listen.
- Remember there is only one truth, and anything the witness says that doesn't line up with that has to be not true.
- Make bullet point notes.
- Hit only those points you've made note of; do not go over the entire direct testimony again.

- Close on your best point.

Effective Closing Argument

Good trial advocacy, especially closing argument, is knowing your community. What values do the people in your community hold dear? How seriously do they take crime? Are they generous with personal injury awards?

Deal with the weaknesses in your case. This enhances your credibility with them and helps them find in your favor because they trust you.

Avoid a mechanical application of the law to the facts. Help the jury understand the real life implications of the case. Appeal to the heart and not just the head without being maudlin. In other words, don't overdo it or overplay your hand.

Remember eye contact.

Analogies and hyperbole can be effective elements of good advocacy.

Explain why the case matters.

Closing argument is the second hardest part of a trial. The key to an effective closing argument is weaving the law and the facts together to compel only one outcome: VEREDICTUM—A TRUE DECLARATION.

APPENDIX A

EVERYTHING YOU EVER WANTED TO KNOW ABOUT TRIAL PROCEDURE AND TACTICS

James A. Tanford
Indiana University School of Law

A. THE CARDINAL RULES OF SUCCESSFUL TRIALS

1. Act respectful toward the judge. Stand when he/she enters or leaves the room. Address him/her as "your honor."
2. Be brief.
3. Don't waffle or whine
4. Never underestimate your opponent
5. Wear comfortable clothes, especially shoes. No rule requires men to wear vests or women to wear pumps that make them limp.
6. Bring water and granola bars.
7. Arrive at every court appearance at least 15 minutes early.
8. Be formal and professional at all times.
9. Prepare.

B. USUAL ORDER OF TRIAL

(1) Preliminaries

Bailiff calls court to order, attorneys stand and judge enters room

Judge asks for attorneys' names (sometimes called "appearances"); attorneys give their names and whom they represent.

Judge asks if there are any preliminary issues and attorneys make motions. Plaintiff usually goes first.

Motions are of three kinds:

a) Motion to separate witnesses under Fed. R. Evid 615

b) Motions in limine to prevent the other side from bringing up inadmissible evidence

c) Requests that the judge clarify his or her procedures on specific issues; e,g, i) May exhibits be used in opening statement?; ii) May leading questions be used on preliminary or uncontested matters?; iii) Should you state grounds for an objection in open court or at the bench?; or iv) Will the judge give jury instructions before or after closing arguments. If instructions are not given until after arguments, will the judge permit you to refer to specific pattern jury instructions during argument.

(2) Jury selection (not usually done at trial competitions)
A jury panel is brought in
The judge introduces the case and lectures the jury about civic responsibility
Six jurors are called to sit in the jury box
Plaintiff questions the panel first, and when done, then defendant questions them
Either side may challenge a juror for cause (legal disqualification) whenever grounds become apparent
After the questioning, the lawyers approach the bench and tell the judge whether they have any peremptory
challenges (you just don't like a juror). Plaintiff exercises the first challenge, then defendant, then alternately

until they are satisfied with the panel or run out of allotted challenges. You may not challenge jurors based on
race, ethnicity or gender.
New jurors are called up to fill in the jury box and the process starts over again.
The jurors who remain are sworn in
3) Opening statement
Plaintiff (or prosecutor) gives an opening statement
Defendant gives an opening statement.
(4) Plaintiff's case in chief
Plaintiff calls Witness No. 1
a) Plaintiff conducts direct examination
b) Defendant conducts cross-examination
c) Plaintiff conducts brief rebuttal
Plaintiff calls remaining witnesses. For each one:
a) Plaintiff conducts direct examination
b) Defendant conducts cross-examination
c) Plaintiff conducts brief rebuttal
Plaintiff announces that s/he rests
(5) Defendant makes a motion for a judgement as a matter of law under Fed. R. Civ. Pro. 50.
(6) Defendant's case-in-chief
Defendant calls Witness No. 1
a) Defendant conducts direct examination
b) Plaintiff conducts cross-examination
c) Defendant conducts brief rebuttal
Defendant calls remaining witnesses. For each one:
a) Defendant conducts direct examination
b) Plaintiff conducts cross-examination
c) Defendant conducts brief rebuttal
Defendant announces that s/he rests.
(7) Plaintiff makes a Rule 50 motion for judgment on the evidence as to any affirmative defense or
counterclaim
(8) Plaintiff presents its rebuttal case, limited to new facts, issues and defenses raised during the defendant's

case-in-chief.
Plaintiff calls one or more witnesses
a) Plaintiff conducts direct examination
b) Defendant conducts cross-examination
c) Plaintiff conducts brief rebuttal
Plaintiff announces that s/he rests.
(9) Both sides renew their Rule 50 motions for judgment on the evidence.
(10) Closing arguments

Plaintiff presents the first argument
Defendant presents his or her argument
Plaintiff presents the final argument
(11) The judge instructs the jury on the law
(12) Jury deliberation
The jury deliberates in secret long enough to get at least one free meal.
If the jury requests more instructions or a review of evidence, it takes place in open court with the parties
present. Even the judge may not communicate ex parte with the jury.
The jury returns its verdict, the lawyers are summoned, and the verdict is read.
Whichever lawyer lost the case asks that the jury be "polled," a process in which each juror is individually
asked if they agree with the verdict.

C. BASIC PRINCIPLES OF ADVOCACY

(1) Develop a theory of your case and stick to it. Make sure that everything you do furthers that theory, and
don't waste time on anything irrelevant to it. A case theory is the simplest model that explains what happened
and why you are entitled to a favorable verdict, and forms a cohesive, logical view of the merits of the case
that is consistent with common everyday experience. A case theory contains the following elements:
Law. Your theory should clearly indicate the proper legal outcome of the case. You must understand the
elements of your cause of action or defense, and whether and how you can prove them. If there are multiple
legal issues, you must decide what is your strongest legal argument. Just because an issue could be argued
does not mean you must do so. For instance, a defendant in a personal injury case could argue that the
plaintiff cannot prove liability, or that plaintiff suffered no damages, or both. If you represent a defendant
who, at the time of an accident, was drunk, speeding, driving in the wrong lane, and did not have a license,
could you sincerely argue that your client was not negligent? If the plaintiff suffered only whiplash injuries

that cannot be medically verified, your theory of the case can more comfortably rest on an argument that the
plaintiff cannot prove any injury.
Facts. Your theory must be consistent with the weight of the evidence. It also should identify which are the
most important items of evidence that support your version of the disputed events. Just because evidence is
available does not mean it must be presented -- even if you have spent time and effort to gather it. You must
develop the ability to discern helpful from confusing information and the discipline to limit yourself to the
presentation of facts supporting your theory.
Weaknesses. You must recognize, acknowledge, and have an explanation for weaknesses, gaps, inconsistencies, and improbabilities in your case.
Emotions. A good theory includes an emotional component. What injustice has been committed? Why is
your client morally deserving of a verdict?
Opponent's case. Recognize that there is another side to the story. Analyze your opponent's case to determine
where the disputes will arise, what the strengths and weaknesses of the adverse case are, and develop an
explanation for why your opponent's version is wrong.
(2) Other general principles
Keep it simple. Concentrate on the five or ten most important facts in your case? Identify them in your case
theory. If you can simplify your case, edit your presentations, and keep the jury focused on your main points,
resisting the temptation to go off on less important tangents, you will present the jury with a case they can
understand and remember.

Understand the law of the case as contained in the jury instructions. A good case fits squarely in the middle
of it. Save your clever legal arguments about what the law should be and your interesting interpretations for
the court of appeals.
Be realistic. Never build a case around what a judge or jury might do, build it around what they will probably
do. Sure, it's possible that jurors might believe that a drooling child molester with "Born to Lose" tattooed on
his forehead is a credible witness, but it is not likely.
Think carefully about the language that you use. Use words that personalize your witnesses and
depersonalize your opponent's. Use colorful labels as mnemonic devices for the main facts.
Corroborate rather than repeat. Exact repetition is boring, but corroboration from several angles is

convincing.
Illustrate. Use themes, stories, examples and anecdotes to illustrate your main points. Jurors may not
remember all the details of your argument that an opposing expert witness's opinions are purely subjective;
but they will remember the story of Goldilocks and the three bears. They may have trouble envisioning what
the scene of a crime was like until you tell them it looked like a scene from "Deliverance."
Be positive rather than negative. Emphasize the strengths of your case, rather than the weaknesses of your
opponent's.
Start strong. Psychologists have confirmed what our mothers always told us: first impressions are important.
This principle suggests that the first thirty seconds of each phase of your trial -- your opening statement, each
direct and cross-examination, and your closing argument -- is a critical point in which you should focus on
something you especially want the jury to remember.
End strong. The psychological principle called "recency" suggests that the final thirty seconds of each phase
of your trial -- your opening statement, each direct and cross-examination, and your closing argument -- is a
critical point in which you should focus on something you especially want the jury to remember.
Admit your weaknesses. Every case has weaknesses, e.g., witnesses with unsavory backgrounds or evidence
that defies common sense. You cannot ignore these problems; weaknesses do not just go away. You cannot
explain them away, but you can disclose them yourself in a way that makes them appear trivial. Psychologists
have shown that you will usually be more persuasive if you bring out both sides of an issue yourself than if
you adopt the "used-car-salesman" approach of trying to hide obvious points of vulnerability. As a corollary
to the principles of primacy and recency, however, weaknesses should usually be buried in the middle of each
phase of your trial.

