

GARDEN STATE CLE LESSON PLAN

A 3.0 CLE CREDIT COURSE

FREE DOWNLOAD LESSON PLAN AND EVALUTION

PERSUADING A CRIMINAL JURY

**WITH
CERTIFIED CRIMINAL TRIAL ATTORNEYS:
ROBERT OBLER, ESQ. & JOSEPH REM, ESQ.**

AND FEATURING

ROBERT RAMSEY, SENIOR INSTRUCTOR

Program Description

The life of a lawyer is all about persuasion and nowhere is it more important than in a criminal trial. Come learn from the experts on all the things you can do to persuade a jury under New Jersey law

I. INTRODUCTION

II. TRIAL TIPS

- a. You are always onstage
- b. Keep smiling
- c. Jurors watch everything
- d. It begins with Jury Selection
- e. Prepare your client
- f. Dress right
- g. Client use of a legal pad
- h. Body language
- i. Watch the adversary
- j. Be yourself
- k. Use silence in your favor
- l. Maintain your composure
- m. Ask a question
- n. Know when NOT to ask a question
- o. Attire, power colors, but don't distract. Look dignified and well dressed.

III. USING THE COURTROOM

- a. Approaches to the jury and to the witness
- b. The physical, you are on stage
- c. Watch TV preachers' with the sound off
- d. Use your evidence in summation
- e. The laws of primacy and recency
- f. Address all of the jurors
- g. Putting things on the juror rail
- h. Drama and stagecraft

IV. JURY SELECTION

- a. Court questionnaire
- b. Hunches
- c. *Voir dire*
- d. Challenges: cause or peremptory
- e. Have the Court address the Defendant by name, not as “Defendant”
- f. Jury consultants
- g. Mock Juries

V. JUROR CHALLENGES: PEREMPTORY AND FOR CAUSE

- a. Gut feeling of comfort with a juror.
- b. *Batson* type challenges, racial based.
Batson v. Kentucky, 476 U.S. 79 (1986)
- c. The foreman’s seat: seat no.
- d. Sidebars during jury selection, use the return to your seat to eyeball the people waiting to get in the box

VI. OPENING STATEMENTS

- a. Setting juror expectations
- b. Look at where you sit and what you can see
Perspective, lines of sight, don’t block a juror,
use proper angles

VII. USING DOCUMENTS

- a. Show a document to the witness properly
- b. Display it, identify it, and maybe move to another line of questioning, returning to it later with the Witness and Jurors in anticipation or apprehensive about it
- c. Usually you should not ask “Why?”, but in some instances—YES.

VIII. TRIAL TIPS

- a. Touch and talk to your client
- b. Position yourself
- c. Psychology: study it, personal space,
- d. Try the case in your mind, several times
- e. Playing at home and playing away
- f. Be good to the court reporters and court staff, Sheriff’s officers etc.

IX. BEST ADVICE TO YOUNG ATTORNEYS

- a. Be yourself
- b. Be sincere

Jury Persuasion – The Art & Science
December 16, 2011
Robert Obler, Attorney
Joseph p. Rem, Jr., Attorney

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I. Introduction – Integrity of Jury Selection Process –

- a. *State v. Tinnes*, 379 N.J. Super. 179 (App. Div. 2005)
- b. Waiver of Jury Trial – *State v. Mazza*, 330 N.J. Super. 467 (App. Div. 2000).

II. Advance Review of Jury Pool – Rule 1:8-5

- a. Challenge to Array (Rule 1:8-3(b)) – *State v. Long*, 204 N.J. Super. 469 (Law Div. 1985).

III. Voir Dire

- a. Tactical and Strategic Considerations
- b. AOC Directives 04-07 and 21-07 – *State v. Morales*, 390 N.J. Super. 470 (App. Div. 2007)
- c. Inadequate Voir Dire – *State v. Oates*, 246 N.J. Super. 261 App. Div. 1991)
- d. Participation by Defendant – *State v. W.A.* 184 N.J. 45 (2005); *State v. Colbert*, 190 N.J. 14 (2007).
- e. *In Camera* – *State v. Dishon*, 297 N.J. Super. 254 (App. Div. 1997)
- f. Presence of the public – *State v. Cuccio*, 350 N.J. Super. 248 (App. Div. 2002).
- g. Juror’s false information – *State v. Bianco*, 391 N.J. Super. 509 (App. Div. 2007).

