

CRIMINAL TRIAL LAW MANUAL

Summary Table of Contents

CHAPTER 1 - RIGHTS OF ACCUSED

I. CONSTITUTIONAL RIGHTS.....	1-1
A. OVERVIEW	1-1
B. PUBLIC TRIAL	1-1
1. Defendant's right to a public trial.....	1-1
2. Closing a proceeding.....	1-1
3. Public and media	1-3
4. Use original action to contest ruling.....	1-3
C. SPEEDY TRIAL.....	1-3
1. Constitutional right.....	1-3
2. Criminal Rule 4	1-4
D. RIGHT TO COUNSEL – Y.2.....	1-7
1. Indigent litigant's right to counsel.....	1-7
2. Only relinquished by knowing, voluntary, and intelligent waiver	1-7
3. Defendant should be warned of dangers of self-representation	1-8
E. RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES.....	1-8
1. Confrontation – J.9.....	1-8
2. Cross-examination – J.9, O.5.e.....	1-8
F. RIGHT TO TESTIFY ON OWN BEHALF	1-8
1. U.S. Constitutional right to testify.....	1-8
2. Indiana Constitution – right to be heard.....	1-9
3. Practice Tips – should your client testify?	1-9
G. RIGHT TO BE PRESENT AT TRIAL PROCEEDINGS – B.13, D.4.A.....	1-10
1. Presence required at every stage where jury present.....	1-10
2. Standard for right to be present	1-10
3. Specific proceedings where presence required.....	1-11
4. Absence of defendant creates presumption of harm.....	1-14
5. Failure to appear does not waive right to jury trial.....	1-15
6. Waiver of right to be present – D.4.a	1-15
7. Failure to appear – Class A misdemeanor, Level 6 felony.....	1-19
H. COMPULSORY PROCESS FOR OBTAINING WITNESSES – D.12	1-19
1. Right to subpoena.....	1-19
2. Right to present witnesses in defense.....	1-20
I. IMPARTIAL ATMOSPHERE, JURY, AND JUDGE	1-21
1. Impartial atmosphere.....	1-21
2. Impartial judge and jury	1-21
II. SPECIAL PROCEDURES DURING TRIAL	1-22
A. SEATING OF DEFENDANT	1-22
1. In courtroom audience to test eyewitness identification	1-22
B. DEFENDANT TESTIFYING FROM COUNSEL TABLE	1-22
C. APPEAR IN CIVILIAN CLOTHES – D.4.C.....	1-23
1. Qualified right not to appear in prison attire	1-23

2. Waiver.....	1-23
3. Request to wear military uniform.....	1-24
D. APPEAR FREE FROM PHYSICAL RESTRAINTS IN FRONT OF JURY – D.4.B.....	1-24
1. Right not to appear before jury in restraints.....	1-24
2. Exceptions.....	1-25
3. Judge presumed to retain impartiality.....	1-26
III. MISCELLANEOUS RIGHTS AND PROBLEMS	1-27
A. COMPETENCY HEARING – B.9.....	1-27
1. Must hold hearing if reasonable doubt.....	1-27
2. When competency issue may be raised.....	1-27
3. Court makes legal determination whether competent - B.9.a.....	1-27
4. Burden to determine competency.....	1-27
5. Juveniles.....	1-27
B. RIGHT TO DECLINE ANTI-PSYCHOTIC DRUGS	1-28
1. Compelling state interests may outweigh right to refuse medication.....	1-28
2. Administering psychotropic drugs to defendant during trial.....	1-28
C. RIGHT TO PRESENT ALIBI – M.5.B.....	1-29
1. Not absolute.....	1-29
2. Evidence Defendant was not at crime scene is not alibi evidence	1-30
D. SEVERANCE – D.6.A	1-30
1. Severance of defendants.....	1-30
2. Severance of offenses.....	1-32
E. BIFURCATED PROCEEDINGS.....	1-33

CHAPTER 2 - JURY TRIAL

I. OVERVIEW	2-1
A. JURY NULLIFICATION.....	2-1
B. RIGHT TO TRIAL BY JURY APPLIES TO MISDEMEANORS AND INFRACTIONS TOO.....	2-1
C. RIGHT TO JURY TRIAL AND “RECIDIVIST FACTOR”	2-2
D. WAIVER	2-2
1. Felony cases – cannot waive unless prosecutor and court agree.....	2-2
E. NUMBER OF JURORS	2-2
II. FELONY CASES – D.9.A.....	2-3
A. ABSOLUTE RIGHT UNDER STATE AND FEDERAL CONSTITUTIONS	2-3
1. State.....	2-3
2. Federal – Sixth Amendment.....	2-3
3. Denial of right is fundamental error.....	2-3
B. ALL CRIMINAL TRIALS BY JURY, UNLESS COURT AND PROSECUTOR ASSENT TO WAIVER	2-3
C. HABITUAL OFFENDER (HO) PROCEEDING.....	2-3
1. No right to separate jury.....	2-3
2. Waiver in HO proceeding.....	2-4
3. Where defendant pleads guilty to underlying offense, but leaves HO allegation pending.....	2-4
4. Where defendant pleads guilty to both underlying offenses and HO allegation	2-4
5. Jury entitled to determine habitual offender status as a matter of fact and of law	2-4
D. CONTEMPT PROCEEDING.....	2-5
E. REPEAT SEX OFFENDER PROCEEDING.....	2-5
F. FIREARM ENHANCEMENT PROCEEDING	2-5
G. WAIVER REQUIREMENTS – D.9.B.	2-5
1. Assent of prosecutor and judge	2-5

2. Knowing, voluntary, and intelligent.....	2-5
3. Personal waiver must be reflected in record.....	2-6
4. Defendant cannot waive rights if absent from trial	2-7
5. Submission to bench trial	2-7
6. Court may conclude knowing and intelligent waiver.....	2-8
7. Waiver a precondition to treatment in lieu of prosecution	2-8
H. WITHDRAWAL OF WAIVER	2-8
1. Court's discretion	2-8
2. Error to deny withdrawal of waiver in some situations.....	2-8
III. MISDEMEANOR CASES.....	2-9
A. INDIANA CONSTITUTION – RIGHT TO JURY TRIAL	2-9
B. CR 22 – WRITTEN DEMAND REQUIRED.....	2-9
1. Outline of steps to obtain trial by jury under CR 22	2-9
2. Constitutionality of CR 22	2-14
IV. NUMBER OF JURORS.....	2-14
A. 12 JURORS.....	2-14
1. Felony cases other than Level 6	2-14
2. No constitutional right to 12- person jury	2-14
B. 6 JURORS.....	2-15
1. Level 6 felonies, misdemeanors, infractions or ordinance violations	2-15
2. D felony elevation to higher level felony	2-15
3. May consent to fewer than six.....	2-15
4. If trial in county court.....	2-15
C. STATE AND FEDERAL CONSTITUTIONS	2-16
1. No less than 6 jurors.....	2-16
CHAPTER 3 - CHALLENGING JURY SELECTION SYSTEM	
I. INTRODUCTION / PRACTICE TIPS	3-1
A. JURY RULES.....	3-1
B. OVERVIEW	3-1
1. Voter registration lists – discriminatory?	3-1
2. Accepting the jury – waives any error.....	3-1
3. Consider Batson challenge	3-1
4. Why bother?	3-2
C. PRACTICE TIPS	3-2
1. Preliminary steps	3-2
2. Determine how the local system selects jurors.....	3-2
3. Motions practice.....	3-2
II. CHALLENGING STATUTORY COMPLIANCE	3-3
A. WRITTEN PLAN FOR JURY SELECTION PROCESS	3-3
B. JURY ADMINISTRATOR'S PROCEDURAL NONCOMPLIANCE.....	3-3
1. "Substantial compliance" standard of proof.....	3-3
2. Appointment of administrators.....	3-4
3. Sources for prospective jurors	3-4
4. Computerized jury selection.....	3-5
5. Computerized jury selection.....	3-Error! Bookmark not defined.
C. CLERK'S NONCOMPLIANCE WITH PROCEDURE FOR DRAWING JURORS	3-6
1. Test for noncompliance	3-6
2. Effect of lack of substantial compliance	3-6
3. Waiver.....	3-6
D. EQUAL PROTECTION CHALLENGES	3-6