3. Plan Your Factual Case Carefully

I*s the evidence admissible?* You can anticipate in advance evidence that can be objected to, and places where
your opponent may object to your evidence. You need to decide whether the judge will sustain any of these
objections and exclude the information. A good theory of the case must be based on a reasonably accurate
prediction of what evidence will be admitted and what evidence will be excluded at trial. It is a waste of time
to develop a theory premised on evidence that is inadmissible.

Diagram the case. Make a chart in which the elements you need to prove are matched with a list of witnesses
and exhibits available to you. You then can comb your interview notes, the prior statements, and the
depositions for each witness, recording on your chart every important piece of admissible evidence that will
help you prove your theory of the case. The chart can form an outline of your case and help assure that you
call all witnesses and introduce all exhibits that help you**.**

Look for corroboration. One witness is legally adequate, two witnesses and a corroborating document is
persuasive. Your goal is to make your case persuasive, not merely adequate. You can make the testimony
given by every important witness more credible by corroborating everything that witness says, through
exhibits, demonstrations, and the testimony of other witnesses -- especially your opponent's witnesses. For
example, a defendant claiming self-defense may ask the arresting officer to describe the overturned furniture
suggesting mutual combat, or verify that a knife was found near the victim's body.

Consider judicial notice. Judicial notice is available to introduce many types of information not subject to
reasonable dispute. Indiana Rule of Evidence 201 provides for two categories: (1) facts "generally known" in
the community, and (2) facts "capable of accurate and ready determination by resort to sources whose
accuracy cannot reasonably be questioned," such as almanacs, encyclopedias, and newspaper television
listings. If you seek to prove facts of the second type, you bear the responsibility for supplying a reference
book to the judge.

4. Use a Trial Notebook

A trial notebook provides a central, easily transportable storage place for everything you may need at trial.

Consider including the following sections:

a) Dramatis personae. A list of the names of everyone important to the case and their roles -- a quick
reminder if you forget.

b) Case theory and a diagram or outline of your proof, which you will use to respond to your opponent's
directed verdict motion.

c) Trial schedule, listing everything you intend to do at trial in the actual order you will do it. If you write
down the scenario and refer to it as you go along, you will not forget to make a motion, ask for a recess so

you can telephone a witness, submit a jury instruction, or call a witness. For example, the first part of a trial
schedule might look something like this:
1. Approach bench, ask for preliminary instruction on cause of action.
2. Move to separate witnesses (Joe).
3. Dave goes to get witness Jackson.
4. Opening statement (Mary).
5. Defense opening
6. Direct examination - Jackson (Joe)
7. Defense cross-examination.
8. Request that Jackson be allowed to leave courthouse (Joe).
9. Request judicial notice of traffic law 9-142 (twenty mph speed limit) (Mary)
10. Read "school zone" stipulation (Mary).
11. Direct examination - Stevens (Mary).
etc.
d) Pretrial. A section containing a list of queries for the judge at the start of trial, e.g., whether she will permit
an exhibit to be used in opening statement, and whether she permits argument accompanying objections.
e) Court documents. A section for the pleadings, rulings on motions, pretrial orders, and any other official
court documents.
f) Opening statement. Your notes for your opening statement, if you are giving one.
g) Your witnesses, both for direct and cross, with copies of statements and documents relating to that witness
and an outline of the direct or cross-examination. Prior statements and depositions should be carefully
indexed so you immediately can locate passages needed to refresh recollection or impeach.

h) Trial motions. Notes pertaining to your argument for or against a motion for a directed verdict.
i) Evidence research. Copies of your evidence research and any briefs you have prepared to support your
objections, or a copy of the Indiana Trial Evidence Manual.
j) Closing argument. Your notes for final argument, including sketches of any diagrams you plan to draw on
the chalkboard.
k) Exhibits appendix. Originals or copies of all documents you will use at any time during trial and a
checklist for keeping track of which ones have been admitted into evidence. Keeping track of exhibits (your
own and your adversary's) can be one of the most difficult tasks in the trial. Exhibits are marked, shown to
witnesses, talked about, offered, withdrawn, admitted and passed to the judge. Laying adequate foundations
may require more than one witness. Few things are more frustrating than being told you cannot use an exhibit

during closing argument because you neglected to move it into evidence. An exhibit checklist can help you
keep a running record of the status of all exhibits.
D. OPENING STATEMENT
(1) The Rule: You are supposed to talk only about the facts you intend to prove; you may not argue.
a. You may discuss the evidence, except:
You may not refer to inadmissible evidence. Judges will rarely sustain this objection unless the evidence is
clearly inadmissible (e.g., privileged, involves insurance), and will permit the statement is the evidence is
potentially admissible (Rule 403; hearsay). The courts use a good-faith-basis test: you may refer to any
evidence that you have reasonable grounds to believe is admissible, and that you intend to offer.
You may not exaggerate or overstate your evidence.
Plaintiff may not discuss evidence the defendant will introduce that will not be part of plaintiff's case.
b. "Argument" is prohibited.
If it is something you intend to prove, it is not argument. If you make a statement that is not susceptible of
proof, it is argument.
Whenever you make a statement, if a witness could take the stand and make the same statement, it is not
argument. However, if the rules of evidence would prevent such testimony, or if no such witness exists, the
remarks are argumentative.
Many judges will allow you to make fair inferences from the evidence, such as "We will prove that the
defendant shot the victim for no good reason."
Many judges permit you to state your legal claim or defense in basic terms and to describe the nature of the
case or the issues.
Asking the jury to resolve disputes in your favor is argument; e.g., referring to your witnesses as "disinterested," and therefore more worthy of belief that your opponent's.
Making negative comments about your opponent is argument; e.g., calling the defendant a "big cow."
Using colorful labels that characterizes facts in a way distinctly favorably to your side is argument; e.g., the
prosecutor characterizing a killing as a "slaughter."
Discussion of the law is prohibited, except to mention the issues and disputes.
c. It is generally inadmissible, and always a waste of time, to read the pleadings or tell the jury how much
was sued for.
(2) Objections
a. When to object
Any discussion of witness credibility is argument.

Any discussion of how the jurors should resolve disputes is argument.
An explanation concerning how the facts should be applied to the law or whether elements of a cause of
action have been satisfied is argument.
To discussion of inadmissible evidence.
If your opponent mentions their personal opinion.
Disparaging remarks about you or your client are argument.
To any misstatement of the law.
b. When not to object
To evidence that you think is irrelevant or hearsay.
To statements of fact beyond the scope of the depositions.
To correct descriptions of the law.
c. How to respond to an objection
"I am only stating what I expect the evidence to show." Memorize this
(3) The technique of opening statement
Find a theme that relates to the elements of your case or in the characteristics of your client that arouse
natural sympathy or coincide with universally admired principles. It is especially helpful if you can come up
with a clever title for your theme. E.g.,
1. David and Goliath -- if you represent an individual against a large corporation.
2. Fighting city hall -- if you represent a person who has been the victim of inflexible policies of government
bureaucracies or the unreasonable decisions of faceless officials.
3. Caught in a sea of red tape -- if you represent a small business trying to comply with contradictory and
arbitrary regulations and laws.
4. Law and order -- if your case is weak on sympathetic factors, but your client's actions were legally
justified.
Use chronological order. The more common is to following your client chronologically through the event.
E.g.:
Ellen Gaston left her house at 3:15 to drive to the supermarket. She put on her seatbelt and drove east on
Second Street. As she passed Rogers Elementary School on her right, she slowed down. She was watching
the road in front and the schoolyard on her right, when she heard a sudden screeching of tires and was
smashed into by the defendant coming out of a driveway on her left.
You also may use a timeline, in which the movements of several people are charted minute by minute, but
there is no protagonist. For example: It's 3:15. Ellen Gaston is leaving her house to go to the supermarket.
The defendant is finishing his fourth beer in his apartment on Second Street. Kim Chua is sitting in his fifth

grade classroom at Rogers Elementary School. At 3:16, Ms. Gaston gets in her car and fastens her seatbelt.
The defendant goes to the refrigerator for another beer, but the cupboard is bare. Kim looks anxiously at the
clock. From 3:16 to 3:20, Ms. Gaston drives east on Second Street. The defendant decides to go out for more
beer, puts on his coat, and walks down to his car. Kim counts the minutes to the end of the school day. At
3:20, Ms. Gaston approaches Rogers School. The defendant guns his car down the driveway. The bell finally
rings and Kim races out of the schoolhouse. At 3:21, these three people come together. Kim runs across the
schoolyard. Ms. Gaston looks to her right to make sure he's not going to run into the street. The defendant
flies into Second Street without stopping and smashes into Ms. Gaston's car.
Tell a story. Be entertaining. Try to forget it's a courtroom; imagine you're sitting around a campfire.

Give a conclusion and tell the jury what verdict you expect the evidence to support. Keep it specific and
brief.
Admit (but don't emphasize) weaknesses. Every case you take to trial will have some inherent weaknesses --
gaps in your evidence, witnesses who lack credibility, the absence of corroboration on an important issue,
unavailable witnesses, and so forth. By bringing them out yourself in as positive a manner as possible you
take some of the sting out of them, appear honest, and lessen the negative impact when your opponent points
them out. This does not mean you should tell the jury about every trivial piece of conflicting evidence nor
anticipate disputes your adversary may raise. Rather, you must bring out and explain away those weaknesses
that will emerge from your own presentation of evidence or that inhere in your theory of the case, regardless
of what your opponent does. For example, suppose your client had consumed a couple of beers. You might
say:
Jack was sober when he got into his car. He had drunk only two beers over the course of the evening, and was
still in full control of his faculties.
(4) Performance suggestions:
Use as few notes as possible.
Maintain eye contact with the jurors, looking from one to another. If looking directly at an individual juror
makes you nervous, look between two jurors.

