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AN INTRODUCTION TO TRIAL LAW*

J. Alexander Tanford**

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I. INTRODUCTION

Is there a comprehensive system of ordinary legal rules that provides a regulatory framework within which trials must be conducted? The answer would seem to be "yes"; a number of sources gather together appellate cases and statutes that declare how portions of a trial are to be conducted, and define them loosely as trial law. However, this body of law needs to be more comprehensively and systematically described and analyzed if it is to be effectively used by the profession and scrutinized by scholars. My purpose in this article is just that: to begin to define, classify, and analyze the major doctrines that can be said to make up trial law.

In general terms, I include within the definition of trial law both procedural and substantive issues concerning the proper way to conduct a trial (either civil or criminal). These issues address the questions of what procedures should be followed, how the participants are to comport themselves during trial, and what topics the participants may talk about. Many issues

1. See, e.g., Alschuler, Courtroom Misconduct by Prosecutors and Trial Judges, 50 Tex. L. Rev. 629 (1972); F. BUSCH, LAW AND TACTICS IN JURY TRIALS (1959); J. LAWLESS, PROSECUTORIAL MISCONDUCT (1983); J. TANFORD, THE TRIAL PROCESS: LAW, TACTICS AND ETHICS (1983); S. THOMPSON, LAW OF TRIALS IN ACTIONS CIVIL AND CRIMINAL (1889). There also are several books in the Matthew-Bender "Art of Advocacy" series, each of which contains a chapter on the legal doctrines affecting one phase of the trial. Trial law issues are found under several headings in the West key number system, including Criminal Law, Juries, Witnesses, Trials, and Evidence, analyzed in a number of ALR annotations, and discussed briefly in most major law encyclopedias. Cf. Ordover, Persuasion and the Opening Statement, 12 Litigation 12, 13 (1986) (stating that "[t]he law of opening statements ... is what individual lawyers actually do ... and bears little relation to the boundaries set by appellate decisions").

2. The substantive law of crimes, torts, etc., will define what elements of any particular cause of action are material, and that obviously also limits what topics the participants may discuss. However, many questions about what topics may be discussed are not answered by defining the material elements. For example, whether the attorneys, or the judge, or a witness may talk about the consequences of a plea of insanity is not answered in the criminal law's definition of the elements of the insanity defense, but may be answered by looking at the rules of trial law pertaining to relevance, prejudicial effect, and discussing matters not in evidence.
affect trials, such as who has the burden of proof and what the material elements are, but if the solutions vary according to the subject matter of the case, it makes little sense to include them. Rather, trial law focuses on those issues that arise independently of the subject matter of the trial.

An example that should help clarify this distinction can be drawn from the issues concerning the burden of proof. Who has it and how heavy it is will be determined by the substantive law of other fields. The answer will vary depending on whether we are discussing a criminal prosecution, a products liability case, or a sex discrimination case seeking an injunction. Thus, the determination of burden of proof is dependent on the subject-matter of the lawsuit, and I would not include it as an issue of trial law. However, what effect bearing the burden of proof has on a party's position at trial is included. Trial law is interested in answering questions such as whether the party with the burden of proof—whichever party that is, and whatever level of burden is assigned—has the right to open the evidence and give the final argument.

Trial law is comprised in part by the law of evidence and doctrines that overlap other fields, such as constitutional law, torts, and civil and criminal procedure. These include such familiar issues as the procedure for seating an unbiased jury in a death penalty case, the permissibility of leading questions, the use of a "per diem" mathematical formula to calculate pain and suffering, the consequences of inaccurate jury instructions, and the necessity to object and preserve the record for appeal.

But such issues only scratch the surface of the questions that can be asked about proper trial procedures. Trials involve more than just the introduction of evidence, and trial law is more than a particular application of constitutional law, torts, and so forth. There are many issues concerning how to conduct a proper trial that do not implicate any of the doctrines associated with these other fields of law. Should the judge allow attorneys to use voir dire to indoctrinate the jurors? What is the legal effect of the defendant's attorney conceding liability in opening statement? What happens if a prosecutor leaves several prejudicial exhibits—shotguns and knives—in


4. But cf. E. Cleary, K. Broun, G. Dix, E. Gellhorn, D. Kaye, R. Weisnholder, E. Roberts & J. Strong, McCormick on Evidence § 337 (3d ed. 1984) [hereinafter McCormick on Evidence] (summarizing various rules concerning the allocation of burdens of proof, and concluding that "there is no key principle governing the apportionment of the burdens of proof," but not going so far as to conclude it is therefore not helpful to include the question among the concerns of evidence law).
plain view of the jury throughout the testimony? What happens if deliberating 
jurors ask to have parts of the transcript re-read to them?

To help answer each of these questions, and many more like them, there is a large body of common law. I estimate that there are about 300,000 reported appellate trial law cases, a number growing by 5000 new cases each 
year. The appeals courts do not seem to treat trial law issues any differently than other kinds of cases. Appeals based on claims of trial law errors result 
reversal about 20-30% of the time,3 approximately the same reversal rate as for appellate cases generally6 and for evidence cases.7

Although much of trial law is common law, it is far from being exclusively so. A substantial number of jurisdictions have partially codified their 
rules of trial procedure. Most states have codified at least some of their rules of 
trial practice, but few have comprehensive sets of rules as complete and 
as detailed as their rules of pretrial and appellate procedure.8 The overall 
level of codification is similar to that of the law of evidence before the Federal 
Rules.

These statutes and court rules cover everything from trivial matters, such 
as requiring attorneys to wear acceptable business attire,9 requiring parties 
to mark their proposed exhibits in a certain manner,10 and prohibiting attor-
tneys from walking around the courtroom during an opponent’s argument 
to distract the jury,11 to general statements about the scope of a party’s rights

5. The reversal rate is based on a random sample of 692 appellate opinions 
from both state and federal courts in which the reviewing courts decided whether 
allegations concerning improper closing arguments warranted findings of reversible 
error. I found reversal rates of 19% in criminal cases, 30% in civil cases, and 24% 
overall.

6. The general reversal rate was calculated based on a random sample of 
469 opinions from state and federal courts in appeals taken from cases that had been 
tried to a verdict. It did not include appeals from summary judgments or directed 
verdicts, nor from administrative agency decisions. This sample produced reversal 
rates of 17% in criminal cases, 39% in civil, and 27% overall.

7. I looked at a random sample of 210 appellate opinions from state and 
federal cases tried to a verdict in which at least one issue was raised concerning the 
admissibility of evidence. I found a reversal rate of 20% in criminal cases, 23% in 
civil cases, and 21% overall.

8. One result of the lack of systematic attention to trial law by scholars has 
been an absence of articles calling for uniformity in state trial practice rules.

9. E.g., MINN. UNIF. DECORUM 17; WYO. DIST. CT. R. 17E (6th District); 
cf. Jensen v. Superior Court, 154 Cal. App. 3d 533, 537-38, 201 Cal. Rptr. 275, 280 
(1984) (lawyer may wear turban to court; judge cannot dictate manner of dress unless 
it disrupts the administration of justice); see also Gold v. McShane, 74 A.D.2d 860, 
860, 426 N.Y.S.2d 504, 505 (1980) (priest could not wear clerical collar while repre-
senting a defendant at trial).

10. E.g., MINN. CIV. TRIALBOOK R. 40 (use Arabic numerals and prefix Pl. 
or Df.).

11. E.g., WYO. DIST. CT. R. 17X (6th Dist.).
to make opening statements and closing arguments.\textsuperscript{12} Almost every state has codified rules governing \textit{procedural matters}, such as whether counsel have the right to ask questions during jury selection,\textsuperscript{13} whether the jury must be sequestered during trial,\textsuperscript{14} which side presents its evidence first,\textsuperscript{15} whether attorneys may use leading questions,\textsuperscript{16} whether jurors may take notes,\textsuperscript{17} which side argues first and last,\textsuperscript{18} whether a judge may impose time limits on closing arguments,\textsuperscript{19} whether instructions precede or follow closing arguments,\textsuperscript{20} and what happens if jurors have questions during deliberations.\textsuperscript{21} Many states also have codified rules concerning \textit{substantive matters}, such as juror qualifications and the grounds for challenges for cause,\textsuperscript{22} whether law may be discussed in opening statements,\textsuperscript{23} whether counsel may comment on a party's failure to testify,\textsuperscript{24} suggest a formula as a way of calculating pain and suffering,\textsuperscript{25} criticize the law,\textsuperscript{26} state a personal opinion about the case,\textsuperscript{27} read portions of the instructions to the jury during closing argument,\textsuperscript{28} and what exhibits may be taken to the jury deliberation room.\textsuperscript{29}

Thus it is apparent that a complex body of trial law exists, although it has so far received only sporadic attention from legal scholars and seems underutilized by the profession. If trial law is to be more systematically thought about by scholars and more effectively used by attorneys, its basic doctrines need to be gathered, described, and analyzed in a more compre-

\textsuperscript{12} E.g., \textit{Alaska R. Civ. P.} 46(a) (in opening statement attorney has the right to discuss the evidence and issues); \textit{Haw. Rev. Stat.} § 635-52 (1976) (in closing argument, party has right to discuss evidence and comment on law); \textit{Kan. Stat. Ann.} § 22-3414(4) (1981) (similar).
\textsuperscript{14} E.g., \textit{Idaho Code} § 19-2126 (Supp. 1986).
\textsuperscript{15} E.g., \textit{Alaska R. Civ. P.} 46(b); \textit{Indiana Code Ann.} § 35-37-2-2 (Burns 1981).
\textsuperscript{16} E.g., \textit{Fed. R. Evid.} 611(c).
\textsuperscript{17} E.g., \textit{Nev. Rev. Stat.} § 175.131 (1979).
\textsuperscript{19} E.g., \textit{Iowa R. Civ. P.} 195; \textit{Maine R. Civ. P.} 51(a).
\textsuperscript{23} E.g., \textit{Minn. Dist. Ct. R.} 27(c) (bo).
\textsuperscript{25} E.g., \textit{N.J. R. Gen. App.} 1:7-1(b).
\textsuperscript{27} E.g., \textit{Wyo. Dist. Ct. R.} 17V (6th Dist.).
hensive way than has been done before. In the following pages, I will attempt to begin that task.

II. Jury Selection

The first stage of a trial—at least of a jury trial—is jury selection. The legal issues in this phase are of two kinds. One group consists of procedural issues, focusing on who conducts the questioning, how the prospective jurors are to be questioned, how unsatisfactory jurors are removed, and how an attorney objects to errors and preserves the record. The second group of issues concerns the contents of questions and the propriety of asking jurors about particular subjects.

A. Jury Selection Procedure

There is little uniformity among jurisdictions with respect to jury selection procedure. This is the only phase of the trial where this is so. Jurisdictions differ on all the major issues: whether a party has the right to participate, whether the judge or attorneys conduct questioning, whether jurors should be questioned individually or in groups, and how many peremptory challenges should be allowed. About the only thing they agree on is the procedure for objecting and preserving a claim of error for appeal.

In subsequent sections, we will see that a party to a lawsuit has constitutional rights to present evidence, conduct cross-examination, give opening statements, and make closing arguments. The only part of the trial in which a party does not have a right to participate is questioning the jury. It is probably true that denial of the right to challenge biased jurors would violate the guarantee of a fair trial, but no case has yet held that the federal constitution gives a party a right to participate in the questioning process.

Jurisdictions follow one of three different procedures in conducting questioning. In many states, the attorneys conduct most or all of the voir dire. Historically, this has been most common. This common law method has been criticized on the grounds that attorneys supposedly abuse the privilege and try to indoctrinate the jurors and that it wastes time. The modern federal rule places the responsibility for voir dire with the trial judge. This method has been criticized because judges are too unfamiliar with the case and not willing to take the time to probe deeply for juror biases. A compromise method is therefore growing in popularity, in which the trial judge conducts the basic questioning, and then the attorneys are permitted a limited time in which to conduct in-depth follow-up questions.

Attorney-conducted voir dire used to be the near universal practice. It was seen as a right that derived from a challenge for cause: a party had the right to prove, through sworn examination of witnesses or the venire-man
himself, the facts necessary to establish grounds supporting a challenge for cause.30 Today, only a few states maintain that a party has a right to voir dire, either by statute or state constitution.31 While attorney-conducted voir dire is still common, it usually is more of a customary practice than a common law procedure. The case law in most states gives the trial judge discretion to decide who will conduct juror questioning. Because of this discretion, the practice may vary widely even within the same jurisdiction.32

Even under attorney-conducted procedures, the degree of judicial control varies. In New York, the trial judge is not even required to be present unless requested by the parties,33 although a procedure giving this much power to the attorneys is unusual. Most judges are present during attorney-conducted questioning, and many will make a few introductory remarks before the voir dire is turned over to the lawyers. Major differences arise, however, concerning the degree to which judges intervene in and exert control over the questioning process when it is handled primarily by attorneys. A survey of Kentucky judges found that those who allowed attorney-conducted voir dire were split about evenly on the question of intervention. Some indicated they would intervene to cut off irrelevant or protracted questioning; others said they rarely intervened.34 It is safe to say that such intervention is justified when attorneys attempt to inquire into jurors’ emotional reactions to legal concepts, engage in redundant questioning, attempt to precommit jurors to a particular verdict, attempt to curry favor with the jurors, or attempt to bring out racial bias or other emotional and moral prejudices.35

At the opposite end of the spectrum is the federal rule in which the judge conducts the entire voir dire. Attorney participation under the federal rule is limited to the submission of written requests that the judge ask certain questions. However, the judge is not required to ask any question submitted by a party, and may ask them, modify them, or refuse to ask them at his discretion.36 In some jurisdictions, the trial judge may deny the attorneys even this small degree of participation.37

30. See 1 S. Thompson, supra note 1, at 99-101.
34. Fortune, supra note 32, at 297-98. Most judges indicated that their decision to intervene did not depend on an attorney making an objection. Id. at 301.
There is no constitutional requirement that attorneys be allowed to actively participate in voir dire questioning. The judge may conduct the entire voir dire as long as he or she does so adequately to assure an impartial jury. The mere fact that participation by counsel has been denied normally will not constitute error; only an inadequate voir dire coupled with a refusal to allow additional questions to be propounded by a party will warrant reversal of a judgment. Some commentators argue that because of the sixth amendment guarantee of an impartial jury, the refusal to allow a criminal defendant to participate directly in voir dire is unconstitutional, but this view has not been adopted generally by the courts.

Probably the most common voir dire procedure today is a cooperative one in which the trial judge conducts basic questioning and then turns the voir dire over to the attorneys to pursue follow-up questions. This is the procedure recommended by the American Bar Association: "[I]nterrogation of jurors should be conducted initially and primarily by the judge, but counsel for each side should have the opportunity, subject to reasonable time limits, to question jurors directly, both individually and as a panel." Judges who employ this method vary on the extent to which they give a free hand to the parties. Attorney-questioning may be limited in scope, or it may be freely allowed.

A second, more mundane, procedural issue concerns the mechanics of voir dire—how are the jurors to be questioned? Here again, practices vary widely among jurisdictions, and it is more likely to be determined by a combination of customary local practice and judicial discretion than by fixed rule. Questions may be posed in the courtroom, in the judge's chambers, in special jury rooms, or in written questionnaires distributed before trial. Jurors may be questioned en masse, in groups of four to twelve, or individually. Individual questioning may be done privately or with other jurors present.

38. E.g., Fietzer v. Ford Motor Co., 622 F.2d 281, 286 (7th Cir. 1980); United States v. Dellinger, 472 F.2d 340, 367-69 (7th Cir. 1972); Labbee v. Roadway Express, 469 F.2d 169, 172 (8th Cir. 1972).


40. STANDARDS FOR CRIMINAL JUSTICE 15-2.4 (2d ed. 1980); see also FLA. R. CRIM. P. 3.300(b) (similar).

41. See, e.g., United States v. Perry, 550 F.2d 524, 528 (9th Cir. 1977) (court not obligated to question a prospective juror in judge's chambers); Campbell v. State, 265 Ark. 77, 93, 576 S.W.2d 938, 948 (1979) (denial of defendant's motion to conduct voir dire in judge's chambers not prejudicial). But see IN RE Pulitzer Pub. Co., 635 F.2d 676 (10th Cir. 1980) (voir dire in chambers inappropriate because of public's right of access to trial proceedings).

Standardized written questionnaires that elicit general background information are becoming more and more common. Frequently, these questionnaires merely track the statutory requirements for minimal qualifications to serve—residency, age, absence of criminal record, literacy, and so forth. However, courts are beginning to realize that a more detailed questionnaire can expedite the voir dire process. Some questionnaires approved by courts now include detailed demographic questions, questions about prior experiences with the legal system, and other questions normally asked anyway during the voir dire. In some individual cases, courts have approved detailed questionnaires that depart from the standardized form and are tailored to deal with such topics as exposure to pretrial publicity about a particular case.

As an alternative to the questionnaire, general questions may be posed to all prospective jurors at the start of the jury selection process. This accomplishes the same goal of detecting basic disqualifications from jury service, such as nonresidency, recent jury service, or physical disability. This kind of mass questioning may be conducted in the common jury room or in the courtroom when the venire is first brought in.

Once the preliminaries are out of the way, the questioning must begin to focus on the particular case. Probably the most common practice is to question prospective jurors in groups of four to twelve at a time. Questions may be posed to the panel as a whole to save time and avoid repetition, or to individuals when necessary to follow up an answer. The usual procedure is for the clerk to call at random the names of potential jurors, who are

(per curiam) (prospective jurors questioned in groups of twelve to eighteen); Shepler v. State, 274 Ind. 331, 336-37, 412 N.E.2d 62, 67 (1980) (no need to individually question prospective jurors when none of them admitted reading a news article concerning the case); State v. Williams, 383 So. 2d 996, 999 (La. 1979) (examination of jurors in presence of each other is not a denial of a fair trial); State v. Littlefield, 374 A.2d 590, 597 (Me. 1977) (no need to individually question prospective jurors when pretrial publicity absent); cf. McCorquodale v. Balkcom, 705 F.2d 1553, 1558-59 (11th Cir. 1983) (en masse questioning in capital case denies right to impartial jury).

43. Three sample questionnaire forms can be found in Fortune, supra note 32, at 323-26. See also Mich. Gen. Cr. R. 510 (containing sample questionnaire form).

44. See, e.g., NATIONAL JURY PROJECT, JURYWORK: SYSTEMATIC TECHNIQUES 254-56 (1979) (reprinting the questionnaire approved for use in Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977), cert. denied, 435 U.S. 924 (1978), a civil suit growing out of the highly publicized shooting of several Kent State students by National Guardsmen).

45. E.g., ILL. ANN. STAT. ch. 78, § 21 (Smith-Hurd 1966) (jurors to be examined in panels of four); Minn. R. Crm. P. 26.02(4) (jurors examined in groups of twelve). Busch states that panels of twelve are the most common practice. 1 F. BUSCH, supra note 1, at 492-93.
seated in the jury box in the order called and are questioned together.\textsuperscript{46} In most jurisdictions, the trial judge has discretion to grant a request for individual voir dire, either in the privacy of the judge’s chambers, or with the other jurors present.\textsuperscript{47} Obviously, this method takes longer than group questioning, and it is usually reserved for exceptional cases that have attracted a great deal of pretrial publicity. Private questioning also is available when it appears that further public questioning could taint the panel. For example, if in response to a general question, a prospective juror states he or she has a reason to be biased against one of the parties, the judge has discretion to remove the juror to a place of privacy before inquiring into why that juror is biased.

There is some conflict over the extent to which questions to individual jurors should be allowed. Some judges do not permit individual questioning except to follow up a specific answer given in response to a question posed to a panel.\textsuperscript{48} In general, the law seems to leave this matter to the discretion of the trial judge, although in a few cases, refusal to allow individual questions has been held to be error.\textsuperscript{49}

At the heart of the jury selection process is the challenge (or strike), the procedure for removing a juror. The lawyer’s control over the composition of the jury is, of course, the right to reject, not select, a juror. Under the challenge system used in most courts, a juror may be challenged for cause if legally unqualified, or challenged peremptorily (without the need to state a reason) by one of the parties. A few states substitute a system of strikes in place of peremptory challenges.\textsuperscript{50}

\textsuperscript{46} Under the common law, it was common for the sheriff to determine the order in which jurors were to be questioned, which frequently resulted in abuses. The sheriff could put persons hostile to a defendant up first, forcing him to use up his peremptory challenges. \textit{See} 1 S. THOMPSON, \textit{supra} note 1, at 37-38.


\textsuperscript{50} \textit{E.g.}, \textbf{ALA. CODE} § 12-16-100 (Supp. 1985) (parties are given lists of all jurors eligible for service, and alternately strike names until only twelve are left); \textbf{VA. CODE ANN.} § 8.01-359 (Supp. 1986) (in routine civil cases, eleven jurors are called and six struck).
In most states, the procedure works as follows: (1) a panel, or venire, of 18 to 36 potential jurors are brought to the courtroom; (2) twelve names are called at random to sit in the jury box; (3) the court questions them on their statutory qualifications, excluding any who do not meet statutory min-
ima; (4) other jurors are called to replace any who were excused; (5) the plaintiff or prosecutor questions the panel first, and makes any challenges for cause that become apparent; (6) the court rules on the challenges for cause as they arise, hearing argument or conducting additional voir dire as appropriate, and replacing any juror who is excused; (7) the plaintiff passes the jury for cause; (8) the defendant then questions the panel, making any appropriate challenges for cause; (9) when the process is complete, twelve legally qualified jurors are in the jury box; (10) the plaintiff has the oppor-
tunity to exercise a peremptory challenge to excuse a juror he or she does not like; (11) the defendant has the opportunity to similarly exercise a per-
emptory challenge; (12) this process continues, alternating back and forth, until both sides either exhaust their allotment of peremptory challenges or are satisfied with the remaining jurors; (13) the empty seats are filled with new jurors and the process starts over, except that the jurors agreed upon in the first round may not be reexamined; and (14) the process continues until both sides are satisfied with or unable to challenge the twelfth juror.

Usually, no jurors are sworn in until all have been seated, which at least theoretically allows a party to wait and see what the next jurors look like before making a decision whether to challenge a juror from the first group. While an attorney may not go back and assert a challenge for cause against a juror whom he has already passed for cause, he may go back and assert a peremptory challenge against a juror whom he has already passed.

