Criminal Trial Preparation

# The Bad and the Good

## My First Trial and Lessons learned

### Material witnesses have limited choices

### Eye witnesses are not to be trusted

### Witnesses should stay away from Jurors

### You should assume witnesses are going to lie so be prepared

### Never under estimate the opposing attorney

## The way a criminal trial should end.

### Video – Perry Mason

## Only 1.3% of Criminal Cases go to trial

### Why is your case going to trial?

### What will be the focus of the trial?

### How do you prepare for the issues in the trial?

# Trial Elements

A. An attorney must prepare for every part of the criminal trial

B. Elements of Criminal Trial

1) Jury Selection

2) Opening Statements

3) Presentation of the Prosecution Case

4) Presentation of the Defense Case

5) Closing ARGUMENT

6) Jury Instructions

7) Jury Deliberation

8) Verdict on Guilt

9) (if Defendant found guilty) Sentencing Phase

10) Judgment and Sentence

C. Is a Criminal Trial a real-life drama?

1. Elements of drama- The basic steps involved in the development of drama include:

#### Coming up with Thought/Theme/Ideas to be expressed through the work.

#### Determine the Genre and Style of the work

#### Outlining Basic Action of the work and Creating Plot.

#### Establish the Structure of the Play and Overall Framework

#### The Development of Characters presented in the work.

#### The Creation of Dialogue and the Language of the Characters.

#### Creating Music: This can involve the Rhythm of the Language or actual Music Composition and the Lyrics of the songs.

#### Establishing Spectacle: The visual and Environmental elements of the work.

#### Research of Subject Matter and Relevant issues presented in the play.

http://homepage.smc.edu/adair-lynch\_terrin/ta%205/elements.htm

### A trial is a real-life story which has a beginning and ending- How the trial is prepared may make the end a tragedy or a comedy

### Many Criminal Trials are fought in the grey area of the evidence – disputed evidence and inferences from the evidence

# Pre-trial

## Crime

### Element of the Crime

### Criminal Investigation- your role

1. Crime scene
2. Informant
3. Entrapment
4. Confession
5. Line up
6. Experts-

##### fingerprints, DNA, ballistics, Medical, Forensic, Financial, Mental Health Expert Witnesses, etc.

1. Entrapment
2. Electronic Surveillance
3. Witness Statements
4. Grand Jury
5. Meeting with investigators or police, inter departmental cooperation

## Pre-trial Practice

### Indictment and grand Jury

### Information and Preliminary Hearing

### Arraignment

### Plea

### Bail

### Removal before trial- NRS 174.455 to NRS 174.505

### Procedure – court rules

### Motion Practice

### Pretrial Deposition – NRS 174.175 to NRS 174.225

### Videotaped deposition – NRS 174.171 to NRS 174.229

### Plea bargain

### Multiple Defendants – Joinder -

### Time of Trial – NRS 174.511 – State right to demand trial within 60 days of the arraignment

# Trial Preparation

## When commence trial preparation

## Preparation for actual trial

### Step One- Prepare your closing argument

### Step Two- Prepare your jury instructions

### Step Three- Pretrial Memorandum

* 1. Your Jury questions and review jury voire dire
  2. Your exhibits
  3. Your witnesses
  4. Your opening
  5. Your cross-examination
  6. Evidence Issues and Rules of Evidence
  7. Défense and issues
  8. Major issues and memorandum
  9. Theory of the Case
  10. Case Outline and presentation

### Trial Notebook

#### Criminal Trial Notebook

#### Old Style Notebook – Binder and Paper

#### Software

#### Contents:

Indictment

Grand Jury transcript

Good facts/Bad facts and notes

Witness list (don’t forget to submit your witness list before the judge reads the list of witnesses to the jury venire)

Exhibit list

Voir Dire

Opening

Closing

Jury Instructions (Go to the New Jersey judiciary website)

Briefs/Motions

Appellate Issues

A section for every witness in the case (civilian and law enforcement). Each section should contain every piece of information you have about that witness. For example, if the witness is a police officer who testified before the grand jury, wrote a police report, submitted evidence to the lab, testified at a pre-trial hearing, and interviewed a civilian witness, all of these documents should be included in the police officer’s section. Similarly, if a civilian witness gave a formal statement at the police station, gave an oral statement to a different police officer at the scene, and has a criminal record, all of these documents should be included in the witness’ section. Be sure to obtain the criminal records of every witness. Insert your written direct or cross-examinations for each witness in their respective sections of the trial binder.