Use simple words and plain English. Avoid "legalese."
Don't get too dramatic -- save it for closing.
Vary your pace, pitch and loudness. A monotonous, droning speaking voice will put jurors to sleep.
Keep up the pace of your speech, without letting it get so fast the jury cannot follow you. Slow speech is
boring.
Use good posture. Despite what you see on television, the slouching country lawyer approach is not very
effective.
E. DIRECT EXAMINATION
(1) What topics to cover
Sufficient facts to make out a prima facie case on every issue on which you bear the burden of proof.
Any testimony from the witness on one of your main points of emphasis.
Testimony that corroborates your other witnesses, especially your client.
Information about the witness's background that makes their particular evidence more credible. You may
have to supplement the meager information in the packet.
Testimony that is necessary to lay a foundation for other evidence
Testimony that provides continuity and makes the story understandable.
(2) Suggested order

Something dramatic and important
Background that bolsters witness's credibility.
Set the scene.
Get witness to tell the story.
Big finish
(3) Making the testimony persuasive.
a. Make sure the jury hears your important evidence:
Attract and keep the jurors' attention. Most direct examination is boring. Much of it is not very important.
Therefore, you want to assure that the jurors' attention is focused on the witness before you cover the most
important parts of the direct examination. You can attract jurors' attention to the witness by having the
witness do something unusual. For example, you can hand the witness an exhibit, have the witness get up and
demonstrate something, or have the witness walk to a diagram. You can keep the jurors' attention by being
brief and using visual aids.
Get your evidence admitted. The jurors cannot hear your evidence if it is ruled inadmissible by the judge.
This means you must anticipate objections your adversary might make, and prepare to circumvent them. With

advance preparation, you can come equipped with research that supports admissibility. You can make sure
that your direct examination contains sufficient evidence to satisfy foundations. You can prepare alternative
theories of admissibility, such as offering evidence for a limited purpose. And, you can be prepared to look
for other alternative methods of proof, perhaps through other witnesses, in case your evidence is excluded.
b. Make sure the jury understands your case. Five techniques will help:
Maintain chronological order. A story is easier to follow if it is in chronological order. Rarely is there any
reason why you should deviate from it.
Subdivide direct examination into smaller units. If you break up a long story into "episodes" it will be easier
for the jurors to understand and remember it. Thus, you might divide up the plaintiff's story of a traffic
accident into six segments: the plaintiff's happy and active life before the accident; the events of the day
leading up to the accident; a detailed account of the accident itself; the minutes immediately following the
accident; the next few days in the hospital; and what plaintiff's life has been like since the accident.
Plan transitions between segments. It will be easier for the jury to follow your story if they understand when
one "episode" stops and another starts. You should therefore plan verbal and visual transitions between
segments. A transition is made up of three parts: a clear closure on one segment, an interruption of the flow
of the direct examination, and then a clear beginning to the next segment. You can close a segment with a
question such as, "Do you recall anything else about the accident?" For an interruption, you may remain
silent for a few seconds, move to a different location, have the witness sit down if the witness was standing,
and/or insert a phrase such as, "Let's move on to the events following the accident." You can open the next
segment with the same kind of topic question you use to start the chronology: "Directing your attention to
immediately after the accident, tell us what happened."
Elicit facts and details, not conclusions. Conclusory testimony depends for its success on the witness and
jurors sharing a common frame of reference. It is unlikely that all jurors will share the witness's view on what
constitutes "large," "fast," or "a good look at the suspect." The more you are able to provide the jurors with

the details of important points, the more certain you can be that the jury will understand it. Thus, you want

your witness to say "six feet tall and two hundred pounds" rather than "large," "going over eighty miles an
hour" rather than "fast," and "close enough to read the words 'born to lose' tattooed on his upper arm" rather
than "got a good look at the suspect."
Use appropriate visual aids. Miscommunication is least likely if you can show the jury the actual objects and
places involved in a litigated event. Photographs, diagrams and other illustrations also reduce the likelihood
of misunderstanding.
c. Make sure the jury remembers your key facts by emphasizing them so they stand out. The essence of
emphasis is difference -- you cannot emphasize everything.
Go into specific detail. The more details you elicit, the more you emphasize the event being described. If the
witness testifies, "I was walking down the street when the defendant pulled a gun on me and said, 'Give me a
hundred dollars,'" the jurors might miss the gun reference. If you wanted to emphasize it, you could break in
at that point and elicit details:
Q: What color was the gun? A: Black.
Q: About how big was it? A: Pretty compact, about the size of an open hand.
Q: Short barrel or long barrel? A: Short. I would call it a snub-nosed gun.
Q: Automatic or revolver? A: Revolver.
Change your questioning pace or pattern. If you have been conducting a normal direct examination, you have
been asking simple neutral questions such as "What happened next," and "What did you see?" If you
suddenly vary the type of question you ask, it emphasizes the testimony to follow. You can use a signal
question, such as "Now think about your answer carefully, and tell the jury ..." Or, you can change from
narrative questions to slow, narrow, detailed questions.
Change your position or the witness's position. For example, if you have been standing near the corner of the
jury box, you could walk over to your table before asking an important question. Or, you can ask the witness
to step to a diagram just before eliciting some crucial fact.
Use visual aids.
Repeat the evidence. Repetition can take three forms: similar testimony from different witnesses, similar
testimony elicited more than once from a single witness, and repetition of testimony by the attorney.

d. Make sure the jury believes your evidence. Several techniques help enhance the witness's trustworthiness.
Enhance the witness's personal credibility. Subject to the rule prohibiting bolstering, it is helpful to show that
a witness is likely to be credible in this particular case. You can show the witness is unbiased, has good social
standing, has experience, etc.
Enhance the credibility of the witness's story by proving that the witness has a good memory, did things to
preserve recollection such as taking notes, and by eliciting detailed testimony about the event itself. Why
does the witness remember? How can the witness be sure?
Prove the witness's expertise and familiarity with the subject-matter. A witness's opinions and observations of
other events and people is more credible if the witness is familiar with that type of event or the people
involved. If a witness is going to describe a traffic accident, bring out that the witness used to be a cab driver.
If a witness is going to testify about the condition of the testator at the time a will was executed, bring out the
witness's knowledge of the details of the testator's general life, family, habits, mannerisms, and so forth.
Prove motives that are consistent with conduct. People do things for reasons. If the reasons and motives are

explained, the conduct makes more sense. If a witness acted out of habit, jealousy, love, shame, curiosity, or
any other common emotion, proving the emotional state will make the conduct seem more logical.
Admit your weaknesses.
(4) Ask proper questions
Ask only one question at a time, and not a question with several parts.
Avoid negatives in the question, if possible. Don't ask questions like: "You do not know whether Jones was
there?"
Make the question brief.
Use simple words that everyone will understand.
Avoid leading questions. Let the witness testify in his or her won words.
(5) Performance suggestions:
Be honest and sincere. Your personal integrity is vital. No "cheap shots."
Manifest confidence and belief in the witness. Show the jury that you believe in the case you are presenting.
Act like you care.
Be professional. It is always better to err on the side of being too formal than let your performance slide into
sloppiness, slouching, or the dreaded "country lawyer" approach.

Respect the judge without becoming subservient. No brown-nosing.
Address all remarks to the bench. Do not speak directly to the opposing lawyer, and do not make comments
to the jury.
Ask permission to approach the bench, the witness or the jury, or to have the witness step out of the witness
chair.
Use a conversational tone of voice. Better to be too loud than too soft.
Let your voice reflect the emotional level of the examination. You probably should question a physician in a
formal, professional manner, but when you examine an injured child, let your voice reflect your compassion
and understanding.
Don't let negative feelings show in your face and voice. If disaster happens, don't reveal that you are angry,
irritated, or frustrated.
Do not try to suppress all human emotion. Laugh if something funny happens. If you win a difficult battle
over an objection, allow yourself a quick smirk of triumph.
Watch the witness, so you see what the jury is seeing. Watch for signs of nervousness or confusion. Be
careful not to get distracted staring at your notes.
Watch the judge. Look for signs of irritation or a raised eyebrow. You also need to watch for visibly negative
reactions that could affect the jury, such as the judge shaking her head in disbelief.

Watch the jury for their reactions. Are they attentive, bored, falling asleep? Have they begun to look at your
witness like the witness has some loathsome disease?
Keep an eye on opposing counsel. Some unethical attorneys may try to distract the jurors' attention away
from the direct examination.
(6) Exhibits have their own special procedure:
Mark the exhibit with a letter or number for identification. This is often done by the attorneys before trial, but
you also may request the clerk or court reporter to mark exhibits just before you use them.
Lay the appropriate foundation through your witness, referring to the exhibit only by its identification mark.
You may not state what the exhibit is; only the witness may do so.
Show the exhibit to opposing counsel or ask the court if opposing counsel would like to examine it.
Remember that you are not supposed to make any remarks directly to your adversary, so it is improper to turn
to your opponent and ask, "Marva, do you want to examine this?" or for you to walk over to the other counsel
table and engage in a whispered conversation about the exhibit.