Challenges for cause are of two kinds: legal disability for not meeting statutory minimal qualifications, or a likelihood of bias because of the peculiar facts of the case. At common law, the former was known as a "principal challenge," and the latter as a "challenge for favor." These distinctions are no longer used.51 Challenges for cause are now controlled almost entirely by statutes that set out the legal grounds upon which they may be made. Such statutes commonly enumerate minimal requirements for eligibility applicable to all trials, and also include a general authorization for a challenge if it is determined that the juror cannot be fair and impartial for any reason. Since challenges for cause go to the legal disability of a prospective juror, they are unlimited in number, and may be asserted by either party or by the judge sua sponte as soon as the grounds become apparent. As a general rule, however, they must be made before any peremptory challenges are exercised and before the jury is passed for cause; otherwise, the right to challenge for cause may be deemed waived.52

51. 1 F. Busch, supra note 1, at 481-82, 497.
52. E.g., Sayer Acres v. Middle Republican Natural Resources Dist., 205 Neb.
Common grounds for challenges for cause include general citizenship requirements, connections to the particular case being tried, and moral or religious scruples that would interfere with the ability to render a verdict. A prospective juror may be excused in most states if he or she is not a resident of the county, is under eighteen years old, does not understand English, has felony convictions or is awaiting trial on a felony, is mentally defective, or has a physical disability that would make jury service difficult or impossible. Prospective jurors also routinely are disqualified from jury service if they have been involved in any way in legal proceedings relating to the case being tried, have been involved in any other legal proceeding involving one of the parties, are related to some degree of consanguinity (often the sixth) to a party or the victim in a criminal case, or are familiar with the facts of the case and have already formed an opinion. Most states also have a provision allowing the challenge of any juror with religious or moral scruples that would interfere with returning a verdict—the most common being, inability to return a verdict of death. Finally, most qualification statutes end with boilerplate language that a juror may be excused for cause if for any other reason they hold biases and prejudices that make them unable to render a fair and impartial verdict.

One of the most controversial issues in jury selection is the systematic exclusion of persons who disfavor the death penalty from jury service in a capital case. Under Witherspoon v. Illinois, prospective jurors may be challenged for cause if they say that their reservations about the death penalty would make it impossible for them to impose it, or if they admit that they could not be impartial in the determination of guilt, knowing that a guilty verdict might lead to the death penalty. They are not supposed to be excused merely because they do not favor capital punishment or would be reluctant to impose it. This practice, called death-qualifying a jury, is controversial because it enables the state to stack the deck in favor of conviction. If the

360, 287 N.W.2d 692 (1980); see also Bitting v. State, 165 Ga. 55, 139 S.E. 877 (1927); Bailey v. Tuck, 591 S.W.2d 605 (Tex. Ct. App. 1979). This notion of waiver for failure to exercise a right—known as procedural default—is a recurring theme in trial law.


state mandates that the same jury decide guilt and punishment, then all the prosecutor needs to do is charge a capital offense and he gets to exclude a great many "liberals" from the jury. Although this results in a jury biased in favor of conviction, the practice has been approved by the Supreme Court.60

In every state except those that use a struck-jury system, peremptory challenges are given to both sides by statute. Usually both sides are given the same number of peremptory challenges, though a few give more challenges to a criminal defendant than to the prosecution—an unusual example of a procedure favoring the defendant in a criminal case. The total number given to each side varies widely, from two or three in misdemeanor and civil cases, to twenty-six in capital cases.61 If there are multiple parties on a side, some jurisdictions give that side extra challenges, others do not.

Peremptory challenges are considered an important right, at least to a criminal defendant, although not explicitly a constitutional right. The Supreme Court has held that it is an important component of a fair trial, and implied that all litigants—criminal defendants, prosecutors, and civil parties—must be allowed to freely exercise their peremptory challenges.62 Preventing a party from exercising a statutorily-guaranteed peremptory challenge is probably reversible error without a showing of prejudice.63

There is one restriction on this right. The Supreme Court has held that the prosecutor in a criminal case must be restricted in his use of peremptory challenges.64 The prosecutor is an agent of the state, and the state may not make any important classifications—in this case, whom to challenge—

61. E.g., FED. R. CRIM. P. 24(b) (in capital cases, 20 for each side; in other felonies, the defense gets 10 and the government only six; in misdemeanors, 3 each); ARIZ. R. CRV. P. 47(e) (4 each in civil cases); CAL. PENAL CODE § 1070 (West 1985) (26 each in capital cases); IOWA CODE § 813.2 (1979) (Rule 17: 10 each in felonies, 4 each in misdemeanors). At early common law, the defense in a capital case was entitled to 35 challenges; the prosecution to unlimited challenges.
on the basis of a prohibited distinction such as race. If the state is allowed to challenge black jurors, just because they are black, the defendant (not the jurors) is denied equal protection of the laws. This new rule effectively requires the prosecutor to give a reason for asserting a peremptory challenge, a position that has been criticized because it misses the parties' abilities to obtain a truly impartial jury. The previous constitutional rule was that a defendant had to show that a prosecutor systematically used his challenges to remove all blacks from all (or most) juries to get his conviction reversed. The burden of proof to establish such systematic bias was almost insurmountable. A defendant had to show that not only did the prosecutor create an all-white jury in his case, but that he had done so many other cases. The Supreme Court's ruling making it easier for a defendant to show bias was somewhat of a surprise. Most states that had considered the issue had rejected that result and reaffirmed the principles of Swain that peremptory challenges may be exercised without stating a reason.

There is one final procedural issue—How are objections made to improper jury selection procedures or improper questions and how is the issue preserved for appeal? Appeals, of course, must putatively be based on the erroneous action of the trial judge, not the other attorney, so the basic requirement is that one must have asked the judge to do something. Error rarely can be committed by the judge, however, because control of voir dire is left largely to the trial judge's discretion. Unless the judge has obviously obstructed the seating of an impartial jury, there is little chance that any ruling he or she makes during voir dire will warrant reversal on appeal. Few cases have been reversed except for the most serious kind of error—the judge so restricting the scope of questioning that the voir dire is inadequate.

If an error is made, it must be properly objected to and recorded. Many claims of error are defaulted away because voir dire is seldom transcribed. The first rule of preserving error, then, is to move that a court reporter be present to record the entire voir dire if possible, but at least objections and

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67. See, e.g., United States v. Leslie, 783 F.2d 541 (5th Cir. 1986) (en banc); People v. Payne, 99 Ill. 2d 135, 457 N.E.2d 1202 (1983).
68. E.g., Parkinson v. Hudson, 265 Ala. 4, 88 So. 2d 793 (1956); State v. Diedman, 58 Mont. 13, 190 P. 117 (1920).
69. E.g., Ham v. South Carolina, 409 U.S. 524 (1973) (reversible error for judge to allow questions about racial prejudices in case involving black defendant and racial overtones); Fietzer v. Ford Motor Co., 622 F.2d 281 (7th Cir. 1980) (verdict reversed in exploding Mercury Comet gas tank case where no questions were permitted about exposure to pretrial publicity or similar experiences); United States v. Robinson, 485 F.2d 1157 (3rd Cir. 1973) (similar to Ham, 409 U.S. 524; reversible error).
rulings. If the judge makes an incorrect ruling by denying a challenge for cause—for practical purposes, the only ground likely to be considered reversible error on appeal—it will support an appeal only if the challenge was made promptly and the grounds were specifically stated. A general challenge that does not specify grounds (e.g., "I challenge this juror for cause"), is not sufficient. Similarly, failure to make a timely challenge, as soon as the grounds become apparent and before the jurors are passed for cause, will likely be considered a procedural default and waive a claim of error. If the claim of error concerns the propriety of a question, a party must have made a timely objection to any improper questions or a motion to allow the asking of a proper question.

There is one final procedural default trap that can prevent appeal. In most jurisdictions, a party must exhaust its peremptory challenges in order to appeal from the wrongful denial of a challenge for cause. If a party still has a peremptory challenge left, the party could use it on the juror in question, and failure to do so is a waiver of the claim that the juror should have been excused for cause. This obviously puts the attorney in a bind. If he uses all his peremptories in order to preserve a claim of error, he may have to challenge a favorable juror just to preserve his record; if he uses a peremptory challenge on the juror in question, the juror is excused and the denial of the challenge for cause may become harmless error. Several states have recognized this problem, and allow a claim of wrongful denial of a challenge for cause to be heard even if the attorney excused that juror with a peremptory challenge, at least if he is thereby unable to challenge another unfavorable juror.

Even if an attorney manages to preserve a claim of error in voir dire for appeal, it is unlikely to result in reversal. As with other violations of the

70. See In re Mertens, 56 A.D.2d 456, 392 N.Y.S.2d 860 (1977) (right to have voir dire transcribed).
73. E.g., Ramseyer v. Dennis, 187 Ind. 430, 119 N.E. 716 (1917); State v. Williams, 375 So. 2d 364 (La. 1979); State v. Jones, 594 S.W.2d 932 (Mo. 1980).
B. The Scope of Voir Dire: Permissible and Impermissible Questions

Regardless of who asks the questions, the topics that may legitimately be inquired into are fairly well-established by common law. In general terms, prospective jurors may be asked questions that elicit information relevant to challenges for cause or to gather information to facilitate the intelligent exercise of peremptory challenges. Thus, jurors may be asked questions about whether they meet statutory qualifications, whether they have the kinds of biases and prejudices that would interfere with their ability to be impartial, and whether they have religious or moral scruples that would make it difficult for them to return a verdict in accordance with law. To a limited extent, prospective jurors also can be asked questions designed to elicit general information about themselves so that the parties can more intelligently exercise their peremptory challenges. Questions primarily designed to begin advocacy—indoctrinate jurors, ingratiate one’s self and one’s client with jurors, and inoculate them against an opponent’s position—are not proper. Many questions, however, may have dual purposes, tending both to legitimately search for biases and also to begin advocacy. Courts traditionally have had a difficult time resolving whether such questions are proper, preferring to prevent attorneys from participating at all rather than make difficult decisions.

It is always proper to question prospective jurors about whether they meet the statutory requirements for jury service. In many jurisdictions, however, it is not necessary to do so, because a clerk or jury commissioner will have prescreened prospective jurors for basic qualifications such as literacy, residency, age, prior jury service, or criminal record requirements. It also is common for the presiding judge to begin the voir dire by posing general questions to the panel about their statutory qualifications, not only matters such as age and residency, but also whether they are related to the parties, have been involved in the case, or have any scruples against the subject-matter of the suit. Either the court or the attorneys may ask jurors whether

76. For example, in McDonough Power Equip. v. Greenwood, 464 U.S. 548 (1984), the Court held that even though a juror has mistakenly answered voir dire questions, his failure to provide accurate information did not automatically lead to reversal, but must be subjected to a harmless error analysis. See infra text accompanying notes 406-64; see also Billington v. United States, 15 F.2d 359 (6th Cir. 1926); Conner v. State, 54 Ariz. 68, 92 P.2d 524 (1939); In re Worrell, 35 N.C. App. 278, 241 S.E.2d 343 (1978), cert. denied, 295 N.C. 90, 244 S.E.2d 263 (1978); Smith v. Maher, 84 Okla. 49, 202 P. 321 (1921).
they have formed any opinions about the case, whether they can abide by and follow the applicable law, and any other matter upon which competency depends.\footnote{77}{See generally 1 F. Busch, supra note 1, at 533-53 (discussing grounds for juror incompetency).}

The law in most jurisdictions permits the attorneys to challenge for cause any juror who cannot be fair and impartial for any reason. Thus, questions that legitimately could expose biases, prejudices, and sympathies that could affect a juror’s impartiality should be permitted. This freedom is restricted by an old common law rule that jurors need not answer any questions calculated to humiliate or embarrass them\footnote{78}{E.g., Abron v. State, 523 S.W.2d 405, 408 (Tex. Crim. App. 1975) (dictum).}—although the balance between this notion of juror privacy and the need to prevent biased jurors from participation has never been clearly struck. The extent to which such questions will be permitted is largely a matter for judicial discretion.\footnote{79}{Compare Ham v. South Carolina, 409 U.S. 524 (1973) (trial judge’s refusal to question jurors about racial prejudice was error in a case with racial overtones) with Ristiano v. Ross, 424 U.S. 589 (1976) (no error in judge’s refusal to allow questions about racial prejudice, despite fact that defendant was black and victims white). See also United States v. Daily, 139 F.2d 7 (7th Cir. 1943); State v. Miller, 357 Mo. 353, 208 S.W.2d (1948); Long v. State, 187 Tenn. 139, 213 S.W.2d 37 (1948); Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980), cert. denied, 451 U.S. 1011 (1981).}

However, there is substantial agreement in the common law that, subject to the trial judge’s limited discretion to\textit{ refuse} to allow them, it is permissible to ask about the following kinds of topics. Questions that inquire into the prospective jurors’ emotional reactions in favor of or against a party, major witness, or attorney, either for some personal reason or because of their occupations, are permitted.\footnote{80}{See Mallott v. State, 608 P.2d 727 (Alaska 1980) (prior run-in with law enforcement officers, hostility to state); Trevino v. State, 572 S.W.2d 336 (Tex. Crim. App. 1978) (tendency to automatically believe police witnesses just because they are police officers).} As long as they are relevant to the facts of the particular case, attorneys can ask about sympathy or antipathy toward a person or his station in life, prejudices against corporations, and racial, ethnic, sexual, or national prejudices.\footnote{81}{See People v. Blyden, 79 A.D.2d 192, 436 N.Y.S.2d 492 (1981) (racial and ethnic prejudice), rev’d on other grounds, 55 N.Y.2d 73, 432 N.E.2d 758, 447 N.Y.S.2d 886 (1982); cf. United States v. Lowell, 490 F. Supp. 897 (D.N.J. 1980) (questions about religious prejudices not mandatory, because defendant’s religion not obvious), aff’d, 649 F.2d 950 (3d Cir. 1981).}

If there is a legitimate issue in the case, jurors even may be questioned about their religious beliefs.\footnote{82}{Inquiring about religious beliefs usually is improper unless a religious issue is involved in the case. United States v. Barnes, 604 F.2d 121 (2nd Cir. 1979), cert. denied, 446 U.S. 907 (1980); Yarborough v. United States, 230 F.2d 56 (4th Cir.), cert. denied, 351 U.S. 969 (1956). \textit{But see} Wasy v. State, 234 Ind. 52, 123 N.E.2d 462 (1955).}
that inquire into possible prejudices concerning the subject-matter of the case or a major issue in it also are permitted. This list includes cases involving insanity, alibi or justification defenses, narcotics, gambling, or obscenity charges, disinheritance, intrafamily torts, crimes against children, malpractice, strict liability, defamation, and police informants.\(^8\) Jurors also may be asked about their friendship, acquaintance, business relationship or other connections with parties, important witnesses, and attorneys.\(^6\) They may be asked about financial interest in the outcome of the case, or personal knowledge of the event being litigated that might cause them to have a preformed opinion about its outcome.\(^5\) Questions may be asked about whether the jurors or persons close to them have ever been involved in similar litigation as a party, witness, or juror.\(^6\) Finally, it is generally permissible to ask about other background similarities and experiences that might cause the juror to feel natural alliance with one side or the other, based on factors such as service in the same branch of the military, similar marital status, having children of similar ages, living in the same neighborhood, or being engaged in a similar occupation.\(^7\)

One recurring issue is whether a question (usually asked by the plaintiff) that discloses the existence of the defendant's insurance is permissible. Generally the law tries to keep the jurors ignorant on the question of insurance throughout the trial.\(^8\) But because jurors can properly be questioned about their interest in or attitudes toward the parties, an argument can be made that they also should be subject to questions about their connections with


8. See, e.g., Klein v. Herring, 347 So. 2d 681 (Fla. Dist. Ct. App. 1977) (never permissible to inform jury of amount of insurance coverage); White v. Piles, 589 S.W.2d 220 (Ky. Ct. App. 1979) (error to disclose insurance during closing argument); FED. R. EVID. 411 (inadmissible during witness examination).
or interest in the insurance companies that ultimately will pay the damages. On the other hand, it is feared that if disinterested jurors find out the defendant is insured, they will award damages not on the basis of proven liability, but on the basis that it is going to be paid by an insurance company. The cases vary considerably on the extent to which insurance can be disclosed on voir dire. In general terms, limited good-faith inquiry is permitted to determine if jurors will be influenced in their decisions by their interests in insurance companies. In many courts, such questions may be pursued only after the attorney makes a prima facie showing that such inquiry is justified (e.g., by a juror answering a question about employment by stating he works for State Farm Insurance Company). Questions designed merely to inject the issue of insurance are not permitted and may constitute reversible error.

There is more agreement among the courts on another recurring issue—whether to question jurors about their exposure to pretrial publicity, and how to determine if that publicity has biased them. In general, in a notorious case, jurors can be questioned about their exposure to media coverage. If extensive exposure to pretrial publicity is shown, a presumption arises that the prospective juror’s ability to be impartial has been destroyed. The judge then has an obligation to question jurors about how much they have read or heard about the case, whether anything has stood out in their minds, and whether it has caused them to form an opinion on an issue in the case. If the juror has been exposed to media coverage but has not formed any opinions on an issue in the case, that juror is not subject to a challenge for cause.

Answers that place a prospective juror within one of these categories of potential bias do not lead automatically to a challenge for cause. Unless a state statute provides for automatic removal of a juror, it must appear from his or her answers that the juror cannot be fair and impartial for one or more of these factors. In practice, if the challenged juror says that he or she

89. E.g., Jones v. Crawford, 361 So. 2d 518 (Ala. 1978); Dedmon v. Thalheimer, 226 Ark. 402, 290 S.W.2d 16 (1956).
91. See Roe v. Schneider, 424 A.2d 1 (Del. 1980).
93. See, e.g., Fietzer v. Ford Motor Co., 622 F.2d 281 (7th Cir. 1980) (suit over exploding Mercury Comet gas tank; inquiry into exposure to publicity should have been allowed); see also Schultz, The Jury Redefined: A Review of Burger Court Decisions, 43 LAW & CONTEMP. PROBS. 8, 21-22 (1980).
can lay aside emotional responses and decide the case impartially, or denies that he or she would be influenced at all, the challenge for cause will be denied, however ludicrous the result.95

Somewhat more controversial is whether attorneys may ask prospective jurors about their willingness to follow the law, particularly unpopular laws. Melvin Belli, for example, strongly recommends asking jurors about their willingness to follow the law, suggesting that they be asked if they are “in sympathy with” a rule of law.96 It is perhaps more common to ask jurors if they can follow a particular instruction even if they disagree with it.97 Even though bias against a particular law is a legitimate ground for challenge, judges often hear such questions as instruments of indoctrination or as invading the exclusive province of the judge to instruct on the law. This results in a wide variety of practices and in inconsistent appellate cases.98 Judicial fears that attorneys will somehow brainwash or indoctrinate jurors by asking them about the law seem misplaced, and the idea that only the judge may instruct on the law is outdated. As long as the attorneys do not misstate the law, they should be allowed to ask the jurors about their ability to follow it.

Courts are divided on whether to allow questions designed solely or primarily to elicit information on which to base peremptory challenges. Obviously, the kinds of questions discussed above may yield information relevant to the exercise of a peremptory challenge. But what about a question, such as what magazines a juror subscribes to, that has no relevance to any issue that would support a challenge for cause, yet the answer may be of great help to an attorney in attempting to intelligently exercise peremptory challenges? Some judges routinely allow such questions, as long as they are not humiliating or embarrassing to the prospective juror; most pay at least lip service to the principle that a broad scope of voir dire questioning is

95. E.g., Cagle v. McQueen, 200 F.2d 186 (5th Cir. 1952), cert. denied, 346 U.S. 815 (1953); Glover v. State, 248 Ark. 1260, 455 S.W.2d 670 (1970); Chafin v. State, 246 Ga. 709, 273 S.E.2d 147 (1980); State v. Clark, 340 So. 2d 208 (La. 1976), cert. denied, 430 U.S. 936 (1977); Commonwealth v. Wilborne, 382 Mass. 241, 415 N.E.2d 192 (1981); cf. State v. Bashor, 188 Mont. 397, 614 P.2d 470 (1980) (juror said she could not be fair, challenge for cause denied, but verdict affirmed anyway). But see Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968); State v. Caron, 118 La. 349, 42 So. 960 (1907) (it is the judge who must be satisfied that the juror can genuinely put aside his feelings).


98. See generally Fortune, supra note 32, at 313-15 (describing variety of views among Kentucky judges; some permitting and some prohibiting such questions); Gold, Voir Dire: Questioning Prospective Jurors on Willingness to Follow Law, 60 IND. L.J. 163 (1984) (analyzing legal precedent on subject).
required to provide a basis for the intelligent exercise of peremptory challenges.\textsuperscript{99} But some courts persist in the old-fashioned view that voir dire questions may only be asked if they are relevant to a possible challenge for cause;\textsuperscript{100} a rule that has somehow survived from the days of small towns when the lawyers already knew the jurors and were required to challenge them before they asked any questions. Under that system, one first challenged a juror for cause and then proved it by eliciting testimony from the challenged juror, and the only relevant inquiries under such a procedure were questions relating to the challenge for cause. The continuing vitality of the restrictive rule, after the reasons for it have changed, is an anachronism.

Finally, the courts also are split over whether to allow attorneys to use their voir dire questions to begin advocacy—to start the process of persuading jurors. Many trial lawyers suggest that the voir dire is the place to start the process of persuasion by indoctrinating the jurors on a partisan view of the facts, and by ingratiating themselves and their clients with the jurors.\textsuperscript{101} This technique most commonly involves the hypothetical question, in which the lawyer previews anticipated favorable evidence or weaknesses in the opponent’s case, and explains how it helps lead to a favorable verdict, and then attaches a meaningless question to the end to avoid the objection that he is arguing his case instead of asking questions. For example:

Ms. Jones, suppose the evidence showed that my client is crippled for life and unable to work or even go to the bathroom by himself, and we had experts testify that he would have to live with this permanent condition for 25 years. Suppose the other jurors began to discuss $500,000 as a possible verdict. Could you consider such a verdict, or do you have some preconceived idea that there is a maximum amount you are supposed to award?

The extent to which such questions are allowed seems to be largely a matter of judicial discretion. It can be argued that if the juror should answer that she could not consider it because she did not believe in verdicts over $100,000, then she could be challenged for cause; therefore, the question should be allowed. Some courts have taken this position and give the attorneys a relatively free hand.\textsuperscript{102} The majority position, however, is that hypothetical


\textsuperscript{101} See, e.g., Spence, A Voir Dire Masterpiece, 3 TRIAL DIPLOMACY J. 8, 9-10, 56 (1980); J. TANFORD, supra note 1, at 240-41 (summarizing the advice of several trial attorneys).

\textsuperscript{102} E.g., Geehan v. Monahan, 382 F.2d 111 (7th Cir. 1967); see also Fortune, supra note 32, at 315-17 (21% of Kentucky judges allowed all hypotheticals; 41% allowed some hypotheticals).
questions are not competent when it is obvious that they are being asked in
an effort to indoctrinate the jury, disclose favorable evidence, or argue one’s
case. It is generally held to be improper either to ask a juror what verdict
he or she would return if certain facts were proved, or to ask whether the
juror could return a particular verdict by applying the anticipated instructions
to an assumed set of facts. 103 One other variation, generally disapproved, is
for the attorney to disclose exhibits he or she hopes to introduce later. 104 The
farther a question strays from the proper purpose of voir dire—the weeding
out of partial jurors—the more likely it is to be prohibited.

III. Opening Statements

The second phase of the trial consists of the opening statements of the
parties. There is substantially less law concerning opening statements than
there is for jury selection. What there is falls into the same two general
categories: a body of procedural law, much of it statutory, that includes the
right to be heard, the order in which statements are given, and whether they
are waivable; and a body of common law addressing issues concerning the
content of the statements and what kinds of topics may be discussed.