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IV. Challenges – NJSA 2B:23-13(b)

a. Tactical and Strategic Considerations

1. Racial Considerations - State v. Gilmore, 103 N.J. 508 (1986); State v. Osorio, 402 N.J.Super. 93 (App. Div. 2008)

2. Group Bias - State v. Lewis, 389 N.J.Super. 409 (App. Div. 2007)

3. Religious Garb, State v. Fuller, 182 N.J. 174 (2004)

4. Language - State v. Pemberthy, 224 N.J.Super. 280 (App. Div. 1988)

b. Challenges for Cause (Rule 1:8-3(b))

c. Pre-trial Publicity State v. Bey, 112 N.J. 45, 86-87 (1988):

“The court should first examine the information disseminated to determine if it has the capacity to prejudice the defendant.” Second,

[i]f the court is satisfied that the published information has the capacity to prejudice the defendant, [the court] should determine if there is a realistic possibility that such information may have reached one or more of the jurors. Relevant considerations include the extent, notoriety, and prominence of the media coverage, with particular reference to the aspects found potentially prejudicial by the [c]ourt....

Where the court concludes there is a realistic possibility that information with the capacity to prejudice defendant's right to a fair trial may have reached members of jury, it should conduct a *voir dire* to determine whether any exposure has occurred. If there is any indication of such exposure or knowledge of extra-judicial information, the court should question those jurors individually in order to determine precisely what was learned, and establish whether they are capable of fulfilling their duty to judge the facts in an impartial and unbiased manner, based strictly on the evidence presented in court.

The Court further explained that, although the form of *voir dire* is discretionary, polling the jurors individually, *in camera*, is the most effective method to ensure juror truthfulness, and a court may want to “err on the side of caution” by conducting individual juror polling.

IV. Use of Jury Consultants

a. Targeting Individual Jurors for Trial

Rules of Court

1:8-1. Trial by Jury

(a) Criminal Actions. Criminal actions required to be tried by a jury shall be so tried unless the defendant, in writing and with the approval of the court, after notice to the prosecuting attorney and an opportunity to be heard, waives a jury trial. In sentencing proceedings conducted pursuant to N.J.S.A. 2C:11-3(c)(1), the consent of prosecutor shall be required for such waiver.

(b) Civil Actions. Issues in civil actions triable of right by a jury shall be so tried only if a jury trial is demanded by a party in accordance with R. 4:35-1 or R. 6:5-3, as applicable, and is not thereafter waived. If a jury of twelve is requested, that request shall be included in the jury demand.

Note: Source-R.R. 3:7-1(a), 4:40-3; paragraph (a) amended September 28, 1982 to be effective immediately; paragraph (a) amended July 13, 1994 to be effective September 1, 1994; captions added to paragraphs (a) and (b) and paragraph (b) amended July 10, 1998 to be effective September 1, 1998.

1:8-2. Number of Jurors

(a) Number Deliberating in Criminal Actions. A deliberating jury in a criminal action shall consist of 12 persons, but at any time before verdict the parties may stipulate that the jury shall consist of any number less than 12 except in the trials of crimes punishable by death. Such stipulations shall be in writing and with the approval of the court.

(b) Number Deliberating in Civil Actions. A deliberating jury in a civil action shall consist of six persons unless:

(1) for good cause shown the court orders a jury of 12 persons pursuant to a demand made in accordance with R. 1:8-1(b); or

(2) fewer than six jurors remain prior to commencement of deliberations and the parties then agree on the record to submit the case to the remaining jurors; or

(3) more than six jurors remain prior to the commencement of deliberations and the parties then agree on the record that all remaining jurors shall deliberate.

(c) Verdict in Civil Actions.

(1) Unless the parties have agreed on the record prior to commencement of deliberations to accept a verdict or finding by a lesser number, the verdict or finding shall be by agreement of five jurors when six jurors deliberate, and by 10 jurors when 12 jurors deliberate.

(2) If the parties have agreed on the record to submit the case to fewer than six jurors, pursuant to paragraph (b)(2) of this rule, the verdict or finding shall be

unanimous, unless the parties have also agreed on the record prior to commencement of deliberations to a verdict or finding by a lesser number.

(3) If the parties have agreed on the record to more than six jurors pursuant to paragraph (b)(3) of this rule, the verdict or finding shall be by agreement of five-sixths of the deliberating jurors, unless the parties have otherwise agreed on the record prior to commencement of deliberations.

(d) Alternate Jurors; Civil and Criminal Actions.