Formally offer the exhibit into evidence, referring to it only by number or letter. For example, "Your Honor,
we offer defendant's exhibit C into evidence."
If appropriate, hand the exhibit to the bailiff (or directly to the judge) for the court to examine. You probably
should in all cases ask if the judge wishes to view the exhibit.
The opposing lawyer may conduct a voir dire examination of the witness concerning foundation matters,
and/or may make objections to the admission of the exhibit.
The court rules on whether to admit or exclude the exhibit.
If the exhibit is admitted, publish it to the jury. With simple documents and photographs, you can distribute
copies to individual jurors. Real evidence can be passed among them. In either case, you should request the
court's permission to approach the jury. Large diagrams or charts can be placed where all jurors can see them.
If anything about the exhibit needs to be explained, you must do so through witness testimony -- you are not
allowed to talk about the exhibit yourself at this time without explicit permission from the court.
(7) Demonstrations and experiments
a. Foundation:
Whether to allow a demonstration is a matter left to the discretion of the judge.
The demonstration must be relevant and not unduly prejudicial.
The witness affirms that s/he can accurately recreate the event.
The judge is satisfied that conditions in the courtroom are "sufficiently similar" to those existing at the time
of the original event to make the demonstration reliable. Variations in conditions generally affect weight, not
admissibility.
b. Persons other than witnesses, such as attorneys and jurors, generally are not allowed to participate in
demonstrations.
c. Tactical considerations

Make sure the demonstration faces the jury, so they can see the event unfold. If you want the jury to see what
the advancing gunman looked like, the witness must demonstrate it in a way that the gunman advances
toward the jury.
It is very difficult for one witness to demonstrate what two people were doing simultaneously.
Demonstrations are more effective if the witness is demonstrating what one person did.
You should not participate in the demonstration. You are not a witness and cannot place evidence into the
record. If you cannot plan a demonstration that the witness can conduct with you out of the way, then don't do
it at all.

If you need a second person in a demonstration, use the jury. If you want the witness to demonstrate that she
was close enough to the robber to see his face clearly, as the witness to demonstrate that distance in relation
to the front row of jurors, not in relation to you, to your co-counsel, or to some inanimate object in the
courtroom.
Do not conduct a demonstration without rehearsing. This means you probably should never ask a witness on
cross-examination to demonstrate anything.
Save them for important facts. Demonstrations, like exhibits, will emphasize the facts being demonstrated.
d. Making a record of a demonstrations, gestures, etc. In addition to formal demonstrations, witnesses will
use gestures to help explain their testimony: They point to the accused, indicate size with their hands, and
shake their heads in answer to questions. You must make sure that this nonverbal conduct is translated into
words so that it can be recorded by the court reporter. We are all, of course, familiar with one common way of
doing this -- the attorney announces, "May the record reflect that the witness has pointed out the defendant."
Tactically, it usually is better for witnesses to provide the verbal descriptions in their own words. For
example, if a witness indicates a distance with his or her hands, you can ask the witness to estimate that
distance verbally. If the witness does so, no further statement need be made for the record. The following
transcript indicates how demonstrations might be included in the record:
Q: What happened next? A: We were standing in front of the trailer when the defendant turned to his wife
and said he was going to beat the stuffing out of her if she didn't get back inside.
Q: How close were you standing to him when he said this? A: Real close, about as far as from here to that
chalkboard there.
Q: So you were about four feet apart? A: Yes.
Q: Did you observe the position of the defendant's arms at that time? A: Yes, I did.
Q: Will you demonstrate to the jury what the defendant did with his arms as he made the threat? A: Sure. He
made fists like this [demonstrates] and took a step toward her like this [demonstrates].
Q: We have to put this into words for the court reporter. Describe exactly how the defendant was holding his
fists. A: Both fists were doubled [demonstrating again], down at his side. He took a step toward her and held
the left fist up at shoulder level and the right fist about at his waist, like a boxer's stance.
(8) Refreshing recollection

a. Informal method -- used if witness forgets one detail
Ask a leading question
b. Example of informal method:
Q: Describe what you saw? A: I entered the room. The were several overturned chairs, and a pinball machine
on my right. I saw the victim lying on the floor, and the defendant standing over him with a revolver in her

hand.
Q: Do you remember seeing anyone else in the room? A: I'm not sure.
Q: Was the defendant's sister there too? A: Oh, yes.
c. Formal method -- used if witness forgets a whole block of testimony. The most common method of
refreshing recollection is to show the witness a writing. Proper procedure consists of the following steps:
Establish that the witness's memory is exhausted
Mark a document for identification
Show the document to opposing counsel, or refer to it by page and line if it is a deposition.
Hand the document to the witness
Ask the witness to read silently the specific portion of the document that covers the forgotten material
Retrieve the document
Asking the witness if his or her memory has been refreshed
Continue the examination if the witness now remembers the information
9) Redirect examination. Give some advance thought to planning your redirect examination. You should be
able to anticipate what kinds of impeachment your opponent will attempt, so you can plan how you will
rehabilitate those witnesses.
F. CROSS-EXAMINATION
(1) The most important facts to bring out on cross are facts that help you prove your case:
Favorable testimony on a contested issue. Occasionally, a witness called by your opponent to testify against
you on one issue will possess significant information you need to help prove a contested issue. If the
favorable testimony was mentioned on direct, you can reemphasize it on cross. If the matter was avoided,
then you should bring it up on cross-examination unless the topic cannot be raised because of limited scope
rules.
Testimony corroborating your main witnesses. It often will be possible to elicit testimony on crossexamination
that enhances the credibility of your witnesses by corroborating parts of their testimony. The possibilities are endless. It can be as simple as eliciting testimony that your witness was present at the scene,

or as complex as bringing out evidence of the truthful character of one of your witnesses. The most fruitful
line of inquiry is likely to concern the opportunity for your own witnesses to observe the events. An adverse
witness, especially one who uses a diagram of the scene to aid his or her direct examination, always should
be able to corroborate that there would have been a good line of sight from another location. Using opposing
witnesses to corroborate the actions of your client also is important. For example, if opposing witnesses saw
your client trying to avoid an accident, rendering assistance to the victim, or driving safely just before it
occurred, or if they overheard your client's explanation of the events, you should bring out these facts.
Testimony consistent with your theory of the case. Rarely are more than a few issues really contested in a
trial. The controversy usually boils down to a few disputed facts. Even if nothing else is possible on crossexamination,
you always can elicit testimony about those uncontroverted facts that form part of your theory
of the event. Prof. Bergman uses the example of a petty theft charge for shoplifting a calculator. On direct, the
defendant admits putting the calculator in his pocket, but denies intent, claiming he stepped out of the store

only to get his checkbook from his wife. The cross-examination of the defendant could consist of the
following questions on uncontested facts:
Q. So you did pick up the calculator?
Q. And you put it in your pocket?
Q. Then you walked to the nearest exit?
Q. And left the store?
Q. And all the time you never took the calculator out of your pocket?
(2) If the witness has hurt you, you will also want to impeach the witness's credibility.
The witness has a personal motive to testify falsely based on bias, prejudice, or interest
The witness has previously been convicted of a crime, which shows the witness to be the type of person who
would lie.
Prior inconsistent statements may indicate that the witness has lied on one occasion.
Prior inconsistent statements cast doubt on how well the witness is able to remember the events.
Inability to recall collateral details of similar importance may cast doubt on the reliability of a witness's
memory. For this kind of cross-examination to be successful, the facts forgotten must be of equal importance
to the facts remembered. If a witness claims to remember a startling event ("I saw the defendant pull a

shotgun and shoot two people."), it probably will be a waste of time to ask if the witness remembers what
other people were doing.
Prove the witness was at an unfavorable vantage point from which to view the events.
Demonstrate that the witness has physiological limitations, such as poor eyesight or hearing.
Show that the witness was in poor condition to observe at the time of the event due to intoxication or fatigue.
Show physical conditions limiting the witness's opportunity to observe the events, such as objects obstructing
the witness's view, inadequate lighting, a great distance separating the witness from the event, distractions, or
a very short time in which to make observations.
Bring out testimony that is impossible or inconsistent with common sense (but don't confront the witness
about it).
Establish inconsistencies with other, more credible, witnesses.
(3) Avoid high-risk topics.
a. Safe topics are those where you have a reason to believe that the witness will give a favorable answer and
you have the ability to refute a bad answer:
You are asking for information the witness has previously given in a statement or deposition that would be
admissible as a prior inconsistent statement if the witness testifies differently.
You are asking about information the witness should know which is also contained in admissible exhibits,
such as photographs or records of criminal convictions.
You are asking about information the witness should know that other more credible witnesses will testify to.
b. Medium-safety topics are those where the nature of the case raises a likelihood that the witness will give

favorable testimony, but you have no direct way to refute a bad answer. Use them cautiously.
You are asking for facts consistent with human experience where an unfavorable answer would contradict
common sense.
You are asking the witness about facts in situations in which the witness assumes that an independent
refutation witness is available.
You want the witness to confirm something implied in a prior statement, but the witness has not previously
been asked directly about it.
You are seeking to prove that something did not happen because the witness says nothing about it in an
otherwise detailed prior statement. For example, if a police officer's accident investigation report is silent on

