Chapter 1

INTRODUCTION

§ 1.01 OVERVIEW

This book is about jury trials and the attorney’s role in conducting them. It discusses law, ethics, tactics, advocacy, the psychology of persuasion, preparation methods and performance skills. If you expect to represent a client competently in a trial courtroom, you will have to master all these aspects of trial practice.

Legal and ethical rules define how a trial is conducted and regulate the conduct of attorneys. Just as the rights and duties of citizens generally are defined by bodies of substantive law, so too will your conduct in court be regulated by the law of trials. This book will introduce you to this area of law and its major doctrines, so that you will understand the rules of the litigation game. The book also will raise common ethical issues that arise during trials, and will discuss the ethical considerations that further constrain your conduct.

A knowledge of the law and ethics of trial practice will tell you what you are required, forbidden, or permitted to do, but will not tell you whether pursuing a particular course is a good idea. In order to make reasoned choices, you must have an overall strategy, understand the psychology of juror behavior, and be familiar with the extensive literature concerning effective trial tactics that has been developed over the years by experienced trial lawyers. Although a growing body of empirical research on juror behavior exists, the field of trial practice is hardly a scientific one. What constitutes “good tactics” is often a matter of hot debate among trial lawyers. Where there are differences of opinion, we will try to present a variety of viewpoints, discussing the pros and cons of each. That way, you will be encouraged to think critically about alternative solutions to problems rather than to accept and imitate one person’s idea of good and bad tactics.

Finally, we will look at trial practice skills and techniques. You have to be able to put into effect what you have decided to do. These “how to’s” are covered in the book, but you should not expect simple answers. Like tactics, skills and techniques are often subjects of dispute. Trial practitioners disagree vehemently about the right and wrong ways to do anything in a courtroom. The text will try to guide you away from the most serious pitfalls, and present a range of views on what constitutes effective trial techniques.

Every book carries with it the author’s view of the world. This one is no exception. My own view of what constitutes good trial practice has dictated the contents and organization of this book. In the next few paragraphs, as I explain the structure of the book, those views should begin to become clear.

First, in order to function effectively in a courtroom, you must know the rules of the game. Trials are not free-for-alls conducted without rules. Litigators cannot do anything they want, but must follow rules of procedure, adhere to courtroom customs and etiquette, and understand the power and
discretion of the trial judge. These issues are addressed in this introductory chapter.

Second, you must have a theory of the case. A theory is your master strategy for how you will pursue the maximum realistic outcome in a trial. It is based on a thorough analysis of the strengths and weaknesses of your case with respect to both the facts and the law, and it plots the most likely course through them that leads to a favorable verdict. Like any good battle plan, your case theory (if it is realistic) recognizes that you have some weaknesses, and will suffer some losses and setbacks. To formulate a good theory, you must gather as much information as possible, through interviewing, investigation, and legal research. Then, you must organize and analyze the information, assessing your strategic options, and discarding the weak ones. Your goal is to formulate a simple, workable theory of the case that will appeal to the jury and produce a favorable verdict. This process of trial preparation and theory formulation is presented in Chapter Two.

Third, you must understand the law, tactics, ethics, skills and techniques of trial practice. This forms the heart of the book. Chapters Three through Nine cover jury selection, opening statements, making and meeting objections, direct examination, cross-examination, expert witnesses, and closing argument. The final chapter in the book covers jury deliberation and the verdict.

Perhaps more than any other course you will take in law school, a trial practice course is an integrative experience. While it will teach you a new body of law, new ethical rules, and how to use a specialized set of practical tools, it also should help you see how a lawyer must use all that is taught in law school. To effectively represent a client at trial, you will have to draw on your knowledge of substantive law, civil or criminal procedure, evidence, ethics, and legal research and writing, as well as on your skills as a trial tactician. In a law school curriculum divided into discrete subjects taken a few at a time, it is often difficult to see how integrally each relates to the others. Beyond teaching you about the trial process, it is the goal of this book and any course in trial practice to help you see that the law is indeed a “seamless web,” and that all you have learned fits together in the tasks that lawyers do.

Although this book focuses on trial practice, you should not lose sight of the fact that the trial is only one part of the litigation system. Many complaints never reach the courts. Most cases that get filed are settled and never go to trial. Of those that are tried to a verdict, most continue afterwards through the appeal process. Nevertheless, the trial itself is the hub of the system. Everything that has gone before, such as the pleadings, discovery, motions, and settlement negotiations, has been influenced by the looming specter of the trial. What comes after, such as motions for new trials, appeals, briefs, habeas corpus petitions, suits to enforce judgments, certiorari petitions, and more negotiation, looks back on what happened during the trial and focuses on the conduct of the judge and attorneys who performed it. Thus, no matter what stage of litigation you become involved in, you must understand the trial process.

§ 1.02 HISTORY OF THE JURY TRIAL

Why does a trial have twelve jurors? Why not fifteen, or seven, or none? Why does the judge wear a black robe? Why do we require witnesses to testify
in person? The answers to many such questions about the structure of the modern trial can be found in history.

We inherited our legal system, along with its dispute resolution process, from England. Prior to the eleventh century, legal disputes in Britain were settled in two ways, both of which depended heavily on religious beliefs. One method was the “wager of law.” A person accused of a crime or sued on a debt could clear himself or herself of the charge by taking an oath denying liability and producing a set number of compurgators (oath-helpers) who swore oaths supporting the accused. If the requisite number of compurgators — usually twelve — was produced, the defendant was discharged. Everyone assumed that fear of God would prevent a compurgator from swearing falsely. Wagers of law were used regularly in debt actions until about 1600.

The other method of early dispute resolution was the ordeal. In an ordeal, a defendant’s guilt was tested by his or her susceptibility to injury. A defendant was required to walk nine yards holding a pound of hot iron, retrieve a number of stones from a pot of boiling water, or walk barefoot across burning wood. If the defendant was burned and blistered from the ordeal, he or she was deemed guilty, because God would have intervened to protect the innocent from harm. A more lenient ordeal was the test of cold water, in which the defendant was bound and lowered into a pond that had been blessed with holy water. If the accused sank, the water had received the defendant with God’s blessing (if they accidentally drowned, at least they went to heaven). However, if the accused floated, he or she was found guilty because pure water would not receive the body of an impure person. Ordeals by iron, hot water, and fire were abolished in 1215. Ordeals by cold water were used well into the seventeenth century for witchcraft trials.¹

The seeds of the modern jury trial were brought to England by the Normans in the eleventh century. The Normans introduced two concepts that have become the cornerstones of our trial process: adversarial dispute resolution and fact finding by a disinterested body of citizens.

The earliest form of the adversary system was trial by battle. Although still based on the assumption that God would make the truthful party victorious, trial by battle required that both parties to a dispute confront each other. Trials by battle were used most commonly to settle disputes over title to land. A party had a choice of fighting personally or appointing a champion to fight in the party’s place. Some writers, with tongue firmly in cheek, have suggested that thus was born the trial lawyer. Although trial by battle died out by 1485, the idea that each litigant should have an equal chance to fight for his or her cause remained imbedded in the system.

The more important innovation of the Normans was the inquisition, a body of citizens summoned to give verdicts on legal issues. While the early compurgators had been summoned by the litigants themselves, inquisitors (or recognitors) were summoned by the government. Faith that God would prevent false swearing was replaced by the belief that disinterested citizens were better able to determine the truth and give a verdict accordingly. Accurate verdicts were further ensured by replacing the fear of punishment in the

¹ Ordeals are described in colorful language in JOHN H. WIGMORE, A KALEIDOSCOPE OF JUSTICE 5–17 (1941).
hereafter with present criminal penalties for false swearing, by giving the parties the right to challenge biased recognitors, and by requiring that a verdict be agreed upon by twelve of the recognitors. The inquest could be summoned only by the monarch and originally was used solely when the crown was a party. By the end of the twelfth century, royal inquests were made available for settling important private controversies also, and other private litigants began to agree to be bound by the verdict of unofficial recognitors modeled after the royal inquests.

These inquisitors performed the roles of witnesses, jurors, and judges at the same time. They were summoned from the neighborhood of the dispute because those persons were expected to know the facts already. If they did not know something, they were required to inform themselves by speaking to other witnesses. The inquisitors then had to determine the proper legal resolution of the controversy. They were assisted somewhat by the parties, who pleaded their causes, and by judges who clarified the precise issues of dispute and gave opinions on the law.

The modern form of the jury trial began to develop in the thirteenth and fourteenth centuries. A class of professional attorneys emerged who were permitted to represent and plead for litigants. They had the power to challenge jurors and recite their clients’ versions of the facts to the jury. The number of jurors became fixed at twelve, and the requirement of a unanimous verdict was established. Reliance on outside witnesses became commonplace, and by the fifteenth century had become the rule rather than the exception. Most of the evidence was now presented in open court by witnesses questioned by the judge and the jurors. The role of attorneys was still minor, however. They gave opening statements about the facts and the witnesses who could prove them, although the jurors were free to ignore their advice. There are even scattered records from the fifteenth century of lawyers making objections to the relevancy of testimony, although there were not yet fixed rules of evidence.

By the sixteenth and seventeenth centuries, it had become uncommon for anyone, even the jurors, to give evidence except by sworn testimony in open court. Rules of evidence were created to regulate witness testimony, and jurors no longer were required to have independent knowledge of the controversy — although they still had to come from the neighborhood and not be wholly strangers to the facts. Since jurors were liable to serious penalties for returning false verdicts, the practice of asking a judge for instructions about the law had become common. The trial was still largely inquisitorial — the judge and jurors, not the attorneys, asked the questions. Many parties did not have lawyers at all. In criminal cases, witnesses could be summoned only by the judge and a prisoner did not have counsel unless he or she assigned a point of law arising on the indictment. There were still few rules of evidence and procedure. Hearsay and conclusory evidence were admissible, and the average trial lasted only a few minutes. Juries were still locked up without food and water, so lengthy deliberations were rare.

When the British colonized North America, they brought trial by jury with them. During the eighteenth century, the trial developed into its modern form. Judges became more passive and jurors became listeners. Advocates for the parties took over the presentation of evidence and made frequent arguments
§ 1.02 HISTORY OF THE JURY TRIAL

(often rhetorical) for the benefit of the members of the community who had come to watch. In criminal cases, the right of the defendant to call witnesses and have the assistance of counsel became established. Formal distinctions between direct and cross-examination emerged, and the first treatises on evidence rules were published. This was what a trial looked like when the United States Constitution was written.

Contemporary American trial practice is characterized by its diversity. At one time, the federal district courts employed ninety-two different methods for selecting jurors, with even greater variations existing in state courts. This diversity of practice is easy to understand: trial procedures are regulated by a crazy quilt of federal and state constitutions, statutes, and case law, state and local court rules and customs, and rules of professional ethics. When you add to this equation the preferences and personalities of trial lawyers and judges, and their differing views on the goals and purposes of trials, it becomes safe to say that probably no two trials today are conducted in exactly the same way.

NOTES

1. Trial by battle. Trials by battle were not abolished officially in England until 1819, in response to the case of Ashford v. Thornton, 1 B. & Ald. 405 (1818), in which one of the parties “threw a gauntlet into a startled court of the King’s Bench.” See John H. Baker, An Introduction to English Legal History 11, 56, 64 (2d ed. 1979).

2. Are we in the midst of a litigation explosion? The claim is often made that America is too litigious. This assertion has two factual premises: 1) We are the most litigious people in the world, and 2) There has been a recent dramatic increase in the amount of litigation. Neither is correct.