(1) *All Actions.* The court in its discretion may direct the impanelling of a jury of such number as it deems necessary to ensure that a sufficient number of jurors will remain to deliberate. If a juror is excused after being sworn but before opening statements begin, another juror may be impanelled and sworn, but no juror may be empaneled and sworn thereafter. All the jurors shall sit and hear the case, but the court for good cause shown may excuse any of them from service provided the number of jurors is not reduced to less than 12 or 6 as the case may be or such other number as may be stipulated to. If more than such number are left on the jury at the conclusion of the court's charge, the clerk of the court in the jury's presence shall randomly draw such number of names as will reduce the jury to the number required to determine the issues. Following the drawing of the names of jurors to determine the issues, the court may in its discretion order that the alternate jurors not be discharged, in which event the alternate jurors shall be sequestered apart from the other jurors and shall be subject to the same orders and instructions of the court, with respect to sequestration and other matters, as the other jurors. If the alternate jurors are not discharged and if at any time after submission of the case to the jury, a juror dies or is discharged by the court because of illness or other inability to continue, the court may direct the clerk to draw the name of an alternate juror to take the place of the juror who is deceased or discharged. When such a substitution of an alternate juror is made, the court shall instruct the jury to recommence deliberations and shall give the jury such other supplemental instructions as may be appropriate.

(2) *Civil Actions.* In civil actions, instead of selecting alternate jurors, the parties may agree on the record, pursuant to paragraph (b)(3) of this rule, that all remaining jurors shall deliberate and that the verdict or finding shall be returned by such number as is provided by paragraph (c)(3) of this rule.

Note: Source-R.R. 3:7-1(b), 3:7-2(d), 4:48-2, 4:49-1(a)(b). Amended July 7, 1971 to be effective September 13, 1971; paragraph (d) amended July 14, 1972 to be effective September 5, 1972; paragraph (d) amended June 29, 1973 to be effective September 10, 1973; paragraph (b) amended July 17, 1975 to be effective September 8, 1975; paragraph (d) amended July 29, 1977 to be effective September 6, 1977; paragraph (d) amended July 21, 1980 to be effective September 8, 1980; paragraph (a) amended September 28, 1982 to be effective immediately; paragraph (d)

amended July 13, 1994 to be effective September 1, 1994; amended July 10, 1998 to be effective September 1, 1998.

1:8-3. Examination of Jurors; Challenges

(a) Examination of Jurors. For the purpose of determining whether a challenge should be interposed, the court shall interrogate the prospective jurors in the box after the required number are drawn without placing them under oath. The parties or their attorneys may supplement the court's interrogation in its discretion. At trials of crimes punishable by death, the examination shall be made of each juror individually, as his name is drawn, and under oath.

(b) Challenges in the Array; Challenges for Cause. Any party may challenge the array in writing on the ground that the jurors were not selected, drawn or summoned according to law. A challenge to the array shall be decided before any individual juror is examined. A challenge to any individual juror which by law is ground of challenge for cause must be made before the juror is sworn to try the case, but the court for good cause may permit it to be made after the juror is sworn but before any evidence is presented. All challenges shall be tried by the court.

(c) Peremptory Challenges in Civil Actions. In civil actions each party shall be entitled to 6 peremptory challenges. Parties represented by the same attorney shall be deemed 1 party for the purposes of this rule. Where, however, multiple parties having a substantial identity of interest in one or more issues are represented by different attorneys, the trial court in its discretion may, on application of counsel prior to the selection of the jury, accord the adverse party such additional number of peremptory challenges as it deems appropriate in order to avoid unfairness to the adverse party.

(d) Peremptory Challenges in Criminal Actions. Upon indictment for kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree as defined by N.J.S.A. 2C:21-1b, or perjury, the defendant shall be entitled to 20 peremptory challenges if tried alone and to 10 such challenges when tried jointly; and the State shall have 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded defendants when tried jointly. In other criminal actions each defendant shall be entitled to 10 peremptory challenges and the State shall have 10 peremptory challenges for each 10 challenges afforded defendants. The trial judge shall have the discretionary authority to increase proportionally the number of peremptory challenges available to the defendant and the State in any case in which the sentencing procedure set forth in subsection c. of N.J.S. 2C:11-3 might be utilized. When the case is to be tried by a foreign jury, each defendant shall be entitled to 5 peremptory challenges, and the State 5 peremptory challenges for each 5 peremptory challenges afforded defendants.