whether your client had been drinking, there is a likelihood that the officer will admit that there was no
evidence of intoxication. Common sense tells us that a police officer would have reported intoxication.
c. High risk topics are those where you engage in wishful thinking. Circumstances suggest that a witness
might know something relevant, but the witness has never said anything one way or the other. Thus, you have
no solid basis to believe the witness's testimony will actually help you, but the witness also has never
explicitly said anything to the contrary, so (you think) maybe the witness will unexpectedly provide favorable
evidence.
The witness acted inconsistently with the fact sought. For example, a witness who says he was "eating pizza
and watching TV" will probably not confirm that there was a knife fight going on, because it is unlikely that
anyone would calmly eat pizza while knives are being waved about.
The weight of the testimony of other witnesses is to the contrary.
The evidence would contradict common sense. For example, if you are cross-examining an eyewitness to a
crime that occurred at night but in a well lighted parking lot, it would be risky to ask whether it was too dark
to see clearly.
It contradicts something in the witness's own prior statement.
(4) Order of topics
High safety favorable evidence on contested issues.
High safety evidence that corroborates your main witnesses.
Medium safety favorable evidence.
Medium safety impeachment evidence.
High safety impeachment attacking the witness's testimony.
High safety impeachment attacking the witness personally.
Final topic that scores a big point
(5) What does a good cross-examination question look like?
Leading
Simple and brief
Non-argumentative. Ask about facts, not conclusions.
Use the witness's own words whenever possible.

Break your topics down into the smallest possible units, and ask about each one separately.
Ask only one fact per question.
Do not repeat damaging direct examination.
Don't ask the witness to explain an answer.
6) Preparing to cross-examine.
Assemble the file before trial. You should have with you in court, in one file, all the necessary documents for

cross-examining the witness: 1) your written cross-examination questions; 2) all prior statements, depositions, or other writings of the witness that could be used to impeach inconsistent trial testimony; and 3)
any exhibits or certified copies of convictions you may want to introduce.
Listen to the direct examination. Never assume a witness will testify in exactly the same way at trial as the
witness did in a deposition. Witnesses occasionally will say extraordinary things or may open the door to
previously inadmissible evidence that you may miss if your attention is focused elsewhere.
Decide whether to abandon any planned questions. Based on the direct examination, you may face a decision
whether to forgo questions because they were covered on the direct examination. Generally, of course, you
should proceed with your planned cross-examination. Repetition of favorable evidence is a good idea.
However, in three situations you may choose to forgo a line of questions: 1) You may have to drop some
topics because your opponent limits the scope of the direct examination; 2) You may decide to forgo
impeachment if the impeaching effect of some prior act is explained away; or 3) The witness may
unexpectedly put evidence in a more favorable light than you expected, and might retract it or dilute it if you
repeat the question on cross-examination.
Decide whether to impeach by prior inconsistent statement. Obviously, you cannot know in advance whether
a witness will give direct testimony inconsistent with prior statements. Listen during direct examination, and
decide whether it is worth impeaching any inconsistencies. In general, the only statements you are concerned
about are those where the witness changes from favorable to unfavorable testimony. If the witness gives
inconsistent statements on unimportant issues, you probably should forgo impeachment, unless you can string
together a lot of small inconsistencies.
(7) Difficult or evasive witnesses.
Ask the witness to limit his or her answers to "Yes" or "No"
Move to strike volunteered or evasive portions of the testimony
Ask the judge to instruct the witness to limit his or her answers to "Yes" or "No"
If a witness evades your question, repeat the question or have it read back
(8) Impeaching With A Prior Inconsistent Statement
a. Prepare an index of prior statements and depositions. You must be able to find the specific prior statement
when you need it. The simplest way is to note beside each question you prepare exactly where it came from.

If it is a high safety question that comes directly from lines 11-13 on page forty-six of the witness's deposition, you might make some notation like "D46/11-13" in the margin beside your question. Your partner can follow along, and if you need to impeach, your partner can instantly hand you the right line in the deposition.

b. Basic principles.

Impeachment is not the same as refreshing recollection. If, in answer to a safe question taken directly from a prior statement, a witness testifies he or she does not remember, then you may choose to refresh recollection.

However, if a witness gives an answer unexpectedly different from one contained in a prior statement, it does not mean the witness has forgotten the facts. You cannot refresh memory when the witness claims to be able to remember (nor has a proper foundation been laid to allow it); you must impeach and show the current memory to be unreliable.

You are not trying to talk witnesses into changing their testimony, but to prove they are unreliable. You are supposed to be impeaching, not trying to talk the witness into changing his or her testimony. You must accept the fact that the witness's memory has changed. No matter how sure you are that it was just an inadvertent misstatement, you will not convince the witness to testify differently, no matter how many times you ask the witness to re-read a prior statement. The only thing that will happen if you try is that the witness will just repeat and emphasize the unfavorable testimony, you will have completely lost control of the examination, and you will have wasted the opportunity to impeach. If it turns out the witness actually had made only an inadvertent misstatement, the witness probably will make the correction anyway when confronted with a prior inconsistent statement, so you lose nothing by assuming the worst and impeaching accordingly.

Inconsistent testimony does not mean the witness is evil. When a witness testifies to facts different from those contained in a prior statement, it may be an inadvertent misstatement, a result of the natural process of erosion of memory. It might be an intentional change due to deliberate perjury, but is not necessarily so.

You impeach direct examination testimony, not cross-examination. The general rule governing impeachment

by prior inconsistent statements is that you may impeach facts testified to on direct examination only. If you
bring up an issue for the first time on cross-examination and get bad answers, your only recourse is to
abandon the line of testimony.
You may impeach specific factual assertions, not inferences. You can impeach a witness who disagrees with a
specific fact or opinion written down in a previous statement. However, if the witness disagrees with your
interpretation of those facts, that cannot be impeached. For example, suppose a witness stated in a deposition
that the defendant's car was traveling 60 miles an hour, If she testifies the car was going 30 miles per hour,
you can impeach. If you ask for an interpretation, such as "Was the car going very fast?" and the witness says
"No," you cannot impeach her by proving that she once said the car was going 60 miles per hour.
Impeachment always entails risk. Witnesses will often be able to explain away an apparent inconsistency, and
you will often be unable to successfully complete the impeachment. Therefore, conduct this kind of
impeachment with other risky cross-examination -- in the middle.
c. Technique
Lock the witness into a definite answer without unnecessarily repeating the unfavorable testimony.
Emphasize the prior version, not the damaging trial version. E.g.:
Q: The light was green, wasn't it? A: No, it was red.
Q: Not green? A: No.
Prove that a prior statement on the subject was made by asking the witness about it, being specific about the
time, place, and circumstances. E.g.,
Q. Do you remember talking to an investigator named Sarah Frandsen at your house? A: Yes.
Q: That was on September 16? A: Yes.
Q: She asked you about the facts of this case, right? A: Right.

Q: Do you remember answering questions about the scene of the accident? A: Yes.
Reveal to the jury that the prior statement on this specific subject was materially different. The easiest way to
do this is to read aloud the precise inconsistent passage and ask the witness to confirm that he or she made it.
Q: Directing your attention to the second line in the second paragraph of that statement, did you say: "When
the car drove through the intersection, it had a green light?"; or
Q: Directing your attention to page four, lines four through seven, is it true that you were asked these
questions and gave these answers: Question: " What color was the light?"; answer: "Green"; question: "Are

you certain?"; answer: "Yes"?
As a courtesy, you might lean over and show the witness the page and line you are referring to, but do not
hand the document over to the witness and ask the witness to peruse it. You are not trying to convince the
witness the testimony is inconsistent, but the jury.
Do not introduce the statement itself unless the witness denies or does not remember making it, in which case
you may introduce it and read the inconsistent portion to the jury. Under Federal Rule of Evidence 613, the
statement is admissible without further foundation.
(9) Impeaching With A Prior Inconsistent Omission. The most difficult kind of impeachment is to
demonstrate that trial testimony is inconsistent with what was not said in a prior statement. To successfully
impeach under these circumstances, you must establish that the failure to mention a fact in the prior statement
is the equivalent of an explicit statement that the fact did not exist, because the person would surely have
mentioned it if it had happened. The omitted fact must be at least as important as other major facts included
in the statement. If you decide to attempt to impeach based on a prior omission, you must add one
preliminary step to the impeachment technique discussed for prior inconsistent statements: eliminate the
possibility that the fact testified to was inadvertently omitted because the witness thought it unnecessary to
include it. E.g.: Q: Officer Jones, you investigate many similar cases, don't you? A: Yes.
Q: You often have to testify later, don't you? A: Yes.
Q: Do you prepare an accident investigation report for each one? A: Yes.
Q: And use them to refresh your memory about a particular case before trial? A: Yes.
Q: They help you keep the facts straight? A: Yes.
Q: So it is important that you be accurate in these reports? A: Yes.
Q: You include all facts that might have some bearing on who was at fault? A: Of course.
Q: And you would include any facts that showed one driver might have violated a traffic law, isn't that
correct? A: Yes.
Q: Do you also write down if anyone was seriously injured? A: Yes.
Q: Handing you defense exhibit B for identification, is this the report you prepared in this case? A: Yes.
Q: On direct, you testified that the defendant was intoxicated, didn't you? A: Yes.
Q: Please look over your report and answer this question: Did you make any mention whatsoever of any
evidence of intoxication? A: No.
Q: The plaintiff did not appear to be seriously injured, correct? A: No, he looked seriously hurt.