1. Purposeful discrimination based on race or class.....	3-6
2. Defendant's initial burden.....	3-7
3. State must rebut presumption.....	3-9
E. FAIR CROSS SECTION REQUIREMENT.....	3-9
1. Systematic exclusion.....	3-9
2. Standard of proof.....	3-10
3. Prima facie violation.....	3-10
4. State must justify infringement.....	3-14
III. SELECTION PROCEDURES - D.9.C.....	3-14
A. GOAL.....	3-14
1. Features of process.....	3-14
B. PROCEDURES AND REQUIREMENTS.....	3-15
1. Frequency of selections.....	3-15
2. Number of prospective jurors called.....	3-15
3. Term of jury service.....	3-15
IV. ALTERNATE JURORS.....	3-16
A. SELECTION PROCEDURE.....	3-16
1. Usually selected after regular jurors selected.....	3-16
2. Alternates considered "juror" for some purposes.....	3-16
B. COURT'S DISCRETION TO REPLACE JUROR WITH ALTERNATE.....	3-16
C. ORDER OF SEATING.....	3-17
D. CIRCUMSTANCES WHERE SUBSTITUTION WARRANTED.....	3-17
1. Personal knowledge of material fact or unable to perform duties.....	3-17
2. Juror about to be arrested and prosecuted.....	3-17
3. Socializing with witnesses.....	3-18
4. Sleeping.....	3-19
E. REVERSIBLE ERROR ONLY WHERE ACCUSED PLACED IN SUBSTANTIAL PERIL.....	3-19
1. Must object.....	3-19
F. DISCHARGED AFTER JURY BRINGS IN VERDICT.....	3-19
G. MAY RETIRE TO JURY ROOM IF PROPER INSTRUCTION GIVEN.....	3-19
V. SPECIAL CIRCUMSTANCES.....	3-19
A. CHANGE OF VENUE OF VENIRE PANEL.....	3-19
1. Court's discretion.....	3-19
B. ANONYMOUS JURIES.....	3-20
1. Used only in limited circumstances.....	3-20
2. Defendant's rights.....	3-21
3. If court insists on empaneling anonymous jury.....	3-21

CHAPTER 4 - VOIR DIRE

I. VOIR DIRE – IN GENERAL.....	4-1
A. OPEN TO PUBLIC.....	4-1
B. JEOPARDY DOES NOT ATTACH UNTIL JURY SWORN.....	4-1
C. ACCEPTING JURY AS CHOSEN SUPPORTS INFERENCE OF WAIVER.....	4-1
D. PURPOSES OF VOIR DIRE.....	4-1
1. Determine whether prospective jurors able to deliberate fairly.....	4-1
2. Elicit information to establish challenge to prospective jurors.....	4-1
3. Restore impartial attitude.....	4-1
4. Build rapport.....	4-2
E. DOUBLE JEOPARDY.....	4-2
1. Prosecutor brings about false statements by juror with intent to cause termination of trial.....	4-2

2. Discharge without jeopardy attaching	4-2
3. Defendant not placed in jeopardy until entire jury sworn	4-2
F. INDIVIDUAL VOIR DIRE OF JURORS.....	4-3
1. May be required in unusual or damaging circumstances	4-3
2. May be permitted when questioning pretrial publicity.....	4-3
3. Capital/LWOP cases.....	4-3
II. PRACTICE TIPS AND CONSIDERATIONS	4-4
A. CONSIDERATIONS	4-4
1. Generally	4-4
2. Common areas of inquiry	4-4
3. Impermissible areas of inquiry	4-5
4. Common objections.....	4-5
B. PRACTICE TIPS	4-5
1. Insist court record voir dire	4-5
2. Find method of striking beforehand	4-6
3. Pre-trial questionnaire	4-6
4. Checklist in planning voir dire	4-6
5. Don't rely on your own stereotypes	4-7
6. Avoid "follow-the-law" questions.....	4-7
7. Common mistakes lawyers make	4-7
8. Prior to start of voir dire – request instruction on prohibited matters	4-8
9. Maximizing effective voir dire.....	4-8
10. Questioning tips.....	4-8
11. How to strike prospective juror without offending	4-9
III. SOME IMPROPER BEHAVIOR ON VOIR DIRE	4-10
A. QUESTIONS/COMMENTS BY COUNSEL.....	4-10
1. Summary of improper inquiries and comments	4-10
2. Must harm defendant to be reversible error	4-14
B. FALSE TESTIMONY BY PROSPECTIVE JUROR.....	4-15
1. Jurors presumed to tell the truth.....	4-15
2. Entitled to new trial – prejudice standards	4-15
3. Knowingly lies or gives incomplete answers; bias.....	4-15
4. Parties entitled to question juror regarding untruthful answers.....	4-15
5. Procedure to preserve error	4-17
IV. LIST OF PERMISSIBLE INQUIRIES AND COMMENTS	4-17
A. DEFENSE COUNSEL MAY ASK ABOUT DEFENDANT'S DECISION NOT TO TESTIFY	4-17
B. ATTITUDES TOWARD NATURE OF A PARTICULAR CRIME	4-17
C. UNCOVER PRECONCEIVED IDEAS ABOUT POSSIBLE INTENDED DEFENSE	4-18
D. PREVIOUS SERVICE IN CRIMINAL CASES	4-18
E. PRECONCEIVED NOTIONS ABOUT DRUG DEALERS AND CONFIDENTIAL INFORMANTS	4-18
F. BIASES REGARDING CREDIBILITY OF WITNESSES	4-18
G. HYPOTHETICAL QUESTIONS.....	4-18
H. PROVOCATIVE AND UNUSUAL FACTS	4-19
1. Sexual abuse.....	4-19
I. READ CHARGING INFORMATION.....	4-19
J. ASCERTAIN WHETHER JUROR COULD ACT IN ACCORDANCE WITH THE LAW	4-19
K. DUTY TO INFORM IF DOESN'T PROVE CASE.....	4-20
L. WHETHER JURORS KNOW ANY WITNESSES	4-20
M. SYMPATHETIC TO POLICE TESTIMONY	4-20

N. WITNESS OR VICTIM OF CRIME.....	4-20
O. TYPE OF OFFENSE OR OFFENSES CHARGED.....	4-20
P. RACISM AND OTHER PREJUDICE	4-21
1. Racism.....	4-21
2. Anti-gay bias	4-21
Q. RELIGION.....	4-21
R. INTEREST IN SERVING.....	4-22
V. COURT’S RESPONSIBILITIES AND DUTIES	4-22
A. ARRANGE AND CONDUCT	4-20
1. Discretion to excuse panelists	4-22
2. Reversal – must be manifest abuse and denial of fair trial	4-22
B. CONTROL QUESTIONING OF POTENTIAL JURORS.....	4-22
1. Attorneys for both parties have right to examine prospective jurors.....	4-22
2. When court chooses to ask questions	4-23
3. Time limitations	4-23
C. DUTY TO REMAIN IMPARTIAL.....	4-24
1. Remarking about counsel’s questions	4-25
2. Throwing temper tantrum.....	4-25
3. Instructing jurors	4-25
D. SWEAR IN JURY PRIOR TO COMMENCEMENT OF TRIAL	4-25
1. Failure to swear in	4-26
E. ALTERNATE JURORS	4-26
1. Selection procedure	4-26
2. Court's discretion to replace juror with alternate.....	4-26
3. Order of seating.....	4-27
4. Circumstances where substitution warranted	4-27
5. Reversible error only where accused placed in substantial peril.....	4-28
6. Discharged after jury brings in verdict.....	4-28
7. May retire to jury room if proper instruction given.....	4-28
VI. PRETRIAL PUBLICITY – D.1.A	4-29
A. IN GENERAL.....	4-29
1. Prejudicial publicity contains	4-29
B. VOIR DIRE CRITICAL STAGE IN SHOWING PREJUDICE	4-29
C. WHERE PREJUDICE EXISTS IN COUNTY TO PREVENT FAIR TRIAL	4-27
D. SHOWING RACIAL PREJUDICE.....	4-30
1. Indiana law	4-31
2. U.S. Supreme Court.....	4-31
E. GATHERING EVIDENCE OF PREJUDICIAL PRETRIAL PUBLICITY	4-31
1. News reports.....	4-31
2. Statistical surveys	4-32
3. Proof of widespread community sentiment.....	4-32
4. Other counties.....	4-32
F. JUDGE’S ROLE.....	4-32
G. REMEDIES	4-33
1. Change of venue.....	4-33
2. Change of venire – imported juries	4-33
3. Test jury.....	4-33
H. PRESERVING ERROR/APPELLATE REVIEW.....	4-34
1. To preserve error if change of venue denied	4-34
2. Decision reversed only for abuse of discretion	4-34