According to statistics compiled by Marc Galanter, the United States is not the most litigious country. Galanter estimates that Australia, Canada, New Zealand, Yugoslavia and parts of East Africa all have higher rates of civil litigation per capita. Denmark, England, Sweden and France have similar litigation rates to ours. Marc Galanter, Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 U.C.L.A. L. Rev. 4, 52–62 (1983). These data are summarized in Table 1.

Nor is there any evidence that litigation rates have recently increased. Galaner examined litigation rates in the United States back to colonial times, and found that the modern era is hardly the most litigious in our history. In colonial times, the litigation rate was up to six times as high as it is now. In the first half of the 19th century, the rate was twice what it is now. Since 1920, the rate has held relatively steady. These data are summarized in Table 2.

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Table 1
Estimated Litigation Rates for Selected Countries

<table>
<thead>
<tr>
<th>Country</th>
<th>Number of Civil Cases Per 1000 Population (est)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yugoslavia</td>
<td>227.27</td>
</tr>
<tr>
<td>Tanzania (Arusha district)</td>
<td>100.00</td>
</tr>
<tr>
<td>Australia</td>
<td>62.06</td>
</tr>
<tr>
<td>New Zealand</td>
<td>52.32</td>
</tr>
<tr>
<td>Canada</td>
<td>46.58</td>
</tr>
<tr>
<td>United States</td>
<td>44.00</td>
</tr>
<tr>
<td>England/Wales</td>
<td>41.10</td>
</tr>
<tr>
<td>Denmark</td>
<td>41.04</td>
</tr>
<tr>
<td>Sweden</td>
<td>35.00</td>
</tr>
<tr>
<td>France</td>
<td>30.67</td>
</tr>
</tbody>
</table>

Table 2
Estimated Litigation Rates, United States

<table>
<thead>
<tr>
<th>Years</th>
<th>Jurisdiction</th>
<th>Estimated number of civil cases per thousand population</th>
</tr>
</thead>
<tbody>
<tr>
<td>1639</td>
<td>Virginia</td>
<td>240.0</td>
</tr>
<tr>
<td>1683</td>
<td>Massachusetts</td>
<td>110.0</td>
</tr>
<tr>
<td>1820s</td>
<td>St. Louis</td>
<td>31.3</td>
</tr>
<tr>
<td>1830s</td>
<td>St. Louis</td>
<td>28.3</td>
</tr>
<tr>
<td>1840s</td>
<td>St. Louis</td>
<td>35.9</td>
</tr>
<tr>
<td>1850s</td>
<td>St. Louis</td>
<td>13.9</td>
</tr>
<tr>
<td>1860s</td>
<td>St. Louis</td>
<td>10.5</td>
</tr>
<tr>
<td>1870s</td>
<td>Menard Co., IL</td>
<td>16.4</td>
</tr>
<tr>
<td></td>
<td>St. Louis</td>
<td>10.5</td>
</tr>
<tr>
<td>1880s</td>
<td>St. Louis</td>
<td>7.3</td>
</tr>
<tr>
<td>1890s</td>
<td>St. Louis</td>
<td>6.9</td>
</tr>
<tr>
<td></td>
<td>Alameda Co, CA</td>
<td>7.6</td>
</tr>
<tr>
<td>1900s</td>
<td>St. Louis</td>
<td>7.7</td>
</tr>
<tr>
<td>1910s</td>
<td>Alameda Co, CA</td>
<td>13.5</td>
</tr>
<tr>
<td></td>
<td>St. Louis</td>
<td>9.1</td>
</tr>
<tr>
<td>1920s</td>
<td>St. Louis</td>
<td>14.9</td>
</tr>
<tr>
<td>1930s</td>
<td>St. Louis</td>
<td>12.5</td>
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<td></td>
<td>Alameda Co, CA</td>
<td>10.8</td>
</tr>
<tr>
<td>1940s</td>
<td>St. Louis</td>
<td>12.4</td>
</tr>
<tr>
<td>1950s</td>
<td>St. Louis</td>
<td>12.8</td>
</tr>
<tr>
<td></td>
<td>Alameda Co, CA</td>
<td>9.5</td>
</tr>
<tr>
<td>1960s</td>
<td>St. Louis</td>
<td>16.0</td>
</tr>
<tr>
<td>Since 1970</td>
<td>St. Louis</td>
<td>16.9</td>
</tr>
<tr>
<td></td>
<td>Alameda Co, CA</td>
<td>11.0</td>
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</tbody>
</table>

Galanter found that the major differences in civil cases in this century concern the types of cases being filed, not the numbers. Domestic relations,
§ 1.03 THE ADVERSARY SYSTEM AND THE SEARCH FOR TRUTH

Tort cases, and cases filed in federal court have increased, while commercial, contract and property cases have declined.

Data from the National Center for State Courts show that after correcting for population increases, overall litigation rates rose only 4% from 1978–84, a far cry from any notion of an “explosion.” Most of that increase is accounted for in small claims actions, which do not usually involve lawyers. See Marc Galanter, The Day After the Litigation Explosion, 46 Md. L. Rev. 3, 7 (1986). See also Michael Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System — And Why Not?, 140 U. Pa. L. Rev. 1147 (1992); J. Alexander Tanford, This Week on the Talk Shows: The Litigation Explosion, 8 Adelphia L. J. 157 (1992).

§ 1.03 THE ADVERSARY SYSTEM AND THE SEARCH FOR TRUTH

What is a trial and what should it be? Many legal writers have turned their attention to these questions, but have been unable to agree upon a single answer. Is a trial a search for truth, a search for justice, a ritual played out for the good of society, or merely a game played by lawyers? Should the lawyer’s goal be to win, to seek justice, or to further valuable social principles? Is an attorney the mouthpiece of the client or the client’s conscience?

At its core, a trial is a search for truth, even though the process may be imperfect. Injustices happen, and wrong verdicts are returned. But accurate verdicts remain the primary goal of the trial.

Does the adversary, lawyer-dominated procedure we have adopted further or hinder this search? Lon Fuller’s famous defense of the adversary system argues that it does:

In a very real sense it may be said that the integrity of the adjudicative process itself depends upon the participation of the advocate. This becomes apparent when we contemplate the nature of the task assumed by any arbiter [i.e., judge] who attempts to decide a dispute without the aid of partisan advocacy. . . . What generally occurs in practice is that at some early point a familiar pattern will seem to emerge from the evidence [and the judge will make a tentative decision]. But what starts as a preliminary diagnosis . . . tends quickly and imperceptibly to become a fixed conclusion, as all that confirms the diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention.

An adversary presentation seems the only effective means for combatting this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, there is time to explore all its peculiarities and nuances. . . . When we take into account the preparation [and marshalling of facts] that must precede the hearing, the essential quality of the advocate’s contribution becomes even more apparent. . . . It is only through the advocate’s participation that the hearing may remain
in fact what it purports to be in theory: a public trial of the facts and issues. Each advocate comes to the hearing prepared to present his proofs and arguments. [T]he experienced judge or arbitrator desires and actively seeks to obtain an adversary presentation of the issues. Only when he has had the benefit of intelligent and vigorous advocacy on both sides can he feel fully confident of his decision. . . . The advocate['s] zeal for his client’s cause promotes a wise and informed decision of the case. ³

Others criticize the American adversary system’s reliance on partisan lawyers as being indifferent, or even hostile to the truth. Many lawyers act like “hired guns” who advance their clients’ interests without regard to right and wrong, and who try to sell their clients’ stories to juries regardless of their merit, subordinating the truth to the struggle to win. The critics suggest that the adversary model leads lawyers to file frivolous lawsuits, display arrogant disregard for truth, and assist greedy clients in grabbing whatever they can from others regardless of the justness of the result.

The adversary system may have other more subtle weaknesses. It may emphasize the cleverness of the lawyer and reward trickery and successful evasion of adverse rules. As the power of the lawyer becomes more important, we may be placing justice beyond the reach of the poor and middle classes who cannot afford to mount an expensive courtroom advertising campaign to sell their cases. All of these factors tend to derogate the process of arriving at a fair resolution of a controversy according to the facts. ⁴

The problem with both sides of this debate is that they assume that a trial lawyer actually has a substantial influence on the outcome of a case — whether for good or bad. That assumption may be incorrect. Fuller’s view that the lawyer can effectively marshal the facts and present the jury with a true picture of what happened is undermined by research which shows that human memories are notoriously unreliable. Witnesses perceive things through a filter of preconceptions. ⁵ They perceive accurately only that with which they are already familiar. Unusual and exciting events that tend to make up the subject-matter of trials, are remembered inaccurately. ⁶ The memories they retain are constantly being reconstructed by recent events. ⁷ Gaps in memory are filled in (a process called confabulation) by guesses — what witnesses think probably happened based on their experiences and their conversations with their neighbors. Memory retrieval is affected by the process by which

⁵ See Gordon Allport & Leo Postman, THE PSYCHOLOGY OF RUMOR 56-62 (1947) (most white subjects shown a picture of a white man robbing a black man in a subway “remembered” that it was the black man who was the robber).
⁶ See Christian A, Meissner & John C. Brigham, Thirty Years of Investigating the Own-Race Bias in Memory for Faces, 7 PSYCH., PUB. POLICY & LAW 3 (2001) (cross-racial identifications are less accurate than own-race identifications).
it is retrieved and by who retrieves it. The way jurors receive, interpret and evaluate the credibility of a witness’s in-court communication is affected by a host of socio-economic factors having nothing to do with whether the witness is being truthful.

A lawyer’s ability to lead a jury into making the right decision is further hampered by the fact that it is not enough to present true and complete evidence. The jurors would still have to understand the law to return a “legally” true verdict, and studies show that jurors have even more difficulty understanding proximate cause than law students.

Critics who fear that clever lawyers can somehow turn a hopeless case into an undeserved victory with their tricks are also overestimating the power of the lawyer. Social psychologists who have studied the effects of argument and other factors on juror decision-making have demonstrated that the merits of a case have by far the greatest impact on how jurors vote. Lawyers’ tricks to try to enhance their persuasiveness have relatively little impact. While bad lawyering undoubtedly can ruin a good case, the reverse is rarely true. Juries decide cases on the sworn testimony of witnesses who relate what they saw, and these facts have more to do with who wins and loses than the lawyers. If a body is cold and blue and rigor mortis has set in, that body is dead, and no amount of clever argument can be expected to convince a jury otherwise.

§ 1.04 THE GENERAL LEGAL PRINCIPLES OF TRIALS

[A] THE ORDER OF TRIAL

You are not free to conduct a trial any way you see fit. Rules of procedure place limits on your performance. Don’t expect a trial judge to treat you like Perry Mason — peering over half-frame glasses and saying, “That’s a bit irregular, counselor, but I’ll allow it this once.” Trials run according to procedures set by statutes, rules, and customs, and judges follow them. A typical trial proceeds as follows:

- Prior to trial, the attorneys have engaged in discovery and fact investigation, exchanged witness and exhibit lists, and prepared their witnesses for court. They have attended one or more pretrial conferences at which the jury instructions are discussed, evidentiary foundations stipulated, and time limits established.

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9 See John Conley, William O’Barr and E. Allen Lind, The Power of language: Presentational Style in the Courtroom, 1978 DUKEL.J. 1375 (finding that witnesses who spoke with hesitation, poor grammar in a lower-class linguistic style were rated as lower in credibility than witnesses who spoke better English).
10 See, e.g., J. Alexander Tanford, The Law & Psychology of Jury Instructions, 69 Neb. L. Rev. 71 (1990) (summarizing research showing that jurors are unable to understand jury instructions).
On the day of trial, the case is called and the attorneys state their readiness to proceed. The lawyers make preliminary motions concerning the admissibility of evidence, trial procedures, and the separation of witnesses, and the judge rules on them.

A panel of prospective jurors is brought to the courtroom, sworn to truthfully answer questions, interrogated by the judge and attorneys, and a jury is chosen.