Q: Again, I direct you to your report. Is there any mention in your report of anyone being seriously hurt? A:
No.
Q: In fact, you wrote that the plaintiff only appeared "shaken," isn't that right? A: Yes.
(10) Re-cross examination is discretionary; usually a bad idea.
G. CLOSING ARGUMENT
(1) Improper arguments

Appeals to sympathy, e.g., referring to the tears of the victim's parents or the client's recent heart attack.
Attempts to arouse racial prejudice
Appeals to religious prejudice, e.g., anti-Semitic remarks
Xenophobic arguments against foreigners
Appeals to prejudice against corporations as large, wealthy or unfeeling
Raising the relative financial conditions of the parties, discussing insurance (unless already in evidence), or
otherwise arguing that the verdict should depend on ability to pay
Asking jurors for vengeance, especially arguments that they should listen to the demands of the community
and use this opportunity to get even for all the wrongs done to society, e.g., by linking a defendant with the
problem of crime and drugs that is out of control, and suggesting that the community wants something done
about the drug problem
Asking jurors to make an example of the defendant or send a message to the community that they will not
tolerate violence
Appealing to jurors' fears for their personal safety or suggesting that they will personally suffer (through
higher taxes or insurance premiums) if they return a particular verdict
Personal attacks on other lawyer
Personal comments about yourself or your opinions.
Arguments that jury should ignore or evade unpopular laws
"Golden rule" arguments that jury should put themselves in the position of a party and ask what they would
want.
(2) Should you object?
a. Reasons to do nothing
The improper argument is trivial
The argument is unimportant to your theory of the case
You've already made several objections and you sense that the jurors are growing impatient
Your opponent is exaggerating or misstating the evidence and you have no further opportunity to respond. It
is unlikely that the judge will remember precisely what the witnesses said, and he or she will probably
overrule you, instructing the jury that their recollection of the testimony controls.

b. Reasons to object
You've already given your last argument and have no opportunity to retaliate or respond
The improper argument concerns a misstatement of law
Your adversary is committing serious error that will prejudice your client: asking the jury to speculate,

quoting damage verdicts from other cases, making a direct appeal to emotion or prejudice, or commenting on
suppressed evidence or the defendant's silence
3) Last-minute preparation: Making changes during trial
During opening statement, note overstatements or exaggerations made by your opponent. These can be used
later to argue that the other side has failed to prove the case they promised.
During the examination of witnesses, you can note the exact words used by a witness at a critical time, so that
they can be quoted accurately. If any evidence is unexpectedly excluded, that too should be noted so that you
do not inadvertently refer to evidence outside the record.
If either side is granted a partial directed verdict, or concedes an issue, whole sections can be eliminated from
your argument.
(4) General principles of argument
Reiterate your theory of the case and make sure the jurors understand it. The importance of having a single,
clear, simple theory cannot be overstated. It provides direction to your jurors. Alternative theories merely
divide your forces into two groups that may start fighting with each other. Stick to it.
Emphasize favorable evidence, but don't waste time with a detailed rehashing of every detail as if the jurors
were too stupid to remember anything. Spend your time arguing your own case, not your opponent's.
Emphasize your strengths and concentrate on your main points. Discuss your opponent's case only to the
extent necessary to refute it briefly.
Rebut your opponent's allegations.
Explain the law and show how the evidence satisfies all legal requirements for a verdict in your favor.
Most importantly, reduce your case to a good story, including plot, motives, adventure, battles between good
and evil, human weaknesses, temptation, drama, and a moral at the end.
Keep it simple. Simple does not mean simplistic; it means uncomplicated. Concentrate on the real disputes,
resist the temptation to offer several alternative theories, and avoid becoming bogged down in reviewing
uncontested or trivial matters. Experiments by social psychologists indicate that about seven points are all

you can argue persuasively. After that, arguments become confusing.
Be specific. Facts are more important than generalizations or rhetoric. Be specific about the important factual
points, and the details that corroborate them. Don't just say you have proven that the goods were delivered,
remind them which witnesses testified to the delivery and show them the warehouse receipt.
Be explicit. Psychologists have demonstrated that an argument is more persuasive if the desired conclusions
are explicitly drawn than if you leave it up to the jury to draw its own conclusions. Although in theory jurors
might hold more strongly to a conclusion they reach on their own, if you do not suggest a conclusion, the
juror may reach a conclusion you do not like.
Be organized.
Use visual aids. Presumably, you introduced exhibits during trial for a reason. Use them! But do not limit
yourself to exhibits already introduced. Charts can be prepared specifically for closing argument, and
arguments can be illustrated on the blackboard. The uses of descriptive exhibits are as varied as your
creativity. You can list the elements of a cause of action, summarize evidence, calculate damages, draw a

sketch of an intersection, and so on. The only requirement is that your exhibit be supported by the evidence.
Some attorneys prefer the apparent spontaneity of blackboards; others prefer charts prepared in advance
because they cannot be erased by your opponent and you cannot make an inadvertent error on them.
Support your positions with jury instructions. Rather than just summarize all the law at one time, weave
instructions into the fabric of your argument. If you are arguing that a witness is not credible because the
witness made a prior inconsistent statement and is the plaintiff's friend, that would be a good time to read a
jury instruction that prior statements and bias may be taken into account in determining credibility.
Use the theme from your opening statement.
Personalize your client and depersonalize the adverse witnesses. You should make conscious efforts to
personalize your client by referring to him or her by name and telling the jury personal things about your
client's life. Similarly, you should depersonalize the other side's witnesses, e.g., by referring to the adverse
party generically (e.g., the defendant, the corporation, the deceased) or with negative labels (e.g., the toxicwaste

company).
Use analogies to common experiences. If you think a jury may have difficulty understanding a legal concept,
try to analogize it to some common experience. The classic example is the explanation of circumstantial
evidence: suppose you got up one morning and saw a foot of snow on the ground that was not there when you
went to bed. You can be certain it snowed during the night even though no eyewitness saw it.
Admit your weaknesses. Every case has weaknesses. You should confront those inherent in your theory,
admit them, and deal with them as best you can. The jury is probably already aware of them from the
evidence, and your opponent is sure to bring them up, so you cannot make them go away. Therefore, you
might as well at least earn points for candor and honesty. However, the dividing line between a candid
discussion of your weaknesses and a defensive argument that focuses on your opponent's evidence is a fine
one. It is not necessary to confront every piece of contradictory evidence. Rather, you should discuss and
explain away the major weaknesses in your own theory.
Be consistent with physical evidence and common sense.
Try to make it appear that your case has more support -- a greater quantity of evidence, or a greater number
of credible witnesses.
Avoid rhetorical questions
(5) Presentation suggestions
Informality is usually better than formality, but don't get too sloppy or casual
Maintaining a courteous, professional demeanor is usually better than sarcasm, anger, or any other childish
outburst. Try not to be rude, abrasive, or obnoxious.
Histrionics should be used sparingly. You are likely to be more effective if you adopt a friendly, conversational manner than if you attempt to mimic the dramatic techniques of the actors who portray
lawyers on television. However, this does not mean you should never use dramatic techniques, only that you
should save them for the most important points in your argument.
When the facts are emotional, you should display an emotional reaction yourself. If you represent a client
who was crippled in an automobile accident, or are prosecuting a rape case, don't talk about the victim's
plight in dry, matter-of-fact terms. Let your voice express your sympathy and your outrage.

Be careful about using exaggeration and hyperbole. Remember that your person credibility is on the line, and
if you say outrageous things that are not true, the jury will believe you less.

Notes should be used as minimally as possible so that your overall presentation is extemporaneous and
conversational. Above all, do not read your closing argument.
Maintain eye contact with the jury. Look from juror to juror during your argument, not at your notes or the
floor. If looking directly at jurors makes you uncomfortable, look between two jurors.
Avoid standing behind a lectern. If you need the security of a lectern, try standing beside it rather than hiding
behind it.
Contrary to what your mother told you, don't speak slowly and distinctly. Slow speech is boring. Vary the
pace, and don't be afraid to talk quickly.
Basic Trial Advocacy https://law.indiana.edu/instruction/tanford/web/reference/basictactics.html
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APPENDIX B

Questions Not Allowed by Trial Courts

What kind of books or magazines jurors read. Alderman v. State, 254 Ga. 206 (3)(1985)

Whether jurors were members of any political organization. Id.

What kinds of bumper stickers jurors had on their cars. Id.

Whether jurors had read anything about the reliability of hypnosis. Id.

Whether jurors had ever expressed an opinion about other criminal cases. Id.

Whether, if Adolph Hitler were on trial for killing 6,000,000 Jews, they could give him the death penalty. Id.

Whether a juror who previously had served in a criminal case had been the foreman. Id.

The defendant is not entitled to ask the jurors whether they would be able to follow the instructions of the court. Head v. State, 160 Ga. App. 4 (6)(1981); Shields v. State, 202 Ga. App. 659 (1)(1992).

Whether any juror had ever been the foreperson of grand jury? Id.

"Could you keep an open mind until all the evidence is in?" Walker v. State, 179 Ga. App. 782 (2)(1986).

"Do you believe the defendant innocent, an innocent man?" Evans v. State, 222 Ga. 392 (13)(1986).

"If you should believe that the defendant might be guilty, but the state has not proven this beyond a reasonable doubt, would your verdict be guilty or not guilty?" Stack v. State, 234 Ga 19 (2)(1975).