CHAPTER 5 - CHALLENGES FOR CAUSE

I. IN GENERAL.....	5-1
A. PURPOSE – PROTECT RIGHT TO IMPARTIAL JURY	5-1
B. BURDEN ON CHALLENGER.....	5-1
C. EITHER PARTIES OR TRIAL COURT MAY CHALLENGE JUROR	5-1
D. CHALLENGE DISCRETIONARY WITH COURT	5-1
E. WHEN CAN PARTIES MAKE CHALLENGE FOR CAUSE	5-1
F. STANDARD OF REVIEW	5-1
1. Decision illogical or arbitrary.....	5-2
2. Abuse of discretion resulting in prejudice.....	5-2
3. Under oath: presumption that juror is truthful.....	5-2
II. PRACTICE TIPS	5-2
A. PROTECTING RECORD FOR APPEAL.....	5-2
1. Challenge on record.....	5-2
2. Exhaust all peremptories	5-2
3. Watch juror’s demeanor	5-2
B. SAMPLE CHALLENGE FOR CAUSE	5-2
1. Technique – close-ended questions	5-2
2. Sample.....	5-3
III. STATUTORY AND JURY RULE 17 CHALLENGES	5-3
A. DISQUALIFIED FROM SERVING AS JUROR AS MATTER OF LAW	5-5
B. SERVED AS PROSPECTIVE JUROR IN SAME COUNTY WITHIN 365 DAYS.....	5-5
C. FORMED OR EXPRESSED OPINION AS TO GUILT OR INNOCENCE.....	5-5
1. Mere recognition of defendant does not indicate opinion	5-6
2. Juror’s response to questioning in presence of other prospective jurors.....	5-6
3. Rehabilitation of potential jurors who have preconceived opinions	5-6
4. Defendant entitled to change of venue if pattern of prejudice in community	5-7
D. WHERE STATE SEEKS DEATH PENALTY AND JUROR HAS CONSCIENTIOUS OPINIONS THAT WOULD PRECLUDE PERSON RECOMMENDING DEATH PENALTY, LIFE WITHOUT PAROLE, OR NEITHER	5-7
1. Federal Constitutional Standard	5-7
2. Constitution Requires “Life-Qualification” As Well As “Death-Qualification”	5-8
E. RELATED WITHIN FIFTH DEGREE	5-8
1. Related to prosecutor.....	5-8
F. PREVIOUSLY SERVED ON SWORN JURY IN SAME CASE AGAINST DEFENDANT ...	5-9
G. MENTAL INCOMPETENCE	5-9
H. BIASED OR PREJUDICED FOR OR AGAINST DEFENDANT	5-9
1. Actual or Implied Bias	5-10
2. Knowledge of defendant’s reputation	5-10
3. Familiarity with witness	5-10
4. Family relationship.....	5-12
5. Former victims	5-12
6. Formed opinion regarding criminals	5-12
7. Formed opinion regarding police	5-12
I. UNQUALIFIED	5-13
J. UNABLE TO COMPREHEND EVIDENCE AND INSTRUCTIONS; DEFECTIVE SIGHT OR HEARING; IGNORANCE OF ENGLISH LANGUAGE.....	5-13
K. PERSONAL INTEREST IN OUTCOME OF CASE.....	5-13
IV. NON-STATUTORY GROUNDS – EXCUSING JURORS	5-13
A. RELATION TO COUNSEL	5-13

B. RELATION TO POLICE	5-14
C. ON PUBLIC AID AND NO RELIABLE BABY-SITTER.....	5-14
D. HARDSHIP ON EMPLOYMENT/WORK DISTRACTIONS	5-14
E. HIGH SCHOOL OR COLLEGE STUDENTS	5-14
F. FAMILY PROBLEMS	5-14
V. WAIVER OF CHALLENGE OF JUROR FOR CAUSE.....	5-14
A. FAILURE TO EXAMINE.....	5-14
B. FAILURE TO TIMELY CHALLENGE	5-14
1. Must challenge before jury sworn	5-14
2. Acceptance of jury as chosen	5-15
3. Not promptly challenging juror prior to verdict where defendant knows grounds for challenge exists.....	5-15
C. FAILURE TO EXHAUST PEREMPTORY CHALLENGES	5-15
VI. CHALLENGE FOR CAUSE DURING TRIAL.....	5-15
A. HEARING REQUIRED	5-15
B. DEFENDANT ENTITLED TO MAKE CHALLENGE FOR CAUSE	5-16
C. DEFENDANT BEARS BURDEN OF PROOF	5-16
D. DISPOSITION OF CHALLENGE FOR CAUSE WITHIN TRIAL COURT'S DISCRETION	5-16
E. REMEDY.....	5-16

CHAPTER 6 - PEREMPTORY CHALLENGES

I. OVERVIEW	6-1
A. PURPOSE –ASSURE FAIR TRIAL BY IMPARTIAL JURY	6-1
B. CREATED BY STATE STATUTE	6-1
C. NEED NOT EXPLAIN REASON FOR EXCUSING.....	6-1
D. NUMBER OF PEREMPTORIES.....	6-1
E. TO PRESERVE ERROR – EXHAUST ALL PEREMPTORIES	6-1
II. USING PEREMPTORY CHALLENGES – D.9.D.....	6-1
A. AVAILABILITY OF / NUMBER OF PEREMPTORIES.....	6-1
1. Number of peremptories challenges available	6-2
2. Judge has discretion to increase number	6-2
3. No federal claim if state judge does not allow defendant to use all peremptories available under state law.....	6-2
B. COURT'S DISCRETION TO DECIDE HOW PEREMPTORIES EXERCISED.....	6-2
1. Subject to reasonable regulation.....	6-2
2. Court's options	6-2
3. Court cannot have blanket policy of demanding justification of every peremptory challenge	6-3
C. TIMING OF PEREMPTORY CHALLENGES	6-4
1. Court cannot require party to strike or accept jurors without providing opportunity to consider other party's voir dire	6-4
2. Court can require counsel to exercise peremptory challenges immediately after opposing party's examination, if at all.....	6-4
3. Local rules control whether counsel can challenge after juror already accepted	6-4
4. Cannot use peremptory after jury sworn	6-4
D. USES OF PEREMPTORY CHALLENGES	6-4
1. Unfettered right to exercise	6-4
2. To obtain more representative jury.....	6-5
3. Use where judge denies challenge for cause	6-5

4. Must exhaust to show defendant subjected to biased panel	6-5
E. SPECIAL ISSUES	6-5
1. Sharing peremptories – multi-defendant cases.....	6-5
2. State and defendant challenge same juror	6-6
3. Forced to use peremptory where erroneous denial of challenge for cause.....	6-6
4. Must exhaust to show defendant subjected to biased panel	Error! Bookmark not defined.
III. DISCRIMINATORY USE OF PEREMPTORIES PROHIBITED –D.9.D.5	6-7
A. Race.....	6-7
1. Must assume black jurors impartial against black defendant	6-7
2. Where prosecutor implies race as a factor.....	6-7
3. Challenges jurors need not be of same race as defendant	6-7
B. GENDER	6-7
1. May challenge class groups.....	6-8
C. OTHER GROUNDS	6-8
1. Religious beliefs.....	6-8
2. Disabilities.....	6-8
3. Age	6-8
D. PRACTICE POINTERS	6-9
1. Presumption favors State striking less than two group members.....	6-9
2. Group over represented in venire	6-9
E. PREPARING FOR VOIR DIRE	6-9
F. RECORD DISCRIMINATORY INFORMATION.....	6-9
1. Here’s how	6-10
2. Make contemporaneous objection or move to strike panel	6-10
3. Insist on full hearing.....	6-11
IV. PROVING PURPOSEFUL DISCRIMINATION.....	6-12
A. DEFENDANT MUST MAKE PRIMA FACIE CASE	6-12
1. Cognizable group	6-12
2. “Other relevant circumstances”	6-13
3. Based solely on evidence at defendant’s trial.....	6-14
4. Relationship between number of challenges and number of jurors in cognizable group	6-15
5. Prosecutor’s “justifications” part of defendant’s prima facie case.....	6-16
6. Examples – failure to establish prima facie case	6-16
B. STATE MUST EXPLAIN CHALLENGE	6-16
1. Explanation must be facially valid	6-17
2. More than mere denial – must relate to case	6-17
3. Invalid race neutral reasons	6-17
4. Valid race neutral reasons	6-18
C. JUDICIAL INQUIRY	6-22
1. In circumstances raise possible inference that challenge was based on racial bias, trial judge should not speculate	6-22
2. Assessment of credibility of witnesses and prosecutor	6-22
3. Doubts resolved in favor of accused	6-22
4. Prosecutor’s invalid explanation for peremptory strike taints any valid explanations	6-22
5. Factors showing pretext.....	6-23
6. Comparative Juror Analysis.....	6-23
7. After party offers explanation and court rules, prima facie showing moot.....	6-23
8. Circumstances where explicit findings are required.....	6-24
9. Finding accorded great deference.....	6-24
D. RELIEF	6-25
1. Punish prosecutor	6-25

2. If new venire has fewer members of group	6-25
3. Reversal.....	6-25
V. STATE CHALLENGES DEFENDANT’S USE OF PEREMPTORIES – D.9.D.5	6-25
A. DEFENDANT MAY NOT PURPOSEFULLY DISCRIMINATE	6-25
B. PROCEDURE.....	6-26
1. Explain <i>in camera</i> – confidential communication or trial strategy	6-26
2. Defendant’s explanation need not be persuasive or plausible.....	6-26
3. Trial court not bound to believe Defendant’s proffered explanation for striking juror.....	6-26
C. POTENTIAL IMPACT	6-27
D. EXAMPLE OF INVALID EXPLANATION.....	6-27