(e) Order of Exercising of Peremptory Challenges.

(1) In any case in which each side is entitled to an equal number of challenges, those challenges shall alternate one by one, with the State in a criminal case and the plaintiff in a civil case exercising the first challenge.

(2) In any case in which there is more than one defendant and/or an uneven number of peremptory challenges, the court shall establish the order of challenge, which shall be set forth on the record prior to the commencement of the jury selection process.

(3) The passing of a peremptory challenge by any party shall not constitute a waiver of the right thereafter to exercise the same against any juror, unless all parties pass successive challenges.

(f) Conference Before Examination. Prior to the examination of the prospective jurors, the court shall hold a conference on the record to determine the areas of inquiry during voir dire. Attorneys shall submit proposed voir dire questions in writing in advance. If requested, the court shall determine whether the attorneys may participate in the questioning of the prospective jurors and, if so, to what extent. During the course of the questioning, additional questions of prospective jurors may be requested and asked as appropriate under the circumstances. The judge shall rule on the record on the proposed voir dire questions and on any requested attorney participation.

Note: Source – R.R. 3:7-2(b)(c), 4:48-1, 4:48-3. Paragraphs (c) and (d) amended July 7, 1971 to be effective September 13, 1971; paragraph (d) amended July 21, 1980 to be effective September 8, 1980; paragraph (a) amended September 28, 1982 to be effective immediately; paragraph (d) amended July 22, 1983 to be effective September 12, 1983; paragraph (d) amended July 26, 1984 to be effective September 10, 1984; paragraph (d) amended November 5, 1986 to be effective January 1, 1987; paragraph (c) amended November 7, 1988 to be effective January 2, 1989; paragraph (e) added July 14, 1992 to be effective September 1, 1992; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (f) added July 5, 2000 to be effective September 5, 2000; paragraph (f) amended July 27, 2006 to be effective September 1, 2006.

1:8-4. Foreperson

Juror number one shall be the foreperson; but if that juror is thereafter selected as an alternate juror or otherwise discharged, then the juror next drawn on the impanelling of a jury, who remains on the jury for the determination of the issues, shall be the foreperson.

Note: Source-R.R. 3:7-2(e), 4:48-2 (last phrase). Amended July 7, 1971 to be effective September 13, 1971, former rule deleted and new rule adopted June 29,

1973 to be effective September 10, 1973; caption and text amended June 29, 1990 to be effective September 4, 1990.

1:8-5. Availability of Petit Jury List

The list of the general panel of petit jurors shall be made available by the clerk of the court to any party requesting the same at least ten days prior to the date fixed for trial. In cases where the death penalty may be imposed, the list shall be made available to any party requesting it at least twenty days prior to the date fixed for trial.

Note: Source-R.R. 3:7-2(a). Amended July 16, 1979 to be effective September 10, 1979; amended September 28, 1982 to be effective immediately.

1:8-6. Sequestration of Juries

(a) **Prior to Instructing of Jury.** The jury shall not be sequestered in any action, civil or criminal, prior to the instructing of the jury by the court, unless the court, in its discretion so orders on its finding that there are extraordinary circumstances requiring sequestration for the protection of the jurors or in the interests of justice.

(b) **Following Instructing of Jury.** Following the instructing of the jury by the court and during the course of deliberations, the court may, in its discretion, in both civil and criminal actions, permit the dispersal of the jury for the night, for meals, and during other authorized intermissions in the deliberations.

Note: Source-R.R. 3:7-2(f). Amended July 14, 1972 to be effective September 5, 1972.

1:8-7. Requests to Charge the Jury

(a) **Generally.** Either within the time provided by R. 4:25-7 or thereafter but before the close of the evidence, as to issues not anticipated prior to trial, any party may submit written requests that the court instruct the jury on the law as set forth in the requests. The requests shall make specific reference to the Model Civil Jury Charges, if applicable, or to applicable law. Copies of the requests shall be furnished all parties at the time they are submitted to the court. The court shall, on the record, rule on the requests prior to closing arguments to the jury. A verbatim record shall be made of any charge conference the court holds. Objections to the instructions to the jury shall be in accordance with R. 1:7-2.

(b) **In Criminal Cases.** Prior to closing arguments, the court shall hold a charge conference on the record in all criminal cases. At the conference the court shall advise counsel of the offenses, defenses and other legal issues to be charged and shall rule on requests made by counsel.