A. Opening Statement Procedural Issues

There is a great deal of uniformity in opening statement procedural rules.
Across jurisdictions and over time, the law is relatively consistent on such
issues as whether a party has a right to make an opening statement, whether
opening statements may be waived or reserved, who speaks first, whether a
directed verdict may be granted based only on opening statements, and what
the legal effect is of an admission made by the attorney during opening
remarks.

Most, but not all, jurisdictions give parties the right to give opening
statements. The right is usually statutory; rarely has it been elevated to
constitutional status. 105 In this respect it is unique. The right to examine and

103. E.g., Hopkins v. State, 429 N.E.2d 631 (Ind. 1981); Rankin v. Blue Grass
Boys Ranch, 469 S.W.2d 767 (Ky. 1971); State v. Manley, 54 N.J. 259, 255 A.2d
Eichstadt v. Underwood, 337 S.W.2d 684 (Ky. 1960) (plaintiff permitted to use black-
board during voir dire to write out total damages requested).

104. See, e.g., Finley v. State, 84 Okla. Crim. 309, 181 P.2d 849 (1947) (show-
ing jury a mugshot of a witness held to be error); Palmer v. State, 121 Tenn. 465,
118 S.W. 1022 (1908) (attempt to show jurors a newspaper article and question them
about it was properly refused).

105. See, e.g., United States v. Stanfield, 521 F.2d 1122 (9th Cir. 1975) (re-
versing conviction for refusal to allow opening statements but not explicitly on con-
stitutional grounds).
cross-examine witnesses and to argue is clearly constitutionally based, and a party clearly has no right to personally voir dire prospective jurors; only opening statements are a nonconstitutional right. In most cases in which an opening statement is requested but denied (at least in jury trials), the courts have held that an important part of the right to be heard has been withheld that warrants reversal in all but the strongest cases.106 However, since the right is not constitutional, it is subject to some limits, and courts have said it can be refused in nonjury trials or simple cases.107 Not all courts agree that parties have a right to make opening statements, and a minority have explicitly given the trial judge discretion to dispense with them.108 A number of appellate cases holding that this is a question of discretion reach that result in part by misciting as precedent cases involving the judge's discretion to set the order or timing of statements. Where openings are permitted, a party generally has the right to make his opening statement without interference from or adverse comments by the judge.109

The purpose of an opening statement is to state what evidence will be presented; it is not an argument on the merits of the case. For that reason, some older cases have suggested that if a defendant does not intend to produce any evidence, he is not entitled to make an opening statement.110 This overlooks the fact that the defendant will cross-examine the prosecution or plaintiff's witnesses, thereby eliciting evidence, and that the plaintiff/prosecutor may have neglected to tell the jury about facts favorable to the defense that will come out in his own case-in-chief. Most jurisdictions recognize the unfairness of permitting only one side to give its slant on the facts, and extend the right to open to both sides regardless of who will be calling witnesses.111

Opening statements customarily are given after the jury has been selected and sworn in and before any evidence is produced. The party with the burden

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106. E.g., United States v. Hershenow, 680 F.2d 847 (1st Cir. 1982); United States v. Stanfield, 521 F.2d 1122 (9th Cir. 1975). But compare the strange case of Stewart v. State, 245 Ala. 511, 512, 17 So. 2d 871, 872 (1944), holding that if the prosecutor makes no opening statement, then the defendant can be refused permission to make one himself; giving to the prosecutor the power to decide whether the defendant is allowed to make an opening.


110. E.g., Lewis v. United States, 11 F.2d 745 (6th Cir. 1926); Thompson v. People, 139 Colo. 15, 336 P.2d 93, cert. denied, 361 U.S. 972 (1959).

of going forward—usually the plaintiff or prosecutor—gives the first opening statement,112 followed immediately by the defendant. In most (but not all) jurisdictions, the defense has the option of postponing (reserving) opening statement until the beginning of its presentation of evidence.113 However, even when a statute or rule seems to set a specific order and timing for opening statements, the trial judge usually has residual discretion to vary the normal order in unusual circumstances.114

One such recurring unusual situation is a multi-party lawsuit. Where several attorneys represent multiple plaintiffs or defendants, or the case involves a third-party complaint, the order of statements customarily is resolved among the parties at pretrial conference. If the parties are unable to set the order themselves, every jurisdiction gives the trial judge discretion to set the order, which will not be overturned as long as there is some rational reason for the order. The party with the most to gain usually will go first for plaintiffs, and the party with the primary liability or the largest financial interest usually will go first among defendants.115 With consent of the court, attorneys representing multiple defendants may give their openings at different times, some immediately following plaintiff, and some waiting until the start of the defense case. Obviously this gives the defendants an advantage, and the judge usually should require that multiple parties arrayed on one side make their opening statements all at one time. That is the usual practice in criminal cases involving multiple defendants, especially if they are represented by a single attorney.116

Jurisdictions differ on whether a party may waive its opening statement altogether. Many require the party with the burden of going forward to give an opening statement. Usually, a party required to open must present a full and fair statement of its case, demonstrating that he can make out a prima

113. See, e.g., Fitzhugh v. United States, 415 A.2d 548, 551 n.5 (D.C. 1980); Cal. Penal Code § 1093 (West 1985); Minn. R. Civ. P. 39.04. All of the above give the defendant the right to either open immediately or reserve until the start of its own case. United States v. Conti, 361 F.2d 153, 158 (2d Cir. 1966) (upholding trial court's decision to require defendant to make statement immediately or not at all), vacated on other grounds sub nom. Stone v United States, 390 U.S. 208 (1968). But see State v. Nowlin, 244 N.W.2d 596, 599 (Iowa 1976) (defense not permitted to reserve).
115. See generally M. LITTLETON, OPENING TO THE COURT OR JURY 30 (1966).
facie case.\textsuperscript{117} Other jurisdictions permit the plaintiff to waive opening remarks. In these jurisdictions, if the plaintiff chooses to make an opening statement, it is not required to demonstrate a prima facie case.\textsuperscript{118} Almost all jurisdictions permit a defendant, especially a criminal defendant, to waive opening remarks,\textsuperscript{119} although a few require statements from both sides.\textsuperscript{120}

Many jurisdictions require that each party with a burden of going forward with evidence make a complete opening statement demonstrating that it has enough evidence for a legally sufficient case. Such opening statements must include enough facts to make out a prima facie case on all essential elements of the claim or defense. Failure to state a case may result in dismissal, nonsuit, or a directed verdict against that party \textit{before} any evidence is introduced. Such a drastic resolution of the case threatens to deprive a party of its basic due process rights to be heard and to present evidence, so a directed verdict will be granted only if it appears that counsel has stated all of his or her evidence and has been given the opportunity to amend his or her remarks to satisfy this requirement.\textsuperscript{121} Courts exercise this power sparingly, and the law prefers that the case be tried on the merits. This is primarily a rule of civil procedure, although at least one jurisdiction has extended it to criminal cases.\textsuperscript{122} The courts are split on the propriety of such a drastic


\textsuperscript{120} \textit{See Or. R. Civ. P. 58(B)(1).}


procedure, and many do not approve of summary disposition based only on opening statements.¹²³

One other unexpected procedural result may occur based on the content of what an attorney says during opening statement. Factual admissions may constitute binding judicial admissions that preclude the party from contesting the facts admitted, and may relieve the opponent of the burden of proving them. If a factual concession is clear, unequivocal, and deliberate, it is likely to be held a binding admission.¹²⁴ Similarly, if an attorney makes a clear statement that he or she intends to rely on only one of several grounds asserted in the pleadings, or only one of several available defenses, that party may be estopped from asserting the alternative grounds.¹²⁵ If there is any ambiguity in the statement, it is presumed that the attorney is not making an admission. This whole concept is somewhat antiquated, since it probably is related to the old evidence rule that a party was bound by the testimony of its witnesses, and could neither impeach them nor introduce evidence that contradicted the testimony of the client. This evidence rule is rarely invoked any more, so there seems little reason why the opening statement rule should continue either.

The one remaining important group of procedural rules concerns how to object to a violation of the rules of opening statement, and how to preserve a claim of error for appeal. As with other parts of the trial, the general rule is that an attorney must make a timely and specific objection to any violation; usually, the objection must also be accompanied by a motion to strike the offending remarks.¹²⁶ Unless the remarks were extremely prejudicial, the court's granting of the motion to strike and instruction to disregard the objectionable statement will obviate the error.¹²⁷ If an attorney can anticipate a particular


¹²⁶ E.g., Haines v. State, 170 Neb. 304, 102 N.W.2d 609 (1960); cf. Leonard v. United States, 277 F.2d 834 (9th Cir. 1960) (motion for mistrial at end of statement sufficient if the opening statement as a whole deprived the defendant of a fair trial).

¹²⁷ See People v. McClellan, 62 Ill. App. 3d 590, 378 N.E.2d 1221 (1978) (claiming defendant connected to other robbery); see also cases collected in 5 F. Busch, supra note 1, at 290-92.
improper matter his or her opponent is likely to mention in opening statement, the attorney may be able to successfully move in limine for an order that the matter not be discussed.\(^\text{128}\) Of course, the opening statements, objections, and rulings must appear in the official transcript to be preserved for appeal. Opening statements often are not recorded, and an attorney may have to make a motion to have a record made to preserve any issues arising in opening statements for appeal.

B. The Content of Opening Statements—What May the Attorneys Discuss?

The basic rule of opening statements is that an attorney must limit him- or herself to a discussion of the anticipated evidence; the attorney may not argue about how to resolve conflicts in the evidence, nor discuss how to apply the law to the facts, nor attempt to arouse the emotions of the jurors. How strictly these limits are enforced, however, is a matter usually left to the discretion of the trial judge. Violations of the basic rules of opening statement rarely will support reversal on appeal. Some judges permit the attorneys wide latitude to discuss their cases; others will more strictly enforce the general rules concerning what one may and may not say during the statement. As one strays further and further from the legitimate purpose of an opening statement—informing the jurors in a general way about the nature of the case so that they will be better prepared to understand the evidence when they hear it\(^\text{129}\)—objections are more likely to be sustained. In rare cases, if impermissible remarks made during opening statement jeopardize the fairness of the trial, they may amount to reversible error or warrant the granting of a mistrial.\(^\text{130}\)

The most basic content rule of opening statements is that argument is prohibited.\(^\text{131}\) The rule is easy to state, but hard to precisely define. One trial lawyer has written that the definition is simple: "If it is something you intend

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\(^{128}\) Motions in limine are discussed in detail in Epstein, *Motions in Limine—A Primer*, 8 *Litigation* 34 (1982), and in J. Tanford, supra note 1, at 313.


to prove, it is not argument. If it is not susceptible of proof, it is argument." 132 Another has suggested that the test is whether a witness could take the stand and make the same statement. If the rules of evidence would prevent such testimony, or if no actual witness exists who can give it, it is argument. 133 However, neither of these statements is complete. The cases seem to permit something more than just a recital of anticipated evidence. Many jurisdictions also allow an attorney to state his or her legal claim or defense, at least in basic terms, 134 and to describe the nature of the case and summarize the issues, at least in complicated matters. 135 Some jurisdictions also permit the attorneys to draw reasonable inferences from the anticipated evidence, and thereby tell the jury in more conclusory fashion the gist of the evidence. 136 The prohibition against argument must be understood in light of the reasons for giving opening statements. As long as opening remarks will assist the jury in understanding the evidence, they are permissible. However, when they turn distinctly partisan—asking the jury to resolve disputes, make inferences, or interpret facts favorably to the speaker—the remarks are argumentative. 137

How the general rule against using opening statements to make legal arguments is interpreted varies from jurisdiction to jurisdiction. Many jurisdictions—probably a majority—do not permit attorneys to discuss law in detail during opening statements, 138 but do permit the attorneys to briefly state the main legal issues on which the case depends. A Vermont court held:

In an opening statement to the jury the plaintiff's counsel briefly outlined his claim with regard to the law of negligence. The gist of the statement in this regard was that negligence is a shortage of duty; but some expressions were used that deviated from an accurate definition of negligence. Counsel expressly disclaimed that such statement was made in correct legal form, and at the outset reminded the jury that they were to take the law from the

134. See Turner v. Commonwealth, 240 S.W.2d 80 (Ky. 1951); People v. Myers, 30 Mich. App. 409, 186 N.W.2d 381 (1971); cf. MINN. DIST. CT. R. 27(c) (attorney must confine himself to stating facts); TEX. R. CIV. P. 265(a).
court. There was nothing of an inflammatory character in the statement, and what was said about the law was put forward in a way that suggested to the jury that the claim of the defendants would differ from that of the plaintiff. An exception was taken to the opening statement, but it avails nothing. In so holding, there is no intention on the part of the court of giving countenance to the idea that counsel may argue the law to the jury, or read law to the jury, or treat as open questions of law upon which the court has ruled, or in any way seek to have the jury understand that they can do otherwise than to take the law from the court.\(^{139}\)

When a cause of action is based on a statute, the parties will usually be allowed to read the statute or an approved jury instruction, but will not be allowed to go further and argue how the law is supposed to be interpreted.\(^{140}\)

Courts are split over whether it is permissible to read from or refer to the pleadings during opening statement. The majority allow an attorney to refer to or read from them—despite the fact that they are not evidence—at least if doing so will explain the procedural posture of the case or the factual contentions, or will help make clear which issues are contested and which are admitted.\(^{141}\) This matter is usually left to the discretion of the trial judge.\(^{142}\) A few jurisdictions have changed this common law rule of discretion by statute; some prohibit the reading of pleadings,\(^{143}\) some require that they be read.\(^{144}\)

Opening statements are supposed to be limited to summaries of the evidence a party intends to introduce. Four major rules follow from this: attorneys may not refer to inadmissible evidence, may not exaggerate or overstate their evidence, may not discuss evidence they expect the opponent

\(^{139}\) Lewes v. John Crane & Sons, 78 Vt. 216, 219-20, 62 A. 60, 61 (1905); see also Ky. R. CRIM. P. 9.42(a) (the prosecutor “shall state to the jury the nature of the charge” as well as the evidence he will introduce); Ward v. State, 246 Ind. 374, 205 N.E.2d 148 (1965). Contra Williams v. Goodman, 214 Cal. App. 2d 856, 29 Cal. Rptr. 877 (1963); State v. Kendall, 200 Iowa 483, 203 N.W. 806 (1925).


\(^{143}\) E.g., U.S. Dist. Ct. R. 9 (W.D.N.C.) (pleadings will not be read); see also Zindrick v. Drake, 75 Ill. App. 3d 702, 393 N.E.2d 1277 (1979) (ad damnum clause may not be read).

\(^{144}\) E.g., Iowa R. CRIM. P. 18(1); cf. Nev. REV. STAT. § 175.141 (1979) (clerk must read indictment or information to jury at start of trial).
to introduce, and may not go into too much detail about each witness' testimony. These rules are enforced to varying degrees in different jurisdictions.

The basic rule enforced in all jurisdictions is that an attorney may not refer in opening statement to evidence that would be inadmissible at trial because it violates the rules of evidence. If such evidence is alluded to, the opponent may object, move to strike, and seek to have the jury instructed to disregard it.145 If the facts wrongfully disclosed are damaging enough, it may justify a mistrial or be reversible error on appeal.146 Nevertheless, courts recognize that one cannot anticipate accurately all of the judge's evidentiary rulings, so the mere fact that evidence is later ruled out will not support a mistrial. The evidence must be prejudicial—must make an erroneous verdict likely—and/or the attorney must have acted in bad faith before mistrial is required.147 If evidence is referred to in opening statement in violation of a motion in limine, it is more likely to lead to a mistrial or reversible error.148

If evidence admissibility is borderline or depends on the successful laying of a foundation, and there has been no advance ruling by the judge, is it error to discuss it in opening statement? While it may be unwise tactically,149 it is not error as long as the attorney has reasonable grounds to believe the evidence would be admissible.150

A closely related problem concerns exaggeration and overstatement—probably the most common kind of "misstatement" of facts that occurs in opening statements. It is improper for a party to refer in opening statement to "facts" that are unprovable because no witness will testify to them.151


147. *See* e.g., United States v. D'Alora, 585 F.2d 16 (1st Cir. 1978); Rutledge v. State, 374 So. 2d 975 (Fla.), *cert. denied*, 446 U.S. 913 (1979); Commonwealth v. Duncan, ___ Pa. ___, 370 A.2d 1191 (1977).

148. *See J. TANFORD, supra* note 1, at 284 (summarizing several sources of tactical advice).

149. *See* Schwedler v. Galvan, 46 Ill. App. 3d 630, 360 N.E.2d 1324 (1977); Timsah v. General Motors Corp., 225 Kan. 305, 591 P.2d 154 (1979); McKinley v. Vize, 563 S.W.2d 505 (Mo. Ct. App. 1978); State v. Nabozy, 54 Ohio St. 2d 195, 375 N.E.2d 784, *vacated on other grounds*, 439 U.S. 811 (1978); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(c)(1) (1982) (lawyer may not allude to any matter unless he has a reasonable basis to believe it is relevant and admissible); 1 ABA STANDARDS FOR CRIMINAL JUSTICE §§ 3-5.5, 4-7.4 (2d ed. 1980); MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.3, 3.4 (1982).

Often such exaggerations and misstatements will take the form of reasonable inferences from the evidence—conclusions one thinks flow logically from the evidence. Such conclusory statements are proper during closing argument, but not during opening statement. It is difficult for the courts to police this rule, because the judge cannot know until the end of the evidence whether an apparent factual statement was proved directly or is only an inference. Thus, the general standard of enforcement is to allow lawyers considerable latitude in stating what they expect to prove, so that anticipatory objections rarely are sustained. Unless the overstatement is prejudicial or obviously made in bad faith—in which case a mistrial is usually appropriate—the only remedy is to move to strike the remark after one's opponent rests his or her case, and request that the judge instruct the jury to retroactively disregard it.

It also is usually error for the party making the first statement to anticipate what the opponent is going to say, or for either party to discuss evidence the other is going to introduce. Case law on this point is sparse, but it is likely that, while it is proper for the trial judge to sustain an objection to such an anticipatory statement, it will not support a reversal of judgment if the trial judge erroneously permits it. The rationale is that, unless an attorney intends to offer the evidence himself, he lacks a good faith basis to believe his opening statement will be supported by evidence. A party has no control over whether his opponent will call a particular witness or elicit testimony on a particular defense. However, once the opponent has committed him- or herself to a course of action—by filing notice of intent to raise a particular defense or by promising to call a certain witness in the opening statement—then a party may discuss that anticipated evidence in a nonargumentative way.

Kenny, 128 N.J. Super. 94, 319 A.2d 232 (1974); see also Arizona v. Washington, 434 U.S. 497 (1978) (fundamentally unfair for counsel to make statements of fact that she or he cannot prove because the rules of evidence would not permit it); State v. Boyd, 600 S.W.2d 97 (Mo. Ct. App. 1980) (prosecutor knew witness was unavailable).


152. See Williams v. Commonwealth, 602 S.W.2d 148 (Ky.), cert. denied, 449 U.S. 1088 (1980); Wilhelm v. State, 272 Md. 404, 326 A.2d 707 (1974); see also State v. Lawrence, 137 Vt. 597, 409 A.2d 597 (1979) (whether defendant prejudiced by prosecutor's opening statement is determined on a case-by-case basis in context of entire proceeding).


The final rule concerning discussion of facts in opening statement is the strange one that a party may not go into too much detail. This rule is not found in all jurisdictions. Some solve the problem by permitting the setting of time limits. Where the rule is found, it basically upholds the right of the trial judge to take action to prevent a party from wasting the court's time by going over needless details. It is doubtful that a violation of this rule by a long-winded attorney would ever be grounds for reversal on appeal, but neither can the long-winded lawyer complain that he was cut off after a reasonable time.\(^\text{155}\)

If a party intends to introduce an exhibit during the presentation of evidence, he should be able to preview it as well as previewing the witness testimony. There is no logical difference between evidence presented by exhibits and evidence presented by oral testimony. Although case law is sparse, and attorneys rarely attempt to use exhibits in opening statement, it appears that most jurisdictions probably would permit a party to use exhibits during opening statements. Those exhibits a party reasonably believes will be admitted into evidence may be shown to the jury. Accurate charts, diagrams, and maps that will later be used to illustrate the testimony of witnesses may be used in opening statement for the same purpose—to help the jury visualize and understand the evidence.\(^\text{156}\) Some case law approves the use of illustrative diagrams during opening statement even if they will not be introduced into evidence, as long as they serve the purpose of opening statements in explaining the case to the jury in a nonargumentative way.\(^\text{157}\) Other kinds of exhibits that will be offered during trial, such as the weapons, autopsy photographs, and bloody clothing associated with a crime, may be permitted at the court's discretion.\(^\text{158}\) With all exhibits, the advance approval of the court probably

\(^{155}\) See Stuthman v. United States, 67 F.2d 521 (8th Cir. 1933); Pacific Fire Ins. Co. v. Overton, 256 Ala. 400, 55 So. 2d 123 (1951); People v. Hamilton, 268 Ill. 390, 109 N.E. 329 (1915); State v. Denney, 352 So. 2d 204 (La. 1977); see also United States v. DeRosa, 548 F.2d 464 (3d Cir. 1977) (reversible error to give detailed statement of facts not later supported by testimony); State v. Browner, 587 S.W.2d 948 (Mo. Ct. App. 1979) (dictum: opening statements should not be detailed).

\(^{156}\) See People v. Green, 47 Cal. 2d 209, 302 P.2d 307 (1956) (en banc), overruled on other grounds, People v. Morse, 60 Cal. 2d 631, 388 P.2d 33, 36 Cal. Rptr. 201 (1964); State v. Jones, 233 La. 775, 98 So. 2d 185 (1957); see 4-County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954).


\(^{158}\) See People v. Green, 47 Cal. 2d 209, 302 P. 2d 307, (1956) (en banc), overruled on other grounds, People v. Morse, 60 Cal. 2d 631, 388 P. 2d 33, 36 Cal.
is required, at least by customary practice in most jurisdictions, because judges feel there is something more prejudicial about an exhibit than mere testimony.

The final basic prohibition of opening statements is that the attorneys are not permitted to attempt to arouse the emotions of the jurors. One theme that runs throughout the rules of trial practice is that the jurors are supposed to be impartial and decide the case based on a dispassionate consideration of the evidence.\(^9\) Therefore, making remarks during opening statement that tend to distract the jury from the facts and law, inject irrelevant side issues concerning the personalities and characteristics of the persons involved in the trial, or otherwise arouse emotional reactions in jurors, is prohibited. While the catalogue of the kinds of remarks likely to arouse emotions is too long to detail, these improper remarks can be grouped into several categories: arousing sympathy for or antipathy against one of the parties,\(^6\) arousing class, racial, ethnic or religious prejudices,\(^9\) injecting insurance, wealth, poverty or other information on a defendant’s ability to pay a verdict,\(^9\) and, in criminal cases, appealing to fear, the desire for vengeance, vigilantism, and other emotions likely to turn the jury into a lynch mob.\(^9\) Violations

Rptr. 201 (1964); Shelton v. Commonwealth, 280 Ky. 733, 134 S.W.2d 653 (1939); see State v. Posey, 347 Mo. 1088, 152 S.W.2d 34 (1941) (even though alleged weapon not introduced at trial). See generally State v. Cook, 606 S.W.2d 241 (Mo. Ct. App. 1980) (may refer to exhibits).