CHAPTER 7 - SEPARATION OF WITNESSES

I. PRACTICE TIPS	7-1
A. MAKING THE MOTION TO SEPARATE WITNESSES.....	7-1
1. Mandatory, if requested (Evid. R. 615).....	7-1
2. Make motion prior to voir dire.....	7-1
3. Seek to have order limit discussions in front of other witnesses.....	7-1
4. Argue exempted witnesses should be called first.....	7-1
B. SAMPLE MOTION FOR SEPARATION OF WITNESSES	7-1
II. INDIANA RULES OF EVIDENCE § 615.....	7-2
A. MUST GRANT IF REQUESTED, UNLESS WITNESS EXEMPT.....	7-2
B. TIMING OF REQUEST AND ORDER.....	7-2
C. WITNESS NOT RECALLED MAY REMAIN IN COURTROOM AFTER TESTIFYING.....	7-2
D. CANNOT HEAR AND DISCUSS TESTIMONY, OR CONSULT WITH OTHER WITNESSES	7-2
1. Purpose of Rule	7-2
2. Witnesses who associate with one another without discussing case	7-3
III. EXEMPTED PERSONS.....	7-3
A. ONLY EXEMPTED WITNESSES MAY REMAIN IN COURTROOM	7-3
B. THREE CATEGORIES OF EXEMPTION.....	7-3
1. Party who is a natural person	7-3
2. Officer or employee of party that is not a natural person designated as its representative	7-4
3. Persons essential to presenting the party’s case	7-6
C. COURT’S DISCRETION TO EXEMPT WITNESS	7-6
D. EXEMPTING MORE THAN ONE WITNESS PER CATEGORY	7-6
E. PRACTICE POINTERS	7-7
1. Exempted witness should testify before others – especially when credibility at issue	7-7
2. Place State’s experts under separation order	7-7
IV. SCOPE OF SEPARATION ORDER.....	7-7
A. REBUTTAL WITNESSES.....	7-7
1. Result depends upon who needs the witness	7-7
2. Federal law	7-8
B. PRIOR TO OPENING STATEMENTS	7-8
C. DISCUSSIONS BETWEEN WITNESSES AFTER MISTRIAL	7-8
D. CONSULTATION BETWEEN WITNESSES AND COUNSEL.....	7-9
V. REMEDIES FOR VIOLATION OF SEPARATION ORDER.....	7-9
A. JUDGE’S DISCRETION.....	7-9
1. Disqualification of witness / exclude testimony.....	7-9
2. Contempt.....	7-11
3. Mistrial	7-11

4. Inform jury about violation of Order	7-12
VI. APPELLATE REVIEW	7-12
A. MUST MAKE SHOWING OF PREJUDICE.....	7-12
B. TRIAL COURT MUST ENFORCE ORDER EVENLY	7-12

CHAPTER 8 - OPENING STATEMENT

I. PRACTICE TIPS	8-1
A. DOS AND DON'TS	8-1
1. Never waive – cannot reserve opening statement	8-1
2. Do not “Open the Door”	8-1
3. General dos.....	8-1
4. General do not's.....	8-1
B. COMMON ABUSES BY PROSECUTOR	8-2
1. Prevent abuses by filing motions in limine	8-2
2. Timely objection.....	8-2
3. Prepare your client.....	8-2
4. Consider filing pre-trial motion notifying court of your defense	8-2
C. SAMPLE CURATIVE INSTRUCTION	8-2
II. OBJECTIONS TO PROSECUTOR'S OPENING STATEMENTS	8-2
A. GROUNDS FOR OBJECTION.....	8-2
1. Putting jurors in place of victim	8-3
2. Referring to evidence ruled inadmissible by prior motion	8-3
3. Referring to evidence where admissibility still under advisement.....	8-3
4. Mistrial where reference to polygraph	8-3
5. Reference to prior crimes, wrongs, or bad acts	8-3
6. Referring to unprovable evidence	8-4
7. Referring to missing codefendants or co-conspirators	8-5
8. Misstating facts.....	8-5
9. Stating personal beliefs or opinions	8-5
10. Prejudicial or inflammatory remarks/pleas to passion	8-5
11. Attacking character of accused.....	8-6
12. Attacking character of defense counsel.....	8-6
13. Argument is not permitted during opening	8-6
14. Prosecutor's personal dealings with witnesses.....	8-6
15. Statements that presume defendant's guilt	8-6
16. Instructing jurors about the law	8-6
B. PRACTICE POINTERS	8-6
1. Before trial.....	8-6
2. Before prosecutor gives opening statement.....	8-7
3. Listen for “promises of proof”	8-8
4. Object sparingly	8-8
5. Avoid waiver on highly prejudicial remarks	8-8
6. Make objection at bench or out of presence of jury	8-9
III. REVERSAL AND MISTRIAL	8-9
A. TEST FOR REVERSAL.....	8-9
1. If misled or surprised by prosecutor.....	8-9
B. MISTRIAL.....	8-9
1. Argue for mistrial outside presence of jury	8-9
2. Test.....	8-9

3. Procedure.....	8-10
IV. DEFENDANT’S OPENING STATEMENT	8-11
A. PURPOSE.....	8-11
B. IMMEDIATELY AFTER STATE’S OPENING OR WAIVER.....	8-11
1. Court must give preliminary instructions prior to any opening.....	8-11
2. Cannot wait until end of State’s case-in-chief.....	8-11
C. SHOULD YOU WAIVE OPENING STATEMENT?	8-11
1. Reasons not to waive.....	8-11
2. Factors to consider if you want to waive opening.....	8-12
3. Waiver of opening not inadequate assistance of counsel (IAC).....	8-12
D. “OPENING THE DOOR” IN OPENING STATEMENT	8-12
1. Opening statement not evidence.....	8-12
2. Your remarks may bind client	8-12
E. CONTENT OF OPENING STATEMENT.....	8-14
1. Introduction	8-14
2. Body	8-14
3. Basis of innocence.....	8-15
4. Conclusion.....	8-15
F. PRACTICE POINTERS	8-15
1. Preparation	8-15
2. Delivery.....	8-16

CHAPTER 9 - IMMUNITY

I. PRACTICE TIPS	9-1
A. ONLY PROSECUTORS ASK COURT TO GRANT IMMUNITY	9-1
B. INFORMAL, “POCKET”, OR “LETTER” GRANTS OF IMMUNITY	9-1
C. WHEN NEGOTIATING	9-1
1. Try for broad coverage	9-1
2. Anticipate consequences	9-1
D. HOW TO OBTAIN IMMUNITY.....	9-1
1. Good ideas.....	9-1
2. Questions to ask.....	9-1
II. TYPES OF IMMUNITY.....	9-2
A. FORMAL IMMUNITY – THREE TYPES	9-2
1. Use and derivative use authorized in Indiana.....	9-2
2. Transactional – complete pardon for offenses disclosed by testimony	9-3
3. Immunity applies to criminal proceedings in any court	9-3
B. INFORMAL IMMUNITY.....	9-4
1. How to obtain – Practice tips: avoiding trouble	9-4
2. Letter or pocket immunity	9-4
3. Advantages	9-4
4. Protections.....	9-5
5. Enforceability	9-5
III. PROCEDURE FOR GRANT OF IMMUNITY	9-6
A. PROSECUTOR MAY GRANT WITH COURT APPROVAL.....	9-6
B. WITNESS MUST REFUSE TO TESTIFY OR PRODUCE ITEM	9-6
1. May obtain immunity prospectively.....	9-6
2. May not obtain before indictment or filing of charges if witness invokes Fifth Amendment.....	9-6
C. HEARING OUTSIDE PRESENCE OF JURY TO DETERMINE PRIVILEGE	9-7

D. IMMUNITY MUST BE GRANTED UPON REQUEST IF PRIVILEGE APPLIES.....	9-7
E. COURT MUST INSTRUCT WITNESS AS TO EFFECT OF GRANT OF IMMUNITY.....	9-7
F. REFUSAL TO GIVE EVIDENCE – SUBJECT TO CONTEMPT	9-7
G. PROSECUTOR CANNOT RETRACT IMMUNITY WITHOUT GOOD CAUSE.....	9-7
1. May limit to certain stages of proceeding	9-8
IV. CHALLENGING STATE’S USE OF IMMUNIZED TESTIMONY.....	9-8
A. STATE USES COMPELLED TESTIMONY AGAINST IMMUNIZED WITNESS	9-8
1. Prohibited from using compelled testimony in any criminal proceeding.....	9-8
2. Procedure to challenge compliance	9-8
3. Remedies	9-10
B. OTHER FORBIDDEN USES OF IMMUNIZED TESTIMONY	9-10
1. Investigatory leads.....	9-10
2. Impeachment in subsequent trial	9-10
3. Prosecution for perjury in prior appearances.....	9-10
4. Inter-jurisdictional use.....	9-10
5. Non-evidentiary use of immunized testimony	9-11
C. USE OF CHILD’S STATEMENT TO MENTAL HEALTH EVALUATOR	9-11
V. HOW TO GET IMMUNITY FOR DEFENSE WITNESSES.....	9-11
A. ASK PROSECUTOR FOR INFORMAL IMMUNITY	9-11
B. REQUEST JUDICIAL IMMUNITY.....	9-11
1. Inherent powers of trial court to protect defendant’s right to present exculpatory evidence	9-12
2. Interference with defendant’s case or distortion of fact finding.....	9-12