"Would any of you have any reluctance in returning a not guilty verdict when you have reasonable doubt as to the defendant's guilt?" Chastain v. State, 255 Ga. 723 (1)(1986).

Whether or not jurors could follow two basic rules of law . . . the presumption of innocence and the duty to not find the defendant guilty unless they believed his guilt beyond a reasonable doubt. Frazier v. State, 195 Ga. App. 109 (1)(1990).

Whether a juror would be able to follow the instructions of the trial court. Shields v. State, 202 Ga. App. 659, 660 (1992).

The age of each juror, unless it appeared that the age of prospective jurors was relevant as an indication of bias. White v. State, 230 Ga 327 (a)(1973).

"Have you read any of the President's [Crime] Commission Report [which] recommended decriminalization of marijuana?" Merrill v. State, 130 Ga. App. 745 (3)(c)(1974).

"Have you formed an opinion as to whether or not marijuana is an addictive drug?" Id.

"Would you expect one accused of burglary and entering a plea of not guilty to make an explanation to the jury?" Young v. State, 131 Ga. App. 553 (2)(1974).

"Does everyone in this panel understand that you would be enforcing the law just as vigorously by voting not guilty in the event the State fails to prove its case beyond a reasonable doubt than [sic] you would by voting guilty under these charges?" Hall v. State, 135 Ga. App. 690, 692 (1975).

Questions about the attitudes or knowledge of the prospective jurors on matters of law. Frazier v. State, 138 Ga. App. 640 (2)(a) (1976).

"Do you have an understanding what the terms presumption of innocence means to you?" Baxter v. State, 254 Ga. 538 (7)(1985).

"What does the term reasonable doubt mean to you?" Id.

"If you were not personally agreeable with certain laws, would you attach any less importance to that law than you would to laws that you agree with?" Williams v. State, 249 Ga. 6, 7 (1982).

"Are you conscientiously opposed to the defense of self-defense?" Parker v. State, 172 Ga. App. 540 (2)(1984); Kyles v. State, 243 Ga. 490 (1)(1979).

"Do any of you have the opinion that simply because you own a gun. . . that you are ultimately responsible for anything that that gun is used for?" McGinnis v. State, 258 Ga. 673 (3)(1989).

"Have you got any fixed opinions in your mind as to whether or not our criminal system works?" Williams v. State, 165 Ga. App. 69 (2)(1983)(too broad).

"Do you feel that criminals generally get treated too leniently?" Id.

Whether jurors thought life imprisonment would allow the possibility of parole. Spivey v. State, 253 Ga. 187, 193 (1984).

Whether the prospective juror had ever served on a grand or petit jury. Frazier v. State, 138 Ga. App. 640 (2)(b)(1976).

Whether prospective juror had ever served as a juror in that particular courtroom. Wiggins v. State, 252 Ga. 467 (1984).

Whether a prospective juror had been able to reach a verdict in an earlier case in which he had served as juror. Jackson v. State, 172 Ga. App. 359 (1984).

The employment of the prospective juror's children. Frazier v. State, 138 Ga. App. 640 (1976).

Whether the potential juror smoked cigarettes or drank alcohol. Id.

What kind of television programs the jurors watched. Spivey v. State, 253 Ga. 187, 193 (1984).

"If there is any conflict in the testimony between a police officer and another witness, would you tend to give more weight to the officer's testimony simply because he is a police officer?" Patterson v. State, 154 Ga. App. 877 (1980); See also, Blanco v. State, 185 Ga. App. 535 (1988).

"Do you feel that because the State has brought charges against [the defendant] that he is in fact guilty?" Todd v. State, 243 Ga. 539 (7)(1979).

"Do you think that places such as [the Fifth Inn] should be closed?" Williams v. State, 249 Ga. 6, 7 (1982).

Questions about what the prospective juror thought would happen to the victim. Berryhill v. State, 249 Ga. 442, 448 (1982).

Questions about the feelings of persons other than the prospective juror, or how those assumed feelings of other persons would affect a prospective juror. Id.

A general question asking whether defense counsel had failed to touch upon any matter bothering any prospective juror which would make it difficult for him to serve. Id.

"If the Judge's charge is contrary to the Bible, which would you follow?" Martin v. State, 195 Ga. App. 548(7)(1990).

Where potential juror states that he is leaning but believes he can be fair, it is not error for the trial judge to refuse to allow defense counsel to ask whether the juror is leaning for the state or defendant. Wilcox v. State, 250 Ga. 745, 758 (1983).

In a murder case, not error to refuse to allow questions pertaining to juror's views on abortion. Baxter v. State, 254 Ga. 538 (7)(1985).

"Whether jurors wondered why two individuals were indicted and only one was on trial." Roland v. State, 266 Ga. 545 (1996).

Questions the Trial Court Must Permit

Whether the jurors have any racial prejudice where the defendant is black. Ham v. South Carolina, 409 U.S. 524 (1973).

Juror's membership in fraternal organizations. Dunn v. State, 251 Ga. 731 (1)(1983); see also Cowan v. State, 156 Ga. App. 650 (1980).

Juror's membership in social or church organizations. Cowan v. State, 156 Ga. App. 650 (1980).

"Do any of you have any bias against me because I am a criminal defense lawyer?" Sanders v. State, 204 Ga. App. 37 (1)(1992).

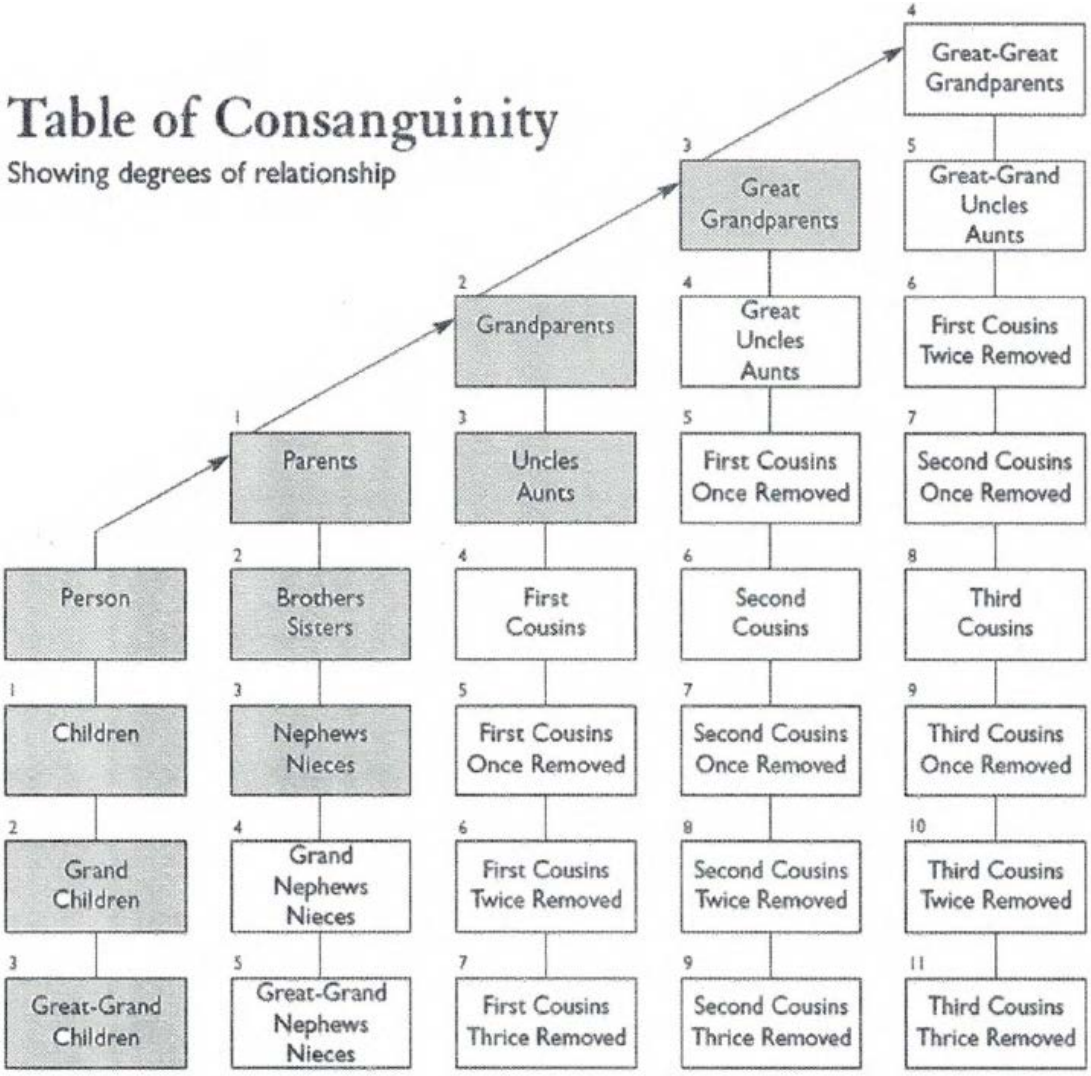
"Do any of you think I [criminal defense lawyer] would trick you?" Id.

In drug trafficking case, "Have you or any of your family ever been a victim of a drug transaction?" Craig v. State, 165 Ga. App. 156 (1983); see also, Ford v. State, 200 Ga. App. 376 (1991).