The judge reads preliminary jury instructions or gives the jury some kind of explanation about the nature of the case and the jurors' obligations, and asks the jurors if they have any questions. The jurors ask about getting their parking tickets validated and who pays for lunch. In many jurisdictions, jurors are given notebooks for taking notes.

The plaintiff (or prosecutor) makes a brief opening statement describing plaintiff's case, and then the defendant makes an opening statement.

The plaintiff calls and examines witnesses and introduces exhibits. The defendant cross-examines each witness. The plaintiff may conduct brief re-direct examination of some witnesses.

The plaintiff rests and the defendant moves for judgment on the evidence. The judge denies the motion.

If the trial continues to a second day, the jury is not sequestered. Jurors are free to go home where, despite the judge's instruction to the contrary, they immediately check the paper to see if their trial is important enough to be covered.

The defendant calls and examines witnesses and introduces exhibits, and the plaintiff cross-examines each witness. The defendant may conduct re-direct examination.

After the defense rests, the plaintiff may produce rebuttal witnesses or exhibits.

After both sides rest, they both make motions for judgment on the evidence which are routinely denied.

The plaintiff makes the first closing argument. The defendant makes the second argument. The plaintiff makes the final argument.

The judge reads instructions on the law to the jury.

The jurors retire, deliberate, and reach a verdict.

**NOTES**

1. **Order of trial set by statute.** This order of trial is not just a matter of local custom. In most states, statutes or rules of procedure address the order of trial. These codes can be very specific or quite general. Thus, the judge's discretion to deviate from the usual order of trial varies. A typical statute might read as follows:
Model Code of Trial Procedure § 101. Order of proceedings. — The trial must proceed in the following order, unless the court, for special reasons otherwise directs:

1. In the case of a jury trial, the jury is first selected and sworn;
2. After the jury is sworn, the plaintiff may state the issue and plaintiff's case;
3. The defendant may then state the defense, or may wait until after the close of plaintiff's evidence;
4. The plaintiff must then produce the evidence supporting plaintiff's claim;
5. The defendant may then produce evidence;
6. The parties may then respectively offer rebuttal evidence;
7. When the evidence is concluded, the plaintiff must commence the argument;
8. The defendant may then present argument;
9. The plaintiff may conclude the argument;
10. The court must then charge the jury.


2. Re-opening your case and other deviations from the normal order of trial. We’ve all seen television shows where a last-minute witness arrives to save the day after the trial appears to be over. What happens in real life if new evidence comes to light after a party has “rested” its case? Although the judge is not required to permit a party to re-open its case, the judge has discretion to permit the parties to deviate from the usual order of trial in the interests of justice. Doyle v. State, 24 S.W.3d 598, 601–02 (Ct. App. Tex. 2000).

There may even be situations where the evidence is so important that due process requires that the judge reopen the case. Consider United States v. Simtob, 901 F.2d 799 (9th Cir. 1990):

In February 1986, a two-count indictment was filed in the District of Montana, charging Simtob with two counts of cocaine distribution. . . . Simtob’s defense at trial was entrapment. [I]t was the government’s burden to prove . . . that the defendant was predisposed to commit the crimes charged before the government’s attempts to persuade him to do so . . . .

[T]he government called Greg Nesbo to testify as to Simtob’s predisposition. Nesbo, who had previously pleaded guilty to a drug offense and who testified pursuant to his plea agreement with the United States, stated on direct examination that Simtob had supplied him with cocaine for almost three years, that he had purchased cocaine from Simtob approximately twenty times over that period, and that, on at least one occasion, he had purchased the drug from Simtob in the basement of Simtob’s home, at which time he had seen a safe filled with packages of white powder. . . Nesbo’s was the final testimony at trial. He was the government’s primary witness on the issue of predisposition, and his credibility was very much at issue.
The night following Nesbo’s testimony and before the final arguments to the jury, Simtob telephoned Nesbo, and, when the latter returned his call, tape recorded the conversation.

NESBO: I said the things that I said today because I had to. If I hadn’t said those things, I was going to get thrown in jail for a long time, and I couldn’t have that. Okay? . . .

SIMTOB: Remember you said about, you know, the thing, you know — what made you say that, that going down stairs, though? I mean, did you even go down stairs in my house?

NESBO: I don’t know if it was your house or Steiner’s house.

SIMTOB: Well, do you — I mean do you have no idea?

NESBO: No. That was really too long ago and my memory fails me but please [t]ry and understand. If I hadn’t said the things I did today, I would be thrown away in jail and I — I couldn’t have that . . .

SIMTOB: Well, okay, yeah, alright. But Greg, I mean, was I there?

NESBO: I’m so confused I can’t even say for sure.

SIMTOB: Yes, but why did you say it on the — I mean why did you say it up there, you know? Here I am just hurting, just wondering why you know.

NESBO: All I can say is I had to say the things I said today or I would have been thrown in jail. . . .

SIMTOB: . . . Well, why did you say — why did you say I sold cocaine to you?

NESBO: If I hadn’t said the things I said today, I’d be in jail. Try and understand that.

Made aware of this conversation, counsel for appellant . . . requested permission either to play the tape to the jury or to recall Simtob so that he could testify as to the content of his conversation with Nesbo. Counsel also suggested recalling Nesbo to further cross examine him by confronting him with the tape. The court denied appellant’s motion.

Under the circumstances of this case, where the tape was represented as containing information important to the ascertainment of the truth, the trial court clearly erred. . . . Further, we cannot adjudge the error to be harmless. Our review of the tape convinces us that it contained information bearing sufficiently on the credibility of the prime prosecution witness that it might well have affected the outcome of the case. While we recognize the limitations of the tape that arise from the manner of its creation, we conclude that the defendant was entitled to cross-examine and to attempt to impeach Nesbro with its contents. The statements in the tape went beyond anything already in evidence, and were therefore not merely cumulative.
3. Judicial questioning. Although the standard procedure is for the attorneys to call and question witnesses, the judge may also do so. The court has an obligation to see that justice is done and the jurors can intelligently pass on the facts, and so may call witnesses omitted by the parties and question witnesses to bring out facts overlooked or clarify the testimony. The judge is not obligated to sit still and watch the guilty escape or the innocent suffer through a failure of parties, or their attorneys, to ask a witness a necessary question. See *O'Hara v. State*, 528 S.E.2d 296, 300 (Ct. App. Ga. 2000). If the judge decides to question witnesses, he or she cannot take over the examination, ask extensive or persistent questions, or give any indication the judge favors one side or the other. See *Alexander v. Willard*, 542 S.E.2d 899, 902–05 (W. Va. 2000); *State v. Paiz*, 987 P.2d 1163 (Ct. App. N.M. 1999). The judge is bound by the rules of evidence and may not display partisanship. Consider *United States v. Beatty*, 722 F.2d 1090 (3d Cir. 1983):

The judge’s conduct . . . became clearly prejudicial when he lengthily questioned three of Ballouz’s four witnesses in a manner which Ballouz fairly labels as “cross-examination.” The court’s vigorous participation in examining the defendant’s witnesses, especially when contrasted with the complete freedom from hostile interruption of the prosecution’s witnesses, must certainly have conveyed the judge’s skepticism about Ballouz’s alibi to the jury. See *United States v. Nazzaro*, 472 F.2d 302, 310 (2d Cir. 1973). “A trial judge’s isolated questioning to clarify ambiguities is one thing; however, a trial judge cannot assume the mantle of an advocate and take over the cross-examination for the government to merely emphasize the government’s proof or question the credibility of the defendant and his witnesses.” *United States v. Singer*, 710 F.2d 431, 436–37 (8th Cir. 1983) (in banc) (quoting *United States v. Bland*, 697 F.2d 262, 265–66 (8th Cir. 1983) (footnotes and citations omitted)). We are particularly disturbed by the court’s examination of Mrs. Axelson, the witness who testified that Ballouz spent the evening of October 9th with her.

THE COURT: How did you come to be a witness in this case, Ma’am?. . .

THE WITNESS: Because of the lawyer coming and asking me to be, which was telling the truth.

THE COURT: Oh, I see. Was the first contact made from him to you or from you to him?

THE WITNESS: No. From the lawyer to me.

THE COURT: Did Mr. John Ballouz contact you before the lawyer did, or was [the] lawyer the first one? . . . Who first spoke to you about being a witness in this case?

THE WITNESS: Well, I think I approached them about that.

THE COURT: Oh, you approached somebody first?

THE WITNESS: Oh, yes. . . Gee, we were at the restaurant. I’d be willing to go as a witness.

THE COURT: You reached out for John Ballouz?
THE WITNESS: Yes.

THE COURT: Where was he when you reached out for him, Ma’am?

THE WITNESS: At my home. . .

THE COURT: Was he staying there?

THE WITNESS: No, no.

THE COURT: Was he just visiting you?

THE WITNESS: Visiting.

THE COURT: Who was he visiting there?

THE WITNESS: Me. . . As I said, he always visited my home when he came to New Jersey. . .

THE COURT: The purpose of that was simply to come to see you?

THE WITNESS: Yes. Just to come to see us, which he always did.

THE COURT: Whenever he was in New Jersey?


THE COURT: When he happened to drop in you mentioned to him you could be a witness for him?

THE WITNESS: Yes. . .

THE COURT: How did you know that you can be a witness for him, Ma’am, or that you would have anything useful to say?

THE WITNESS: Only that, you know, . . . if he was involved with this thing, how can he been there and at my home — be at the restaurant, too?

THE COURT: Be where, Ma’am?

THE WITNESS: Whatever this thing that is going with —

THE COURT: What did you know about this thing going with when you first spoke to him?


THE COURT: You read it in the newspaper?

THE WITNESS: Yes. . .

THE COURT: When you first spoke to him and told him that you would be a witness, did you have any idea whether you had any evidence to offer?


THE COURT: All right. Thank you.

Mrs. Axelson was . . . a “key” witness, and the jury’s verdict ultimately rested on the jurors’ evaluation of her credibility. We have long held that a judge must be extremely careful, especially when dealing with a key witness, to “minimize its own questioning . . . to the end that any such judicial departure from the normal course of
trial be merely helpful in clarifying the testimony rather than prejudicial in tending to impose upon the jury what the judge seems to think about the evidence.” *Groce v. Seder*, 267 F.2d 352, 355 (3d Cir. 1959). In this instance, the judge’s questions cannot possibly be construed as “clarifying.” They were completely unrelated to the offenses with which Ballouz was charged, the alibi which Ballouz offered, and the substance of Mrs. Axelson’s testimony. Rather the judge asked Mrs. Axelson again and again how she had come to be a witness in the case. This lengthy cross-examination, which occupies four pages in the trial transcript, was a frontal attack on her credibility. The jury could not have helped but conclude that the judge simply did not believe Mrs. Axelson. The judge’s overzealous examination was error.

[B] THE RIGHT TO A JURY

UNITED STATES CONSTITUTION

**Amendment VI.** In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .

**Amendment VII.** In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Despite the apparent clarity of these two constitutional provisions, the right to a jury trial in criminal and civil proceedings is limited in a number of ways.

In criminal trials, the right to be tried by a jury is fairly broad. The Supreme Court has held that because trial by jury in criminal cases is fundamental to the American scheme of justice, the Sixth Amendment applies to the states as well as the federal courts. It is limited, however, to trials for “serious” offenses. Petty crimes do not constitutionally require a jury, and states are free to decide for themselves whether to give jury trials for petty offenses. The Supreme Court has defined a petty offense as one that carries a maximum potential sentence of up to six months. The right to a jury trial is determined by the potential maximum sentence, not the actual sentence received by the defendant, because a court cannot know what a defendant’s actual sentence will be prior to trial. The two leading cases are *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Baldwin v. New York*, 399 U.S. 66 (1970).