CHAPTER 10 - EVIDENCE/OBJECTIONS/MISTRIAL

I. RULES OF EVIDENCE CHART.....	10-1
II. COMMON TRIAL OBJECTIONS	10-9
III. MISTRIAL.....	10-12
A. PROSECUTORIAL MISCONDUCT – GENERAL FAIRNESS IN TRIAL PROCEEDINGS	10-12
1. Prompt admonition presumed adequate	10-12
2. Waiver if counsel refuses admonition	10-12
3. Instruction to disregard is unmitigated fiction.....	10-12
B. EVIDENTIARY HARPOON – NOT CORRECTED BY ADMONITION – D.15.B.1	10-13
1. Can be evidentiary harpoon even if not elicited by State	10-13
2. If intentional and evidence of guilt in conflict	10-13
3. No harpoon if defendant opens door	10-13
4. Move for mistrial.....	10-14
5. Showing – “Grave Peril”	10-14
6. Factors determining whether mistrial is necessary – D.17.....	10-14
C. RE-PROSECUTION AFTER MISTRIAL – J.10.B.....	10-16
1. Retrial barred only when prosecutor “intended to goad” defendant to move for mistrial..	10-16
2. Retrial barred where judge or prosecutor asked for mistrial, and no manifest necessity ...	10-17

CHAPTER 11 - PROSECUTION MISCONDUCT DURING PRESENTATION OF EVIDENCE

I.	PROSECUTORIAL MISCONDUCT PRACTICE TIPS – D.15	11-1
A.	MUST OBJECT TO PRESERVE ERROR	11-1
1.	Request for admonishment	11-1
2.	Request for mistrial	11-1
B.	TEST FOR REVERSIBLE ERROR.....	11-1
1.	Misconduct need not determine outcome of trial.....	11-2
2.	Probable persuasive effect of misconduct on jury’s decision.....	11-2
3.	Intentional misconduct	11-2
C.	MISCONDUCT CLAIM MUST BE RAISED IN DIRECT APPEAL; CLAIM IMPROPER FOR POST-CONVICTION REVIEW (PCR).....	11-2
D.	PROSECUTOR TO ACHIEVE JUST RESULT, NOT TO PROCURE CONVICTION AT ANY COST	11-2
II.	SPECIFIC TYPES OF MISCONDUCT WITH AUTHORITY	11-2
A.	CURRY FAVOR WITH JURY	11-3
B.	PREVENT OR DISCOURAGE DEFENSE WITNESSES FROM TESTIFYING.....	11-3
C.	CHARACTERIZE WITNESSES AS LIARS.....	11-4
1.	Prosecutor cannot express personal opinion.....	11-4
2.	Forcing defendant and witnesses to call other liars.....	11-4
D.	COMMENT ON ROLES OF DEFENSE AND PROSECUTION	11-4
1.	Prosecutor as “good guy”	11-4
2.	Remarks about integrity of defense counsel.....	11-5
E.	USE DEFENDANT’S POST-ARREST, POST-MIRANDA SILENCE FOR IMPEACHMENT	11-6
1.	Violates due process.....	11-6
2.	Probableness is irrelevant.....	11-6
3.	Examples of reversible error	11-7
4.	Improper to offer post-arrest silence as evidence of sanity	11-7
5.	Open the door.....	11-8
6.	Object to preserve error.....	11-8
7.	Specific procedure.....	11-8
8.	Standard of review.....	11-8
9.	Harmless error analysis	11-8
F.	UNDECIDED WHETHER IT IS IMPROPER TO USE POST-ARREST, PRE-MIRANDA SILENCE	11-9
G.	DISPLAY OR REFER TO INADMISSIBLE EVIDENCE	11-9
1.	Improper for prosecutor to reference exercise of right to counsel	11-9
2.	Improper to offer exercise of 6 th Amendment as evidence of sanity	11-9
H.	DISPLAY OR REFER TO INADMISSIBLE EVIDENCE	11-10
1.	Prohibited unless reasonable basis to believe evidence admissible.....	Error! Bookmark not defined.
2.	Serious conflicts in evidence	Error! Bookmark not defined.
3.	Exception.....	Error! Bookmark not defined.
I.	MAKE IMPRESSIONS UNSUPPORTED BY EVIDENCE.....	11-10
J.	DISPLAY SUPPRESSED ARTICLES, COMPELLING DEFENSE TO OBJECT REPEATEDLY	11-11
K.	REPETITIOUS IMPROPER QUESTIONING	11-11
L.	REFERENCE TO POLYGRAPH	11-12
1.	Reinforcing credibility of witness	11-12

2. Cannot allude to polygraph of accused	11-12
M. REFERENCE TO MUG SHOTS	11-13
1. Not per se inadmissible	Error! Bookmark not defined.
2. Misconduct must place defendant in grave peril	Error! Bookmark not defined.
3. No probative value and irrelevant when witness positively identifies defendant in courtroom	Error! Bookmark not defined.
4. Photograph of person in three classic poses	Error! Bookmark not defined.
5. Introduction of mug shots from current arrest not error if probative	Error! Bookmark not defined.
N. REFERENCES TO RELIGIOUS BELIEFS OR DEFENDANT'S RACE.....	11-14
1. Prior crimes	11-14
2. Allegations defendant bribed or threatened State's witness	11-14
O. REFERENCES TO RELIGIOUS BELIEFS OR DEFENDANT'S RACE.....	11-15
1. Any reference to witness's religious beliefs improper	Error! Bookmark not defined.
2. References to defendant's race.....	Error! Bookmark not defined.
P. BRING WITNESS BEFORE JURY IN ATTEMPT TO SHOW REFUSAL TO TESTIFY ...	11-16
1. Accomplice or co-defendant.....	Error! Bookmark not defined.
2. Witnesses.....	Error! Bookmark not defined.
3. Entitled to admonishment and final instruction.....	Error! Bookmark not defined.
Q. CALLING WITNESS IN ORDER TO IMPEACH & ARGUIN IMPEACHMENT EVIDENCE AS SUBSTANTIVE	11-17
R. IMPROPER IMPEACHMENT	11-17
1. Using specific acts to prove bad character	Error! Bookmark not defined.
2. Exceptions – evidence rules	Error! Bookmark not defined.
(a) Indiana Rule of Evidence 404(b)	Error! Bookmark not defined.
(b) Indiana Rule of Evidence 608(b)	Error! Bookmark not defined.
S. CHARACTER ASSASSINATION	11-18
T. GUILT BY ASSOCIATION	11-18
1. Guilt due to association with unsavory characters	Error! Bookmark not defined.
2. Guilt due to co-defendant's guilt.....	Error! Bookmark not defined.
U. TELLING JURORS TO PUT THEMSELVES OR CHILDREN IN VICTIM'S PLACE.....	11-19
V. SUGGESTING DEFENDANT HAS BURDEN OF PROOF	11-19
W. USING FALSE TESTIMONY TO OBTAIN A CONVICTION	11-19

CHAPTER 12 - FALSE STATEMENTS AND PERJURIOUS TESTIMONY

I. PRACTICE TIPS	12-1
A. ALL ATTORNEYS PROHIBITED FROM KNOWING USE OF FALSE EVIDENCE (INDIANA RULES OF PROFESSIONAL CONDUCT, RULE 3.3)	12-1
1. If a defendant wants to offer evidence	12-1
B. DILEMMA – YOUR CLIENT INSISTS UPON TESTIFYING	12-2
1. Considerations	12-2
C. PROSECUTOR'S USE -- SUMMARY OF THE LAW	12-2
1. Conviction must be vacated if prosecutor knowingly uses false testimony	12-2
2. Defendant must object, or waived	12-2
3. Prosecutor charged with knowledge of agents and officers	12-3
4. Prosecutor purchased testimony by inducements – request cautionary instruction	12-3
D. SAMPLE INSTRUCTIONS REGARDING SNITCHES	12-3
1. Witnesses Requiring Special Caution	12-3
II. PROHIBITED USE BY PROSECUTOR	12-4