Note: Source-R.R. 3:7-7(a), 4:52-1 (first and second sentences); amended July 21, 1980 to be effective September 8, 1980; paragraph (a) caption and new paragraph (b) added July 13, 1994 to be effective September 1, 1994; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraph (a) amended July 5, 2000 to be effective September 5, 2000.

1:8-8. Materials to be Submitted to the Jury; Note-taking; Juror Questions

(a) Materials. The jury may take into the jury room the exhibits received in evidence, and if the court so directs in a civil action, a list of the claims made by the parties and of the defenses to such claims, a list of the various items of damage upon which proof was submitted at the trial and a list of the verdicts that may be properly found by the jury. Any such list may be prepared by an attorney or the court, but before delivery to the jury, it shall be submitted to all parties. The court, in its discretion, may submit a copy of all or part of its instructions to the jury for its consideration in the jury room. The court may also, in its discretion and at such time and in such format as it shall determine, permit the submission to the jury of individual copies of any exhibit provided an appropriate request to employ that technique was made prior to trial on notice to all parties and provided further that the court finds that no party will be unduly prejudiced by the procedure.

(b) Juror Note-taking. Prior to opening statements, the attorneys or any party may request that the jury be permitted to take notes during the trial or portion thereof, including opening and closing statements. If the court determines to permit note-taking after all parties have had an opportunity to be heard, it shall provide the jurors with note-taking materials and shall take such steps as will ensure the security and confidentiality of each juror's notes.

(c) Juror Questions. Prior to the commencement of the *voir dire* of prospective jurors in a civil action, the court shall determine whether to allow jurors to propose questions to be asked of the witnesses. The court shall make its determination after the parties have been given an opportunity to address the issue, but they need not consent. If the court determines to permit jurors to submit proposed questions, it shall explain to the jury in its opening remarks that subject to the rules of evidence and the court's discretion, questions by the jurors will be allowed for the purpose of clarifying the testimony of a witness. The jurors' questions shall be submitted to the court in writing at the conclusion of the testimony of each witness and before the witness is excused. The court, with counsel, shall review the questions out of the presence of the jury. Counsel shall state on the record any objections they may have, and the court shall rule on the permissibility of each question. The witness shall then be recalled, and the court shall ask the witness those questions ruled permissible. Counsel shall, on request, be permitted to reopen direct and cross-examination to respond to the jurors' questions and the witness's answers. A witness who has been excused shall not be recalled to respond to juror questions unless all counsel and the court agree or unless the court otherwise orders for good cause shown.

Note: Source – R.R. 4:52-2; caption and text amended July 15, 1982 to be effective September 13, 1982; amended and paragraphs (a) and (b) designated July 10, 1998 to be effective September 1, 1998; new paragraph (c) added July 12, 2002 to be effective September 3, 2002; caption amended July 28, 2004 to be effective September 1, 2004; paragraph (c) amended July 27, 2006 to be effective September 1, 2006.

1:8-9. Return of Verdict

In every trial by jury the verdict shall be returned by the jury to the judge in open court. The verdict shall be unanimous in all criminal actions and shall be rendered in civil actions by the number required by R. 1:8-2(c).

Note: Source-R.R. 3:7-9(a), 4:40-4, 7:8-6; amended July 10, 1998 to be effective September 1, 1998.

1:8-10. Polling of Jury

Before the verdict is recorded, the jury shall be polled at the request of any party or upon the court's motion, and it shall be polled in every civil action if the verdict is not unanimous. If the poll discloses that there is not unanimous concurrence in a criminal action or concurrence by the number required by R. 1:8-2(c) in a civil action, the jury may be directed to retire for further deliberations or discharged.

Note: Source-R.R. 3:7B9(d), 4:49B2; amended July 10, 1998 to be effective September 1, 1998.

2B:23-13. Peremptory challenges

Upon the trial of any action in any court of this State, the

parties shall be entitled to peremptory challenges as follows:

a. In any civil action, each party, 6.

b. Upon an indictment for kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree as defined by subsection b. of [N.J.S.2C:21-1](#), or perjury, the defendant, 20 peremptory challenges if tried alone and 10 challenges if tried jointly and the State, 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded the defendants if tried jointly.

c. Upon any other indictment, defendants, 10 each; the State, 10 peremptory challenges for each 10 challenges allowed to the defendants. When the case is to be tried by a jury from another county, each defendant, 5 peremptory challenges, and the State, 5 peremptory challenges for each 5 peremptory challenges afforded the defendants.