Despite the requirement that jury trials be provided for all serious crimes, some jurisdictions employ a two-tiered court system in which all misdemeanors are first tried to a judge alone. If the defendant is convicted, he or she may appeal to the second tier where the defendant is entitled to a full jury trial de novo. In *Ludwig v. Massachusetts*, 427 U.S. 618 (1976), such a system was upheld by the Supreme Court against attacks that it violated the
defendant's rights to a speedy jury trial, and to protection against double jeopardy.

In civil cases, the right to a jury trial is far more limited. The Supreme Court has held that the Seventh Amendment's guarantee of a right to a civil jury trial is not so fundamental to due process that it must be applied to the states. The states are free to grant or withhold the right to a jury in civil trials, and practices vary widely. Even in federal trials, the right to a jury is limited. The Supreme Court has consistently interpreted the Seventh Amendment to apply only to suits involving the litigation of legal rather than equitable rights. Thus, it has generally held that federal lawsuits seeking most kinds of monetary damages are legal in nature, and carry a guarantee of a jury; whereas trials seeking equitable relief, such as an injunction or the application of civil penalties unrelated to damages, do not require a jury.

NOTES

1. **Right to counsel during criminal trial.** As a matter of constitutional criminal procedure, a defendant is entitled to the assistance of counsel at all “critical stages” of a criminal prosecution. Obviously, a trial is a critical stage, and a defendant has the right to counsel throughout the trial. See *United States v. Johnson*, 267 F.3d 376 (5th Cir. 2001). But there is no guarantee to the right to a good attorney. A defendant is entitled only to a minimally competent lawyer who can provide a minimal level of “effective assistance” to the defense. The standard is a low one. The Supreme Court has held that the right to counsel does not guarantee a “meaningful relationship” between client and lawyer, *Morris v. Slappy*, 461 U.S. 1, 12–14 (1983); contemplates a “wide range” of acceptable levels of representation, *Nix v. Whiteside*, 475 U.S. 157, 164–66 (1986); and is to be interpreted by using a “strong presumption” that counsel’s representation was acceptable. *Strickland v. Washington*, 466 U.S. 668, 687–96 (1984). In real life, representation of huge numbers of poor and minority defendants is provided by a small number of inexperienced, overworked, underpaid public defenders who lack the resources, time, experience and training to provide effective representation.

2. **Trial in absentia.** Under Fed. R. Crim. P. 43, a defendant who is present at the beginning of a trial but absconds during it, waives his or her right to be present, and the trial may continue even though the accused is absent. However, a trial may not be begun in the absence of the accused, nor continued if the defendant’s absence is involuntary. *Crosby v. United States*, 506 U.S. 255 (1993).

3. **Waiver of jury in criminal cases.** A criminal defendant may waive his or her right to a jury trial, if such waiver is made knowingly and voluntarily. However, such a waiver does not automatically mean that the defendant will receive a trial in front of a judge alone. Rule 23 (a) of the Federal Rules of Criminal Procedure provides:

- Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

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The defendant does not have the right to choose a non-jury trial whenever it would be in his or her best interest. See Singer v. United States, 380 U.S. 24 (1965) (the ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right). The rule is to the contrary in some states, which interpret their state constitutions as giving the defendant the unilateral power to select a jury or non-jury trial. See, e.g., People ex Rel. Daley v. Joyce, 533 N.E.2d 873 (Ill. 1988).

4. Waiver of jury in civil cases. Juries are more easily waived in civil cases than criminal, and can be waived implicitly as well as explicitly. To be entitled to a jury, a civil litigant must comply with Fed. R. Civ. P. 38, which requires that a jury demand be made in writing within 10 days after the filing of the last pleading. The failure to make a written request amounts to a waiver. See Kletzelman v. Capistrano Unified Sch. Dist., 91 F.3d 68, 71 (9th Cir. 1996) (failure to demand amounts to waiver).

5. History of the Seventh Amendment. The best scholarly commentary on the history, scope, and continuing usefulness (or lack thereof) of civil juries is Paul Carrington, The Seventh Amendment: Some Bicentennial Reflections, 1990 U. CHI. LEGAL FORUM 33.

6. Juries in complex civil cases. The argument has been made that some cases are so complicated that jurors cannot possibly understand them and render a rational verdict. The likelihood of an irrational verdict offends due process and so requires a complex-case exception to the Seventh Amendment. A good example is In re Japanese Electronics Products Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980), a case charging a dozen Japanese companies with violating antitrust and anti-dumping laws, and driving American electronics producers out of business. These dumping practices were alleged to be part of a large conspiracy that covered more than thirty years, in which defendants agreed among themselves and acted in concert with over 90 coconspirators around the world to maintain artificially low prices for Japanese televisions sold in the United States. Defendants allegedly facilitated and financed this scheme by fixing high prices for televisions sold in Japan, a practice made possible by concerted action and protection afforded by the Japanese government. Discovery took nine years and produced millions of documents and over 100,000 pages of depositions. The court held that due process requires the denial of a jury trial when a jury will not be able to perform its task of rational decision making with a reasonable understanding of the evidence and the law, thus carving out a complex-case exception to the Seventh Amendment. The standard is a high one — the complexity of a suit must be so great that it renders the suit beyond the ability of a jury to understand the evidence and decide the case rationally. Moreover, the district court should not deny a jury trial if severance of multiple claims, thoughtful use of the procedures suggested in the Manual for Complex Litigation, or other methods can enhance a jury’s capabilities or reduce the complexity of a suit sufficiently to bring it within the ability of a jury to decide.

7. Juries in scientifically complex cases. A similar argument has been made that there should be an exception to the right to a jury trial when an understanding of science is critical to the case, because jurors are incapable of understanding scientific evidence. Consider Peter Huber, Junk Science and the Jury, 1990 U. CHI. L. FORUM 273:
Surveys suggest that about half the population believes that lucky numbers have a scientific basis, that astrology is scientifically valid, that there is no scientific basis to evolution, that rocket launchings can change the weather and that UFOs have visited earth (10% claim to have seen a UFO). About a third of the population believes that radioactivity is exclusively man-made and can be removed by boiling, and is unsure what a molecule is. In the Karen Silkwood case, all the scientific experts agreed that the plutonium “discovered” in her urine sample was non-soluble, and therefore must have been added after the sample was taken, yet the jury returned a huge verdict in Silkwood’s favor.


8. Do statutory caps on damages infringe the Seventh Amendment? In Davis v. Omitowoju, 883 F.2d 1155 (3d Cir. 1989), the Third Circuit upheld a law placing a cap on medical malpractice damages against a Seventh Amendment challenge. Plaintiffs had been awarded $640,000 by a jury, which amount was cut in half by the judge based on a Virgin Islands law capping non-economic damages at $250,000. Plaintiffs argued that this violated their right to a jury trial on damages to which they would have been entitled at common law, and that it violated the second part of the Amendment that “no fact tried by a jury shall be reexamined” by the court. The Court of Appeals held that because the legislature could eliminate the cause of action altogether, it could limit total damages without violating the Seventh Amendment. Statutory damage caps have also been upheld against assertions they violate the Americans with Disabilities Act, Due Process, and Equal Protection. See Patton v. TIC United Corp., 77 F.3d 1235 (10th Cir. 1996).

9. Financial exigency. In 1989, North Dakota experienced a “revenue shortfall” and cut the court budget by 9% for the remainder of the 1989–91 biennium. The Supreme Court adopted a budget proposal that included reducing jury trial expenses by 50%. In one district, in order to meet this request, the presiding judge ordered a moratorium on all civil jury trials for 18 months. In Odden v. O’Keefe, 450 N.W.2d 707 (1990), the blanket moratorium was held to violate the state’s constitutional guarantee of the right to jury trials in civil cases. The court held that our basic liberties cannot be offered and withdrawn as budget crunches come and go, nor can they be made contingent on transitory political judgments regarding the advisability of raising taxes, balancing budgets, and so forth.

10. Cost of a jury trial. In many jurisdictions, the party demanding a jury trial will have to pay for it. The party may have to prepay the costs or post a bond. This can effectively prevent some plaintiffs from obtaining jury trials. Nevertheless, these statutes have routinely been upheld as reasonable and found to only incidentally implicate the right to a jury trial. Cases are collected in Annot., Validity of Law or Rule Requiring State Court Party Who Requests Jury Trial in Civil Case to Pay Costs Associated With Jury, 68 ALR 4th 343 (1989).
§ 1.04 THE GENERAL LEGAL PRINCIPLES OF TRIALS

[C] THE PRINCIPLE OF JUDICIAL CONTROL AND DISCRETION

To understand the basic dynamics of a trial, you must understand the broad power of the trial judge. The trial judge is in absolute charge of the trial. The judge has virtually unlimited discretion to exercise that power to keep the trial proceeding in an efficient and orderly fashion, to protect the safety of jurors and court personnel, and to see that justice is done. This power is expressed in Fed. R. Evid 611(a):

Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

The primary constraint upon that power is that the judge must exercise it fairly, without taking sides, and without influencing the outcome.\(^{14}\) While no one can force a judge to put aside all his or her biases and become impartial, judges must behave impartially.\(^{15}\)

The judge's power includes the ability to determine the order of proceedings, set time limits, impose rules of behavior on attorneys and spectators, determine the admissibility of evidence and the propriety of attorney conduct, deviate from the usual rules of procedure in the interests of justice, and declare a mistrial. The judge may exercise these powers whether or not the attorneys request it. Although attorneys often initiate judicial actions by making motions and objections, the judge may also act “sua sponte” (on its own motion) if the judge thinks it will facilitate the fairness and efficiency of the trial. In practice, most judges use this power sparingly, giving attorneys broad latitude to conduct trials as they see fit.

A good example of judicial power and discretion is the Supreme Court's decision in Illinois v. Allen, 397 U.S. 337 (1970). Allen represented himself at trial. He questioned the jurors at great length about irrelevant matters. Although there had been no objection, the trial judge interrupted and requested him to confine his questions solely to matters relating to the prospective juror's qualifications. At that point, Allen started to argue with the judge in an abusive and disrespectful manner. The judge asked appointed counsel to take over the jury selection, but Allen continued to talk, proclaiming that the appointed attorney was not going to act as his lawyer. He terminated his remarks by saying to the judge, “When I go out for lunchtime, you're going to be a corpse here,” and scattering his attorney's papers on the floor. Despite the judge's warnings, Allen continued to be disruptive, saying to the judge, “There's not going to be no trial, either. I'm going to sit here and . . . talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no

\(^{14}\) See People v. Smith, 702 N.E.2d 218 (Ct. App. Ill. 1998) (judge may call or question witnesses as long as judge remains impartial).

\(^{15}\) See United States v. Filani, 74 F.3d 378 (2nd Cir. 1996) (judges' questioning of defendant that expressed doubt as to defendant's veracity was error).
“The trial judge on his own motion ordered the trial to proceed in Allen’s absence and directed the bailiff to remove him from the courtroom.

The Supreme Court held:

It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.

The trial court in this case decided under the circumstances to remove the defendant from the courtroom and to continue his trial in his absence until and unless he promised to conduct himself in a manner befitting an American courtroom. [W]e find nothing unconstitutional about this procedure. Allen’s behavior was clearly of such an extreme and aggravated nature as to justify either his removal from the courtroom or his total physical restraint. Prior to his removal he was repeatedly warned by the trial judge that he would be removed from the courtroom if he persisted in his unruly conduct, and . . . the record demonstrates that Allen would not have been at all dissuaded by the trial judge’s use of his criminal contempt powers.

