Gerlach on Motions:

Pretrial Litigation for Prosecutors

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I. Dedication

To my colleagues,
the Minnesota prosecutor
who battle for justice every day,
The cavalry is not coming;
you are the cavalry.

My greatest respect.

II. Introduction

A friend motivated me to create this document when she asked for copies of motions I typically make in sexual assault trials. I was a bit unprepared: What motions?

I did little criminal motion practice for most of my twenty-year career. The Fourth Judicial District largely eschewed this feature for efficiency's sake. Attorneys made evidentiary and procedural motions orally the day of trial or during trial, which the trial court took under advisement while selecting a jury, and as trial rolled on. Judges ruled from the bench in a terse oral disposition. Disconcerting is not too strong a word. My commentary reflects this history and may reveal an antipathy.

I decamped the Fighting Fourth for Stearns County and confronted a new phenomenon: the Motion Hearing. I was uncertain what to do and anxious in anticipation of the eerie calmness of knowing what my trial would look like before it began, (what is the excitement in that?). I invoked a time-honored legal tradition: I cribbed someone's work. The universe did not collapse. The sun rose the next morning. I moved on wiser.

I am a zealous convert. Haphazard motion practice is only slightly better than no motion practice. Neither is appropriate. I refused to send my friend copies of my evidentiary motions. Simply put: I didn't trust them. She waits still.

As a member of the Minnesota County Attorneys' Association Education Committee, I give considerable time and thought to improving Minnesota's prosecution bar. As a veteran prosecutor I struggle with identifying and correcting my own weaknesses. It is tougher than one might think (and all the more difficult the older I get).

The marriage of these two influences, the desire to improve myself and educate others, conceived this work.

Focus of This Work

The best method of improvement is to question everything.

Filing motions to satisfy a judge's desire for a hearing is insufficient. Knowing exactly which motions to file, why and how, approaches the idyll of prosecution: the seamless integration of a persuasive legal theory, factual theory, and communication medium priming a jury to convict.[2] Intentionality.

This document is not a legal treatise on the law of evidence and criminal procedure. It is intended to provoke thought on what types of motions a prosecutor may make, why, with suggestions on drafting. Moses did not provide the syntax used in wording these sample motions. Feel free to express your legal self as you deem appropriate.[3]

[2] This is the Analytical Advocacy thesis, a concept introduced to me at the National College of District Attorneys and the basis upon which the MCAA instructs attorneys at the Trial Advocacy Course, dba Law Camp.

[3] For guidance on with grammar and persuasive writing, I recommend William Strunk & E.B. White, The Elements of Style (4th ed. 1999).

As officers of the court, prosecutors are responsible for accurate and up-to-date legal authority. Our credibility is dependent on being correct. Where evidentiary issues get thorny, this work briefly provides secondary sources and/or applicable case law. In short: where a warning is advised, a caution is supplied. A prosecutor must do her research, however.

This work attempts to be complete. It anticipates revisions as suggestions arrive.

To broaden the prosecutor's horizons, I recommend Lisa McGuire & David Finley, Minnesota Motions in Limine 29 Minn. Prac. (Sept. 2020 udpate). While primarily designed and written for civil practice, it provides worthwhile guidance for motion practice in Minnesota.

Goals

Prosecution should be nothing if not intentional. Everything a prosecutor does must serve an identifiable and appropriate objective. In pretrial litigation, the prosecutor should have goals for every motion.

> Motions in limine serve other purposes as well, such as: permitting more careful consideration of evidentiary issues than would take place during the heat of battle during trial; minimizing side-bar conferences and disruptions during trial; and, by resolving potentially critical issues at the outset, enhancing the efficiency of trials and promotion of settlements.

McGuire & Finley, surpa, § 1.1. As goals go, this is a fair start.

Motions in limine seek orders admitting and excluding evidence. The prosecutor must think strategically, both offensively and defensively. For example, a prosecutor may move admission of a victim's out-of-court statement under Minnesota Rules of Evidence 807; while moving to exclude a defendant's hearsay statement under State v. Taylor.[4]

Motions in limine are a sound method of obtaining pretrial orders concerning less common evidentiary matters or atypical authentication.[5] An uninformed, under-informed, or misinformed judge may rule from the bench because he thought he learned the issue years ago from some guy; he remembers that case he tried as a lawyer 20 years ago; reflex took over (it seemed right at the time); or, mere random chance.[6] We fight the too common proclivity to 'give the defendant a fair trial' even if so doing does violence to the Rules of Evidence. Motion practice is an excellent opportunity to 'reeducate' the judge on the Rules of Evidence, perhaps for the first time.[7]

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[4] 258 N.W.2d 615, 622 (Minn. 1977) (see Rule 801(d) below).

[5] See infra, Rule 901(b)(9) on a preliminary ruling on the legal sufficiency of evidence authenticating a video under the 'silent witness theory'.

[6] I recommend every county attorney acquire a copy of Minnesota Judges Criminal Benchbook (7th ed. 2020). Every judge in Minnesota has this resource. Some use it. It may form the baseline of his working knowledge of criminal law and procedure. The floor may also be the ceiling. A wise prosecutor should know what the judge thinks he knows.

[7] You may interpret my commentary as disdainful of judges. I generally am not. I deliberately and provocatively pursue a point here. You cannot know your judge's experience level. Underestimate and be delightfully surprised as he surpasses expectations, overestimate and risk disappointment and acquittal.