A. STATE CANNOT <u>KNOWINGLY</u> USE FALSE TESTIMONY	12-4
1. Prosecutorial misconduct	12-4
2. Defendant must show <u>knowing</u> violation by State	12-4
3. False statements made during guilty plea process.....	12-5
4. Exception – false testimony to show consciousness of guilt.....	12-6
B. STATE’S DUTY TO DISCLOSE AND CORRECT	12-6
1. When obligation arises	12-6
2. State cannot escape obligation by omission	12-6
3. Duty to disclose inducements or temptations to testify falsely	12-7
C. GUIDELINES FOR PROVING PROSECUTOR’S USE OF FALSE EVIDENCE	12-7
1. Identify evidence	12-7
2. Show facts material, not collateral	12-7
3. Show more than inconsistencies in testimony.....	12-7
D. WAIVER OF ERROR IF NO CONTEMPORANEOUS OBJECTION	12-8
E. STEPS TO PRESERVE ERROR	12-8
F. APPELLATE REVIEW.....	12-8
1. Highest level of scrutiny.....	12-9
2. Standard of review.....	12-9
3. Reversal even where prosecution lacked knowledge of perjury	12-9
III. PROHIBITED USE BY DEFENSE COUNSEL.....	12-9
A. CANNOT <u>KNOWINGLY</u> USE PERJURED TESTIMONY	12-9
1. Comments on Rule 3.3	12-10
2. Disclose client’s perjury where absolutely convinced	12-10
3. Determining what is perjury	12-11
4. Handling client’s insistence on testifying.....	12-11
5. Perjured alibi testimony.....	12-13
B. LAWYER’S OBLIGATIONS	12-13
1. Report client’s fraud upon court.....	12-13
2. Cannot knowingly make false statement of fact or law.....	12-13
3. Must correct material misstatements of fact or law.....	12-13
4. Eliciting/offering false evidence by person other than client	12-14

CHAPTER 13 - JUROR MISCONDUCT

I. TYPES OF JUROR MISCONDUCT	13-1
A. FALSE STATEMENTS ON VOIR DIRE.....	13-1
1. Hearing required if defendant shows potential bias	13-1
2. Retrial not barred if statement prevents fair trial.....	13-2
3. Retrial barred if prosecutor brings about false statement	13-2
B. OUT-OF-COURT COMMUNICATION OR CONTACT	13-2
1. Test to determine prejudice	13-3
2. Socializing with State’s witnesses.....	13-3
3. Discovering prior convictions of defendant	13-4
4. Reading newspaper article.....	13-5
5. Telling someone “I am serving as a juror” in a case	13-5
6. Contact with Defendant.....	13-5
7. Misconduct with social media	13-5
8. Contact with bailiffs and other court personnel	13-6
9. Making phone calls during jury separation	13-6
C. CONSUMPTION OF ALCOHOLIC BEVERAGES	13-7
1. After deliberations have begun.....	13-7

2. Prior to deliberations	13-7
D. INATTENTIVENESS OR SLEEPING	13-8
1. Waiver	13-8
2. Replacing a sleeping juror is discretionary	13-8
E. USE OF PRESCRIBED TRANQUILIZERS	13-9
F. TESTIFY AS WITNESS IN CASE	13-9
G. FOREMAN PREVENTS FREE AND OPEN DISCUSSION AMONG JURORS	13-9
H. JUROR DIVULGES EXTRANEOUS EVIDENCE	13-9
1. Before reaching verdict	13-9
2. After reaching verdict	13-10
I. UNAUTHORIZED VIEWING OF SCENE	13-10
J. JURY EXPERIMENT/RESEARCH	13-10
K. BRINGING BOOKS INTO JURY ROOM	13-11
1. Using outside references during break in deliberations subject to same analysis	13-11
L. FAILURE TO DISCLOSE PERSONAL KNOWLEDGE OF MATERIAL FACT	13-11
M. MAKING DECISIONS AS JURY PRIOR TO CLOSE OF CASE	13-12
1. Jurors may discuss evidence during recesses among themselves, but may not make decision until deliberations commence	13-12
2. If court fails to admonish, must show prejudice	13-12
N. INTIMIDATING OTHER JURORS	13-12
II. POSSIBLE PREJUDICIAL INFLUENCES ON JURY	13-13
A. JUROR'S STATEMENT INFECTS VENIRE	13-13
B. EXTRA-JUDICIAL COMMENTS	13-13
C. FOREMAN TELLS JURORS HE KNOWS DEFENDANT'S WIFE	13-13
D. ANONYMOUS/INTIMIDATING PHONE CALL	13-14
E. BOMB THREAT/SECURITY CONCERNS	13-14
F. INFORMED ABOUT DEFENDANT'S PRIOR CONVICTION	13-14
G. JURORS OVERHEAR MEMBERS OF AUDIENCE DISCUSS CASE	13-15
H. EXPOSURE RESULTING BY SEPARATING JURORS	13-15
1. Absent consent of parties, jury must remain together once deliberations begin	13-15
2. Test for harmless error	13-15
I. USE OF CELL PHONES DURING DELIBERATIONS	13-16
1. Use of cell phone is jury separation	13-17
2. Short usage – defendant must show prejudice	13-17
3. Jury Rule 26 – instructions re: electronic communication devices	13-17
J. THREATENING COMMENTS TO JUROR'S WIFE	13-17
K. ALTERNATE JUROR'S PARTICIPATION IN DELIBERATIONS	13-17
L. <u>LINDSEY</u> TEST –DETERMINING POTENTIAL EXPOSURE DURING TRIAL	13-18
1. Bring to attention of court	13-18
2. Court determines likelihood of resulting prejudice	13-18
3. Reversible error where denial of motion to interrogate	13-19
4. Reversible error where failure to poll at proper time	13-19
5. Review of denial of mistrial	13-19
III. PROCEDURES TO RAISE ISSUE OF JUROR MISCONDUCT OR REMOVE JUROR ..	13-19
A. PROCEDURE FOR RAISING JUROR MISCONDUCT DURING TRIAL	13-19
1. Object before return of verdict	13-19
2. Present specific evidence showing possibility of bias	13-20
3. Hearing to determine bias or prejudice	13-20
4. Decision within court's discretion	13-21
B. PROCEDURE FOR RAISING JUROR MISCONDUCT AFTER TRIAL	13-21
1. May not impeach verdict	13-21

2. Exceptions for intoxication, outside information, and outside influence	13-22
C. REMOVAL OF JUROR	13-22
1. Trial court must justify removal on record	13-22
2. Court must avoid affecting juror's judgment during questioning	13-22
3. Instruction should be given	13-22
4. Court cannot remove impartial juror	13-23
5. Timing of removal of juror	13-23
6. Varying appellate standard of review	13-24

CHAPTER 14 - JUDICIAL MISCONDUCT AND ERRORS / RECUSAL

I. DEALING WITH A JUDGE WHO IS BIASED AGAINST YOU OR YOUR CLIENT	14-1
A. RIGHT TO IMPARTIAL JUDGE	14-1
B. MAKE A RECORD	14-1
1. Judge attacks you or your presentation	14-1
2. "Baited" into arguments	14-1
3. Judge remarks on belief in credibility of witnesses or evidence	14-2
4. Judge asks questions impacting credibility	14-2
II. JUDICIAL MISCONDUCT AND ERRORS – D.14	14-2
A. TYPES OF MISCONDUCT AND ERRORS	14-2
1. Exclusion of general public from proceeding	14-2
2. Pressuring defendant to forego his rights	14-3
3. Placement of persons	14-3
4. <i>Ex parte</i> communications	14-4
5. Leaving court while trial in progress	14-6
6. Failure to sequester jury	14-6
7. Sarcasm, quips, and ridicule	14-7
(a) During bench trial	14-7
(b) Judge's intrusion of self into bench trial proceeding	14-8
8. Courtroom demonstrations	14-8
9. Calling witnesses	14-8
10. Interrogating witnesses in a way that improperly influences jury	14-8
11. Interrogating witness during bench trial	14-10
12. Commenting on evidence, credibility, guilt, or facts	14-10
13. Comments to jury during recess	14-11
14. Admonishing defendant in front of jury	14-11
15. Assuming role of advocate	14-11
16. Prejudging case	14-12
17. Broadcasting, televising, recording, or taking of photographs	14-13
18. Judicial comments on perjury	14-13
19. Testifying at trial in which judge presides	14-14
20. Testifying voluntarily as character witness	14-14
21. Commenting on defendant's decision not to testify	14-14
22. Discussion with jury during deliberations & emphasizing particular jury instruction	14-15
23. Telling jury about sentence	14-15
24. Commending or criticizing jurors for verdict	14-16
25. Interfering with attorney-client consultation	14-16
26. Using example during <i>voir dire</i> that is similar to D's case	14-16
27. Inattentiveness; sleeping during trial	14-16
28. Letter to Supreme Court justice to state agreement with opinion	14-16
29. Operating illegal traffic school deferral program	14-16

B. IMPROPER JUDICIAL INTERVENTION	14-17
1. Intervention or abandonment of impartiality	14-17
C. SPECIFIC OBJECTION TO PROTECT RECORD	14-17
1. Reluctance to object	14-17
2. Object outside presence of jury	14-17
D. DELAY ENTERING JUDGMENT – D.8.C.	14-17
1. Promptly prepare and sign judgment or be compelled by mandate – C.R. 15.1	14-17
2. Lazy judge rule – Trial Rule 53.2.....	14-18
3. Undue delay in carrying out sentence	14-18
III. RECUSAL.....	14-19
A. MUST RECUSE WHEN ACTUAL PREJUDICE OR WHEN IMPARTIALITY MIGHT REASONABLY BE QUESTIONED	14-19
1. Indiana leans towards recusal if in doubt	14-19
2. <i>Cite</i> both due process and Judicial Canon 2, Rule 2.11	14-19
B. TEST FOR ACTUAL PREJUDICE.....	14-19
1. Establishing actual bias	14-20
2. Disqualification where impartiality might be reasonably questioned	14-20