It is not pleasant to hold that the respondent Allen was properly banished from the court for a part of his own trial. But our courts, palladiums of liberty as they are, cannot be treated disrespectfully with impunity. Nor can the accused be permitted by his disruptive conduct indefinitely to avoid being tried on the charges brought against him. It would degrade our country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes. As guardians of the public welfare, our state and federal judicial systems strive to administer equal justice to the rich and the poor, the good and the bad, the native and foreign born of every race, nationality, and religion. Being manned by humans, the courts are not perfect and are bound to make some errors. But, if our courts are to remain what the Founders intended, the citadels of justice, their proceedings cannot and must not be infected with the sort of scurrilous, abusive language and conduct paraded before the Illinois trial judge in this case. The record shows that the Illinois judge at all times conducted himself with that dignity, decorum, and patience that befit a judge.

We do not hold that removing this defendant from his own trial was the only way the Illinois judge could have constitutionally solved the
problem he had. We do hold, however, that there is nothing whatever in this record to show that the judge did not act completely within his discretion. Deplorable as it is to remove a man from his own trial, even for a short time, we hold that the judge did not commit legal error in doing what he did.

NOTES

1. The scope of judicial discretion. Consider the following cases:

   Ayres v. Lakeshore Community Hospital, 689 So. 2d 39 (Ala. 1997), was a medical malpractice case for failure to diagnose a heart attack. The jury found for the defendants. On appeal, Ayres argued that the trial court erred in forbidding the cross-examination of Dr. Hinnen regarding the loss of his medical license. She maintained that because Dr. Hinnen provided expert testimony on his own behalf concerning the standard of care he gave the deceased, his qualifications were at issue. The court held:

   As Ayres correctly argues, an expert witness may generally be cross-examined as to his or her credentials. . . . However, the trial judge has substantial discretion as to the questions a party is allowed to ask of an expert witness. The scope and extent of cross-examination is vested in the trial court’s sound discretion, and this Court will not reverse on the basis of the trial court’s rulings regarding cross-examination unless an abuse of discretion has occurred.

   In Brown v. State, 875 S.W.2d 828 (Ark. 1994), the defendant was convicted of terroristic threatening and attempted murder. In closing argument, the defendant objected to the prosecutor saying that the only reasons the defendant had not killed one of the victims was that he was drunk and shooting at a spinning target and that “he [had] a pretty short barrel on [his] pistol and I would submit to you, the shorter the barrel, the harder it is to hit what you’re aiming at.” The trial judge overruled the objection despite the fact that the facts were not in evidence, and the usual rule is that closing argument must be limited to facts in evidence. The appeals court affirmed, holding:

   A trial court has wide discretion in controlling, supervising, and determining the propriety of counsel’s arguments, and we will not reverse absent a showing of manifest abuse.

   In Vega v. People, 893 P.2d 107 (Colo. 1995), the defendant was convicted of possession with intent to distribute more than 28 grams of cocaine. The charges were based on the sale of three kilograms of cocaine to undercover drug enforcement officers who relied on the help of an informant Anderson. Anderson had promised the DEA that he could help them catch bigger fish in exchange for a reduction of the charges against him and for leniency in sentencing. At trial, the defendant asserted that he had been entrapped by Anderson. He contended on appeal that the trial court improperly excluded cross-examination testimony concerning internal DEA incentive programs for obtaining drug convictions. The court held that the judge acted within his discretion:

   The Confrontation Clause of the United States Constitution guarantees the right of a criminal defendant to cross-examine witnesses
testifying for the prosecution. . . . It is constitutional error to limit excessively a defendant’s cross-examination of a witness regarding the witness’ credibility, especially cross-examination concerning the witness’ bias, prejudice, or motive for testifying.

However, a trial court has wide latitude . . . to place reasonable limits on cross-examination based on concerns about, for example, harassment, prejudice, confusion of the issues or interrogation which is repetitive or only marginally relevant. Likewise, the trial court has discretion to determine the scope and the limit of cross examination, and absent an abuse of discretion, its ruling will not be disturbed on review.

In *State v. Johnson*, 712 P.2d 301 (Wash. App. 1985), the defendant was convicted of first degree robbery. On appeal, he asserted that the trial court erred by: (1) refusing to excuse a juror challenged for cause; and (2) denying his motion to exclude evidence of two prior convictions. During voir dire, defendant challenged juror Audrey Russell for cause based upon her employment relationship with the State. Russell was employed by the Washington State Department of Social and Health Services (DSHS) and was frequently involved with the juvenile court. The court denied the challenge after hearing Russell state that she could be a fair and impartial juror. The appeals court affirmed, stating that:

The decision to deny a challenge for cause lies within the trial court’s discretion, and will not be overturned absent a manifest abuse of discretion.

The defendant also argued that the court erred by admitting evidence that he had previously been convicted for felony possession of marijuana. The court stated:

Whether to admit the evidence . . . was a decision within the trial court’s discretion, and we will not disturb that decision absent a clear showing that discretion was abused.


Opponents of judicial discretion . . . have used strong words against it. Lord Camden said that “The Discretion of A Judge Is The Law of Tyrants,” and declared that “[i]n the best [of times] it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature can be liable.” . . . [Discretionary decision making gives judges] unchecked (and largely uncheckable) power. [T]he legal system cannot fully control such power and indeed is not designed to do so. These are frightening possibilities, making our hesitation about the exercise of discretion . . . understandable. [We] fear that power will be exercised arbitrarily.

For a contrary opinion, see Kenneth Culp Davis, *Discretionary Justice* 19 (1954):

Rules will not suffice. Rules must be supplemented with discretion. When discretion shrinks too much, affirmative action is needed to
recreate it. For many circumstances the mechanical application of a rule means injustice; what is needed is individualized justice, that is, justice which to the appropriate extent is tailored to the needs of the individual case. Only through discretion can the goal of individualized justice be attained.

3. Do judges try to follow the law? Granting broad discretionary power to the trial judge obviously assumes that the trial judge will follow the law and act in good faith when applying it. Do you think this idealistic view of the “neutral” judge is realistic? Consider the findings of H. Laurence Ross & James P. Foley, Judicial Disobedience of the Mandate to Imprison Drunk Drivers, 21 LAW & SOCIETY REV. 315 (1987). They studied whether judges in Indiana and New Mexico were following state laws requiring repeat drunk driving offenders to serve mandatory jail time. In New Mexico, judges actually sentenced the defendants to the mandatory jail time in 45% of cases. In Indiana 64% of judges imposed the required jail time.

[D] THE CONTEMPT POWER

One way a judge enforces obedience to his or her orders is with the contempt power. The contempt power gives the judge the ability to imprison or fine someone who is misbehaving during trial.

18 U.S. CODE § 401. Power of Court. A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
(2) Misbehavior of any of its officers in their official transactions;
(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Under this standard, mere disrespect shown toward a judge is not contempt. Misbehavior must amount to either a direct disobeyal of a court order or a threat to obstruct the administration of justice, before it becomes contemptuous. Exactly when heated comments by attorneys become contemptuous is an impossible line to draw. Some appellate courts have upheld contempt orders against an attorney for engaging in acts of disrespect such as belligerently insulting the judge while standing with arms folded and an insolent facial expression, or referring to a judge as a “lying incompetent ass-hole.”17

The judge’s power extends over attorneys, witnesses, and others directly involved in the trial, and also to the audience or others who are in the courtroom or so near thereto that their behavior can interfere with the trial. For example, the judge can hold an attorney in contempt based either on courtroom conduct, e.g., repeatedly disobeying the court’s request not use the

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phrase “baby-killing” while representing abortion protestors,\(^\text{18}\) or on conduct outside the courtroom, e.g., harassing the opposing party in a custody dispute in the hallway for “hiding the child.”\(^\text{19}\) The judge can also hold in contempt a member of the audience, for e.g., slouching in his seat instead of rising when the judge entered the courtroom,\(^\text{20}\) or one of the parties themselves, e.g., disrupting closing arguments by shouting about constitutional rights.\(^\text{21}\) This kind of contempt is often referred to as criminal contempt, because it involves the judge punishing someone for misbehavior.

A second kind of contempt is called civil contempt, and is used not as punishment but to coerce a participant in the trial to cooperate. A civil contempt order must include a way for the contemnor to purge him-or herself of the contempt by complying with the court’s orders. It is most commonly used for recalcitrant witnesses.

28 U.S. CODE § 1826(a). Recalcitrant Witnesses. Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

1. the court proceeding, or
2. the term of the grand jury including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

NOTES

1. **Is a criminal contempt defendant entitled to a jury trial?** Recall that anyone charged with a serious offense is constitutionally entitled to a jury trial. Does this include being charged with criminal contempt? It would if the potential sentence were more than 6 months, which is why contempt sentencing laws universally set a maximum sentence of 6 months. That leaves the defendant entitled only to a bench trial. Even that trial is usually dispensed with, at least if the misbehavior occurred in the actual presence of the judge. No trial is necessary if the judge personally saw or heard the conduct constituting the contempt. Fed. R. Crim. P. 42.

2. **Reliance upon legal advice not a defense.** In *United States v. Underwood*, 880 F.2d 612 (1st Cir. 1989), the court found a witness guilty of criminal contempt for refusing to testify despite an order to do so. The witness had

\(^{18}\) Zal v. Steppe, 968 F.2d 924 (9th Cir. 1992).


\(^{20}\) United States v. Abascal, 509 F.2d 752 (9th Cir. 1975).

\(^{21}\) United States v. Ruggiero, 835 F.2d 443 (2nd Cir. 1987).
tried to claim a Fifth Amendment right not to incriminate himself despite the fact that he had been given immunity. On appeal, the defendant argued that his refusal to testify was not willful because he relied in good faith upon his counsel’s advice that the subpoena was unlawful and that he must refuse to testify in order to preserve the issue for appeal. The court rejected this defense, pointing to the universal rule that anyone subject to a court order must abide by its terms or face criminal contempt, even if they think the order is unlawful. An attorney may not exculpate a client of contempt by advising the client to disobey an order of the court because the judge is “wrong.”

3. Disrespect. In basketball, merely arguing a call loudly with the referee can draw a technical foul. What about at trial? The majority rule is that mere disrespect and criticism are not contempt. Conduct does not become contemptuous until it actually obstructs justice. Consider Ronald J. Rychlak, Direct Criminal Contempt and the Trial Attorney: Constitutional Limitations on the Contempt Power, 14 AM. J. TRIAL ADVOC. 243 (1990):

The power of contempt was not fashioned to stifle the search for truth through adversary proceedings; rather it was designed to preserve it by punishing actual, material obstruction of these proceedings. Thus, in order to preserve the vigorous representation necessary for our adversarial system to work, attorneys must be free to operate without the threat of a contempt citation. When the alleged contempt is committed by a lawyer representing a client, the courts must be especially careful not to confuse vigorous advocacy with contemptuous behavior. In situations of alleged lawyer contempt, the need to give uninhibited effect to the sixth amendment right to the assistance of counsel requires a clear showing of actual obstruction of justice. . . . When the conduct takes place in the courtroom, especially when the issue involves an attorney’s zealous argument, obstruction should be the key issue. Discourteous conduct could become an obstruction to court proceedings at some point, but a court should not consider all discourteous conduct contemptuous. If no obstruction has occurred, the need for use of the contempt power is lacking.