159. Because jurors take an oath to put aside prejudices, they may be challenged for cause if their feelings interfere with their ability to be fair to both sides and relevant evidence may be excluded if it tends to arouse their emotions. FED. R. EVID. 403. Moreover, even final arguments may not unduly appeal to emotions.


161. See United States v. Stahl, 616 F.2d 30 (2d Cir. 1980) (class prejudice); Annotation, Counsels Appeal in Criminal Case to Race, Nationality or Religious Prejudice as Ground for Mistrial, New Trial, or Reversal, 45 A.L.R.2d 303 (1956); Annotation, Statement by Counsel Relating to Race, Nationality or Religion in Civil Action is Prejudicial, 99 A.L.R.2d 1249 (1965).


of this rule are more likely to lead to reversible error than others.

IV. PRESENTATION OF EVIDENCE

The next phase of the trial is the presentation of evidence—primarily the interrogating of witnesses and examination of exhibits. Many of the legal rules discussed in this section already will be familiar as rules of evidence; I will not spend any time summarizing them. It should, however, become apparent that the traditional rules of evidence are only a part of a larger system of rules that regulates all aspects of the presentation of evidence. Some rules are common to all sides during the introduction of evidence, others are unique to either direct examination or cross examination. Much of the law concerning this phase of the trial is intended to regulate what the witnesses may say and do, but it also addresses the propriety of the conduct of the trial judge and the attorneys.

A. Witness Examination

In most trials, a majority of the evidence is presented through the testimony of witnesses. These witnesses are called by one of the parties or the court—usually in a predetermined order—and then direct and cross-examinations are conducted. Witness examination is controlled by rules of procedure, rules that regulate the kinds of questions that attorneys may ask, rules limiting the content of what the witnesses may testify to, and special rules concerning direct examination and cross examination.

As with other parts of the trial, the law seems to say that the basic legal principle of witness examination is trial court discretion. Federal Rule of Evidence 611(a) provides:

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.¹⁶⁴

Yet, discretion plays no greater a role in controlling witness examination than it does elsewhere in the trial. Legal rules exist that limit or override that discretion, and appellate courts pay no more systematic deference to trial court discretion when reviewing errors concerning witness examination than they do for any other kind of errors.¹⁶⁵

¹⁶⁴ Fed. R. Evid. 611(a). The advisory committee noted that spelling out detailed rules to govern direct examination was neither desirable nor feasible. Id. advisory committee’s note.

¹⁶⁵ See supra notes 5-7 and accompanying text.
1. Procedure for Presenting Evidence

It is said that the trial judge has discretion to determine the order of proof.166 Yet, the party with the burden of going forward with evidence—usually the plaintiff—almost always presents its evidence first, followed by the defense case, followed by rebuttal. In an ordinary case, it is probably error to reverse the normal order, although a "wrong" ruling is unlikely to support a new trial because the aggrieved party will be hard-pressed to show prejudice. As long as each party is given the opportunity to present its case at some time during the trial, an erroneous ruling on the proper order is undoubtedly harmless error.167 Due process is satisfied when each side is given one opportunity to present its evidence. Unless the court restricted the scope of evidence in a party's case-in-chief, whether to allow rebuttal or surrebuttal, and their appropriate scope, these are decisions mostly within the court's discretion. Rebuttal commonly is allowed, limited to responding to new issues raised in the defense case-in-chief, such as an affirmative defense, or to rebutting specific facts testified to by defense witnesses.168 Surrebuttal is discretionary; generally allowed if the plaintiff raised new issues in his rebuttal.169 The trial judge has the discretion, of course, to permit a party to reopen his case to introduce evidence inadvertently omitted from his case-in-chief,170 even after the close of evidence171 or the submission of the case to the jury.172


While the trial judge sets the order in which the parties present their evidence, he is not supposed to interfere in the parties' decisions concerning internal organization, such as which witnesses to call in what order.173 However, the judge may limit the time available for a party to present its evidence, or put limits on the number of cumulative or repetitive witnesses a party may call.174 Obviously, any such restriction must be reasonable considering the seriousness and complexity of the case. Because of the sixth amendment right of compulsory process, the court theoretically must be more careful in limiting witnesses called by a criminal defendant.175

There is one universal rule of procedure for the presentation of evidence, so fundamental that in some jurisdictions it is known simply as "the rule." At the request of either party, most witnesses must be excluded from the courtroom.176 The purpose of this rule is to prevent witnesses from conforming their testimony to evidence previously introduced. In that way, it is consistent with other rules of witness examination designed to make sure that the jury hears each witness' personal recollection of the events in his or her own words, however flawed that recollection might be. The separation rule (also called sequestering or excluding witnesses) generally does not apply to parties or to other important witnesses if an attorney can convince the judge that a particular witness' presence is necessary. The judge has a fair amount of discretion in deciding whom to exclude and whom to allow to remain in

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175. See People v. Van Zile, 48 Ill. App. 3d 972, 363 N.E.2d 429 (1977) (may not limit occurrence witnesses but may limit impeaching witnesses); State v. Trickel, 16 Wash. App. 18, 553 P.2d 139 (1976) (character witnesses may be limited).

the courtroom. If a witness violates a separation order, at least if he does so with the connivance of one of the parties, the court has the power to prohibit the witness from testifying at all, but is not required to ban the witness.

The trial judge also may interrogate witnesses or call additional witnesses. In most jurisdictions, judges have statutory authority to arrange for and hire neutral expert witnesses, but the power to interrogate witnesses is broader than that. As long as the judge does not display partiality to one side or the other, he or she may participate fully in the presentation of evidence, interrogating witnesses called by the parties or calling new witnesses. A witness called by the court may be cross-examined by all parties to the case regardless of which side they are on.

Whether the jurors are or should be permitted to participate in interrogating witnesses is another matter. In most jurisdictions, the rule probably is that juror questioning is disfavored but not prohibited, and must be carefully supervised by the court. Usually, the juror should submit his or her question to the judge, who can screen it for violations of the rules of evidence.

There is one other procedural rule that is perhaps so obvious that it needs little discussion. Parties have the right to have their witnesses testify

177. See In re United States, 584 F.2d 666 (5th Cir. 1978) (police officer in charge of investigation usually remains); International Harvester Corp. v. Hardin, 264 Ark. 717, 574 S.W.2d 260 (1978) (corporate party’s employee most closely involved with case may stay); Hopkins v. Department of Highways, 350 So. 2d 1271 (La. Ct. App. 1977) (expert witnesses usually may remain); see also Lindsey v. Lindsey, 361 So. 2d 601 (Ala. Civ. App. 1978) (not error to permit defendant’s relatives to remain when judge determines that plaintiff’s request that they be excluded is a tactic to isolate defendant from family during trial); Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981) (not error to allow victim’s widow to remain), cert. denied, 463 U.S. 1213 (1983). But see Johnson v. State, 283 Md. 196, 388 A.2d 926 (1978) (rule mandatory; no exception for principal investigator).


179. See, e.g., Fed. R. Evid. 706.


without interference. The attorneys may interrupt in order to make proper objections or the judge may interrupt for valid procedural reasons, but other persons may not disrupt a direct examination. The judge should not permit the friends and relations of the parties to demonstrate their feelings, nor tolerate any intimidating actions or pressure from political groups, citizen committees, religious organizations, or any other outside organizations. Nonparties, such as witnesses, public interest groups, and the families of victims may not interrupt in order to object. The judge also has power to prohibit parties and attorneys from unnecessarily interrupting the presentation of evidence.

The basic procedure for eliciting testimony from witnesses is for the attorney to ask questions and the witness to answer them. With the exception of a few rules of cross-examination, this process is regulated by a series of loosely-enforced rules concerning the proper form of questions and answers, designed to assure that the evidence presented is accurate from the witness' point of view. Attorneys are prohibited from asking questions that interfere with or subvert this goal, although the rules are only loosely enforced and there is a fair amount of judicial discretion to vary from them.

Thus an attorney may not directly supply evidence to the jury by suggesting or assuming facts not in evidence or misquoting witnesses. The attorney is not supposed to ask compound questions involving two or more separate issues, nor any other form of ambiguous, vague, or incomprehen-


185. See, e.g., Fed. R. Crim. P. 43(b)(2) (disruptive defendant may be removed from courtroom); Illinois v. Allen, 397 U.S. 337 (disruptive defendant may be removed from courtroom or bound and gagged),reh'g denied, 398 U.S. 915 (1970); People v. Simon, 80 Cal. App. 675, 252 P. 758 (1927) (improper remarks by attorney are objectionable); see also Katz, Meeting the Challenge (Of Unfair Tactics), 1958 TRIAL LAWYER 249 (attempts to distract the jury).

186. See, e.g., Riverside Ins. Co. v. Smith, 628 F.2d 1002 (7th Cir. 1980).

sible question that might confuse the witness about what is being asked.^{188} An attorney is supposed to ask each question only once, and is prohibited from asking a question he previously asked and the witness answered, or otherwise eliciting repetitive testimony.^{189} And, on direct examination, the attorney generally may not ask leading questions in which the attorney, not the witness, chooses the words, phrases or ideas that are to be expressed.^{190}

As there was for the other phases of the trial, there is a procedure for objecting to violations of the rules of presenting evidence. The basic requirements are: A timely and specific objection, a transcript showing the error, and a motion to strike or offer of proof if appropriate. Although it rarely comes up, there is also a standing requirement to object: only the parties and the judge may object to evidence. Witnesses and others may assert valid privileges, but may not otherwise object to evidence.^{191}

The two primary requirements are that a timely and specific objection be made. The timeliness requirement means that one must object as soon as the grounds become apparent. That usually means the objection must be made to an attorney's question on the grounds that it calls for inadmissible evidence, rather than waiting until after the answer. When, however, the question was innocuous, but the answer violates evidence rules, an objection is still timely if made to the answer before the next question is asked.^{193} As

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^{188} E.g., Schmoe v. Cotton, 167 Ind. 364, 79 N.E. 184 (1906) (question must be understandable); Conner v. First Nat'l Bank, 118 Ind. App. 173, 77 N.E.2d 598 (1948) (one topic at a time); Sterling v. Marine Bank, 120 Md. 396, 87 A. 697 (1913) (question must be clear). See generally Denbeaux & Risinger, supra note 187, at 483-84.


^{190} See United States v. Cooper, 606 F.2d 96 (5th Cir. 1979). A precise definition of a leading question is impossible. See discussion of leading questions, how to define them, and when they are permissible, in E. Brownlee, Objections to Evidence § 2.1 (1974); McCormick on Evidence, supra note 4, § 6; J. Tanford & R. Quinnlan, Indiana Trial Evidence Manual § 33.1 (1982).


^{193} See, e.g., State v. Decker, 591 S.W.2d 7 (Mo. Ct. App. 1979); Reynolds v. Rio Rancho Estates, 95 N.M. 560, 624 P.2d 502 (1981); Commonwealth v. Farris,
a general rule, it also is untimely to object too soon in anticipation of upcoming inadmissible evidence, although the trial judge has some discretion to permit a premature objection.\(^1\) The specificity requirement means that the objecting attorney must state the grounds for the objection with sufficient particularity that the judge understands which evidence rule is being violated. A general objection that does not explain the grounds is insufficient to preserve any claim of error for appeal,\(^2\) although the trial judge probably will rule on it anyway. In addition, many jurisdictions permit the grounds for the objection to be stated within the hearing of the jurors, but require that any arguments concerning the objection be conducted out of their presence.\(^3\)

There are several common secondary rules of objection procedure that must be complied with to avoid procedural default. The alleged error, the objection, and the ruling must appear in an official transcript, and that transcript supplied to the appellate court. The law differs from jurisdiction to jurisdiction over whose reponsibility it is to arrange for recording—the court's or parties'.\(^4\) Objections to erroneously admitted evidence must be made every time the same or similar evidence is offered,\(^5\) either by a series of objections or by lodging a continuing objection.\(^6\) Because one can only appeal from an adverse ruling by the judge, a party has a right to a ruling on an objection, although the judge properly may reserve ruling until later.\(^7\)

\(^{1}\) E.g., Stephens v. Central of Ga. R. Co., 367 So. 2d 192 (Ala. 1978); Campbell v. Wilson, 143 Ga. App. 656, 239 S.E.2d 546 (1977); Flanagan v. DeLapp, 533 S.W.2d 592 (Mo. 1976); see also Minn. Cvic. Trialbook R. 49 (an incomplete question shall not be interrupted by an objection).


\(^{3}\) See, e.g., United States v. Ledesma, 632 F.2d 670 (7th Cir. 1980); United States v. Fosher, 568 F.2d 207 (1st Cir. 1978); People v. Wadkins, 101 Mich. App. 272, 300 N.W.2d 542 (1980); see also Wyo. Dist. Cr. R. 17N (6th District).


\(^{6}\) See, e.g., Oliver v. Perry, 293 Ala. 424, 304 So. 2d 583 (1974); People v. Sam, 71 Cal. 2d 194, 454 P.2d 700, 77 Cal. Rptr. 804 (1969); N.C. R. Civ. P. 46(a)(i).

If an objection is made to something the jury already has heard, it must be accompanied by a motion to strike and a request for an instruction that the jury disregard it.\(^{201}\) If the judge sustains an objection and wrongly prevents a party from offering its evidence, that claim of error is preserved only if the party makes an offer of proof—includes in the record (but out of the hearing of the jury) a specific statement of the evidence that he or she intended to introduce.\(^{202}\)

2. Direct Examination

Direct examination procedures are fairly uniform from jurisdiction to jurisdiction, but often there are minor local variations. The right to present evidence is basic to due process, but one must do so through competent witnesses whose testimony complies with rules of evidence. The attorney calls the witness, the court determines that witness' competency, and then the examining attorney interrogates the witness using a question-and-answer format.

In some jurisdictions, trivial procedural rules exist that regulate such things as whether the attorneys must sit or stand, or how close to the witness they can approach. Some courts, for example, require attorneys to remain behind a lectern or stay seated unless they need to show an exhibit to a witness; others permit the attorneys free movement around the courtroom. Some courts require attorneys to ask permission to approach a witness with


a document; others do not. Such matters are not only questions of local customary practice. In many jurisdictions, these trivial matters are covered in statutes or rules of procedure with state-wide effect.203

The question concerning who may be a witness also is answered fairly uniformly. Anyone with admissible evidence is competent to be a witness if that person—by oath or otherwise—indicates an understanding of the need to tell the truth and has some minimal ability to testify without lying or fabricating.204 Only a small group of persons are incompetent: the presiding judge, the jurors, and in some jurisdictions, the spouse of a criminal defendant, and persons barred by so-called dead man’s statutes.205

The basic format for a direct examination is a question-and-answer dialogue between the witness and the attorney, in which the witness provides the evidence and the lawyer facilitates, but does not take over. Thus, it generally is error to conduct an examination at either extreme. The witness may not generally be left to his or her own devices to testify as the witness sees fit through an unguided narrative,206 nor may the attorney take over the examination through leading and suggestive questions that deprive the witness of the opportunity to express his or her evidence in the witness’s own words.207 The attorney is supposed to ask a comprehensible question about a particular subject,208 and the witness is supposed to give a responsive answer.209

These basic boundaries leave much room for judicial discretion. How the judge will strike a balance between prohibited leading questions by the

203. See, e.g., N.C. GEN. R. PRAC. FOR SUPER. & DIST. CTNS. Rule 12 (direct examination shall be conducted from a seated position at counsel table); Minn. CIV. TRIAL BOOK R. 48 (lawyers shall be seated or stand at counsel table; lectern may be used with court’s permission); see also Wyo. Dist. Ct. R. 17-I (6th Dist.) (attorneys may approach witnesses with documents and diagrams; no permission required).


207. E.g., Fed. R. Evid. 611(c) (leading questions should not be used on direct examination).

208. See, e.g., Schmoe v. Cotton, 167 Ind. 364, 79 N.E. 184 (1906) (incomprehensible questions not allowed); Conner v. First Nat’l Bank, 118 Ind. App. 173, 77 N.E.2d 598 (1948) (compound or multiple questions asked at once not permitted); Sterling v. Marine Bank, 120 Md. 396, 87 A. 697 (1913) (judge may require attorney to rephrase an unintelligible or ambiguous question).

attorney and the requirement that the attorney direct the examination will vary from judge to judge, and no standard has evolved to guide this discretion. 210 Some judges will prefer the specific question and response format because it affords the opposing counsel greater opportunity to object, and because it tends to keep the witness’s testimony more within the boundaries of the rules of evidence than a narrative. 211 Such judges often will sustain objections to long, narrative answers, especially if the objecting attorney can articulate a fear that specific inadmissible evidence may be testified to by the witness. Of course, other judges prefer to hear narrative testimony from the witness, believing it to be more reliable than testimony tightly directed by an attorney. 212

The judge also has discretion whether to allow redirect examination, and if so, to set its scope. 213 Courts routinely allow redirect on any new matters brought out during the cross-examination. This principle is so well established that it is probably an abuse of discretion if the judge does not permit at least this limited scope of redirect examination. 214 In a few states, statutes specifically elevate this limited form of redirect examination to a procedural right. 215

The purpose of redirect examination is to clarify and supplement confusion and uncertainties caused by cross-examination, so that the entire examination of the witness will fairly represent his or her knowledge. Therefore, in most jurisdictions, it is error to go into new matters for the first time in redirect that should have been presented in the examination-in-chief, although the judge has discretion to vary from this rule in the interests of justice. 216

210. See, e.g., FED. R. EVID. 611(a) (court shall exercise reasonable control over the mode of interrogation); see also Frisella v. Reserve Life Ins. Co., 583 S.W.2d 728 (Mo. Ct. App. 1979).


212. Social psychologists have discovered that narration is more accurate, but that specific narrow questions produce more details. In increasing the amount of information by narrow questions, however, one increases both accurate and inaccurate information. See Lipton, On the Psychology of Eyewitness Testimony, 62 J. Applied Psych. 90 (1977); Marquis, Marshall & Oskamp, Testimony Validity as a Function of Question Form, Atmosphere, and Item Difficulty, 2 J. Applied Soc. Psych. 167 (1972); E. Loftus, Eyewitness Testimony 93-94 (1979).

213. E.g., United States v. Taylor, 599 F.2d 832 (8th Cir. 1979); United States v. Mackey, 571 F.2d 376 (7th Cir. 1978); Woodford v. State, 273 Ind. 487, 405 N.E.2d 522 (1980); see also State v. Hinkley, 52 Wash. 2d 415, 325 P.2d 889 (1958).


216. See United States v. Lopez, 575 F.2d 681 (9th Cir. 1978); Hampton v.
Courts generally have held that it is permissible to use redirect examination for the following purposes: to correct a mistake or misstatement made during cross-examination,\(^{217}\) to explain or qualify an apparent contradiction between testimony given on direct and cross-examinations,\(^{218}\) to explain ambiguous or incomplete testimony, to place an ambiguous answer in its proper context,\(^{219}\) to explain a prior inconsistent statement,\(^{220}\) to explain or qualify apparent interest or bias, but not to justify a bias by explaining the reasons for it,\(^{221}\) to elicit testimony about a whole transaction or conversation when the cross-examiner only referred to one part taken out of context,\(^{222}\) to refresh a witness's recollection after he or she has become confused or testified to a lack of memory on cross-examination,\(^{223}\) and to show mitigating circumstances surrounding a criminal conviction or other act of misconduct dis-


217. See, e.g., Cochrane v. State, 48 Ariz. 124, 59 P.2d 658 (1936) (correcting misstatement); Ivi v. Richardson, 9 Utah 2d 5, 336 P.2d 781 (1959) (mistaken witness may rectify errors); see also Schwartau v. Miesmer, 50 N.J. Super. 399, 142 A.2d 675 (1958) (recalling witness to say that truck was dump truck, not a pick-up).


219. See, e.g., United States v. Walker, 421 F.2d 1298 (3d Cir.) (full explanation of short answer, cert. denied, 399 U.S. 931 (1970); Thornton v. City of Birmingham, 250 Ala. 651, 35 So. 2d 545 (1948) (complete facts upon which opinion was based); People v. Tucker, 142 Cal. App. 2d 549, 298 P.2d 558 (1956) (explaining incomplete answer); State v. Reed, 174 Conn. 287, 386 A.2d 243 (1978) (witness has a natural right to clarify own testimony); Department of Pub. Works & Bldgs. v. Exchange Nat'l Bank, 40 Ill. App. 3d 623, 356 N.E.2d 376 (1976) (explaining incomplete answer); State v. King, 225 N.C. 236, 34 S.E.2d 3 (1945) (that witness who admitted conviction did not know what word meant; had actually been acquitted).


222. See United States v. Barrentine, 591 F.2d 1069 (5th Cir.), reh'g denied, 599 F.2d 1054 (5th Cir), cert. denied, 444 U.S. 990 (1979) (in general); Nitzel v. Austin Co., 249 F.2d 710 (10th Cir. 1957) (written statements); New York Life Ins. Co. v. Doerksen, 75 F.2d 96 (10th Cir. 1935) (remainder of conversation); People v. Miller, 58 Ill. App. 3d 156, 373 N.E.2d 1077 (1978) (context of conversation); see also White v. Commonwealth, 292 Ky. 416, 166 S.W.2d 873 (1942) (relevant parts only, not necessarily entire conversation); cf. Chavez v. Chenoweth, 89 N.M. 423, 553 P.2d 703 (Ct. App. 1976) (discussing statement on cross-examination does not allow plaintiff to elicit that statement was made to an insurance agent).

discussed during cross-examination. In many jurisdictions, redirect examination also may be used to elicit prior consistent statements if the witness was impeached by a prior inconsistent statement.

One final issue of direct examination concerns refreshing the recollection of a witness. During the direct examination, it is proper for the attorney to take steps to refresh the recollection of a witness whose memory of specific events proves inadequate. Most jurisdictions require a foundation that the witness cannot now recall all the facts about an event, or that the witness' memory is exhausted. If the witness is unable to answer a question, his or her memory may be refreshed so that testimony may be given, but if the witness does answer the question, then it is improper to "refresh" the witness's memory in an effort to change that answer. An attorney has no right to try to correct what he thinks is a mistake on the part of the witness through the guise of refreshing recollection. An attorney may attempt to jog the witness' memory by asking a leading question that suggests the forgotten fact, or by letting the witness examine a document (that has been properly marked as an exhibit).