Photographs

Lab reports

Defendant’s statement

Defendant’s criminal history

DNA reports

Crime Scene Reports

Legal research

Stipulations

Expert’s report including CV and resources relied upon by the expert

#### Checklists

* 1. Junior Attorney
  2. Paralegal

### Audio visual preparation – Backup?

### Witness interviews

### Expert Testimony

### Exhibit Review

### Know your Judge- know the clerk and bailiff

### Review NRS Chapters 169 to 179

### Review NRS TITLE 4—WITNESSES AND EVIDENCE

#### Chapter 47 – General Provisions; Judicial Notice; Presumptions

#### Chapter 48 – Admissibility Generally

#### Chapter 49 – Privileges

#### Chapter 50 – Witnesses

#### Chapter 51 – Hearsay

#### Chapter 52 – Documentary and Other Physical Evidence

#### Chapter 53 – Affidavits; Foreign Depositions

#### Chapter 54 – Corroborative Proof of Residence

#### Chapter 55 – Findings of Presumed Death

#### Chapter 56 – Tests of Biological Specimens

# Trial Preparation and Actual Trial

## Jury Selection Issues

### Waiver of Rights to Jury trial

#### Jury is twelve members of community

#### Defendant and counsel may participate in selection

#### Jury verdict must be unanimous

#### If waiver judge alone will be the finder of fact

### Voir Dire - Questions

### Challenge for cause

### Jury conduct

### Jury sequestration

### Deliberating jury

### Simultaneous use of two juries

### Anonymous jury

### Use of alternate jurors – replacement

### Communication trial court and jury

### Juror misconduct

### Extraneous influence on Jury

### Visible security measures

### Jury questing of witnesses

### Deadlocked Jury

### Batson Issues

### Post-verdict interview of Jurors

## Defendant Issues

### Pro Se Representation

### Public Defender issues

### Retaining and substituting of Counsel

### Multiple Defendants

Bruton Rule- In Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court held that the Confrontation Clause of the Sixth Amendment was violated when the confession of one defendant, implicating another defendant, was placed before the jury at the defendants’ joint trial, and the confessing defendant did not take the witness stand and was therefore not subject to cross-examination.

In Richardson v. Marsh, 481 U.S. 200 (1987), the Court held that the Bruton rule is limited to confessions of a nontestifying codefendant that are facially incriminating of another defendant. Thus, the Confrontation Clause is not violated by the admission of a nontestifying codefendant’s confession that is redacted to eliminate the defendant’s name and any other reference to the defendant’s existence. In Richardson, evidence introduced after the codefendant’s redacted statement caused the statement to inculpate the defendant.

## Disclosure

### Open file policy

### Statutory Disclosure - NRS chapter 174

#### NRS 174.233 Defendant disclose alibi witness

#### NRS 174.234 Reciprocal disclosure of lists of witnesses, experts, continuing duty

#### NRS 174.235 – prosecution duty

1. Confessions
2. Physical or mental examinations, scientific tests
3. Books, papers, document etc. that the prosecution intends to introduce during the trial – possession, known or due diligence may be known
4. Defendant not entitled to internal reports, memos prepared by prosecuting attorney or privileged material – not affect constitutional or other duties of prosecutor
5. Grand Jury material – NRS 172 (NRS 172.271 Grand Jury Report) and Preliminary Hearing transcript

#### NRS 174.245 – Duty of defendant

1. Statements of witnesses
2. Scientific tests etc.
3. Books documents etc introduce
4. Not entitled to internal memos or privilege material

#### NRS 714.285 Time limits – demand 30 days after arraignment

#### NRS 174.275 Protective Order

### Subpoenas

#### Witness in Prison

#### Out of State witness

#### Production of documentary evidence

#### Service of subpoena and affidavit of service (Uniform Act NRS 174.395 to NRS 174.445)- NRS 174.435 out of state witness exempt from arrest and service of process

### Brady Material – evidence favourable including impeachment evidence to the accused upon request, doubts resolved in favour of disclosure

## Civil and Criminal contempt during trial

### Witness

### Defendant

### Attorney

## Admission of Evidence

### Review Rules of Evidence before presenting evidence and have a copy of the rule and its interpretation

### Character Evidence – NRS 48.045 and NRS 48.055

### Privilege – NRS Chapter 49

#### Lawyer-client – NRS 49.115 Exceptions

#### Accountant – client – NRS 49.205 Exceptions

#### Psychologist – patient – NRS 49.213 Exceptions

#### Doctor – patient – NRS 49.245 Exceptions

#### Marriage and family Therapist and client

#### Cliental professional Counselor - see NRS 641A.031

#### Social worker and client- see NRS 641B

#### Victim’s Advocate and victim

#### Other Occupational Privileges- confessor and confessant, News Media, counsellor and pupil, teacher and pupil, law enforcement or public safey personnel and counsellor