There are several alternatives to the contempt power which can be used to maintain order. Attorneys do not usually want to alienate judges before whom they may again appear. That concern, coupled with a caution from the judge, should control most attorneys. When tempers flare and cautions do not suffice, judges can call a recess to allow for cooling down. If there is a concern over how certain conduct has impacted on the jury, the judge can instruct the jury to disregard the information. If the court is concerned about disrespect damaging its moral authority, the judge can publicly chastise such behavior. These alternatives should be sufficient to control the courtroom in almost all cases. In fact, the experience under the federal rule suggests that courts have encountered no significant problem from a more limited contempt power. When these alternatives do not work, actual obstruction is probably taking place, and contempt would then be available.
See also State ex rel. Picerno v. Mauer, 920 S.W.2d 904 (Ct. App. Mo. 1996) (attorney properly held in contempt who walked out of courtroom after judge refused to grant continuance was going beyond disrespect; conduct affected trial). A few jurisdictions expressly extend the contempt power to conduct that diminishes respect for the court. See, e.g., Cal. Penal Code § 166(a)(1); N.C.Gen. Stat. § 5A-11(a)(2).

[E] DISRUPTIONS

The judge’s power to control the courtroom extends to regulating the conduct of members of the audience and virtually anyone else in the vicinity of the courtroom. The following case is illustrative:

STATE V. FRANKLIN
327 S.E.2d 449 (W.Va. 1985)

Larry Dale Franklin was [convicted] for the felony charge of driving under the influence of alcohol, resulting in death. . . . Shortly after the automobile accident that killed Mr. Moss, a national organization to curtail drunk driving established its first chapter in West Virginia in our eastern panhandle. This organization campaigns under the acronym MADD, which stands for Mothers Against Drunk Drivers. Sheriff Kisner of Berkley County became MADD’s first president.

During voir dire on the first day of Mr. Franklin’s trial a lady who had been summoned for jury duty appeared at the bar of the court wearing a large, bright yellow lapel button on her blouse. Imprinted on this button were the capital letters “MADD”. This lady, Eileen Cramner, explained that as she entered the courthouse a gentlemen in uniform, subsequently identified as Sheriff Kisner, handed her the “MADD” button and told her where to sit. Although she was immediately excused from jury duty and the sheriff was censured by the court for his partisan activity, the sheriff and other adherents of MADD remained highly visible in the courtroom throughout the three-day trial. Counsel for the defense repeatedly requested a mistrial or alternatively asked the court to order the removal of MADD buttons, or the spectators wearing them, from the courtroom; however, no further action was taken. Indeed, from ten to thirty MADD demonstrators remained in court throughout the trial and sat directly in front of the jury. Some cradled sleeping infants in their laps and all prominently displayed their MADD buttons.

The appellant alleges that it was reversible error for the court to deny his motion for a mistrial because of the presence and activities of the representatives of Mothers Against Drunk Drivers. He asserts that his right to a fair trial by an impartial jury was denied him. This Court, under the circumstances of this case, agrees.

W. Va. Const. art. III, § 14 is a clear constitutional mandate that requires an open public trial in every criminal case. This provision guarantees, both to the accused and to the public, that criminal trials are conducted unabashedly, openly and fairly. But we are concerned that the right of public access to a criminal trial be coordinated with the constitutional right of a defendant to a fair trial. . . . An important element in this process is insuring
that the jury is always insulated, at least to the best of the court’s ability, from every source of pressure or prejudice.

In State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982) the . . . Court noted:

The defendant’s argument could be made as to the attendance of the general public since their presence could arguably demonstrate community hostility. Of more direct analogy would be the presence of females at a rape trial or the presence of the victim’s family and relatives at any criminal trial. We must assume that a jury has the fortitude to withstand this type of public scrutiny, and cannot presume irreparable harm to the defendant’s right to a fair jury trial by the presence of spectators who may have some type of a social identity with the victim of the crime.

However, the Richey holding is inapplicable to the facts here. In this case the spectators were clearly distinguishable from other visitors in the courtroom and, led by the sheriff, they constituted a formidable, albeit passive, influence on the jury. Indeed, the court’s cardinal failure in this case was to take no action whatever against a predominant group of ordinary citizens who were tooth and nail opposed to any finding that the defendant was not guilty. This Court quite simply cannot state that the mere presence of the spectators wearing MADD buttons and the pressure and activities of the uniformed sheriff leading them did not do irreparable damage to the defendant’s right to a fair trial by an impartial jury. Indeed, it constitutes reversible error.

NOTE

1. Hostile courtroom atmosphere. State v. Richey, cited above, suggests that the judge is powerless to take action in response to a hostile atmosphere in the courtroom that is merely the result of community outrage at the crime or other event being litigated. Not all courts agree. In Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991), the defendant had been convicted of killing a prison correctional officer. The case was tried in the small rural community in which the prison was located, and was attended by a large number of prison guards in full uniform. Fifty-four potential jurors were excused because they, a relative, or a close friend worked in the prison. The court held that the presence of the officers threatened the essence of the Sixth Amendment right to be tried by a panel of impartial jurors whose verdict is based on the evidence, rather than community sentiment. The court reversed the conviction:

Viewing the totality of the circumstances, we have no choice but to conclude that there was "an unacceptable risk [of] impermissible factors coming into play." Holbrook v. Flynn, 475 U.S. at 570, 106 S. Ct. at 1346. The officers in this case were there for one reason: they hoped to show solidarity with the killed correctional officer. In part, it appears that they wanted to communicate a message to the jury. The message of the officers is clear in light of the extensive pretrial publicity. The officers wanted a conviction followed by the imposition of the death penalty. The jury could not help but receive the message.

Defendant-Appellant, Edward H. Collins, appeals from an order finding him in direct criminal contempt of court and sentencing him to 180 days in the De Kalb county jail. When the circuit court of De Kalb county was called to order at 9 a.m. on April 20, 1976, defendant was seated in the second row of the courtroom without any clothing; his clothes were strewed on the floor by his feet. At this time there were approximately 100 people in the courtroom. After the judge took his place on the bench he ordered defendant removed from the courtroom [and later in the day] ordered that he be incarcerated in the county jail for a period of 180 days. . . . The contempt order reads in pertinent part:

4) That as a direct result of this misbehavior by Edward Collins, various defendants and/or onlookers left the Courtroom. Further as a direct result of Edward Collins’ wilful behavior aforesaid, laughter and other noises caused disorder in the Court and its administration of justice and further caused the Court to be embarrassed.

While defendant’s removal prevented a continuation of the disturbance it was his initial act of appearing naked in the courtroom which caused the disturbance for which the contempt order and sentence were imposed. The delay between defendant’s act and the entering of the contempt order was reasonable under the circumstances: The defendant had to be clothed, lest the disturbance continue and the judge, to restore order, proceeded to conduct the business of the court as usual.

§ 1.05 COURTROOM CUSTOMS AND ETIQUETTE

Just below the surface of the law lie local practices concerning courtroom customs and etiquette. These “rules” are usually unwritten, and may vary widely from courtroom to courtroom even in the same county. Local custom may govern where you sit, how free you are to move around the courtroom when questioning witnesses, how exhibits are handled and stored, the propriety of socializing with the trial judge, and a host of other factors. If we were to write them down, a typical set of rules of courtroom etiquette might read as follows:23

Model Rules of Courtroom Behavior

A. In General.

1. Food, beverages, and tobacco. — Neither food nor beverages shall be brought into the courtroom; tobacco in any form shall not be used. No gum may be chewed.

22 At the conclusion of one recent court appearance, the author and the other attorneys were invited by the judge to join him and some local college students for pizza.

23 These model rules are based on my own experience, the Rules for Uniform Decorum in the District Courts of Minnesota, and Catherine T. Clarke, Missed Manners in Courtroom Decorum, 50 Md. L. Rev. 945 (1991).
§ 1.05 COURTROOM CUSTOMS AND ETIQUETTE

2. Disconcerting or distracting activities— There shall be no unnecessary conversation, loud whispering, newspaper or magazine reading or other disconcerting or distracting activity by anyone in the courtroom during the progress of the trial.

3. Laptop computers, cellphones, electronic equipment. Laptop computers, handheld P.D.A’s, and cell phones may be brought into the courtroom. Cell phones must be turned off. Laptops and PDAs may not be used except by lawyers actually involved in the trial or with the permission of the judge. No one may bring any music playing device or headphones into the courtroom.

4. Behavior of persons in the courtroom. — Dignity and solemnity should be maintained in the courtroom at all times by attorneys, court officers, witnesses and other persons; unseemly behavior shall be grounds for removal from the courtroom.

5. Clothing. — Attorneys shall be suitably attired in conservative business clothing. Attorneys shall see that their witnesses are dressed appropriately. No one shall wear a hat or other headgear in a courtroom unless for religious purposes.

6. Advising clients and witnesses of formalities — The lawyers should advise their clients and witnesses of the rules governing proper courtroom behavior, avoiding embarrassment to all concerned.

B. Beginning of Trial

7. Attorneys.— Attorneys shall be at their tables at least five minutes before the start of any trial or hearing. Coats, briefcases, and other objects unnecessary to the trial shall be left in the attorneys’ coat room. If other proceedings are taking place in the courtroom, the attorneys shall remain in the audience until they can enter beyond the railing without disrupting the proceedings.

8. Seating; furniture. — Plaintiff’s counsel shall take the table nearest the jury. Only the attorneys actually trying the case, the client, and one investigator or assistant shall sit at counsel table. Other members of the bar may sit in chairs located inside the railing if doing so will not disrupt proceedings. Witnesses, family members, paralegals and others who are not members of the bar must sit in the audience. The furniture in the courtroom may not be rearranged without permission from the court.

9. Appearances. — Prior to the start of the trial, the attorneys must provide the courtroom deputy and the court reporter with their names, the correct spelling of their names, and whom they represent. If more than one attorney will be conducting portions of the trial on behalf of a single party, they must inform the deputy and court reporter concerning which attorney will be conducting which portion of the trial.

10. Formalities in opening court — At the opening of each court day, the bailiff shall, by a rap of the gavel or other signal, direct all present to stand, and shall say clearly and distinctly:

Everyone please rise! Hear Ye — Hear Ye — Hear Ye! The District Court of the County of __________, State of __________ is now open for the conducting of business. The Honorable Judge __________ presiding.

C. During Trial

11. Duties of bailiff — It shall be the duty of the bailiff to maintain order in and around the courtroom at all times; this includes the duty to admit persons to the courtroom and direct them to seats, and to refuse admittance to the courtroom in such trials where the courtroom is occupied to its full seating capacity.

12. Calling and swearing of witnesses — Witnesses shall gather in the witness room and not in the courtroom. The attorney shall state the name of the witness to be called, and the bailiff shall fetch the witness and escort him or her to the witness stand. The courtroom deputy shall administer the oath, have the witness give the reporter his or her full name, and after being sworn, courteously invite him or her to be seated on the witness stand.

13. Manner of administration of oath or affirmation — The oath or affirmation shall be administered to jurors and witnesses in a slow, clear, and dignified manner. Witnesses when sworn should stand near the bench or witness stand, and the swearing of witnesses should be an impressive ceremony and not a mere formality.

14. Addressing court or jury — Lawyers should rise and remain standing while addressing the court or the jury. In addressing the court, the lawyer should refer to the judge as “Your Honor” or “The Court”. Unless the court otherwise directs, it is not necessary for the attorney to speak from the lectern or podium.

15. Approaching bench — The lawyers should normally address the court from a position at the counsel table. If a lawyer finds it necessary to discuss some question out of the hearing of the jury at the bench, the lawyer may request permission to approach the bench, and, if invited, approach the bench for the purpose indicated. In such an instance, the lawyers should never lean upon the bench nor appear to engage the court in a familiar manner.

16. Examination of witnesses — The lawyers may be seated or stand while examining witnesses. They may move around the courtroom, but shall not approach the witness except when identifying or examining exhibits, or when other circumstances require a modification of the procedure. The lawyer should request permission from the court to approach the witness from the court before doing so.