3. Cross-Examination

The most important procedural rule of cross-examination is the right to conduct it. It is safe to say that all litigants have the right to cross-examine witnesses who give adverse testimony. For defendants facing criminal charges, this right is said to derive from the sixth amendment guarantee that the accused may confront witnesses against him. In civil cases, the right to cross-examine is said to be part of fundamental due process to which all parties are entitled. This does not mean that cross-examination is completely unbridled in scope and duration. A party is entitled to a full and fair oppor-


225. E.g., Thompson v. State, 223 Ind. 39, 58 N.E.2d 112 (1944); cf. State v. Paige, 272 N.C. 417, 158 S.E.2d 522 (1968) (prior consistent statement admissible if there has been any attack on witness's credibility).


tunity to cross-examine, but not to raise irrelevant issues or mislead the jury.\textsuperscript{228}

In \textit{Mattox v. United States},\textsuperscript{229} the Supreme Court held that under no circumstances shall the accused be deprived of the right to subject prosecution witnesses to the ordeal of cross-examination. In \textit{Pointer v. Texas},\textsuperscript{230} the Court stated: ‘‘[I]t cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him.’’ This right includes the opportunities to test the recollection and sift the conscience of the witness, and to give the jury the chance to view the witness’ demeanor under pressure.

Other parties also have rights, rooted in fundamental concepts of due process, to cross-examine witnesses who give adverse testimony. The prosecution is entitled to cross-examine defense witnesses, including the defendant if he or she waives the privilege against self-incrimination by giving direct testimony.\textsuperscript{231} In civil cases, refusal to allow cross-examination on relevant matters covered during direct testimony is a denial of a fundamental right and is usually a sufficient ground for reversal. While a judge has more discretion to \textit{limit} cross-examination in civil cases, the judge may do so only after a party has had a fair and substantial opportunity to exercise the right.\textsuperscript{232}

This fundamental guarantee is accompanied by a few secondary rules designed to facilitate its enforcement. The right of cross-examination has been held to encompass not merely the opportunity to ask questions, but also the right to compel answers. A judge is supposed to compel a reluctant witness to answer proper questions on pain of being held in contempt. In extreme cases where the witness’ refusal to cooperate effectively denies a party the right to conduct cross-examination, the court may strike out all or part of the \textit{direct} examination and instruct the jury to disregard it, or even grant a mistrial.\textsuperscript{233} At the other extreme is the ‘‘overcooperative’’ witness


\textsuperscript{229} 156 U.S. 237, 244 (1895).

\textsuperscript{230} 380 U.S. 400, 404 (1965).


\textsuperscript{233} Whether the direct examination must be stricken depends not on whether the witness was unjustified in refusing to answer, but on whether it is fair to allow the direct evidence to stand unchallenged. See, e.g., Henderson v. Twin Falls County, 59 Idaho 97, 80 P.2d 801 (1938) (witness died before cross-examination; jury instructed to disregard direct testimony). \textit{Compare} Montgomery v. United States, 203
who volunteers more than he or she was asked or otherwise gives nonresponsive answers. While the prohibition against allowing the attorney to ask misleading questions gives the witness the right to explain answers, the witness must remain responsive to the question asked. In many jurisdictions, the cross-examiner may move to strike the unresponsive part of a witness' answer, and, if the problem continues, have the judge admonish the witness.234

A second procedural issue concerns the timing of cross-examination. As a general rule, cross-examination follows the completion of the direct examination. It is within the discretion of the trial judge to allow the cross-examination to take place at some other time. Judges frequently will allow an interruption of the direct for limited cross-examination on issues of the competency of the witness or the competency of offered evidence—most often, the qualifications of a proposed expert, the foundation for an exhibit, or the foundation for an exception to the hearsay rule. In many jurisdictions this mini-cross is called a voir dire examination. Cross-examination also may be postponed for the convenience of witnesses.236 A judge also may allow a party to recall a witness for additional cross-examination.237 This is permissible not only when a subsequent witness' testimony reveals new matters, but also when the cross-examiner realizes he or she simply forgot to ask an important question the first time. The timing of cross-examination, except to the extent that it is specified by statute, is entirely at the judge's discretion.

There are two different rules concerning the permissible scope of cross-examination. A majority of jurisdictions limit cross-examination to the issues raised on direct; a minority follow the English practice of allowing cross-examination on any relevant issue. The limited-scope rule is illustrated by Rule 611(b) of the Federal Rules of Evidence: "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." There are innumerable variations of interpretation of this rule, and how strictly it is enforced is a matter for judicial discretion. The strict view, which is usually attributed to Philadelphia

F.2d 887 (5th Cir.) (witnes claimed fifth amendment privilege on cross-examination; violation of the right to cross-examine) with United States v. Seifert, 648 F.2d 557 (9th Cir. 1980) (witnes claimed fifth amendment on cross-examination; direct did not have to be stricken). Compare Stephan v. United States, 133 F.2d 87 (6th Cir.) (refusal to answer questions for no reason; direct not stricken), cert. denied, 318 U.S. 781, reh'g denied, 319 U.S. 783 (1943) with United States v. Keown, 19 F. Supp. 639 (W.D. Ky. 1937) (unjustified refusal to answer questions required direct to be stricken).


& T. R. Co. v. Stimpson;238 is that the right to cross-examine extends only to matters brought up on direct and the general credibility of the witness. The federal rule is similar, but also permits the judge to allow the attorney to go beyond these strict boundaries as long as he does so "as if on direct," i.e., without using leading questions.239 Another variation is the so-called "Michigan Rule," which permits inquiry not only into the subjects raised on direct examination, but also any new matter that would tend to modify, explain, or rebut what was said or implied.240 The English Rule permits wide-open cross examination on any relevant issue, whether or not it was inquired into during the direct examination. Unlike the federal rule, this variation permits a party to pursue new matters while still retaining the power to use leading questions and the other tools of cross-examination.241 Regardless of which test is used, all jurisdictions permit cross-examination for purposes of impeachment if the witness has given any direct testimony. Wide latitude is usually allowed to test and challenge the credibility of the witness, even when it involves questioning on collateral matters.242

The majority rule limiting the scope of cross-examination to matters raised during direct is premised in part on the ability of the cross-examiner to recall the witness as his own and elicit direct testimony. What happens under these limited scope rules if a criminal defendant takes the stand but limits his testimony to only one of the several material issues? The prosecution would seem to be prohibited by the fifth amendment from calling the defendant to testify against himself, and by the rules pertaining to the scope from pursuing the other issues during cross-examination. There is a split of opinion here. Many jurisdictions—probably a majority—appear to allow broader cross-examination of a defendant than of other witnesses.243 However, other jurisdictions say that the rule is the same for defendants as for other witnesses.244 The pattern of decisions is erratic.

There is one situation in which the scope of cross-examination may be narrower than the subjects covered on direct examination. If evidence is

239. Fed. R. Evid. 611(b); see also Boller v. Cofrances, 42 Wis. 2d 170, 166 N.W.2d 129 (1969) (in civil cases, it would be a waste of time to make party recall witness in own case, so he can go beyond the scope of cross-examination if he conducts it as if it were a direct).
242. See id. § 1891(2).
243. See, e.g., United States v. Gaston, 608 F.2d 607 (5th Cir. 1979); United States v. Palmer, 536 F.2d 1278 (9th Cir. 1976); People v. Zerillo, 36 Cal. 2d 222, 223 P.2d 223 (1950); State v. Harris, 564 S.W.2d 561 (Mo. Ct. App. 1978).
244. See Tucker v. United States, 5 F.2d 818, 822 (8th Cir. 1925) (testifying defendant subjects himself to cross-examination to same extent as any other witness, but not to a greater extent); State v. Zdanis, 173 Conn. 189, 377 A.2d 275 (1977) (similar).
admitted on direct that violates the rules of evidence, a party is not necessarily entitled to go over it or expand upon it. While the judge in his discretion may permit a party to introduce additional inadmissible evidence in order to offset prejudice caused by previous inadmissible evidence, it is usually said that the proper scope of cross examination is limited to matters covered on direct that are relevant to the controversy. Pursuing irrelevant matters, or repeating hearsay, only compounds the problems. The fact that inadmissible evidence was brought up on direct is a waiver of the offering party's right to appeal in the event that the judge erroneously allows the cross-examiner to repeat it; it does not make the subject open to cross-examination.

If the party who called the witness conducts a redirect examination, the other side may ask for permission to conduct recross-examination. The court has discretion to permit or refuse it. Unlike the first cross-examination, recross is not a right unless new matters have been raised for the first time in the redirect examination. When it is permitted, recross-examination usually is strictly limited to issues raised on redirect. It is within the discretion of the judge to allow recross on matters inadvertently omitted from the first cross-examination; and it is also within the judge's discretion to prohibit it.

There are some special rules concerning the mode of interrogation on cross-examination; the rules concerning the kinds of permissible questions that may be asked are different than on direct. The major difference is that leading questions, which were prohibited during direct examination, are usually allowed. There are limits: generally one may not use leading questions when cross-examining one's own client who was called as an adverse witness by the other side, one may not ask misleading or trick questions nor frame leading questions in such a way as to elicit half-truths and distortions, and

245. See, e.g., United States v. Nardi, 633 F.2d 972 (1st Cir. 1980).
249. See Gailey v. Commonwealth, 508 S.W.2d 574 (Ky. 1974); State v. Ryder, 348 A.2d 1 (Me. 1975). But cf. Oberlin v. Marlin Am. Corp., 596 F.2d 1322 (7th Cir. 1979) (no one has absolute right to ask leading questions on cross-examination).
the judge always has discretion to stop a leading interrogation that seems to be resulting in unreliable evidence.\textsuperscript{252}

The other kind of question prohibited on cross-examination is one that becomes argumentative. Argumentative questions are speeches by the lawyer disguised as questions. Argumentative refers \textit{not} to arguing with (badgering) the witness, but to making inferences and suggesting conclusions that belong in closing argument. An argumentative question is one that does not seek to elicit an answer; indeed, it is usually one where the attorney does not care what the answer is. There are four common types of argumentative questions: speech-making, in which the lawyer uses a question to make a rhetorical point;\textsuperscript{233} summarizing testimony, in which the lawyer simply repeats parts of the cross-examination he wants to emphasize;\textsuperscript{234} pursuing a line of questions despite the witness' denial of any knowledge about the subject-matter in which the attorney implies that he personally believes the witness is lying;\textsuperscript{235} and sarcastic comments to the jury not in question form.\textsuperscript{236}

\begin{itemize}
  \item \textsuperscript{252} \textit{See} United States v. Glynn, 627 F.2d 39 (7th Cir. 1980); Nelson v. State, 257 Ark. 1, 513 S.W.2d 496 (1974).
  \item \textsuperscript{233} \textit{See} Smith v. Covell, 100 Cal. App. 3d 947, 161 Cal. Rptr. 377 (1980); Self v. Dye, 257 Ark. 360, 516 S.W.2d 397 (1974); \textit{In Re Kemp's Will}, 236 N.C. 680, 73 S.E.2d 906 (1953). For example: "So, Mr. Witness, since you testified you were looking the other way, you really have no idea what color the traffic light was, do you?"
  \item \textsuperscript{234} \textit{See} Commonwealth v. Latimore, 378 Mass. 671, 393 N.E.2d 370 (1979).
  \item \textit{For example:}
    \begin{enumerate}
      \item Q: You were fifty feet away? A: Yes.
      \item Q: It was night? A: Yes.
      \item Q: There was no moonlight? A: That's right.
      \item Q: And you saw the scar on his face? A: Yes.
      \item Q: So you are asking the jury to believe you could see a scar on a man's face from fifty feet away on a dark night?
    \end{enumerate}
  \item \textsuperscript{235} \textit{See} State v. Cuevas, 288 N.W.2d 525 (Iowa 1980). An example of such a colloquy follows:
    \begin{enumerate}
      \item Q: You robbed that convenience store, didn't you? A: No
      \item I did not, I was in Cleveland.
      \item Q: You pulled a shotgun on the clerk, didn't you? A: No.
      \item Q: Then you asked for money? A: No.
      \item Q: And then you pulled the trigger, didn't you? A: No.
    \end{enumerate}
  \item \textsuperscript{236} \textit{See}, \textit{e.g.}, State v. Blount, 4 N.C. App. 561, 167 S.E.2d 444 (1969). For example:
    \begin{enumerate}
      \item Q: You claim to have seen a scar on his face from fifty feet away on a dark night? A: Yes.
      \item Q: You have remarkable vision, Mr. Witness. Did you see anything else?
    \end{enumerate}
\end{itemize}
The other difference between direct and cross-examination concerns the use of exhibits. Any document, photograph, chart, map, model, or other exhibit introduced during the direct examination may be referred to on cross-examination. It may be shown again to the witness and further questions may be asked about it. If the direct examiner used a blackboard or other illustrative exhibit without formally introducing it, that exhibit similarly may be used. Even objects and documents referred to during direct but not introduced usually can be compelled by the cross-examiner for inspection, and introduced into evidence.\(^{257}\)

The more difficult question is whether new exhibits may be used or offered into evidence during cross-examination. Certain types of collateral exhibits usually are permitted: documents used to refresh memory, prior inconsistent written statements, and certified records of convictions may be introduced.\(^{258}\) However, many jurisdictions do not permit new substantive exhibits to be introduced during cross-examination. In states that permit wide-open cross-examination, new exhibits usually are allowed, but in jurisdictions that restrict the scope of cross-examination, the introduction of new exhibits may also be restricted. In some, new exhibits are \textit{per se} beyond the scope of the direct examination and not permitted. In others, new exhibits may be introduced, but only if their subject matter is relevant to issues raised on the direct examination.\(^{259}\)

The introduction of an exhibit by the defendant on cross-examination may have unanticipated procedural consequences. Some jurisdictions have held that introducing an exhibit—perhaps even one used only for impeachment—constitutes opening the defendant’s case. Theoretically, that could result in a waiver of the right to make a directed verdict motion at the close of the plaintiff’s case.\(^{260}\) In those jurisdictions where the defendant can earn the right to open and close the final arguments if he presents no evidence, introducing a document on cross-examination may cost him that privilege.\(^{261}\)

Finally, there is a special group of rules regulating what attorneys may do to impeach the testimony of witnesses. While under modern law, a party theoretically could impeach his own witness on direct examination,\(^{262}\) that is a rare occurrence. The important impeachment rules permit an attorney to

\(^{257}\) \textit{But see} Robinson v. Faulkner, 163 Conn. 365, 306 A.2d 857 (1972) (cross-examination as to contents of exhibit not introduced should not be permitted).

\(^{258}\) \textit{See}, \textit{e.g.}, \textit{Fed. R. Evid.} 609 (impeachment by evidence of conviction of crime); \textit{id.} 613(b) (extrinsic evidence of prior inconsistent statement).

\(^{259}\) \textit{See} Kellerher v. Porter, 29 Wash. 2d 650, 189 P.2d 223 (1948).

\(^{260}\) I could not find any cases on the subject. It may be a point of only academic interest anyway, since the defendant may still make a directed verdict motion at the close of all the evidence.

\(^{261}\) \textit{E.g.}, Grimsley v. State, 304 So. 2d 493 (Fla. Dist. Ct. App. 1974).

\(^{262}\) \textit{See Fed. R. Evid.} 607.
ask questions about prior convictions and, in some jurisdictions, prior acts of misconduct that did not result in conviction, prior inconsistent acts and statements, and prior incidents showing biases, prejudices, or financial interest in the case. The attorney may not ask about lack of religious beliefs. The rule is fairly uniform that before an attorney may ask about any of these specific events he must direct the witness' attention to the time, place, and circumstances under which the incident took place. This is sometimes thought of as a foundation requirement, insofar as directing the witness to the specific time and place of an event demonstrates to the court that the attorney has a good faith basis for asking the question and is not merely fishing.

B. Exhibits and Visual Evidence

Exhibits may occasionally be used during cross-examination, and in some jurisdictions may be offered into evidence during cross-examination, but they are overwhelmingly associated with direct. The rules governing exhibits and the foundations required for their introduction are not difficult to understand if one understands the different purposes for which they can be used. There is much confusion in the case law and legal writing that comes from a failure to distinguish clearly among different kinds of exhibits. This problem is exacerbated by a lack of agreement about what names to give to different kinds of exhibits. For example, exhibits are sometimes collectively denominated as demonstrative evidence, in order to distinguish them from testimonial evidence. At other times, only exhibits used as part of a courtroom demonstration are considered demonstrative exhibits. Based on the purposes for which they are used and the different foundation requirements, it makes most sense to distinguish among four kinds of exhibits: real evidence, writings and documents, illustrative exhibits and demonstrations, and silent witness exhibits.

Real evidence consists of objects offered as having played an actual and direct part in the incident giving rise to trial. A classic example is the actual murder weapon. When real evidence is offered, the attorney must lay a foundation that the object is the actual one that was involved in the incident, and that it is still in the same condition in all material respects. If the object is unique or readily identifiable, direct testimony that it is the very one and

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263. See, e.g., Id. 609.
265. See Fed. R. Evid. 613.
267. See Fed. R. Evid. 610.
268. See, e.g., MCCORMICK ON EVIDENCE, supra note 4, § 212, at 664; Cady, Objections to Demonstrative Evidence, 32 Mo. L. Rev. 333 (1967).
still appears to be in the same condition will suffice. On the other hand, if the object is one of a number of mass-produced objects without identifiable marks, or if it is susceptible to alteration or was tested in a laboratory, the offering attorney probably will have to prove a chain of custody, establishing through circumstantial evidence the unlikelihood of tampering, contamination, or substitution.269

Real evidence also must be relevant, but no higher standard of probative value is required for an exhibit than for testimony. If an item of evidence tends to prove any material issue, it is relevant. There is a common misapprehension that an item of real evidence must be connected to one of the parties to be admissible; the law is otherwise.270 For example, a gun found at the scene of a robbery is relevant to prove that the crime of armed robbery was committed, even if it cannot be connected to the defendant.

Writings or documents are a kind of real evidence. They are objects that played an actual role in the transaction giving rise to the lawsuit. Because of their unique characteristics, a separate foundation requirement has developed for them. To be admissible, a writing must be authenticated and must satisfy the best evidence rule. To authenticate a writing, one proves that it is what it appears to be—a writing produced by a certain person (private writings), by someone within a business (business writings), or by a government official as part of his official duties (official or public writings). Public writings generally can be authenticated merely by showing a certification.271 Private writings, whether business or personal, require a witness for authentication—someone who can testify to whose handwriting or signature appears on the page, or can establish by circumstantial evidence a likelihood that the writing was prepared by a particular individual or by someone (even if they cannot be identified) within a business.272 If the terms of the writing are independently material—that is, if legal rights and duties turn on how a document is worded—then the offering party must comply with the best evidence rule and make a reasonable effort to locate the original. Under modern law, however, the best evidence rule is of little importance.273

Exhibits that played no direct role in the events being litigated, but which are offered to illustrate a witness' testimony and make the evidence more comprehensible to the jury are also admissible. This kind of illustrative exhibit includes maps, charts, diagrams, scale models, photographs, movies, and similar items used to illustrate how events occurred and what things

269. McCormick on Evidence, supra note 4, §§ 212-14.
271. E.g., Fed. R. Evid. 902.
273. See McCormick on Evidence, supra note 4, § 271, at 705; Fed. R. Evid. 1002-1006.
looked like. The specific source of an illustrative exhibit is irrelevant—for example, it does not matter if a diagram is drawn by the witness, the attorney, or a professional draftsman. The only foundation requirement is that the offering attorney must prove that the exhibit is reasonably fair and accurate enough to help the witness communicate his peculiar perspective.\textsuperscript{274} Whether the exhibit is objectively accurate is of no matter.\textsuperscript{275}

Photographs present some unique problems and must be distinguished from other kinds of illustrative evidence. Jurors are likely to assume that a photograph is correct, even to the minute details recorded, and forget that it is offered only as a general representation—a mistake they are not likely to make with a hand-drawn diagram. A photograph, because of its ability to record small details, carries a higher potential for being dramatic and emotional than other kinds of exhibits. Two considerations follow from these differences: gruesome or dramatic photographs are more likely to be excluded because of their prejudicial effect,\textsuperscript{276} and the judge may require a stricter foundation concerning the accuracy of the photograph.\textsuperscript{277} The contemporary view is that photographs are admissible despite inaccuracies as long as those inaccuracies are clearly explained to the jury.\textsuperscript{278}

Closely related to illustrative exhibits are demonstrations conducted by the witness. Like a diagram or other physical object that helps illustrate what the witness testifies to, a demonstration by the witness may help illustrate oral testimony and make the evidence clearer to the jury. Again, appellate opinions tend to imply that there is broad judicial discretion whether to allow


\textsuperscript{275} Cf. Smith v. Ohio Oil Co., 10 Ill. App. 2d 67, 134 N.E.2d 526 (1956) (if exhibit is so inaccurate as to be misleading to the jury, the judge may exclude it).

\textsuperscript{276} See Commonwealth v. Chacko, 480 Pa. 504, 391 A.2d 999 (1978). The court, however, has broad discretion to admit gruesome photographs if they are relevant, and in practice, such photographs rarely are refused. See People v. Jackson, 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1980), cert. denied, 450 U.S. 1035 (1981); State v. Morales, 120 Ariz. 517, 587 P.2d 236 (1978). In fact, when I researched one jurisdiction—Indiana—I discovered that over the last twenty-five years, not a single criminal case was reversed because excessively gruesome photographs were admitted. E.g., Loy v. State, 436 N.E.2d 1125 (Ind. 1982) (35 gruesome color slides admitted).

\textsuperscript{277} See, e.g., Hopper v. Reed, 320 F.2d 433 (6th Cir. 1963); Lee v. Crittenden County, 216 Ark. 480, 226 S.W.2d 79 (1950); Virginian Ry. v. Hillsman, 162 Va. 359, 173 S.E. 503 (1934).

\textsuperscript{278} E.g., Moyer v. United States, 312 F.2d 302 (9th Cir. 1963); Botz v. Krips, 267 Minn. 362, 126 N.W.2d 446 (1964); Spence v. Rasmussen, 190 Or. 662, 226 P.2d 819 (1951). Compare Georgia S. & F. Ry. v. Perry, 326 F.2d 921 (5th Cir. 1964) (posed photograph admissible) with City of Biloxi v. Schambach, 247 Miss. 644, 157 So. 2d 386 (1963) (posed photograph inadmissible).
a demonstration, but in practice it is usually error to refuse a demonstration if the proponent can lay the foundation. Illustrative demonstrations, usually conducted by the witness, are admissible if the witness testifies that he can with reasonable accuracy demonstrate some relevant event and that he can more clearly explain what happened if allowed to demonstrate something that may be difficult to describe in words alone. Experimental demonstrations, usually intended to show cause and effect, require the additional foundation that the circumstances in the courtroom under which the experiment will take place are substantially similar to the conditions under which the original event took place.

While illustrative exhibits are almost always admitted, the common law has developed several rules of exclusion for demonstrations. Demonstrations designed to show causation—for example, that a chair would fall over if one leaned back in it, or the bindings on a ski would not properly release if one fell—are inadmissible unless substantial similarity of conditions is shown. It also is generally improper for a witness to give a physical demonstration of the effect of an injury, such as manipulating a body part so as to cause an outcry of pain or walking with a limp. And, contrary to television portrayals, it generally is improper to reenact the crime. The problem with this kind of demonstration is that it goes beyond merely illustrating the witness’ testimony and becomes evidence itself.