#### Miscellaneous Privileges – Married person NRS 49.295, trade secret, etc

#### Informant NRS 49.335-NRS 49.375

#### Waiver and Comment on claim of privilege (NRS 49.405)

### Expert Testimony NRS 50.260 to 50.350

#### Lay witness- rationally based perception of witness

#### Daubert Test

### Hearsay – NRS chapter 51

#### NRS 51.035 – Hearsay – statement to prove truth unless: made by witness at trial or hearing and subject cross-examination or Inconsistent statement, consistent and offered to rebut charge of inconsistent, identification soon after perceiving the person, transcript under oath at trial, hearing , Grand Jury; against a party – own or representative capacity, adopted, authorized, within agency or employment before termination, co-conspirator within scope of conspiracy

#### NRS 51.045 Statement

#### NRS 51.055 Unavailable as witness

#### NRS 51.065 General Rule

#### NRS 51.067 Hearsay within hearsay – not excluded if each conforms to exception

#### NRS 51.069 Credibility of declarant

#### NRS 51.075 General Exception – statement under circumstances assurance of accuracy not enhanced if declarant available

#### NRS 51.85 to NRS 51.305

1. NRS 51.105 then existing mental statement
2. NRS 51.115 medical treatment
3. NRS 51.125 Recorded recollection – refresh memory
4. NRS 51.135 Record of Regularly conducted Activity- testimony or affidavit of custodian or qualified person unless lacks trustworthiness
5. NRS 51.155 Absence of Regularly recorded record
6. NRS 51.155 Public Record and Report if:
7. NRS 51.195 religious organization
8. NRS 51.225 statement affecting property
9. NRS 51.235 ancient documents
10. NRS 51.255 Learned treaties
11. NRS 51.295 Previous conviction
12. Et Cetera

#### NRS 51.315 to 51.355 – Declarant unavailable

#### NRS 51.385 inability child to testify

### Chapter 52 – Documentary and other physical evidence

#### Authentication

#### Medical, casinos and hotels, banks and financial

#### NRS 52.385 to 52.400 - Disposal of Physical Evidence before criminal trial: photos of evidence, controlled substance, marijuana (?)

### Chapter 53 - Affidavits and Foreign Depositions

### Chapter 54- Corruptive Proof of Residence

### Chapter 55 – Findings of Presumed Death

### Chapter 56 – Tests of Biological Specimens – DNA etc.

### Cross-examination and Confrontation clause

The Confrontation Clause provides that a criminal defendant have the

opportunity to cross-examine adverse witnesses. During cross-examination,

a defendant is allowed to test the witness’s credibility as

well as the witness’s knowledge of the facts. Davis v. Alaska, 415 U.S.

308, 316-17 (1974); United States v. Chandler, 326 F.3d 210, 222 (3d

Cir. 2003); Lewis v. Wilkinson, 307 F.3d 413, 420-21 (6th Cir. 2002).

Crawford v. Washington, 541 U.S. 36 (2004), the Supreme Court

altered the relationship between the Confrontation Clause and hearsay

evidence. It did so, though, by seeking to distill consistent principles

from its earlier decisions dealing with these issues: namely the nature of

“testimonial” evidence and the unavailability of the witness, combined

with the defendant’s prior opportunity to cross-examine the witness.

911 calls/excited utterance

Dying Declaration -US v. Jordan 2005 WL 513501 – dying declaration is barred by Crawford

Autopsy Reports- business records not testimonial

Cross-examination is limited to scope of prior testimony.

### Presumptions – Constitutional?

## Opening Statement

### Government Opening

#### Arouse undue sympathy

#### Put Juror in shoes of the victim

#### Other uncharged crimes

#### Inadmissible evidence

#### Personal evaluation

#### Defendant not testify

### Defense Opening

#### Statement even only rely upon cross-examination of government witnesses

#### Immediately after or at commence of case in Chief

### No objection – reversable error?

### Judges Instruction to disregard- enough?

## Closing Argument

### Government closing

#### Defendant not testify – not rebut facts -ERROR?

#### Personal Belief or opinion

#### Appeal for sympathy to maintain law and order - **“violating your sacred oath before God” if you turn the Defendant free –**

#### Race-conscious or racially biased – **“Cuban Drug Dealers”**

#### Arguing facts not in evidence – but reasonable inference

#### Defendant’s prior conviction

#### Failure of Co-defendant to testify

#### Vouching of witness

The majority of circuits allow the government to admit evidence of the truthfulness provisions of a plea agreement on direct examination of a witness, before any challenge to the witness’s credibility The Second and Eleventh Circuits prohibit introduction of truthfulness provisions until the defense challenges the witness’s credibility. In United States v. Cosentino, 844 F.2d 30 (2d Cir. 1988),

## Jury Instructions

### Special Interrogatories or General Verdict

### Reasonable Inferences

## Mistrial –

A mistrial is not to be declared unless (1) there is “manifest necessity” for termination of the proceedings, or (2) “the ends of public justice” would otherwise be defeated.

Double Jeopardy - A motion for a mistrial made by the defendant normally serves to remove any barrier to reprosecution, but such is not the case when the prosecutor has, through bad faith or overreaching, “goaded” the defendant into requesting a mistrial.