17. Exhibits — At the beginning of trial, the lawyers shall give the court reporter a list of exhibits they intend to introduce, and the numbers by which they have been marked for identification. Exhibits shall be kept hidden from the jury until such time as they are actually introduced into evidence. If an attorney wishes to use an exhibit in opening statement, permission of the court is required. After an exhibit has been introduced, it shall be left in the custody of the court reporter when not being used by the lawyers.
§ 1.06 THE IDEA OF ADVOCACY

18. **Objections without argument** — Lawyers shall state their objections and the grounds therefor concisely and without argument; if there is to be an argument or offer of proof, it shall be made out of the hearing of the jury.

19. **All remarks addressed to the bench.** — When speaking to an objection or any other point of law, the lawyers shall address all remarks to the bench, and not address each other directly.

20. **Instructing the court reporter.** — The judge shall be in complete charge of the trial at all times and shall see to it that everything is done to obtain a clear and accurate record of the trial. Only the judge may give any directions to the court reporter concerning the record. If an attorney wants something reflected in the record, the attorney shall make his or her request to the court.

21. **Courtesy toward opposing counsel and witnesses** — The lawyer shall treat opposing counsel and witnesses with courtesy and respect.

22. ** Interruption of other lawyers** — The lawyers as far as possible shall refrain from interrupting each other or speaking at the same time in order to assist in making a proper record. Interruption for the purpose of making an objection is permitted.

23. **Approaching the jury.** — The lawyers shall not approach the jury except unless necessary in connection with the handling of an exhibit. The lawyer should request permission to approach the jury from the court and explain the reason therefor.

24. **Familiarity with witnesses, jurors or opposing counsel** — During trial, lawyers shall not exhibit undue familiarity with witnesses, jurors or opposing counsel, and the use of first names shall be avoided except when referring to children. In arguments to the jury, no juror should be singled out and addressed individually.

25. **Demonstrations in connection with verdict or testimony** — There shall be no demonstration in the courtroom in connection with the rendering of a verdict or other decision, nor any outburst, disruption or applause in connection with any testimony. It is the obligation of the attorneys to advise their clients and other interested persons of this rule.

§ 1.06 THE IDEA OF ADVOCACY

[A] THE OBLIGATION TO BE AN ADVOCATE

**INDIANA RULES OF PROFESSIONAL CONDUCT**

As a representative of clients, a lawyer performs various functions. . . . As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. . . . The advocate’s task is to present the client’s case with persuasive force.

25 See, e.g., *State v. Adams*, 439 S.E.2d 760 (N.C. 1994) (deliberately trying to irritate witness to see how he would react amounted to prosecutorial misconduct).
An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expediens, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

FERGUSON V. MOORE
39 S.W. 341 (Tenn. 1897)

[Defendant was found liable for seducing the plaintiff and then abandoning her when she was pregnant and refused to get an abortion. On appeal, he] assigned as error that counsel for plaintiff, in his closing argument, in the midst of a very eloquent and impassioned appeal to the jury, shed tears, and unduly excited the sympathies of the jury in favor of the plaintiff, and greatly prejudiced them against defendant. Bearing upon this assignment of error we have been cited to no authority, and after diligent search we have been able to find none ourselves. The conduct of counsel in presenting their cases to juries is a matter which must be left largely to the ethics of the profession and the discretion of the trial judge. Perhaps no two counsel observe the same rules in presenting their cases to the jury. Some deal wholly in logic, argument without embellishments of any kind. Others use rhetoric, and occasional flights of fancy and imagination. Others employ only noise and gesticulation, relying upon their earnestness and vehemence instead of logic and rhetoric. Others appeal to the sympathies — it may be the passions and peculiarities — of the jurors. Others combine all these with variations and accompaniments of different kinds. No cast-iron rule can or should be laid down. Tears have always been considered legitimate arguments before a jury, and, while the question has never arisen out of any such behavior in this court, we know of no rule or jurisdiction in the court below to check them. It would appear to be one of the natural rights of counsel which no court or constitution could take away. It is certainly, if no more, a matter of the highest personal privilege. Indeed, if counsel has them at command, it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises, and the trial judge would not feel constrained to interfere unless they were indulged in to such excess as to impede or delay the business of the court. This must be left largely to the discretion of the trial judge, who has all the counsel and parties before him, and can see their demeanor as well as the demeanor of the jury. [T]his case . . . was, we think, an eminently proper occasion for their use, and we cannot reverse for this.
§ 1.06 THE IDEA OF ADVOCACY

[B] ETHICAL LIMITS TO ZEALOUS ADVOCACY

American College of Trial Lawyers
CODE OF TRIAL CONDUCT

In advocacy before a court or other tribunal, a lawyer has the professional obligation to represent every client courageously, vigorously, diligently and with all the skill and knowledge the lawyer possesses. It is both the right and duty of the lawyer to present the client’s cause fully and properly, to insist on an opportunity to do so and to see to it that a complete accurate case record is made without being deterred by any fear of judicial displeasure or punishment. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of the attorney does not permit, much less does it demand of a lawyer for any client, violation of law or any manner of fraud or chicanery. The lawyer must obey his or her conscience and not that of the client.

INDIANA RULES OF PROFESSIONAL CONDUCT

Rule 3.3 Candor Toward the Tribunal.

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;
(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act against a tribunal by the client;
(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6 [on Lawyer-Client Confidentiality].

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

Rule 3.4 Fairness to Opposing Party and Counsel. A lawyer shall not:

(a) Unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material

26 Portions of this section have previously been published as J. Alexander Tanford, The Ethics of Evidence, 25 Am. J. Trial Ad. 487 (2002).
having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; [or]

(e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

Most writings on the ethics of advocacy approach the issue as an analysis of rules. Lawyers are taught and socialized to sharply distinguish “rules” from “morality,” and think of ethics as just another set of rules. They parse the text of the Rules of Professional Conduct, engage in statutory interpretation, and pose questions of ethics solely in terms of whether an attorney is likely to be successfully disciplined. Given the unlikeliness that an attorney will be disciplined, this seems a poor way of approaching an issue of ethics.

Ethics are not rules, of course. They are moral principles that guide our lives as attorneys. The decisions we have to make in litigation are too variable and complex to be reduced to rules. The Rules of Professional Conduct may be the “law for lawyers,” clearly defining the circumstances under which we can be found guilty of improper conduct and disbarred, but they are not coextensive with the concept of legal ethics. If we are to live lives as ethical litigators, we must make decisions based on more than the Rules — we must (and do) rely on our experience, judgment, tradition, moral ideals, and character, guided by moral principles that are supposed to push us in the direction of good lawyering.

The problem with thinking of ethics as just a set of rules arises most clearly when the Rules of Professional Conduct do not explicitly prohibit a proposed course of questionable conduct. In one memorable case in my early years, I prosecuted a 50-year-old prostitute for robbery after she hit one of her johns over the head with a lamp and stole his wallet. Before trial, the defense attorney had gotten her a part-time job at the New York Public Library as part of a drug-rehabilitation program. At trial, she showed up wearing a brown tweed suit, with her graying hair in a bun, took the stand and testified that she was a librarian. The jury looked at me like I was insane for accusing this nice old lady of being a prostitute. Did the defense attorney behave unethically? There is no ethical rule governing misleading clothing, nor getting a client a last-minute job, nor telling them to wash the dye out of their hair.


29 See HENRY DRINKER, LEGAL ETHICS 2 (1953) (quoting Lord Moulton: “True civilization is measured by the extent of Obedience to the Unenforceable”).
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and look their age, yet the defense attorney deliberately hoodwinked the jury and caused them to return a false verdict.

In the absence of broader ethical principles, lawyers are drawn to the position that anything that might increase their chances of winning that is not expressly prohibited, is permitted — even required. We may end up saying vaguely that “[t]here is no Model Rules provision that expressly proscribes trickery” other than the rule against knowing use of false evidence, and proceeding no further, except maybe to engage in epistemological debates on when a lawyer really “knows” that evidence is false. Is a little knowledge enough, or must the lawyer know falsity beyond a reasonable doubt? Can lawyers, like ostriches, hide their heads in the sand to avoid knowing something? The problems of lawyers presenting misleading or incomplete cases to try to win unwarranted verdicts goes unexamined.

It is absurd to suggest that trial lawyers are free to subvert justice to their hearts’ content as long as they can tell the disciplinary commission with a straight face that they did not “knowingly” use any false evidence. Advocacy is not a dichotomous ethical universe in which whatever is not expressly prohibited must be permitted. Arguments that a lawyer is required to mislead a jury out of loyalty to a client, or that deliberate evidentiary deception constitutes zealous advocacy within the bounds of law, are unpersuasive. One should be able to be loyal to a client and a zealous advocate without defrauding the jury.

A fair reading of the Rules of Professional Conduct cannot possibly produce the conclusion that the overriding ethical principle of advocacy is “anything goes.” A lawyer is not given carte blanche to ask trick questions, present unreliable or misleading evidence, and make any argument however deceitful, in the name of client loyalty and zealous advocacy. As one court stated, just before suspending an attorney: “Attorneys must ‘possess a certain set of traits — honesty and truthfulness, trustworthiness and reliability, and a professional commitment to the judicial process and the administration of justice.’”

The Rules themselves place clear limits on advocacy. They do not demand unrestrained zealous advocacy designed to win at all costs, but zealous advocacy within the bounds of law. Rule 8.4(c) sets a perfectly clear ethical limit:

It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Rule 3.4 (e) provides:

A lawyer shall not in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.

Ethical Considerations promulgated under the former Code of Professional Conduct reminded lawyers they were supposed to avoid bringing about unjust

results\textsuperscript{32} or inflicting needless harm on others.\textsuperscript{33} Lawyers owe a duty to the system of justice to utilize procedures that command public confidence and respect.\textsuperscript{34} 

Taken together, these statements reflect an ethic quite different from the amoral proposition that an advocate's primary duty is to win the case for the client, constrained only by the prohibition against knowingly using false evidence. They direct an advocate to act in good faith, to abide by rules of evidence and procedure, to avoid conduct that will deceive a jury, and to limit the use of evidence to that which the advocate reasonably believes is accurate. A lawyer is not obliged or even permitted to misleading the jury with unreliable and incomplete evidence, but must have a good faith basis for that evidence before presenting it in the first place.

The good-faith principle is a two-part standard under which an advocate must have both a \textit{factual} and a \textit{legal} basis for alluding to, asking about, offering, or relying on particular evidence. To have a good-faith factual basis, the attorney must have both a subjective belief that evidence represents the true recollection of a witness, and objective support for that belief, such as a deposition, statement, report, or interview notes. To have a legal basis, the attorney must have a reasonable legal argument that it is admissible under the rules of evidence and procedure. It is unethical to offer inadmissible evidence on the off-chance that your opponent will not object or the judge will rule unexpectedly in your favor.\textsuperscript{35} The attorney must be able to point to a rule of evidence or procedure that plausibly supports the item's admissibility, and also have a subjective belief that the evidence properly falls within the rule.