The one situation in which this kind of evidence is admissible for substantive purposes is when the proponent can lay a foundation for a silent witness exhibit. The silent witness exhibit is beginning to be recognized in many jurisdictions which recognize that limiting the use of photographs to illustrative purposes presents problems when no witness can verify the accuracy of the events portrayed. For example, a bank robbery can take place in the absence of eyewitnesses yet may be recorded by automatic cameras. Since no witness saw the robbery, no one can verify the accuracy of the photographs, so they are inadmissible as illustrative evidence. If no other theory of admissibility exists, the photographs must be excluded even if they clearly show the faces of the robbers. This peculiar result has led to the development of the silent witness theory of admitting exhibits. Since no eyewitness is available to verify the accuracy of a silent witness exhibit, some other means must be established for proving a likelihood that the contents of the pictures are accurate. The most common procedure is to call witnesses familiar with the scene to identify objects and persons in the photograph and establish where and approximately when it was taken. In many jurisdictions, it may be necessary also to call an expert who can establish that the process involved in making this particular recording is likely to result in accurate images. Some courts require that there be evidence that the equipment used to record and play back the images be in good working order and competently operated; some that the actual photograph appear untampered with. A single common law foundation has not yet emerged.

There are certain procedural formalities that must be followed in introducing exhibits regardless of what kind of exhibits they are. It is safe to say that most courts require something approximating the following steps: (1) mark the exhibits for identification, (2) lay the foundation through witnesses, (3) show the exhibit to the opposing attorney, (4) make a formal offer of the exhibit into evidence, offering to hand it up to the judge, (5) after voir dire, if any, obtain a ruling on its admissibility, and (6) publish the exhibit to the jury. Items of real evidence usually are passed among the jurors. With simple documents and photographs, copies can be made so that each juror will have one. Large diagrams and charts may be placed on an easel.

where the jurors can see them. The contents of exhibits may not be disclosed to the jurors until after the judge has ruled on their admissibility. This is probably the most often violated rule of trial practice; it is almost certainly harmless error to prematurely discuss or disclose the contents of an exhibit if it is subsequently admitted into evidence.287

Jury views are related to exhibits and demonstrations, but do not involve witnesses. Whether the court permits a jury view is almost exclusively a matter for the judge’s discretion.288 Views and the procedure for conducting them are regulated mostly by statutes. Under most procedures, the jurors, accompanied by the parties, are transported by the bailiff to the scene and permitted to view it. It is improper for the bailiff, lawyers, or witnesses to point out the significance of details or direct the jurors to any particular features.289 It is rare for the judge to reconvene court at the scene to enable witnesses to testify about it, and rarer still for the judge to authorize a reenactment of the events.290 Views are most commonly granted in suits concerning real property.291

When witnesses are unavailable, depositions may be substituted for live testimony. The procedure for getting the contents of a deposition disclosed to the jury vary widely. Some courts prefer that someone play the role of the witness and read the deponent’s answers, while the attorney reads the questions—simulating a direct examination; others forbid this theatrical method.292 The deposition is not supposed to be simply introduced into evi-
Evidence and given to the jury to read, as that would unduly emphasize one witness' testimony over others.

C. Substitutes for Evidence

Evidence can also be "introduced" without calling a witness or offering an exhibit. The parties may satisfy portions of their burdens of proof by resorting to stipulations, judicial notice, and presumptions.

A stipulation is an agreement between the parties to a lawsuit that certain facts are true. Stipulations are considered binding judicial admissions, admissible against the parties who entered into them, and uncontrovertable.293 A stipulation of fact means that the fact is no longer contested and therefore not a material issue. Evidence concerning the stipulated matter becomes irrelevant, and evidence contradicting it strictly inadmissible.294 The parties generally are allowed to stipulate to factual issues, foundations, and that certain elements of a cause of action or defense have been proved, but they may not stipulate to purely legal matters without the consent of the court.295

If facts are matters of common knowledge or authoritatively settled and readily available in reference books, they need not be formally proved. The trial court (as well as the appellate courts) may take judicial notice of them. Courts may take notice of state and federal laws, their own court records, facts of common knowledge, and scientific facts on which scientists are generally agreed and which can be found in ordinary reference books. Under the modern view, the court is usually required to take notice if the requesting party is able to produce reliable documentation of the fact or law. At least if the fact to be noticed is of any significance to the resolution of the dispute, both sides have the right to be heard prior to the taking of notice.296

Finally, a party may satisfy part of his burden of proof by resorting to an evidentiary presumption. Much has been written about the effect of various kinds of presumptions that relieve a party of the necessity to produce any testimonial or documentary evidence. Because a presumption permits a party to prove its case without offering any proof, they are much more restricted in criminal cases than in civil. In criminal cases, presumptions cannot be used in such a way that the prosecution is relieved of its burden of proving every element of the charge beyond a reasonable doubt. Permissive


296. See generally Fed. R. Evid. 201; McCORMICK ON EVIDENCE, supra note 4, §§ 328-30, 332-35.
presumptions—those where the judge instructs the jury that they may but are not required to reach a certain conclusion from circumstantial evidence—are probably valid. The validity of such presumptions will be determined on a case-by-case basis, looking at the judge’s instructions and the circumstantial evidence offered. If the presumed conclusion more likely than not flows from the facts adduced, then a permissive presumption instruction may be given. A common kind of permissive presumption is the presumption of possession based on close proximity. Mandatory presumptions—those where the judge instructs the jury that they must reach a certain conclusion from the evidence unless the defendant proves otherwise—generally are unconstitutional because they shift the burden of proof to the defendant. So-called “bursting bubble” presumptions, which only shift the burden of going forward with evidence, are generally allowed. Conclusive presumptions—where the defendant is not permitted to disprove the fact presumed—are, of course, unconstitutional.297

In civil cases, jurisdictions are free to create virtually any kind of presumption they want. Permissive and mandatory presumptions are permitted, and the courts have held that they present no constitutional issue.298 Nevertheless, even in civil cases, conclusive presumptions that do not permit a party to contradict a conclusion may, in extreme circumstances, be a denial of due process. Presumptions tend to be thought of as part of the substantive law, and the federal practice is to follow state law presumptions.299

V. CLOSING ARGUMENT

After all the evidence has been presented, the parties may give closing arguments. The legal rules of closing argument fall into the same two categories: those that regulate closing argument procedures, and those that control the content of argument—what the attorneys may say. The common law of closing argument is by far the best developed within trial law, primarily because of a large number of appeals in criminal cases based on “prosecutorial misconduct.”

A. Closing Argument Procedure

The procedural rules of closing argument fall into two groups. The first concerns the right to make a closing argument and the limits that can be put on its exercise. The second concerns the procedure for objecting and preserving a claim of error for appeal.

It is safe to say that every party in a civil or criminal trial has a right to be heard in argument on the merits of the case. In criminal cases, and probably also in civil cases, the right is constitutional. This includes the right to argue the facts in evidence, to argue how the law is to be applied, and to employ oratorical and rhetorical skills. The modern view is that the right applies in both jury and nonjury trials, and that the judge lacks the power to dispense with arguments even in civil bench trials. For the party with the burden of proof, the right to argue usually includes the right to argue first and last. This is part of the broader right to open and close each phase of the trial that follows the party with the burden of proof.

A party may waive its right to argue, either explicitly or implicitly. Of course an explicit statement by a party that he does not wish to make argument is a waiver. In addition, all jurisdictions agree that the right to argue can be impliedly waived—that waiver can be inferred from conduct. However, there is a split on whether waiver may be implied from a party’s inaction—silence or failure to affirmatively request argument. The consensus probably is this: silence in the face of a specific request that the right either be exercised or waived, and failure to request argument when the party has had reasonable opportunity to do so are waivers; other forms of silence are not.

One of the more common procedural issues is whether the party going first and last can partially waive argument—waive its first argument but give its final argument. This maneuver is usually called “sandbagging” the defense. It forces the defense to make its argument first, depriving the defend-

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302. But see Eldridge v. Rogers, 40 Wyo. 89, 275 P. 101 (1929) (one of a handful of older cases holding arguments discretionary in civil bench trials).

303. See, e.g., ARIZ. R. CRV. P. 51(c); see also Silver v. New York Life Ins. Co., 116 F.2d 59 (7th Cir. 1940) (defendant who admits plaintiff’s allegations and proceeds on affirmative defense earns right to open and close). But see FLA. R. CRIM. P. 3.250 (if defendant puts on no evidence he earns right to open and close); KY. R. CRV. P. 43.02 (defendant opens, plaintiff closes).


305. See, e.g., United States v. Spears, 671 F.2d 991 (7th Cir. 1982) (silence is waiver only if party had opportunity to assert right but failed to do so); Fuhrman v. Fuhrman, 254 N.W.2d 97 (N.D. 1977) (failure to request argument not a waiver if counsel had no opportunity to request it); Piatt v. Head, 35 Kan. 282, 10 P. 822 (1886) (silence after request is a waiver); see also Horney v. McKay, 138 Neb. 309, 293 N.W. 98 (1940) (failure to assert right to open and close argument prohibits assertion of same issue on appeal).
ant of the ability to respond to anything the plaintiff says. There is a split of authority. In many jurisdictions this maneuver is seen as unfair, and is prohibited. The party with the right to go last has the obligation to go first, and must either make both arguments or waive argument altogether. This seems to be the modern rule. However, several older cases, at least implicitly, permit this kind of partial waiver.

Several procedural rules facilitate the exercise of the right to argue. Indeed, courts are inclined to believe that closing arguments are an important part of the adversary system of justice and encourage their exercise. Trial judges generally are supposed to allow the parties time to prepare arguments. Although the interpretation of what constitutes reasonable preparation time may differ, and long recesses need not be granted, it is probably an abuse of discretion to refuse a request for a few minutes recess before argument. The second facilitating rule is the prohibition against interruption and disruption of argument. Simply stated, no one may interfere with or disrupt argument except the judge, or the opponent, who may do so only to assert valid grounds for objection.

There also are several well-established procedural rules that inhibit and restrict the exercise of the right to argue. For reasons having to do with crowded calendars and court efficiency, arguments may be limited. Unless a statute establishes the time available for arguments, the trial judge may set “reasonable” time limits. Courts are supposed to take into account the complexity of the legal and factual issues, the length of the trial and number of witnesses, and the seriousness of the case when setting these limits. In

306. E.g., ALASKA R. CIV. P. 46(g); ARK. STAT. ANN. § 43-2132 (1977); IOWA R. CIV. P. 195; TENN. R. CRIM. P. 291; see also Central of Ga. R. Co. v. Sellers, 129 Ga. App. 811, 201 S.E.2d 485 (1973) (trial should not be a game); Reagan v. St. Louis Transit Co., 180 Mo. 117, 79 S.W. 435 (1904) (waiver of first argument is waiver of all).


308. See, e.g., Commonwealth v. Cooper, 230 Pa. Super. 204, 327 A.2d 177 (1974) (implies that it would be error to refuse a request for a 15-minute recess; not error to refuse request for several days recess).

309. See, e.g., King v. Kaplan, 94 Cal. App. 2d 697, 211 P.2d 578 (1949) (error for judge to instruct jury to disregard arguments); State v. Hardy, 189 N.C. 799, 128 S.E. 152 (1925) (error to interrupt and criticize attorney for making his argument); Martin v. Philadelphia Gardens, 348 Pa. 232, 35 A.2d 317 (1944) (trial judge’s excessive interference denies due process); People v. Higgins, 88 A.2d 921, 450 N.Y.S.2d 558 (1982) (error for attorney to interrupt); ARIZ. R. CIV. P. 51(d) (attorney may not interrupt except to raise questions of law); WYO. DIST. CT. R. 17(X) (attorney shall not walk around to divert jury’s attention).

310. Compare ME. R. CIV. P. 51(a) (plaintiff allowed 50 minutes for first argument, defense allowed one hour, then plaintiff permitted 10 minutes for rebuttal) with MO. R. CRIM. P. 27.02(l) (court fixes time limits).

311. See Brooks v. State, 187 Tenn. 67, 213 S.W.2d 7 (1948), cert. denied,
the absence of a statute or procedural rule to the contrary, the trial judge also has the discretion to limit the number of attorneys who may argue and the number of arguments they may make. In complex cases involving multiple parties, all jurisdictions give the trial judge discretion to set the number, order, and time limits on each party.

Procedures for making and preserving objections are similar to the procedures for objection already discussed. In general, they are as follows. First, the judge must permit a party the opportunity to object to a violation of closing argument rules or to request a procedural right, and the opportunity to preserve that objection or request for appeal. That means the judge must be present during arguments, must not prevent a party from objecting, and must provide for a transcript upon request. Second, the objection or request must be timely. That means that objections must be made as soon as the grounds become apparent, and generally may not be made for the first time at the close of argument. For requests to exercise a procedural right or privilege, the request must be made in advance (obviously), but there is little agreement how far in advance. Third, the objection or request must be specific. A vague or general objection does not preserve any issue for appeal.


314. See, e.g., People v. Morgan, 93 Ill. App. 3d 12, 416 N.E.2d 740 (1981) (closings should be recorded); Caplan v. Reynolds, 191 Iowa 453, 182 N.W. 641 (1921) (dictum-judge must be present); Johnson v. Zadworny, 6 Mass. App. Ct. 934, 381 N.E.2d 1119 (1978) (attorney rose to object, judge motioned him down, case reversed—though not specifically on this point); W. Va. Trial Ct. R. VI(a) (counsel may interrupt argument to make objection).


nor compel the trial court to take any action.317 And fourth, in the case of an objection, the party must make a specific request for a remedy. Usually that means that a party is expected to do three things: (1) object, (2) move for an instruction to the jury to disregard the improper argument or for some other appropriate remedy, and (3) move for a mistrial if the error is serious.318 The mistrial motion need not be made at the same time as the objection, because it may be based on cumulative errors.319 The other requirements for making proper objections generally—that they be argued out of the jury’s hearing and that the appeals court be provided with a transcript—apply to closing argument errors also.320

B. Regulating the Content of Closing Arguments: What the Attorneys May Say

The substantive rules of closing argument that govern the propriety of the contents of a party’s argument fall into five categories. There is an extensive body of common law concerning what kinds of arguments can be made about the facts, what attorneys may say about the law, what kinds of arguments can be made about damages, the extent to which attorneys may make emotional pleas, and the extent to which they may suggest that information other than the evidence and law be used to reach a verdict.

The courts seem to consider appeals to emotions to be the most serious kind of improper closing argument. Almost any unwarranted attempt to arouse the emotions, prejudices, biases, and sympathies of the jury can be reversible error. Attorneys are permitted to display emotions during argument,321 but may not make arguments designed to arouse the jurors’ emotions and distract them from the law and facts. Thus, arguments asking for sympathy for the client or crime victim or arousing feelings of anger and antip-

320. E.g., Kelly v. State, 7 Ark. App. 130, 644 S.W.2d 638 (1983) (cannot review allegation of error without transcript); Fed. R. APP. P. 10 (transcript usually required); MINN. CIV. TRIALBOOK R. 31 (objections argued out of jurors’ presence).
321. See Ferguson v. Moore, 98 Tenn. 342, 39 S.W. 341 (1897) (plaintiff’s lawyer cried during summation, no error, may even be professional duty to shed tears if counsel has them at his disposal).
athy toward the other client are prohibited. Arguments that tend to arouse racial, ethnic, religious, and similar prejudices are improper. In civil cases, arguments that bring up the wealth of the parties or the existence of insurance are usually error if that is suggested as a reason for returning a verdict.

In criminal cases, prosecutors often make arguments about the problems of crime, the need to protect the community, the evil of criminals, the need to avenge the victim, and other arguments tending to turn the jury into a lynch mob. Courts have been reluctant to label these cases as error, despite their clear tendency to whip the jury into an emotional frenzy. Such arguments rarely result in reversible error unless the appeals court believes they resulted in an innocent person being convicted. Bearing in mind that there is a great deal of inconsistency and variation among the cases, a few generalizations can be made. Arguments that merely repeat what jurors already

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322. See Missouri K. T. R. Co. v. Ridgway, 191 F.2d 363 (8th Cir. 1951) (plaintiff argued that defendants had taken plaintiff off payroll when he was injured, erroneous attempt to arouse anger of jurors); Georgia Mut. Ins. Co. v. Willis, 140 Ga. App. 225, 230 S.E.2d 363 (1976) (error to warn jury of defendant’s treachery and danger it posed); People v. Eckles, 83 Ill. App. 3d 292, 404 N.E.2d 358 (1980) (error to hold up picture of victim and argue her life had been snuffed out when she was too young to die); People v. Leverette, 112 Mich. 142, 315 N.W.2d 876 (1982) (error to try to arouse sympathy for crime victim); cf. Beal v. Southern Union Gas Co., 66 N.M. 424, 349 P.2d 337 (1960) (not error to refer to pitiable condition of plaintiff in personal injury suit alleging that defendant must compensate plaintiff for causing that condition). But see Hartford Fire Ins. Co. v. Becton, 58 Tex. Civ. App. 578, 124 S.W. 474 (1910) (not error for plaintiff to argue that if Jesus Christ came to earth and took out a fire policy these companies would charge him with arson).


know—e.g., that there is a crime problem—are not error.\footnote{See State v. Williams, 107 Ariz. 262, 485 P.2d 832 (1971) (not error to refer to prevalence of crime); State v. Bissantz, 3 Ohio App. 3d 108, 444 N.E.2d 92 (1982) (not error, in bribery case, to argue that community needed public officials with integrity); Commonwealth v. Gwaltney, 497 Pa. 505, 442 A.2d 236 (1982) (no error to tell jury that gang violence was a problem in city).} Similarly, it is not error to warn about the danger to the community in failing to convict the guilty, or that the jurors have a duty to convict if they believe the defendant to be guilty.\footnote{See Matthews v. State, 3 Md. App. 555, 240 A.2d 325 (1968) (no error to tell jury they act as a protective force for the citizens of the county); Wilhelm v. State, 272 Md. 404, 326 A.2d 707 (1974) (not error to argue there was danger to community from violence prone people).} But, once the prosecutor starts to suggest that the defendant should be convicted, based not on facts but as an example to other criminals, to be taught a lesson, to avenge an injustice done to the victim, because the community desires it, or because this person might commit future crimes, it is error.\footnote{See Hines v. State, 425 So. 2d 589 (Fla. Dist. Ct. App. 1983) (error to argue that jurors should use this opportunity to send a message to other criminals); People v. Frazier, 107 Ill. App. 3d 1096, 438 N.E.2d 623 (1982) (appeal to fear that defendant would commit future crimes); Cosey v. State, 93 Nev. 352, 566 P.2d 83 (1977) (error to argue defendant will commit more robberies if not convicted); Commonwealth v. Long, 258 Pa. Super. 312, 392 A.2d 810 (1978) (error to suggest that guilty verdict should be returned if jurors wished to help fight growing crime problem on subways); see also School Bd. of Palm Beach v. Taylor, 365 So. 2d 1044 (Fla. Dist. Ct. App. 1978) (error to suggest that damage award would set an example to prevent future incidents).}

The other kind of nonfactual argument that the courts have trouble with are arguments that suggest a relationship between the jurors and the community. The basic rule of propriety for these “civic duty” arguments is similar to the rule concerning prosecutors’ “safe streets” arguments. As long as the attorney is not suggesting that a verdict be returned on any basis other than the facts in evidence, he or she may make arguments designed to make the jurors take their jobs seriously—arguments that the jurors consider community values, or speak for the community.\footnote{See United States v. Phillips, 664 F.2d 971 (5th Cir. 1981) (no error to tell jury they are conscience of community); Matthews v. State, 3 Md. App. 555, 240 A.2d 325 (1968) (no error to tell jury they act as a protective force for the citizens of the county); Carleton v. State, 425 So. 2d 1036 (Miss. 1983) (no error to ask jury to speak for community).} On the other hand, arguments that ask the jury to substitute as the basis for decision the wishes of the community or the financial interest of the community instead of the facts of the particular case are improper.\footnote{See Finney v. G.C. Murphy Co., 400 Pa. 46, 161 A.2d 385 (1960) (error to suggest that a plaintiff’s verdict will cause everyone’s insurance rates to go up); Byrns v. St. Louis Co., 295 N.W.2d 517 (Minn. 1980) (error to suggest that verdict will cause taxes to go up); Powell v. United States, 455 A.2d 405 (D.C. 1982) (error...}
Proper argument is supposed to be confined to facts introduced in evidence, facts of common knowledge, and logical inferences based on the evidence. If an attorney strays beyond these somewhat vague boundaries when making arguments about the facts of the case, he may commit error. Fact errors overall are next most likely to result in reversible error.

It is improper to argue or allude to facts not in the record, to misstate a witness’s testimony, or to attribute to a witness testimony that was not given. Whether these are trivial or serious errors depends on whether the attorney merely makes a mistake of form that does not alter the evidence (such as attributing testimony to the wrong witness), or makes a substantive error that does alter the evidence, either by discussing “facts” not proved or by contradicting the evidence admitted. This reference to facts not in the record is most likely to result in reversible error if the new information is likely to be used by the jury to resolve one of the critical issues and is not cumulative of other admitted evidence. Generally, courts usually make reasonable allowances for honest mistakes of memory, and ignore misstatements of unimportant facts. Obviously, it is error to refer to evidence that was suppressed or ruled inadmissible by the court.

The more difficult issues in fact arguments revolve around the proper interpretation of the rule allowing attorneys to draw reasonable inferences from the facts. It is improper to insinuate the existence of unproved facts or to invite the jury to speculate about missing evidence, when there is no factual basis in the record for such a conclusion.