Chapter 15 - CONTEMPT OF COURT

I. DIRECT CRIMINAL CONTEMPT	15-1
A. PRINCIPLES OF DIRECT CRIMINAL CONTEMPT	15-1
1. Acts which are disrespectful, defiant or otherwise deter court process.....	15-1
2. Requirements.....	15-2
3. Unique features of proceeding	15-4
4. Subsequent prosecution for unlawful act	15-5
B. LAWYERS	15-5
1. Higher standard for lawyers	15-5
2. Practice pointers	15-5
3. Examples of Lawyers Guilty of Contempt.....	15-6
4. Examples of Lawyers Not Guilty of Contempt.....	15-7
C. DEFENDANT OR WITNESS.....	15-7
1. Noise/outbursts and disregard for authority.....	15-7
2. Gun	15-8
3. Flight from courtroom.....	15-8
4. Contemptuous, insolent, or disorderly remarks.....	15-8
5. Racial slur.....	15-9
6. Refusal to testify.....	15-9
7. Refusal to disclose identity of informer	15-10
8. Refusing to take oath or affirmation	15-10
9. Intentionally giving false testimony	15-10
10. Witness demeaning self to retard proceedings	15-10
11. False pleading or inappropriate affidavit.....	15-10
12. Failure to appear.....	15-10
D. CONTESTING CONTEMPT FINDING.....	15-11
1. Motion to reconsider opinion and judgment	15-11
2. New Trial.....	15-11
3. Appeal	15-11
E. RIGHTS IF HELD IN CONTEMPT	15-12
1. Must be given an opportunity to respond.....	15-12

2. No right to counsel	15-12
F. PUNISHMENT	15-12
1. Court's discretion	15-13
2. Fine and/or imprisonment	15-13
3. Imprisonment must be for set term.....	15-13
4. Punishment must be appropriate	15-13
5. Trial court cannot suspend an attorney from the practice of law	15-14
II. INDIRECT CRIMINAL CONTEMPT	15-14
A. ACTS CONSTITUTING INDIRECT CONTEMPT	15-14
1. Violation of court order.....	15-14
2. Resisting or delaying process	15-16
3. Influencing or intimidating witnesses	15-16
4. False or inaccurate reporting of case or proceeding.....	15-16
5. Refusal to testify notwithstanding grant of immunity	15-16
B. PROCEDURES	15-17
1. Service of rule upon defendant.....	15-17
2. Rule to show cause must set forth facts of alleged contempt and give notice of right to offer defense.....	15-17
3. Court may extend time to give defendant opportunity to be purged of contempt.....	15-17
4. Rule cannot issue until information and sworn affirmation attest to contempt.....	15-17
5. Strict compliance not required if sufficient notice is given.....	15-17
C. RIGHT TO COUNSEL.....	15-18
1. Indiana.....	15-18
2. Federal – Right Attaches if Requested	15-18
D. DEFENSES.....	15-19
1. Void orders.....	15-19
2. Inability to pay fines.....	15-19
3. Lack of intent.....	15-19
4. Inability to comply	15-19
5. Substantial compliance.....	15-19
6. Acts not constituting indirect contempt.....	15-20
7. Denial of due process no excuse	15-20
8. Other possible defenses.....	15-20
III. DIFFERENCES BETWEEN CRIMINAL AND CIVIL CONTEMPT	15-20
A. CONTEMPT DEFINED	15-20
1. Power necessary to protect administration of justice	15-21
2. Intrinsic judicial power; neither civil, criminal, nor equitable	15-21
B. CRIMINAL CONTEMPT	15-21
C. CIVIL CONTEMPT	15-21
1. Offense against party on whose behalf court issued mandate	15-22
2. Inherent power to impose sanctions within ongoing judicial process	15-22
D. OPPORTUNITY TO PURGE ONLY IN CIVIL CONTEMPT	15-22
1. No need for purge opportunity for indirect criminal contempt	15-22
2. Attempt to purge must be timely	15-22

CHAPTER 16 - JUDGMENT ON EVIDENCE / INVOLUNTARY DISMISSAL

I. OVERVIEW	16-1
A. FOR JURY TRIALS.....	16-1

1.	Always make T.R. 50 motion at conclusion of State's case.....	16-1
2.	Court should grant if lack of evidence on any element.....	16-1
3.	Presenting evidence following denial of motion waives error	16-1
4.	Do not permit court to reserve ruling on the motion	16-1
B.	BENCH TRIAL – T.R. 41 (B).....	16-1
II.	JURY TRIALS – T.R. 50 MOTION FOR JUDGMENT ON EVIDENCE.....	16-1
A.	WHERE MOTION APPROPRIATE	16-2
1.	To test sufficiency	16-2
2.	State grounds when making motion	16-2
3.	Make and record motion at sidebar	16-2
4.	Request ruling outside jury's presence.....	16-2
5.	Insist that judge rule promptly.....	16-2
6.	Court's action shall be shown by order book entry	16-3
B.	TIMELINESS OF MOTION (OPPORTUNITIES TO MAKE MOTION).....	16-3
1.	When defendant is entitled to move	16-3
2.	When court may enter judgment on evidence	16-3
3.	After State's opening statement, State has opportunity to correct defect.....	16-3
4.	Close of State's case is best time to move for directed verdict	16-3
5.	At close of all evidence, make renewed motion.....	16-3
6.	After mistrial or discharge of jury	16-3
7.	Before final judgment or before ruling on Motion to Correct Error.....	16-4
8.	First time on appeal	16-4
C.	WAIVER OF APPEAL OF DECISION NOT TO GRANT J.O.E. – G.5.C	16-4
1.	Introducing evidence after motion denied.....	16-4
2.	Failing to make record of motion	16-4
3.	Failing to state grounds for motion	16-4
D.	COURT'S DECISION TO GRANT OR DENY	16-4
1.	Sufficiency standard	16-4
2.	Consider evidence introduced prior to motion	16-5
3.	Determining whether State failed to establish essential element of crime	16-5
4.	Cannot weigh evidence	16-5
5.	Examples of insufficiency	16-6
E.	TYPES OF RELIEF	16-8
1.	Grant some, but not all, of parties judgment on evidence	16-8
2.	Grant of new trial in lieu of judgment on evidence	16-9
3.	Judgment on evidence as to some counts or offenses	16-9
4.	Re-open of State's case if evidence easily obtainable.....	16-9
5.	Set aside verdict.....	16-10
6.	Grant new trial.....	16-10
F.	DOUBLE JEOPARDY CONCERNS – J.10.C	16-10
1.	Judgment for defendant acts as acquittal.....	16-10
2.	Even if court erroneously grants judgment for defendant, double jeopardy bars retrial	16-10
3.	Verdict set aside, no double jeopardy.....	16-11
G.	STANDARD OF APPELLATE REVIEW	16-11
1.	Neither reweigh evidence nor judge credibility	16-11
2.	Exception – “incredible dubiousity” rule	16-11
III.	BENCH TRIALS – T.R. 41(B) MOTION FOR INVOLUNTARY DISMISSAL.....	16-12
A.	STRATEGY IN MAKING MOTION	16-12
B.	TIMELINESS OF MOTION	16-12
C.	DETERMINATION OF MOTION	16-12
1.	Court weighs all evidence and credibility	16-12

2. Standard.....	16-12
D. WAIVER BY INTRODUCING EVIDENCE	16-13
E. DOUBLE JEOPARDY	16-13
F. STANDARD OF REVIEW	16-13

CHAPTER 17 - CLOSING ARGUMENT

I. PRACTICE TIPS	17-1
A. REINFORCE THEMES	17-1
B. DEALING WITH PROSECUTORS	17-1
1. Aggressive advocacy is required during closing	17-1
C. BEWARE OF OPENING THE DOOR	17-1
D. HELPFUL HINTS TO PREPARE	17-2
E. WAIVER OF CLOSING	17-2
II. ORDER OF ARGUMENT	17-2
A. JUDGE'S DISCRETION.....	17-2
1. Time allotted.....	17-2
2. Scope of closing statement	17-3
B. STANDARD OF REVIEW	17-3
C. GUIDELINES	17-3
1. May agree not to give closing argument	17-3
2. Prosecution opens and closes final argument	17-4
3. Defendant's right to reply in surrebuttal to facts or points not disclosed in opening	17-4
4. When State refuses to open	17-4
5. Defense refuses to give closing after prosecution has opened argument	17-4
III. CLOSING ARGUMENT OF PROSECUTOR.....	17-4
A. OBJECTING DURING PROSECUTOR'S CLOSING	17-4
1. Attacking integrity of defense counsel	17-5
2. Commenting on role of defense attorney	17-6
3. Prosecutor's duty to society and defendant	17-7
4. Insulting defendant (Name calling)	17-7
5. Inadmissible evidence	17-8
6. Comment on exercise of one's rights	17-8
7. Reasonable doubt analogies	17-14
8. Grand jury improperly mentioned	17-14
9. Duration of punishment.....	17-14
10. Mentioning previous hung jury	17-15
11. Jurors addressed by name	17-15
12. Misstatement of law	17-15
13. Misstatement of evidence	17-16
14. Matters not in evidence	17-16
15. Injecting personal experiences	17-18
16. Implying personal knowledge independent of evidence	17-18
17. Personal opinion or belief stated	17-19
18. Prejudicial or inflammatory statements that ask to convict for reasons other than guilt....	17-21
19. Repetitious reading of indictment	17-25
20. Rebuttal: matters not addressed by defense (sandbagging).....	17-25
B. AVOIDING WAIVER.....	17-25
1. Timely object.....	17-25
2. Request admonition and mistrial, even if your objection overruled.....	17-25