In drug trafficking case, "Has any member of your family ever had any problems with drugs?" Id.

Whether any members of the juror's immediate families had ever worked for law enforcement agencies. Henderson v. State, 251 Ga. 398 (1)(1983).

APPENDIX C



"Affinity" is relationship by marriage (and some adoption situations). A first-degree relative by affinity could be a spouse, step-child, step-parent, adopted child, mother-in-law or father-in-law. Using the chart above, adding "step" or "in-law" to the chart position determines the same degree of relationship. The boxes in gray are within third degree.

APPENDIX D

Honorable Cheveda D. McCamy

Alcovy Judicial Circuit Superior Court Judge

Biography

Cheveda McCamy was appointed to serve as a Superior Court Judge by Governor Brian Kemp in October of 2020. Since that time she has presided over numerous hearings and trials. Prior to her appointment, she practiced law in Georgia for more than 20 years, as a prosecutor and civil attorney. She served as Chief Assistant District Attorney for the Henry County District Attorney's Office, where she supervised more than 40 employees. Her work with Project Safe Neighborhood, which is a partnership with the United States Attorney's Office for the Northern District of Georgia, was successful in having dangerous violent offenders prosecuted federally and removed from the Henry County community. She instructed new assistant district attorneys on professionalism during the Fundamentals of Prosecution conference presented by the Prosecuting Attorneys Council of Georgia (PAC) and was a part of the Council's faculty for Basic litigation. Basic is a week-long trial training course for prosecutors. She has presented on ethics and professionalism at the Summer and Winter Conferences presented by PAC. She served as an Assistant District Attorney for the Fulton and DeKalb District Attorney's Offices, working in the Crimes Against Women and Children, Major Case and Public Integrity Units. She has prosecuted hundreds of felony cases including murder, child molestation, rape, drug trafficking, armed robbery, public corruption, gangs and other felony cases.

She has worked as an associate attorney for the insurance defense firm previously named Hall, Booth, Smith and Slover, P.C. and the general practice firm of Lisa R. Roberts and Associates, P.C. She was a partner in McCamy and Seals-Starke, LLC. During her career, Judge McCamy worked in private practice and handled matters involving criminal law, family law, personal injury, estate planning and real estate. Additionally, she has taught torts and criminal law to paralegal students at Atlanta Metropolitan Technical College.

Judge McCamy is a leader in her community. She is a member of the Newton County Bar Association (Vice-President/President Elect), Walton County Bar Association (2021 Member of the Year), and NewRock Legal Society (Co-Chair of Community Service Committee). She is the creator and a founding board member of Beyond The Bar Scholarship Foundation which is a collaborative effort between NewRock Legal Society, Walton County Bar Association, Newton County Bar Association and Rockdale County Bar Association to award scholarships to high school seniors from each of the 3 counties to assist with college costs. The scholarship was renamed in 2020 in honor of the late Judge Horace J. Johnson, Jr. whom Judge McCamy succeeded.

Judge McCamy was the inaugural president of the East Metro Chapter of the Georgia Association of Women Lawyers. She is a member of the Georgia Association of Black Women

Attorneys (Judicial Review Committee), and Gate City Bar. Judge McCamy is a member of the Professionalism Committee with the State Bar of Georgia and a member of the Council of Superior Court Judges (Pattern Jury Charges Committee Co-Chair, Parental Accountability Court Committee and Access to Justice Committee). She is a member of 2022 classes of Leadership Georgia and Leadership Walton.

She serves on the boards of Newton Mentoring (Chair and mentor to two high school student), Newton County Boys and Girls Club (2021 Board Member of the Year, 2019 Rookie Board Member of the Year), the Newton County Arts Association, the Krimson Cornerstone Foundation and beginning in August 2023, Athens Technical College. She is a member of the Kiwanis Club of Covington (Scholarship Committee). She is also an UGA mentor. She is an active member of Springfield Baptist Church, where she serves on the Hospitality ministry.

Judge McCamy was born and raised in Covington, Georgia. Her parents, Walter and Olivia (Peggy) Grier raised Judge McCamy to value education and public service. Her mother, Olivia, taught elementary school children for over 30 years in Social Circle, Georgia. Judge McCamy graduated with honors in 1991 from Social Circle High School and as class president. In 1995, she graduated from the University of Georgia with a Bachelors of Arts degree in Psychology. She earned her Juris Doctorate from Mercer University Walter F. George School of Law in 1998.

She and Marcellus McCamy, her husband of 22 years, have two children, a daughter who is a graduate of and current graduate student at the University of Georgia and a son who is attending the U.S. Naval Academy Preparatory School. Both graduated with honors from the Academy of Liberal Arts at Newton High School.

APPENDIX E

Jeffrey L. Foster

Judge, Superior Courts of the Alcovy Judicial Circuit
Dec 2020 - Present · Monroe, GA

Chief Judge, Social Circle Municipal Court
Dec 2017 - Dec 2020 · Social Circle, GA

Co-Founder and Firm Manager, Foster, Hanks & Ballard, LLC
Aug 2003 - Dec 2020 · Monroe GA

Director of Community Outreach, The Ministry Village
Jan 2015 - Apr 2017 · Loganville, GA

Associate Judge, Magistrate Court of Walton County
Jan 2004 - Aug 2012 · Monroe, GA

Chief Assistant District Attorney, Alcovy Judicial Circuit
May 1995 - Aug 2003 · Monroe and Covington, GA

Judicial Law Clerk, John M. Ott, Alcovy Judicial Circuit
May 1993 - May 1995 · Monroe and Covington, GA

Inventory and Pricing Analyst, Mobil Oil Corporation
Jun 1989 - Aug 1990 · Valley Forge, PA

University of Georgia School of Law, J.D. Class of 1993

University of Delaware, B.S. in Economics, Class of 1989

APPENDIX F

G. KEVIN MORRIS

160 PINECREST DR.
MONROE, GEORGIA 30655
770-856-1080
GKEVIN@ME.COM

PROFESSIONAL SUMMARY

I am a native Georgian, graduating from the University of Georgia in 1994 with a Bachelor of Arts degree. In 1995, I moved to Shizuoka, Japan to teach English and business communications to Japanese executives. In 1999, I graduated from Mercer Law School and began handling complex litigation claims involving local governments. During that time, I served as the Deputy County Attorney for Butts and Henry Counties. Since joining my current firm, I have continued representing local governments in municipal liability claims. I have handled countless appeals to the 11th Circuit and routinely appear before the Court for oral argument. As a Magistrate Judge, I preside over civil and criminal matters and serve as the Technology Chair for the Council of Magistrate Court Judges. I also teach classes to new Magistrate Judges

WORK HISTORY

JUDGE, 12/2014 to CURRENT
WALTON COUNTY MAGISTRATE COURT – Monroe, GA

- Preside over hearings to ensure adherence to legal process by attorneys and litigants
- Provide independent, unbiased review of arrest and search warrants
- Conduct bond hearings and set constitutionally permissible conditions of release
- Serve as on-call judicial officer for after-hours warrants and orders
- Prepare written opinions relative to various civil and criminal legal proceedings

ATTORNEY, 12/2001 to CURRENT
WILLIAMS, MORRIS & WAYMIRE – Buford, GA

- Represent elected officials, local governments, and their employees in complex constitutional claims
- Advise local elected officials on operational policies and procedures
- Brief and argue cases in trial and appellate courts
- Manage law firm marketing and digital presence
- Provide digital law office consulting services

ATTORNEY, 10/1999 TO 11/2001
O'QUINN & CRONIN – McDonough, GA

- Served as Deputy County Attorney for Butts and Henry Counties
- Managed all trial preparation for federal civil litigation matters
- Briefed and argued cases before trial and appellate courts

EDUCATION

- JURIS DOCTOR—1999
  WALTER F. GEORGE SCHOOL OF LAW, MERCER UNIVERSITY - Macon, GA
- BACHELOR OF ARTS, PHILOSOPHY—1994
  UNIVERSITY OF GEORGIA - Athens, GA

APPENDIX G

KEN WYNNE

SUPERIOR COURT JUDGE

ALCOVY JUDICIAL CIRCUIT

Ken Wynne is a 1987 graduate of the University of Georgia School of Law. Before attending law school, he earned his Bachelor of Arts degree in political science from the University of Georgia in 1984.

In 1987, Ken joined the Atlanta law firm of Harmon, Smith, and Bridges as an associate. The following year, he became an assistant district attorney in the Alcovy Judicial Circuit (Newton and Walton Counties), earning a promotion to Chief Assistant District Attorney in 1990. In 2000, Ken was elected District Attorney of the Alcovy Judicial Circuit.

In 2009, Governor Sonny Perdue appointed Ken to the superior court bench in the Alcovy Judicial Circuit effective July 1, 2010. As a Superior Court Judge, Ken hears felony and misdemeanor cases, as well as all types of civil cases. Judge Wynne has also presided over the Newton County Adult Felony Drug Court since its inception in 2013.

Judge Wynne is a former president of the Alcovy Bar Association, a past president of the Covington Kiwanis Club, and a 2003 graduate of Leadership Walton. He is a past recipient of the State Bar of Georgia Younger Lawyers' Division Commitment to Justice Award, and in 1990, the Georgia Department of Human Resources named him Georgia Child Support Attorney of the Year.

Originally from Macon, Georgia, Judge Wynne and his wife have lived in Newton County since 1989. They have two daughters, Courtney and Kendall.