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333. See, e.g., Murray v. New York, N.H. & H. R.R., 255 F.2d 42 (2d Cir. 1958) (defendant suggested that personal injury plaintiff would be able to retire at full pension); People v. Terry, 57 Cal. 2d 538, 370 P.2d 985, 21 Cal. Rptr. 185 (1962) (en banc) (prosecutor implied that a threat originated with defendant, despite evidence that a third person was responsible), cert. denied, 375 U.S. 960 (1963); State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975) (prosecutor implied that the defendant had a criminal record).
it is proper for an attorney to make an argument that draws a conclusion as long as the basis for that conclusion or inference is evidence in the record. While courts say that only reasonable inferences are permitted, in fact they allow any kind of inference, however illogical, as long as it is closely tied to facts in evidence.\textsuperscript{334}

One common kind of inferential argument is based on the \textit{absence} of evidence. In many situations, the law permits the attorney to draw the jurors' attention to missing evidence, and ask them to infer that the opposing party did not produce the evidence because it would have been damaging.\textsuperscript{335} In all civil cases, it is considered legitimate argument to comment upon the fact that a party did not testify, did not deny conduct or statements attributed to him, or did not produce a witness related to him or under his control who was likely to possess material information.\textsuperscript{336} It also is usually proper to draw an adverse inference from an adversary's failure to produce evidence in his possession or uniquely under his control.\textsuperscript{337} In criminal cases, the defendant similarly may comment on the prosecution's failure to produce evidence or \textit{res gestae} witnesses, without regard to whether the evidence is primarily under the control of the state. However, the courts are split on the extent to which the state can ask the jurors to draw an adverse inference from the defendant's failure to offer evidence. Direct comments on the defendant's personal failure to testify are universally prohibited,\textsuperscript{338} as are indirect comments, such as referring to the state's case as "uncontradicted and unrefuted," when the defendant is the only person who could have provided such refuting testimony.\textsuperscript{339} Most jurisdictions also prohibit com-

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  \item \textsuperscript{334} See Ladson v. State, 248 Ga. 470, 285 S.E.2d 508 (1981) (attorneys may make absurd or illogical deductions); see also State v. Sims, 639 S.W.2d 105 (Mo. Ct. App. 1982) (valid inference for prosecutor to argue that defendant might be a drug user despite evidence he had no convictions for drug offenses); Clanton v. Commonwealth, 223 Va. 41, 286 S.E.2d 172 (1982) (valid inference for prosecutor to argue that defendant would kill other inmates based on his criminal record).
  \item \textsuperscript{335} See generally Livermore, \textit{Absent Evidence}, 26 Ariz. L. Rev. 27 (1984).
  \item \textsuperscript{337} See, e.g., Dollison v. Chicago, R.I. & P. R.R., 42 Ill. App. 3d 267, 355 N.E.2d 588 (1976); Clayton v. St. Louis Pub. Serv. Co., 276 S.W.2d 621 (Mo. Ct. App. 1955); Forbes v. Long, 184 N.C. 38, 113 S.E. 575 (1922); see also Stevenson v. Abbott, 251 Iowa 110, 99 N.W.2d 429 (1959) (proper to comment on opponent's failure to produce evidence to support allegations in pleadings).
  \item \textsuperscript{338} Griffin v. California, 380 U.S. 609, \textit{reh'g denied}, 381 U.S. 957 (1965).
  \item \textsuperscript{339} See Butler v. Rose, 686 F.2d 1163 (6th Cir. 1982); Angel v. State, 627 S.W.2d 424 (Tex. Crim. App. 1982); State v. Shattuck, 141 Vt. 523, 450 A.2d 1122 (1982); cf. United States v. Hasting, 461 U.S. 499 (1983) (dictum stating that pros-
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menting on the defendant's failure to produce evidence unless that evidence is exclusively within the defendant's power to produce and is material to the nature of his defense.\textsuperscript{340} Others hold that because a defendant has no obligation to present evidence, it is improper for the prosecutor to comment in any way upon his failure to produce evidence.\textsuperscript{341}

The second common inferential argument that attorneys make is that, based on the evidence, a certain amount of damages should be awarded. Many kinds of damages are not susceptible to direct proof and are difficult to quantify in dollars. Especially difficult to articulate are emotional injuries, punitive damages, pain and suffering, and future business or financial losses. Since there is likely to be little direct evidence in the record concerning the value of such intangible harms, attempts by the attorneys to quantify how much the jury should award are rife with possibilities for straying beyond the reasonable-inference-from-the-facts limitation. The basic rule is that the attorneys may suggest specific amounts as the proper measure of damages even for intangible injuries, provided they derive those amounts from the evidence.\textsuperscript{342} They may not base their requests on what their clients want, nor on what similar lawsuits have been worth.\textsuperscript{343}

The most litigated of these issues is the so-called "per diem" argument, in which an attorney attempts to make a concrete estimate of intangible

\textsuperscript{340} See, e.g., United States v. Schultz, 698 F.2d 365 (8th Cir. 1983) (failure to call alibi witness available to defense, proper subject of comment); United States v. Mitchell, 613 F.2d 779 (10th Cir.) (failure to call wife unavailable to government because of privilege, comment permissible), cert. denied, 445 U.S. 919 (1980); State v. Jenkins, 516 S.W.2d 522 (Mo. Ct. App. 1974) (failure to call alibi witness mentioned by defendant, comment permissible).


damages such as pain and suffering by breaking down a long period of time into small units—usually days—and asking the jury to assess a dollar amount to that unit. Total damages are arrived at by multiplying, and what may have seemed like an inconsequential amount for a day or an hour adds up to millions of dollars when multiplied over several years. Courts are divided over the permissibility of these mathematical formula arguments. Some prohibit them altogether, but most allow them under two conditions: the judge must instruct the jury that the attorney’s suggested formula is not binding, but merely illustrative, and the dollar amount suggested must be based on, or at least consistent with, evidence in the record. Attorneys also are permitted to allude to facts that are matters of common knowledge, whether or not those facts were introduced into evidence, and to ask a jury to use that information to arrive at a verdict. Thus, for example, an attorney may wish to remind the jury of inflation when arguing what the proper measure of future damages should be. The argument usually is allowed, as long as the attorney does not suggest a particular rate of inflation. In criminal cases, prosecutors like to remind the jury about the crime problem and the growing crime rate. This argument, too, is permitted as long as the prosecutor does not get too specific. Whether a fact is a matter of common knowledge is left to the discretion of the trial judge.

The fourth group of rules concerning the content of closing argument concerns argument about the law. The basic principle is simple: attorneys can review and discuss the law, whether derived from statutes, case law, or jury instructions, and suggest to the jury how to apply it to the facts, as long as they do so accurately. Any misstatement or misapplication of the law—by omitting part, including an unnecessary element, distorting or contradicting it—is error. The most serious of these errors is an argument that encourages the jury to disregard or circumvent the law.


348. See State v. Thomas, 307 Minn. 229, 239 N.W.2d 455 (1976); People
error is to discuss law that is not part of the instructions nor material to the case, yet is likely to affect the verdict. One common example occurs in capital cases, in which prosecutors tell the jury (accurately, of course) that if they only impose a life sentence, the defendant could be eligible for parole in a few years or be pardoned, and thus might be back on the streets soon, and that a death sentence will be automatically reviewed by an appeals court anyway. Such arguments alternately try to scare the jurors into returning a death penalty and encourage the jurors to err on the side of execution and let the appeals court make the hard decision. The Supreme Court has held that a death sentence imposed in the wake of such an argument violates the eighth amendment.\(^{349}\) Another common example occurs in civil damage cases, in which a defense attorney points out to the jury that personal injury awards are not subject to income taxes, hoping to proportionately reduce the final award.\(^{350}\)

The final category of substantive errors is an eclectic collection of rules prohibiting attorneys from arguing that the verdict should be based on anything other than the facts applied to the law tempered by the jurors’ common experiences. In this group are rules that make it improper to ask the jurors to base their decisions in part on the credibility and personalities of the lawyers—by attacking the honesty or motives of one’s opponent or stating one’s own personal belief in the proper outcome.\(^{351}\) Similarly, it is improper

\(^{349}\) Caldwell v. Mississipi, 105 S. Ct. 2633 (1985) (prosecutor informed jury that Supreme Court would review a death sentence, encouraging them to believe that they were relieved of the burden of responsibility for determining the appropriateness of the death sentence); see Brothers v. State, 236 Ala. 448, 183 So. 433 (1938); People v. Morse, 60 Cal. 2d 631, 388 P.2d 33, 36 Cal. Rptr. 201 (1964) (en banc); Moore v. State, 240 Ga. 807, 243 S.E.2d 1, cert. denied, 439 U.S. 903 (1978); People v. Walker, 91 Ill. 2d 502, 440 N.E.2d 83 (1982); State v. Willis, 410 So. 2d 1019 (La. 1982). But cf. California v. Ramos, 463 U.S. 992 (1983) (upholding statute requiring court to instruct jury that governor can commute life sentence but not that governor can also commute death sentence; future of this opinion is in doubt because of contradictory holding in Caldwell, 105 S. Ct. 2633).


\(^{351}\) See United States v. Morris, 568 F.2d 396 (5th Cir. 1978) (error to state personal opinion of witness’s credibility); Missouri K.T. R.R. v. Ridgway, 191 F.2d
to ask the jury to award an extra amount for attorney's fees so the client's award will not have to be reduced, or to comment on the large fees charged by lawyers.352 Also in this group are rules prohibiting an attorney from bolstering his position by claiming that it is supported by "higher authority"—the government, the supreme court, or God.353 The third common rule prohibits arguments that inform the jury of the past procedural history of the lawsuit, especially the results of a prior verdict reversed on appeal.354

VI. JURY DELIBERATIONS

The final phase of the trial is the deliberation process, in which the jury receives its instructions, deliberates, and returns a verdict. The legal framework for deliberations is made up of the basic procedural structure and rules concerning what jurors properly may consider in the jury room. It is a common misunderstanding that this is a process largely immune from judicial scrutiny, since jurors supposedly cannot impeach their own verdict. As will be seen, this is not an accurate view.


A. Jury Deliberation Procedure

The procedural issues concerning jury deliberations fall into four categories: how do juries receive their instructions, how are they supposed to deliberate, what happens if they want something—an instruction or some evidence—repeated, and how can a party object and make a record of jury misconduct for appeal?

Jurisdictions differ on how and when juries are to be instructed on the law. All agree that this is primarily, if not solely, the province of the trial judge, who bears the responsibility for preparing instructions and giving them to the jury. Somewhat inconsistently, there also is agreement that it is a prerequisite to appeal that a party must have requested specific instructions. The combined effect of these two rules is that a party will have to submit detailed requests for instructions in order to preserve its right to appeal, but the judge has broad power to select which instructions to give and which to reject.

When the instructions are given to the jury, they are read out loud by the judge. The common law majority for some bizarre reason prohibits the judge from giving the jurors a written copy of the instructions, but this prohibition is beginning to break down. As various studies show that jury instructions are difficult to understand, particularly when the jurors have only a single opportunity to hear them, several jurisdictions are beginning to permit (but not require) the trial judge to send a written copy of the instructions to the jury room. The majority practice is for the judge to instruct the jury after closing arguments, which gives him or her the chance to correct any misstatements about the law made by the attorneys, but in


356. E.g., United States v. Gonzalez, 548 F.2d 1185 (5th Cir. 1977).


358. See, e.g., Sales, Elwork & Alfini, Improving Comprehension for Jury Instructions, in 1 PERSPECTIVES IN LAW & PSYCHOLOGY (B. Sales ed. 1977).

359. Compare United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101 (7th Cir. 1979) (no error for trial judge to send written set of instructions to jury room), cert. denied, 444 U.S. 840 (1979) with United States v. Quilty, 541 F.2d 172 (7th Cir. 1976) (no error for trial judge to refuse to send set of instructions to jury); see also State v. Swain, 269 N.W.2d 707 (Minn. 1978) (discretionary). But cf. Parker v. State, 270 Ark. 897, 606 S.W.2d 746 (1980) (mandatory, judge must send instructions to jury room).

360. E.g., People v. Wilson, 43 Ill. App. 3d 583, 357 N.E.2d 81 (1976).
In most states, the parties are given an opportunity to request (in writing) particular instructions and to object to instructions out of the hearing of the jury. A request or objection will be, of course, a procedural prerequisite to an appeal.

The precise deliberation procedures are left largely to the discretion of the trial judge. The only universal principles are privacy and sobriety. The jury must be allowed to deliberate in private, without any of the parties, lawyers, witnesses, court personnel, law enforcement officers, or even alternate jurors present. The presence of anyone other than the officer-in-charge on legitimate business, or the delivery of any unauthorized communication is error, however innocent or well-intentioned. In addition, the jurors must deliberate soberly, and almost any alcohol use by a juror will require a mistrial.

Beyond that, however, the court has discretion to decide such issues as whether to sequester the jury during trial, whether to allow them to separate once they start deliberating, or how late into the night to keep them deliberating. In some jurisdictions, it is even within the judge's discretion to refuse the jury food and refreshment. This is a vestige of the old English common law practice of keeping the jury together without food and water until they reached a verdict. This discretion is limited by a few rules in some jurisdictions concerning whether the jury can be allowed to separate. At common law, the jury could not separate once sworn, and had to be kept together until a mistrial.


sequestered from the possibility of outside influence. Vestiges of these two principles remain. In some states, the jury still must automatically be sequestered in capital cases; in some, the jury may not be allowed to separate once deliberations have begun.

With only a few exceptions, there are no rules governing how the jurors deliberate among themselves. One of those few exceptions is that jurors are not supposed to decide a verdict by lot, by chance, or by quotient. Verdicts by lot are those derived at by drawing a possible verdict out of a hat or flipping a coin. Quotient verdicts occur when a jury decides in advance that each juror will write down how much damages he thinks appropriate and agrees in advance that they will be bound by the amount derived by adding them up and dividing by twelve. The other common exception is that jurors are not supposed to resolve an inability to determine liability by awarding only a percentage of the damages proved or convicting for a lesser-included offense. This is called a "compromise verdict," and is generally disallowed, although difficult to prove.

If the jury wants testimony or an instruction reread, they must ask the judge, who has the discretion to permit or refuse it. As a general rule, both parties have the right to be present and to be heard when the judge makes the decision, and certainly have the right to be present when the

366. See, e.g., Davidson v. Commonwealth, 555 S.W.2d 269 (Ky. 1977) (felonies).


371. See United States v. Pimental, 645 F.2d 85 (1st Cir. 1981); United States v. Peltier, 585 F.2d 314 (8th Cir. 1978), cert. denied, 440 U.S. 945 (1979); Humana, Inc. v. Fairchild, 603 S.W.2d 918 (Ky. Ct. App. 1980); see also Parker v. Tuttle, 260 N.W.2d 843 (Iowa 1977) (dictum: error for bailiff to reread testimony without judge's permission).
testimony or instruction is read to them. This whole process is supposed to take place on the record in open court, not informally in the jury room.\cite{372} When the request is to have testimony reread, the court is supposed to question the jurors about exactly what they wish reread, and try to keep the scope as narrow as possible. Unreasonably lengthy requests need not be granted.\cite{373} However, in most jurisdictions, it is error for the judge to refuse a reasonable request to have testimony reread, at least when it stems from a disagreement among the jurors as to exactly what the evidence was.\cite{374} When the request is to have an instruction reread, however, the tendency is the opposite. In general, an individual instruction should not be reread, for fear of giving undue weight to it. The preference is that, if the judge permits instructions to be reread, he should read all related instructions.\cite{375}

A related issue concerns the propriety of additional instructions. May the judge, because the jury requests it or because he or she feels it is necessary, give the jury a new instruction after they have begun deliberations? As a general rule, the judge has discretion to give or refuse new instructions, whether requested by the jury or not,\cite{376} although in a few jurisdictions, the judge is prohibited from giving any new instructions.\cite{377} Somewhat more controversial is the giving of a so-called "dynamite" or "hammer" charge, designed to try to break a deadlocked jury by telling them that the case will have to be tried again if they are unable to arrive at a verdict, and suggesting that any juror in a small minority reconsider his position. While such instructions have been criticized as tending to cause majority verdicts, most

\begin{itemize}
  \item \cite{373} See State v. Scott, 277 N.W.2d 659 (Minn. 1979) (per curiam); Hill v. Robinson, 592 S.W.2d 376 (Tex. Ct. App. 1979).
  \item \cite{374} See People v. Litteral, 79 Cal. App. 3d 790, 145 Cal. Rptr. 186 (1978) (refusal of reasonable request to allow testimony to be read back was error); Bloch v. City of New York, 68 A.D.2d 932, 414 N.Y.S.2d 592 (1979) (judge must reread if jurors disagree about what was said).
  \item \cite{376} See United States v. Collum, 614 F.2d 624 (9th Cir. 1979), cert. denied, 446 U.S. 923 (1980); Nichols v. Seaboard Coastline Ry., 341 So. 2d 671 (Ala. 1976); Matthews v. Taylor, 155 Ga. App. 2, 270 S.E.2d 247 (1980) (mandatory for court to clarify confusing jury instructions); see also Thompson v. Walker, 565 S.W.2d 172 (Ky. Ct. App. 1978) (judge may decline to instruct further if he feels original instructions were sufficiently clear).
  \item \cite{377} E.g., Hoover v. Gray, 616 S.W.2d 867 (Mo. Ct. App. 1981); cf. Stevens v. Travelers Ins. Co., 563 S.W.2d 223 (Tex. 1978) (judge may not give instruction that coerces minority jurors).
\end{itemize}
jurisdictions approve them. If further instructions are given, the parties have a right to be present.

The procedure for objecting and preserving error, which has been fairly straightforward up to this point in the trial, now becomes complicated. Suppose there is jury misconduct in deliberations—how does a party object and preserve the issue for appeal? Since jury deliberations occur in private, much misconduct goes undetected. Some comes to light only after the trial when attorneys talk to the jurors, and it is difficult to do anything because of the rule that a juror may not impeach his own verdict through testimony or affidavit. However, some misconduct may come to light during the trial. If it does, it must be objected to, and a record made by calling witnesses, including the jurors themselves. As long as the witnesses are being questioned about what persons other than jurors did (outside influence), or about physical objects seen in the jury room, or about what jurors did outside the deliberation process (such as visiting the scene or looking something up in an encyclopedia), there is no problem with the rule that jurors are incompetent to impeach their own verdict. A few states have misinterpreted the rule, and forbid jurors from ever testifying about any kind of misconduct and a few others have expressly changed their common law to permit broad


inquiry into juror misconduct.\textsuperscript{383} Finally, a specific remedy must be requested—a mistrial or an instruction that the jurors disregard an improper influence. Generally, the judge is required to question the jurors about whether they have been influenced, and to grant a mistrial if they admit their deliberations have been affected.\textsuperscript{384}

B. The Basis for Decision: What May the Jurors Consider?

The more interesting rules of deliberations concern what kinds of information the jurors properly may consider during their deliberations. Obviously, they may consider the testimony and the instructions, and discuss the credibility and demeanor of witnesses. But to what extent, if any, can they consider other information—exhibits, their personal experiences, or evidence they gather themselves—or use deliberations aids, such as calculators or notes taken of testimony?

Surprisingly, jurors are not entitled to take with them to the jury room everything used in the trial. Obviously, they cannot take the witnesses in with them; similarly they may not take with them depositions used in lieu of live testimony even if those depositions were introduced as exhibits.\textsuperscript{385} Some jurisdictions carry this prohibition one step further and exclude illustrative exhibits because they, too, are merely part of witness testimony.\textsuperscript{386} Also obviously, the jurors cannot take with them exhibits referred to but not actually introduced, or the complete document when only a portion of it was properly in evidence.\textsuperscript{387} However, even for exhibits properly in evidence, the majority rule gives the judge discretion whether to send them to the jury

\textsuperscript{383} E.g., Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977); Quinn v. Winkel's, Inc. 279 N.W.2d 65 (Minn. 1979).

\textsuperscript{384} See United States v. Hendrix, 549 F.2d 1225 (9th Cir.) (en banc, cert. denied, 434 U.S. 818, reh'g denied, 434 U.S. 960 (1977); see also Bell v. Brewton, 139 Ga. App. 463, 228 S.E.2d 600 (1976) (communications between jurors and insurance agent not reversible error unless prejudice resulted); Kalianov v. Darland, 252 N.W.2d 732 (Iowa 1977) (question is not whether misconduct was intentional or accidental, but whether party was prejudiced).


\textsuperscript{386} See, e.g., United States v. Cox, 633 F.2d 871 (9th Cir. 1980) (illustrative exhibits usually should not be sent to the jury room), cert. denied, 454 U.S. 844 (1981).

room.\textsuperscript{388} In at least one jurisdiction, it is error to send exhibits to the jury room without consent of the parties.\textsuperscript{389} Sending other kinds of documents involved in the trial, such as pleadings or copies of the instructions, generally is not permitted, but also generally is harmless error if sent.\textsuperscript{390}

Perhaps more surprising than the discovery that jurors are not routinely allowed to take all exhibits with them is the discovery that they are not permitted to use their own personal experiences as a basis for decision. Jurors are encouraged to use common experience, but are prohibited from becoming a kind of "expert witness" and telling other jurors about their own unique experiences, making the assumption that it was similar to what happened in the case being tried.\textsuperscript{391} For example, a juror may not properly discuss how severe his own back pain was in evaluating how severe the plaintiff's pain is; nor bring expertise from his or her employment into the deliberations. This injects information into the case that is not part of the evidence, and is usually considered error.\textsuperscript{392} It also is undoubtedly one of the most frequently violated rules of trial procedure, and one of the most difficult violations to detect.

Similarly, jurors may not become detectives and gather new information not offered into evidence. If a juror violates this rule on his own, it is usually harmless error, but if he becomes a witness and shares this information with the other jurors, and it becomes part of the basis for decision, it is likely to be reversible.\textsuperscript{393} Under this rule, it has been held to be error for a juror to look up information in the library,\textsuperscript{394} consult experts,\textsuperscript{395} conduct investigations or question witnesses,\textsuperscript{396} or to visit the scene of the incident.\textsuperscript{397}


\textsuperscript{389} See, \textit{e.g.}, Collins v. Ogburn Realty Co., 49 N.C. App. 316, 271 S.E.2d 512 (1980).


\textsuperscript{391} \textit{See generally} State v. Rogers, 420 A.2d 1363 (R.I. 1980).


\textsuperscript{394} \textit{See} State v. Amorin, 58 Haw. 623, 574 P.2d 845 (1978) (looked up definition of insanity); Dutton v. Southern Pac. Transp., 561 S.W.2d 892 (Tex.
New information brought to the jurors' attention by an outside agency also creates potentially reversible error. If parties, witnesses, or court personnel provide new information to the jury, it is considered a serious error.\(^{398}\) Whether a mistrial will have to be declared, however, will depend on the nature of the information provided, and there is little agreement among courts on where to draw the line.\(^{399}\) One common situation is when a newspaper article or television story might have been read by some of the jurors. For it to warrant a mistrial, the story must not only have contained wrong information or new evidence not heard at trial, but also there must be evidence that some jurors saw or heard it and were affected by it—\(^{400}\) the latter being very difficult to prove. However, "new" evidence derived by the jurors from the testimony is not error. The jurors may make inferences and create new evidence themselves in the jury room—for example, a juror may draw a diagram based on witness testimony.\(^{401}\) Jurors' notes of the testimony similarly are not considered prohibited new information.\(^{402}\)

A more difficult question is whether jurors may use exhibits or other physical objects properly introduced to conduct experiments or otherwise help them resolve an issue. At one extreme, where the jurors use some kind of device to help them perform a purely mechanical task, such as using a calculator to add up damages, or a projector to enlarge slides, it is not error.\(^{403}\) The court even has discretion to provide them with such aids, al-

\(^{395}\) E.g., People v. Honeycutt, 20 Cal. 3d 150, 570 P.2d 1050, 141 Cal. Rptr. 698 (1977) (en banc) (consulted criminal lawyer).


\(^{399}\) E.g., Rhodes v. State, 364 So. 2d 1177 (Ala. 1978) (heard that defendant tried to escape, no mistrial).


\(^{401}\) E.g., Wagner v. Doulton, 112 Cal. App. 3d 945, 169 Cal. Rptr. 550 (1980); see also Harris v. Deere & Co., 263 N.W.2d 727 (Iowa 1978) (verdict cannot be impeached based on what jurors do inside jury room).

\(^{402}\) E.g., United States v. Rhodes, 631 F.2d 43 (5th Cir. 1980).

though it is not required to. At the other extreme, where jurors perform experiments on exhibits in order to test a witness's version of the events, thereby creating new evidence that may not be reliable, reversal is usually required. Between those extremes is a gray area in which the courts have to decide if a party's rights were prejudiced. While jurors are encouraged to closely examine the evidence (including the exhibits), they are prohibited from creating new evidence on their own and using it as a basis for decision.