3. Request prosecutor be admonished	17-26
4. Stringent standard of review if no objection made or fail to move for admonishment or mistrial.....	17-26
C. PROSECUTORIAL MISCONDUCT	17-26
1. Maldonado test	17-26
2. If no contemporaneous objection and motion for admonishment, both Maldonado elements and fundamental error must be shown.....	17-27
D. PERMISSIBLE ARGUMENTS	17-27
1. Comment on testimony in evidence, and exhibits admitted	17-28
2. May point out reasonable inferences from facts.....	17-28
3. Law	17-28
4. Failure to be present	17-29
5. Credibility of evidence	17-29
6. Character of offense	17-29
7. Opinion	17-29
8. Right to respond even if objectionable	17-29
IV. DEFENDANT'S CLOSING ARGUMENT.....	17-30
A. OBJECTIVES	17-30
B. MUST HAVE OPPORTUNITY TO MAKE CLOSING	17-30
1. Request opportunity to close or it is waived	17-31
2. Trial court should inquire whether defendant has closing argument.....	17-31
C. PREPARATION	17-31
1. Start early	17-31
2. Refine issues and themes.....	17-31
3. Review final jury instructions	17-31
4. Anticipate state's position	17-31
5. Use visual aids and exhibits	17-31
6. Prepare written outline	17-32
7. Rehearse	17-32
8. Self-critique	17-32
D. DOS & DON'TS.....	17-33
1. Do	17-33
2. Do not	17-33
E. INEFFECTIVE ASSISTANCE OF COUNSEL FOR CLOSING ARGUMENTS.....	17-34
1. Judicial review of closing argument highly deferential.....	17-34
2. Unsympathetic or prejudicial comments about defendant may be unreasonable.....	17-34

CHAPTER 18 - JURY QUESTIONS & DELIBERATIONS

I. JURY QUESTIONS	18-1
A. COURT MUST ENSURE JURORS KNOW WHEN THEY CAN ASK QUESTIONS	18-1
B. QUESTIONING PROCEDURE.....	18-1
C. APPROPRIATENESS OF QUESTION	18-2
1. Jurors might consult as a group and then submit questions	18-2
2. Questions subject to the rules of evidence	18-2
3. Alternate jurors.....	18-2
II. RETIRING TO DELIBERATE	18-2
A. PROCEDURE.....	18-2
1. After hearing court's charge.....	18-2
2. Alternate juror may be sent to jury room	18-3

3. Duties of sworn bailiff.....	18-4
B. ITEMS PERMITTED IN JURY ROOM DURING DELIBERATION – D.9.E.4	18-4
1. Factors court considers	18-4
2. Lawyer’s responsibilities before materials go to jury	18-4
3. Examples of materials allowed.....	18-5
4. Inadmissible materials inadvertently taken inside jury room.....	18-7
5. Materials that jurors cannot take into jury room	18-8
III. REQUEST FOR INFORMATION DURING DELIBERATIONS	18-8
A. WHEN JURY INDICATES THAT IT HAS REACHED AN IMPASSE/IS IN DISAGREEMENT	18-8
1. Jury Rule 28 – jury advises it is at an impasse.....	18-8
2. Ind. Code 34-36-1-6 – jury expressly in disagreement	18-9
B. COMMON LAW RULES IF JURY JUST REQUESTS EVIDENCE.....	18-10
1. No <i>ex parte</i> communication permitted	18-10
2. Factors to consider in granting request.....	18-10
3. Trial judge must ensure jury makes best effort to reach truth, with restraint.....	18-10
4. Less discretion after jury has begun deliberation	18-10
C. PREFERRED PROCEDURE FOR ANY JURY REQUEST	18-10
1. Court refuses to answer question.....	18-11
2. If jury’s question ambiguous	18-11
3. When challenging exhibits ask for mistrial	18-11
D. SPECIFIC JURY REQUESTS	18-12
1. Clarification of point of law	18-12
2. Court may give additional instructions.....	18-12
3. Court may not read from party’s closing argument.....	18-13
4. Replaying testimony or rereading documentary evidence	18-13
5. Providing additional materials.....	18-15
6. Examination/Experimentation.....	18-16
7. Viewing single piece of evidence.....	18-16
8. Transcript of witness’ testimony	18-16
IV. IMPROPERLY COMMUNICATING WITH JURY (JUDGE AND BAILIFF)	18-16
A. PROCEDURES TO CHALLENGE	18-16
1. Communications must be in open court	18-16
2. Improper communications.....	18-17
B. JUDGE.....	18-18
1. May give additional instructions	18-18
2. Forbidden <i>ex parte</i> communications	18-18
3. Must make objection	18-20
C. BAILIFF	18-21
1. Speak only to ask if verdict reached, or if court orders.....	18-21
V. SEPARATION OF JURORS	18-23
A. NOT REQUIRED PRIOR TO TRIAL	18-23
B. NO RIGHT TO SEQUESTER THROUGHOUT TRIAL UNLESS CAPITAL CASE	18-23
C. MUST REMAIN TOGETHER UNTIL VERDICT RETURNED UNLESS PARTIES CONSENT.....	18-23
1. Instructions if parties consent to separation	18-23
D. SEPARATION MAY BE HARMLESS – WALKER RULE.....	18-24
1. Not harmless error when	18-24
E. EXCEPTION – EXIGENT CIRCUMSTANCES.....	18-25
1. State must prove exigent circumstance	18-25
F. WAIVER – ACCEPTING COURT’S ADMONISHMENT OF JURY	18-25

VI. DEADLOCK / DISCHARGE – D.9.E.6	18-25
A. DEADLOCK	18-25
1. When is jury deadlocked?	18-25
2. Procedure.....	18-25
3. Strategy considerations.....	18-26
4. Improper responses.....	18-26
5. Acceptable responses	18-28
B. DISCHARGE.....	18-29
1. Judge’s discretion.....	18-29
2. No longer jurors after verdict returned and accepted by judge	18-30

Chapter 19 - JURY VERDICT/POLLING OF JURY/JUDGMENT

I. RETURN OF VERDICT – D.9.H.	19-1
A. PRACTICE POINTERS	19-1
1. Judge must accept verdict in open court.....	19-1
2. Must tender proper forms	19-1
3. Polling jurors	19-1
4. Irregularities – make a record before jury discharged.....	19-1
B. PROCEDURES	19-1
1. Defendant’s duty to tender proper and complete forms	19-1
2. Discharge when jury fails to reach verdict	19-2
3. Tender of verdict	19-2
4. Only judge can receive verdict.....	19-2
5. Changing the verdict	19-2
6. Jury action after discharge null and void.....	19-2
C. DEFECTIVE VERDICT	19-2
1. Nomaterial amendments after discharge	19-2
2. To be defective the verdict must be so uncertain no judgment can be rendered	19-3
3. Must raise questions about verdict before jury discharged	19-3
4. Double jeopardy	19-3
5. Jury’s right to change verdict when instructed to correct its verdict.....	19-4
6. Examples of defective verdicts.....	19-4
7. Remedy.....	19-7
D. INCONSISTENT VERDICTS	19-7
E. GENERAL VERDICT.....	19-7
1. Degree of offense not specified.....	19-7
2. Case tried and submitted on two theories, one bona fide and other not	19-8
3. Habitual offender finding made by general verdict.....	19-8
F. POLLING THE JURY – D.9.I	19-9
1. Polling sufficient to establish unanimous verdict.....	19-9
2. Polling procedure	19-9
3. Request, or right waived.....	19-10
4. Failure to poll not IAC without showing of harm	19-10
G. IMPEACHMENT OF VERDICT BY JURY	19-10
II. ENTRY OF JUDGMENT.....	19-10
A. CRIMINAL RULE 15.1	19-10
B. WHEN VERDICT ERRONEOUS	19-10
1. Reversal –if defendant misled	19-10
2. Modify conviction – if not misled.....	19-11