\textbf{NOTE}

\textit{Are there different ethical standards for criminal defense attorneys?}

A number of commentators suggest that a criminal defense attorney is held to a lower ethical standard than other attorneys. \textit{E.g.}, Monroe Freedman, \textit{Lawyers' Ethics in an Adversary System} 37 (1975); Murray L. Schwartz, \textit{On Making the False Look True and the True, False}, 41 Sw. L.J. 1135, 1145–47 (1988); Charles W. Wolfram, \textit{Client Perjury}, 50 S. Cal. L. Rev. 809, 854–55 (1977). The suggestion is implausible. There is certainly no general ethical principle permitting attorneys to practice deception, fraud, and trickery in order to further the important social goal of returning violent criminals to the streets regardless of guilt. Nor does a criminal defense exemption exist in the Model Rules. The requirements that advocates confine their zealotry to the bounds of law, avoid using false evidence, refrain from acts of fraud, and abide by the good-faith principle make no distinction between criminal and civil cases.

\begin{itemize}
\item \textsuperscript{32} EC 7-14, A.B.A. Model Code of Prof. Resp. (1969).
\item \textsuperscript{33} EC 7-10.
\item \textsuperscript{34} EC 7-20.
\item \textsuperscript{35} By the same token, it is not unethical in hindsight to have attempted to introduce evidence you thought was admissible just because an objection was sustained. Lawyers and judges will frequently have legitimate disagreements on the admissibility of evidence.
\end{itemize}
§ 1.06 THE IDEA OF ADVOCACY

The claim of a special rule for criminal lawyers also is sometimes tied to the defendant’s constitutional right to the effective assistance of counsel. For example, Horgan argues that criminal defense attorneys are specially exempt from the rule requiring that attorneys disclose fraudulent evidence because “trust between attorney and client . . . is the “cornerstone of the adversary system and effective assistance of counsel.” Robert C. Horgan, Making Black and White Out of Gray: An Attorney’s Duty to Investigate Suspected Client Fraud, 29 New Eng. L. Rev. 795, 853–55 (1995). The problem is that this argument defines “effective assistance” as measured only by whether a criminal defendant is acquitted, irrespective of whether the accused committed the crime. Therefore, the lawyer must be allowed to whatever is necessary to get his guilty client acquitted. This is a distortion of the right to counsel and misperceives the professional advocate’s function. We are obliged to use all honorable means to present the most favorable picture possible so that no defendant is convicted without putting the prosecution to its proof, but we are not permitted to go to any lengths in an effort to see that a defendant is acquitted. Thornton v. United States, 357 A.2d 429, 437–38 (D.C. App. 1976).

[C] SOME BASIC PRINCIPLES OF ADVOCACY

A substantial part of this book is concerned with the techniques of effective advocacy at various stages of trial. However, there are some basic principles of advocacy that apply to all parts of your presentation, which you should begin thinking about.36

- Prepare! Prepare! Prepare! Good advocacy is 90% preparation and only 10% talent.
- 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.
- Keep it simple. Have a few main points, make sure the jury understands them, and repeat them at every opportunity. Forget the nuances.
- 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 client and witnesses and depersonalize your opponent’s. Use colorful labels as mnemonic devices for the main facts.
- Be entertaining. This does not mean that you should tell jokes during a wrongful death case, but that you should structure your

presentation in ways that will capture and hold the jury’s attention. Use exhibits, movies and charts. Skip boring stuff. Include gestures and demonstrations.

- Corroborate rather than repeat. Exact repetition is boring, but corroboration from several angles is convincing. Corroboration with documents, photos, and diagrams is especially effective.
- Use stories and anecdotes to illustrate your main points.
- Be positive rather than negative. Emphasize the strengths of your case, rather than the weaknesses of your opponent’s.
- Ignore jurors who are going to vote against you. You lack the power to make them change their minds, and attempting to do so will probably only harden their adverse stand. Instead, present your case to the nice jurors who are already inclined to vote in your favor. Make sure they understand your position, will remember it in the jury room, and will be able to articulate reasons why it is a good explanation of the facts.

§ 1.07 COURTROOM STYLE

What makes a good public speaker, and how do you become one? Some are born, of course, but what about the rest of us? There are no clear answers. However, the following general suggestions may help you think about how to present yourself effectively in a courtroom.

- **Be yourself.** Most of you are not professional actors, so don’t try to be. If you try to act like someone else, you will probably appear insincere. Think about how you naturally argue when you are involved in a lunchroom debate — are you emotional or logical, loud or quiet? Do you gesture with your hands or draw diagrams on paper? Do you tend to suggest compromises or argue for a position? Do you support your arguments with statistics or with stories about your family experiences? You will be most comfortable, coherent and persuasive if you work within your natural style, rather than trying to be someone else.

- **Be professional.** The second most important rule is probably “Thou shalt not try to be a country lawyer.” Jurors will be quick to detect the insincerity. They expect you to be a professional attorney, not Goober down at the feed store.

- **Be confident.** Know the case well enough that you are confident of your grasp of the facts and law. Convey that confidence to the jury.

- **Vary the volume, pitch and pace of your voice.** Nothing is more boring than a monotonous delivery. You can slow down or insert pauses for emphasis, speed up to convey excitement, raise your voice in indignation at an injustice, or drop to a whisper when disclosing a key fact.

- **Choreograph your presentations.** The courtroom is your stage, and you should think about where you want to stand and when you
will move. You can move in or out of the jury’s view, change positions during transitions, put your arm on your client’s shoulder, stand at a chalkboard like a teacher, and employ a host of other stage techniques to complement your verbal presentation.

- **Use visual aids.** Even a dull speaker is more entertaining with well chosen visual aids.
- **Limit your use of notes.** The more tied you are to your notes, the less spontaneous and heartfelt will be your presentation. Use the minimum number of notes that still enable you to remember exactly what you wanted to do.
- **Watch good lawyers.** Watch the good lawyers and see what they do. How long are their presentations? How often do they use visual aids, gestures, or tell stories to illustrate their points? How do they move around the courtroom? Do not try to copy anyone, but learn from what they are doing and see if you can incorporate any of it into your natural style. Check the law school library media department; they probably have dozens of videotapes of demonstrations by the country’s best litigators.
- **Read.** The library is full of literature on trial techniques and tactics containing examples of how good lawyers phrase their questions and present their arguments. Many of these are cited in the notes throughout this book.37

### NOTE

**Juror reaction.** How do jurors react to the various styles of courtroom behavior? James P. Brown, was senior vice president of a savings and loan association when called to serve jury duty. He later wrote an article called *A Juryman’s View*, 2 Ga. St. B. J. 225, 227–29 (1965):

> The most important persons in the courtroom to the juror are the attorneys who participate in the trial.

> In all situations involving human beings, each person and each group of persons chooses a leader for guidance, and in a court of law the attorney is the leader. Invariably, the remarks in the jury room center on the impression made by the attorney. The verdict of the jury in every case reflects the skill of the attorney in presenting the case. The attorney is always on the spot and is the focus of attention; the attorney’s appearance, manners, logic, and what the attorney puts value upon are the factors that bring jurors to conclusions.

> Case Situation in Point: A female witness is frightened and balky. The male attorney, with his obvious superior intellect, intimidates and finally traps the witness. He infuriates her as he calls her time and again by her first name and then by her nickname. He belittles her beyond reason. He struts and appears to enjoy confusing the witness.

37 Probably the best are the Art of Advocacy series from Matthew Bender & Co., a set of volumes with annotated examples of all aspects of civil trial practice; and the similar Criminal Law Advocacy series, also from Matthew-Bender, which covers criminal trials.
Later, in the jury room, the entire group expresses disapproval of the attorney's methods. Though not on trial, the attorney was tried by the jury, a verdict reached, and his client suffered from his behavior.

No law, written or unwritten, infers or states that an attorney is to be on trial with the client; but to the juror, who must reach the verdict, the attorney is always on trial consciously or unconsciously.

The Juror Evaluates Attorneys by:

Their manners
Their sincerity
Their familiarity with all aspects of the case
Their attention to details
Their consideration of others
Their attire and general appearance
Their speech
Their method of communication
Their estimate of the jury's intellect

A juror reaches a verdict from the logical factors and from many intangible sources including the juror's background, and perhaps from the mysterious reason that caused the juror to be chosen for the particular case. However, what the attorneys did, said, or what they did not do or say overpowers other factors and influences the jurors' decision. In that dramatic moment when the verdict of the jury is read, the juror recalls the points won and lost by the attorneys.

§ 1.08 THE PSYCHOLOGY OF JURY TRIALS

In the 1950's, a pioneering team of lawyers and social scientists undertook the University of Chicago Jury Project to systematically study the jury decision process. Since that time, social psychologists have studied the jury trial system in great depth. Using mock juries and simulated trials, they have investigated what constitutes effective communication, what influences jurors, and how jurors reach decisions. If you expect to be a good trial lawyer, you must understand what their research has shown.

The consensus among psychologists is:

• Jurors base their decisions primarily on the evidence, and not on extraneous factors
• Jurors are not easily tricked or persuaded by clever tactics or rhetoric
• Jurors give more weight to vivid anecdotes, emotions and personal experiences, and less weight to statistics, science and abstract concepts
• Jurors have difficulty understanding and following the law
• Jurors reach decisions by the “story model” — arranging evidence in the form of a plausible story of human motives and actions,

discarding evidence that does not fit, and picking the closest available verdict.

The most important of these points is that jurors reach decisions by constructing stories, not by engaging in orderly legal analysis. Based on their expectations about what makes a complete story, jurors construct narratives partly from the facts presented and partly from their knowledge of similar events. They arrange this information into a story of motives, actions, and consequences. A story usually comprises a series of discrete episodes. Each episode contains events connected by causal relationships — events produce mental states in the characters which cause them to engage in actions which produce consequences. For example, in a criminal assault case, a juror might construct the following episode: the victim sees his girlfriend dancing with the defendant (initiating event) and becomes angry (mental state); he pulls a knife (action) and causes the defendant to back away (consequence), which leaves the defendant angry and wanting revenge (consequence).

If more than one story emerges, the jurors will tend to accept the one that provides the greatest coverage of the evidence and is the most coherent. Coverage refers to the extent to which the story accounts for the evidence offered at trial. Coherence refers to internal factors: whether the story is internally consistent, plausible, and complete. The greater the coverage and coherence, the more confidence a juror will have that it is the correct story. Only after they have agreed upon a story do jurors attempt to match it with the available verdict categories.\(^{39}\)

Psychologists also have demonstrated that jurors are relatively good at understanding the facts of a case and basing their verdicts on them. Fears that jurors are swayed by emotions or racial prejudices are largely misplaced. Jurors pay attention to evidence, remember most of it, and correct each others’ misunderstandings during deliberations.\(^{40}\) However, not all “facts” are given equal weight. Jurors are disproportionately influenced by vivid anecdotes and concrete examples, tending to assume that these specific illustrations are representative of the universe of similar events. They tend to undervalue abstract information, science, and statistical probabilities. The more important the decision, the stronger is this anti-scientific tendency.\(^{41}\)

Not surprisingly, jurors make stereotypical judgments about the people and things in a trial. Based on their common sense about the way the world works, jurors make assumptions about the character and credibility of witnesses based on factors that might be thought to be legally irrelevant, such as race, class, attractiveness, status, and clothing.\(^{42}\) They have preconceived notions


(often called “schemas”) about what is meant by terms like “supermarket.” Any reference to a supermarket will automatically call up a specific mental image that includes a wealth of details, such as size, location, how crowded it is, and how brightly lit. These mental images are used as shorthand summaries in deciding the facts of a case. If the facts of a case are unclear, because they are poorly presented or both sides have plausible stories, then these biases and attitudes can have a strong influence on a juror’s decision.

Unfortunately, jurors are not very good at understanding and following the judge’s legal instructions. Jury instructions are written in complicated legal language, usually presented orally, and are given at the end of trial rather than the beginning. Jurors may be prohibited from taking notes or asking any questions about the law. Imagine taking an exam based only on a single lecture in which you were not permitted to take notes or ask questions! The difficulty is due in part to the fact that jurors tend to adhere to their preconceived notions of what a typical armed robbery or kidnaping is, and ignore technical legal instructions to the contrary. However, the news is not all bad. Jurors are more likely to follow the law if they hear it several times, see it in writing, and have it explained in plain English using analogies to common experience.

Finally, it is probably reassuring to know that jurors are not swayed by extralegal tricks, techniques and rhetoric of lawyers. They base their decisions on the merits of the case as filtered through their common sense.