VIII. TRIAL LAW ON APPEAL: PROCEDURAL DEFAULT, CURED ERROR, AND INVITED ERROR

On appeal, most judgments are affirmed. In cases in which appellants assert violations of trial law as bases for their appeals, over seventy percent are found to contain errors, yet less than twenty-five percent are reversed. The familiar harmless error rule accounts only for about one-third of the cases affirmed despite the finding of a trial court error; only another five or six percent can be dismissed as bad decisions. That leaves over half of the cases in which the appellate courts find that a trial law error was committed but refuse to reverse unaccounted for. These are cases affirmed under three doctrines: procedural default, cured error, and invited error.

A. PROCEDURAL DEFAULT

If a party fails to properly object and preserve a claim of error for appeal, the appellate court supposedly will not consider the issue unless the error is particularly egregious. This is the doctrine of procedural default. The appellant often is said to have "waived" his right to appeal, but that is a misnomer; rarely will the party intentionally have abandoned a known right to appeal. Instead, procedural default occurs through ignorance, mistake, or neglect on the part of the appellant's attorney. The doctrine has taken on added importance since the Supreme Court announced that failure to adhere to procedural technicalities can result in the inability to appeal even for violations of constitutional law. The basic requirements for preserving a claim of a violation of the trial practice rules are a prompt and specific


405. But see United States v. Hawkins, 595 F.2d 751 (D.C. Cir. 1979) (per curiam) (experimenting with binoculars was permissible examination of the evidence), cert. denied, 441 U.S. 910 (1979).

406. For example, the jury in the movie "Twelve Angry Men" committed serious misconduct.

objection or motion, a request for an appropriate remedy from the trial judge, an adverse ruling, and an offer of proof if appropriate; all of which are recorded in an official transcript.

The timeliness requirement means that one must object as soon as the grounds become apparent. In direct examination, that usually means the objection must be made to the attorney's question on the grounds that it calls for inadmissible evidence, rather than waiting until after the answer.\textsuperscript{408} During other phases of the trial, failure to object to an error of any kind immediately, as soon as it is committed, will likely be considered a procedural default and waive a claim of error.\textsuperscript{409} Many attorneys believe it to be common courtesy not to interrupt in the middle of their opponent's opening statement or closing argument, and to wait until the end to assert objections. This courtesy usually results in procedural default; objections to misconduct by the attorney must be made as soon as the grounds become apparent, not saved until the attorney is finished speaking.\textsuperscript{410} Requests to exercise procedural rights and privileges must be made in advance to be timely, but there is little agreement how far in advance.\textsuperscript{411} If an attorney can anticipate that a particular trial law error is likely to occur—usually that his opponent will try to introduce inadmissible evidence or refer to that inadmissible evidence during opening statement before he has a chance to object—the attorney may be able to successfully move \textit{in limine} for an order that the matter not be discussed.\textsuperscript{412} To preserve a claim of error if the ruling is violated, the attorney must make a separate timely objection; the motion in limine does not by itself preserve any claim of error for appeal.

The specificity requirement means that the opposing attorney must state the grounds for the objection with sufficient particularity that the judge can understand which trial practice rule is being violated. A general objection that does not explain the grounds is insufficient to preserve any claim of


\textsuperscript{409} E.g., Ramseyer v. Dennis, 187 Ind. 430, 119 N.E. 716 (1918); State v. Diedtman, 58 Mont. 13, 190 P. 117 (1920).


\textsuperscript{411} See Horney v. McKay, 138 Neb. 309, 293 N.W. 98 (1940) (request to open and close argument must be made before, or at, close of evidence); \textit{Conn. Gen. Stat. § 52-209} (Supp. 1983) (request for additional time to argue must be made before argument begins).

\textsuperscript{412} See generally Epstein, \textit{Motions in Limine—A Primer}, 8 LITIGATION 34 (1982); J. Tanford, \textit{supra} note 1, at 313.
error for appeal.\textsuperscript{413} If the judge makes an incorrect ruling by denying a challenge for cause, it will support an appeal only if the grounds were specifically stated.\textsuperscript{414} An objection to evidence or attorney conduct, or a request to exercise a procedural right, similarly must be specific. A vague or general objection does not preserve any issue for appeal nor compel the trial court to take any action.\textsuperscript{415}

If an objection is made to something the jury already has heard—evidence or part of an attorney's argument—it must be accompanied by a motion to strike and a request for an instruction that the jury disregard it.\textsuperscript{416} Usually that means that a party is expected to do three things: object, move for an instruction to the jury to disregard the improper argument or evidence, and move for a mistrial if the error is serious.\textsuperscript{417} The mistrial motion need not be made at the same time as the objection, because it may be based on cumulative errors.\textsuperscript{418} In voir dire, a party can only appeal from a judge's refusal to allow a question if he made a motion or other formal request that it be asked.\textsuperscript{419}

Because one can only appeal from an adverse ruling by the judge, a party has a right to a ruling on an objection,\textsuperscript{420} although the judge properly may reserve ruling until later.\textsuperscript{421} Failure to insist on or try to obtain a ruling usually is also considered procedural default.\textsuperscript{422}

If the judge sustains an objection and wrongly prevents a party from offering its evidence, that claim of error is preserved only if the party makes


\textsuperscript{416} See, e.g., Laguna v. Prouty, 300 N.W.2d 98 (Iowa 1981); Haines v. State, 170 Neb. 304, 102 N.W.2d 609 (1960); Isom v. River Island Sand & Gravel, 273 Or. 862, 543 P.2d 1047 (1975) (en banc). This is not entirely a semantic exercise of saying the right words. See James v. Kentucky, 466 U.S. 341 (1984) (defendant moved for "admonition" instead of "instruction," Kentucky court found procedural default; Supreme Court reversed).


\textsuperscript{419} E.g., Ramseyer v. Dennis, 187 Ind. 430, 119 N.E. 716 (1918).


\textsuperscript{422} E.g., Bahnsen v. Rabe, 276 N.W.2d 413 (Iowa 1979).
an offer of proof—includes in the record (but out of the hearing of the jury) a specific statement of the evidence that he or she intended to introduce.\textsuperscript{423} Similarly, if one is prevented from making an argument or following a line of questions on voir dire, one must make sure the record includes an explicit statement of what the attorney intended to do.

Finally, the alleged error, the objection, the request for a remedy, the ruling, and the offer of proof must appear in an official transcript, and that transcript supplied to the appellate court.\textsuperscript{424} Many claims of error are defaulted away because voir dire, opening statements, and arguments are seldom transcribed. The first rule of preserving error, then, is to move that a court reporter be present to record the entire trial, not just the witness testimony. At least objections and rulings must be made with a court reporter present. In many jurisdictions, the judge must provide for a court reporter upon request, but usually is not required to do so on his own.\textsuperscript{425} Misconduct that occurs after the jury has started deliberations must also be placed in the record, usually by calling witnesses, including the jurors themselves. As long as the witnesses are questioned about what persons other than jurors did (outside influence), or about physical objects seen in the jury room, or about what jurors did outside the deliberation process (such as visiting the scene or looking something up in an encyclopedia), the rule that jurors may not impeach their own verdict is not usually implicated.\textsuperscript{426}

There are a few common secondary rules of procedure that also must be complied with to preserve a claim of error. Failure to comply with these relatively inconsequential ones is supposed to result in a procedural default, although they are not as often strictly enforced by the appeals courts. Objections to erroneously admitted evidence must be made every time the same or similar evidence is offered,\textsuperscript{427} either by a series of objections or by

\begin{itemize}
\item \textsuperscript{424} \textit{E.g.}, Fed. R. App. P. 10.
\item \textsuperscript{425} \textit{E.g.}, Sherman v. State, 142 Ga. App. 691, 237 S.E.2d 5 (1977); State v. Farris, 420 A.2d 928 (Me. 1980), \textit{overruled on other grounds}, State v. Brewer, 505 A.2d 774 (Me. 1985); \textit{cf.} State v. Seitzinger, 180 Mont. 136, 389 P.2d 655 (Mont. 1979) (implying that court should order trial recorded sua sponte).
\end{itemize}
lodging a continuing objection. 428 Similarly, if a party makes a similar argument or introduces similar evidence himself, going beyond what is necessary to rebut an improper argument of evidence, he “waives” a claim of error for his opponent’s conduct. 429 In most jurisdictions, in order to preserve a claim of error for the wrongful denial of a challenge for cause during voir dire, a party must exhaust his peremptory challenges. If a party still has a peremptory left, he could use it on the juror in question, and failure to do so is a waiver of the claim that the juror should have been excused for cause. 430

B. Cured Error

Appellate courts have developed another rule that reduces the number of reversible error cases: cured error. This doctrine says simply that appropriate remedial action by the trial judge or one of the attorneys may reduce the negative effect of a trial law error, thereby eliminating the need for a new trial. Appropriate remedial action may include the attorney withdrawing or apologizing for a remark or question that violates the rules of trial practice, or the trial judge admonishing the jury to disregard what they have seen or heard.

Attorney self-help remedial actions include withdrawing an improper remark or question, apologizing for a rule violation, and correcting a misstatement or rephrasing an improper question. Such actions are more than just courtesies or good tactical ways to avoid being reprimanded by the judge. They are court-approved procedures for correcting rule violations that effectively cure at least the more trivial kinds of trial law errors. For example, attorney self-help is an appropriate response to minor errors such as making obviously inadvertent misstatements of fact 431 or commenting on the credibility of the attorneys in argument. 432

The trial judge may respond with more or less severity as the situation demands. The usual curative response is for the judge to instruct the jury

428. See, e.g., Oliver v. Perry, 293 Ala. 424, 304 So. 2d 583 (1974); People v. Sam, 71 Cal. 2d 194, 454 P.2d 700, 77 Cal. Rptr. 84 (1969); see also N.C. R. Crv. P. 46(a)(1).
to disregard improper evidence, questions, or statements by the attorneys. In some situations, relatively weak corrective action that does not tell the jury to disregard improper information—merely sustaining an objection, giving the jury a general instruction about the proper way to deliberate, or reprimanding the attorney—may be sufficient. In other cases, the instruction may not suffice, and a mistrial is required. Overly broad language in many opinions says that the trial judge has broad discretion to select the appropriate remedy, but that does not appear to be the case. Appellate courts are fairly consistent in their holdings on when the various remedies are appropriate, and are not shy about reversing a trial judge who takes either inadequate action or too drastic action.\textsuperscript{433} It does not seem to make any difference whether the instruction is given at the time of the violation or later, during the regular instructions.\textsuperscript{434}

The weaker judicial responses—sustaining an objection, giving a general instruction, and admonishing the attorney—are sufficient to cure only relatively trivial errors. For example, weak responses have been held to cure such violations as misstating unimportant facts,\textsuperscript{435} referring to a juror by name,\textsuperscript{436} and commenting on the credibility of the attorneys in closing argument.\textsuperscript{437} They have been held insufficient to cure more serious errors, such as suggesting in argument that a defendant had an unproved criminal record,\textsuperscript{438} misstating law,\textsuperscript{439} or trying to place information about the wealth or insured status of the defendant before the jury.\textsuperscript{440}

The usual, and presumptively correct, judicial response is to specifically instruct the jury to disregard an improper question or comment, inadmissible evidence, or events that occurred outside the courtroom. This kind of instruction is almost always considered adequate to cure a rule violation, whether the underlying error is trivial or serious.\textsuperscript{441} It is never too drastic


\textsuperscript{436} \textit{E.g.}, Lane v. Mathews, 74 Ariz. 201, 245 P.2d 1025 (1952).


\textsuperscript{438} State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

\textsuperscript{439} Helford v. Yandell, 558 S.W.2d 400 (Mo. Ct. App. 1977) (misstated law of contributory negligence).

\textsuperscript{440} \textit{E.g.}, Missouri Pac. R.R. Co. v. Foreman, 194 Ark. 490, 107 S.W.2d 546 (1937).

\textsuperscript{441} See United States v. Miroyan, 577 F.2d 489 (9th Cir.) (cures judge's improper remark in voir dire), \textit{cert. denied}, 439 U.S. 896 (1978).
a remedy. However, there are situations in which the error is so serious that even an instruction to the jury to disregard it will not cure the error.

Mistrials are the most extreme remedy, and are to be granted only for the most serious trial errors. The opinions make it clear that mistrials are to be used sparingly, although there are situations where they are required. For example, mistrials may be required if the prosecutor makes an unconstitutional comment on the defendant’s failure to testify, if an attorney appeals to racism or other extreme passions and prejudices of the jury, or if the plaintiff’s attorney discloses that the defendant has insurance and suggests that a verdict be returned on that basis. Less serious errors apparently will not support a mistrial under any circumstances, and these serious errors only require a mistrial if their inherently prejudicial effect is aggravated by the presence of multiple errors, the bad faith of the guilty party, or the existence of an otherwise weak case.

The concept of curing error rests on the premise that jurors will in fact be able to disregard something improper that has occurred. Lawyers have long analogized this to “unringing” a bell, and argued that it is unrealistic to think that any sensible juror would, for example, acquit a defendant who confessed to child molesting, no matter how many times the are told to disregard it. Justice Jackson stated it well: “The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction.” More recent evidence from social scientists also undercuts this premise. In one experiment, model jurors actually gave more weight to improper information

444. State v. Caldwell, 322 N.W.2d 574 (Minn. 1982).
447. See State v. Mayfield, 506 S.W.2d 363 (Mo. 1974) (prosecutor used evidence outside the record, judge denied mistrial stating he had watched jurors' reactions and they seemed unaffected; appellate court reversed anyway).
when told to disregard it. The weight of the published research is that jurors are able to follow positive instructions, such as what the elements of a cause of action are, relatively well, but ignore negative instructions to limit their use of prejudicial information. Nevertheless, the doctrine persists probably because of the continuing naive belief that, despite the evidence to the contrary, instructions from the judge must have some tendency to reduce the prejudice from a trial law error.

C. Invited Error

The most controversial doctrine that appellate courts use to avoid reversing judgments is invited error, also known as the retaliation doctrine. It says that if one side commits a trial law error—introduces inadmissible evidence, or makes an improper argument—then the other side may retaliate by introducing additional inadmissible evidence or making an improper argument of its own. While one trial law error might be reversible, two similar errors are not reversible; two wrongs make a right. For example, if a defendant improperly argues that his client is a poor man and cannot afford to pay a large verdict, the plaintiff may retaliate by arguing that the defendant has a $300,000 insurance policy. In one sense the two arguments sort of offset each other. While either argument by itself might have skewed the verdict radically toward one side or the other, the arguments together pull in opposite directions. In another sense, however, the two arguments compound the problem. It is now virtually certain that the jury will decide the case based on the defendant's ability to pay, rather than the facts and law—precisely the result the rule against bringing up the wealth of the parties was designed to prevent.

The ambivalence the courts feel about this doctrine is well illustrated by a recent opinion of the Supreme Court:

The situation before the Court of Appeals was but one example of an all too common occurrence in criminal trials—the defense counsel argues improperly, provoking the prosecutor to respond in kind, and the trial judge takes no corrective action. Clearly two improper arguments—two apparent wrongs—do not make for a right result. Nevertheless, a criminal

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452. See Kalven, A Report on the Jury Project of the University of Chicago Law School, 24 Ins. Counsel J. 368, 377-78 (1958) (experiment in which jurors' average verdicts increased from $34,000 to $37,000 when they found out an insurance company would pay the bill, and increased to $46,000 when the judge instructed them to disregard the information); see also Wolf & Montgomery, Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors, 7 J. Applied Soc. Psych. 205 (1977).

conviction is not to be lightly overturned on the basis of a prosecutor’s comments standing alone, for the statements . . . must be viewed in context [to determine] whether the prosecutor’s conduct affected the fairness of the trial. To help resolve this problem, courts have invoked what is sometimes called the “invited response” or “invited reply” rule, which the Court [approved] in Lawn v. United States, 355 U.S. 339 (1958) . . . . This Court’s holding in Lawn was no more than an application of settled law.454

The invited error doctrine is used to affirm cases containing relatively serious trial errors. Trial law violations that cannot be said to be harmless error, and which probably could not be cured by an instruction to disregard, may nevertheless be found to have been invited, so that the judgment may be affirmed.455 The invited error doctrine has been used to affirm cases containing the most serious kinds of errors for which mistrials normally are required. For example, cases have been affirmed that contained a prosecutor’s unconstitutional comments on a defendant’s exercise of his right to remain silent,456 an attorney’s deliberate attempt to appeal to racial or religious prejudices,457 and a judge’s criticism of the defense attorney in front of the jury.458 In all of these cases, the courts permitted a conviction to stand despite the presence of serious error that threatens the reliability of the verdict, because the defendant’s own conduct invited it.

The true retaliation doctrine must be distinguished from its common misuse—cases in which the language of invited error is used but the facts do not justify it. The true invited error doctrine permits only reasonably commensurate responses-in-kind, where the effect of an improper argument or of otherwise inadmissible evidence is to correct or negate the prejudice caused by an opponent’s improper conduct.459 A significant number of cases can be found in which trial law errors grossly disproportionate to or

454. United States v. Young, 105 S. Ct. 1038, 1044-45 (1985) (the Burger opinion criticizes the doctrine and also uses it as part of its reason for decision).
455. See Williams v. North River Ins. Co., 579 S.W.2d 410 (Mo. Ct. App. 1979) (defendant suggested that verdict would raise jurors’ insurance rates; argument not harmless and could not be cured, would only be permissible in retaliation); Commonwealth v. Gwaltney, 497 Pa. 505, 442 A.2d 236 (1982) (improper for attorney to express personal opinion of witness’s credibility except to retaliate).
even totally unrelated to a supposedly provoking error have been affirmed under the rubric of invited error. For example, the invited error doctrine has been used to justify such totally disproportionate responses as the prosecutor telling the jury that a codefendant had been sentenced to death in response to an innocuous defense statement that the prosecutor had a duty to the state,460 prosecutors unconstitutionally commenting on the defendant's failure to testify in response to an argument that the state was being overzealous,461 and that the defendant did not have to take the stand.462

In other cases, invited error has been erroneously invoked when an attorney commits error responding to proper conduct from the other side. For example, the invited error doctrine has been used to justify normally reversible errors as responding to proper conduct, such as an argument that the defendant was unable to get anyone to testify on his behalf being responsive to a proper defense argument asking for an adverse inference from the fact that the state did not call some res gestae witnesses,463 and a speech by a prosecutor vouching personally for his witness in response to a proper defense attack on their credibility through evidence.464 These cases of excessive retaliation tend to have one thing in common—they are almost all criminal cases in which the appellate court upholds the conviction. Indeed, the invited error/retaliation doctrine is almost exclusively a creature of criminal cases, used to uphold error-ridden convictions on appeal.465

VIII. CONCLUSION

In this article, I have tried to define and analyze the basic legal structure of trials. In so doing, it seemed useful to separate procedural and substantive regulation. I recognize of course that there is not always a clear dividing line between them. Nevertheless, it is often valuable to draw the distinction. For example, a trial court's discretion to vary procedures may be greater than its discretion to vary from the usual rules on what issues may be debated, while its power to restrict the exercise of procedural rights may be less than its power to control content.

The body of procedural law is made up of a reasonably balanced mixture of common law, statutes, and court rules. Its primary purpose

465. In the sample of 692 closing argument cases I studied closely, the invited error doctrine was used to affirm 30 criminal cases—10% of those containing errors—but only 10 civil cases—approximately 4% of those containing errors. It was used to affirm particularly serious errors only in criminal cases.
seems to be to provide all parties with fair opportunities to present their messages to the jury. It covers such issues as the scope of the right to be heard, the order of trial, who may participate and the forms in which they must couch their words, the extent of judicial discretion to impose time-saving measures, and the requirements for objecting and preserving a claim of error for appeal. However, it is incomplete. There is almost no settled law concerning a number of the most important trial issues—how to create fair procedures that reduce the incidence of perjury, protect the rights of victims (especially child abuse victims) and witnesses, and make the trial system more efficient without sacrificing the litigants’ rights. Procedural rules facilitate the correction of errors at the trial court level—through retaliation or curative instructions—rather than an appeal where a retrial might have to be granted.466

Substantive trial law affects what attorneys, witnesses, judges, and jurors may say and do during trial. Its primary purpose seems to be to control the content of the information that is communicated to the jury. Except for the Federal Rules of Evidence, this part of trial law is comprised almost entirely of appellate cases. Common law limits the topics attorneys may raise during jury selection, restricts opening statements to nonargumentative discussions of the forthcoming evidence, excludes distracting or unreliable evidence, discourages arguments that primarily appeal to emotions, and controls what information the jurors may use to reach a verdict. On some issues, the rules vary for different phases of the trial. For example, law generally may be discussed during closing argument, jury selection, and deliberations, but not during opening statements or witness examination. On other issues, overriding principles have led to rules common to all phases. The strongest probably are the rules designed to reduce the adverse impact of bias, prejudice, and strong emotions, by prohibiting participants from trying to arouse these passions and by facilitating the exposure of those who hold such strong feelings. The other pervasive principle is that the jurors’ decision should be based only on evidence introduced at trial and not on outside “untested” information.

Although many trial law issues implicate fundamental concepts of fair trial and due process of law, few of them have been addressed by the Supreme Court or firmly grounded in constitutional principles. Trial law seems to be largely a concern of state appellate courts, which treat it as a matter of nonconstitutional common law. There are a few notable exceptions, however. It has long been a rule of constitutional criminal procedure

466. For a marvelous example of the bureaucratic mentality at work, see McDonough Power Equip. v. Greenwood, 104 S. Ct. 845 (1984) (in refusing to reverse a judgment, despite evidence that a biased juror lied in order to get on the jury, the court emphasized the importance of finality and the “practical necessities of judicial management”).

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that a criminal defendant has a right under the confrontation clause to cross-examine witnesses against him.\textsuperscript{467} In recent years, the Supreme Court has decided that the equal protection clause prohibits a state prosecutor from peremptorily challenging black prospective jurors on account of their race,\textsuperscript{468} that due process gives a defendant the right to make a closing argument,\textsuperscript{469} and that the eighth amendment prohibits imposing a death sentence when a prosecutor has argued to the jury that their decision will be reviewed on appeal.\textsuperscript{470} The Court has decided in several other cases that particular trial practices do not offend the constitution.\textsuperscript{471}

However, in reviewing the cases on which this article is based, I found that although appellate courts seemed intuitively to reach similar results in similar cases, they rarely articulated any general principles of trials, or cited previous cases as precedent. One reason may be that access to a basic description of the doctrines of trial law, a collection of a substantial number of its cases and statutes, and a framework within which new or doubtful cases could be analyzed has not been easy. There seems to be a need for a more systematic examination of trial law if it is to be used by the profession and analyzed by scholars more effectively in the future. This article has been intended to begin that process.

\textsuperscript{467} Ohio v. Roberts, 448 U.S. 56 (1980); Pointer v. Texas, 380 U.S. 400 (1965); Mattox v. United States, 156 U.S. 237 (1895).


\textsuperscript{469} Herring v. New York, 442 U.S. 853 (1975).

\textsuperscript{470} Caldwell v. Mississippi, 105 S. Ct. 2633 (1985).