Motions in limine offer the judge the opportunity for more careful consideration of issues if only to avoid an anxious, surprised, or annoyed judge ruling against her in the middle of a trial because he is anxious, surprised, or annoyed. This is the more humane practice; no one likes looking stupid in front of a jury, judges certainly not excepted. Good motion practice eliminates the awkward 'deer in the headlights' pause as the lawyers stare at the judge staring back at the lawyers in front of the jury staring at them.

Motions in limine make smooth trials. There are few trial experiences more satisfying than responding to a defense objection by saying, "Your honor, you ruled on this." Or, my favorite, "Judge, counsel conceded this issue." And then moving expeditiously toward a guilty verdict.[8]

Hope is a bumper sticker; not a trial strategy. Motion practice improves the chance of prevailing, no small consideration. If evidence addresses a critical issue, caution and self-preservation dictate the prosecutor take time beforehand to assure its introduction, cementing the issue in her favor, rather than hope for the best after jeopardy attaches. No one wants to sit in a courtroom staring at three pages of essential questions she just learned she cannot ask.

When the dust settles, and the prosecutor's motions are granted, the defendant will know the horrible things the prosecutor is going to say about his conduct. He may decide it is an experience to avoid and avail himself of an attractive offer.[9]

I add two purposes to the goals for motion practice. Motions are an opportunity to curtail shenanigans, which through experience can be reasonably anticipated from the defense. Move the Court for an order instructing the defense attorney to knock it off.[10] If you trust your defense bar, skip those motions.

Second, motions are a prime opportunity to educate the judge about the factual and legal theories of the prosecution's case; and, if artfully executed, create an opportunity for an initial and lasting emotional response. Remember ABC: Always Be Closing.[11] Never fail to take the opportunity to persuade.

Lastly, nothing prepares a prosecutor more thoroughly than a 'belts-and-suspenders', seal the seams, kick the tires before you leave the lot, run-through of her case. You may be surprised at what you find; or cannot find.

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[8] In a recent trial, a judge complained the sidebar discussions took too long. I replied that the prosecution attempted to obtain preliminary rulings on the evidence, but the defendant objected on the grounds the Court lacked authority to make preliminary evidentiary rulings at the evidentiary hearing. We all learned something that day.

[9] The converse is also true: A prosecutor may wish to leave the field with honor by sweetening the deal after the judge eviscerates her case.

[10] The defense corollary is the Motion to Have the Prosecution Abide by the Constitution, Rules of Criminal Procedure, and Minnesota Rules of Evidence. To which I reply, with no small amount of self-righteous, sanctimonious indignation: "The State intends to follow the law, your honor."

[11] Glengarry Glen Ross (New Line Cinema 1992) https://www.youtube.com/watch?v=AO_t7GtXO6w (last viewed July 21, 2020).

Specificity

Motions are fact and case specific. No set of motions is applicable for every trial. Avoid generic, canned or boiler-plate motions.

A brief statement of facts should accompany motions. Tailor the facts to serve the motions they support. Consider a trial memo to the court. Outline the case. Provide a 'witness/evidence map' of how you anticipate evidence coming in. Highlight the issues the motions address. The prosecutor may be lucky; her judge may know the Rules of Evidence. She can never assume the judge knows the factual context to which the law will be applied. Provide that context.

Many of motions can be ruled on from the bench at the Omnibus Hearing. The judge may appropriately withhold a final ruling until the evidence plays out in trial. See Minn. R. Evid. 104(b). Some motions may require additional briefing. Yet another opportunity to educate the judge on the factual and legal theories, reeducate on the Rules of Evidence, and provide a roadmap for the judicial law clerk to follow when her judge is granting a motion.[12]

[12] As a rule, I write memoranda for the law clerk's comprehension. Success is reading the Court's order and seeing my cites, organization, and phrasing. One way to gain the confidence of the clerk is to mirror the Minnesota Supreme Court and Court of Appeals' organizational structure and wording. Repetition, repetition, repetition.

III. Procedural Authority

Judges may hold a sincere belief they are good if not great lawyers, and therefore capable of overseeing the work of others. Inadvertently disabusing a judge of this notion in front of a jury may prove hazardous to our cause. It certainly does not win friends. In fairness, to be a judge is to remain neutral and objective. In practice: ignorant of the case. Prepare your judge for what comes next. Tell her how to do the right thing. Show her the authority to rule in the prosecutor's favor.

Begin by perusing the Minnesota Rules of Evidence. Examine each article and rule in determining if you have evidence worthy of a motion. Next, consider objections or motions in limine based on statutes and case law. Lastly, look for criminal procedure issues. And read this document.

Procedural Posture

Lawyers should be cognizant of what hearing they are having. Determine what rule you are operating within. An Omnibus hearing does not mean Rules 5 through 26; it means Rule 11. Once a hearing is anchored to a rule, the Rules of Criminal Procedure dictate what may and must occur. If the hearing doesn't have a number assigned to it, it is a 'meet-and-greet'. Nothing can be expected nor demanded of you and the defendant.

Anticipate your evidentiary hearing. Rule 7 requires the prosecutor notice the defendant of several issues before the Omnibus hearing. Minn. R. Crim. P. 7.01. They include (1) evidence obtained as a result of a search, search and seizure, wiretapping, or electronic surveillance; (2) confessions, (3) evidence obtained by a confession, and (4) line-ups, show-ups, or identification procedures. Minn. R. 7.01(a). You are also required to notice any other crime, wrong or act evidence intended to be introduced, Minn. R. Crim. P. 7.02, subd. 1 (citing Minn. R. Evid. 404(b)), intent to cross-examine with a specific instance of conduct, Minn. R. Crim. P. 7.02, subd. 2, and notice of intent to seek an aggravated sentence. Minn. R. Crim. P. 7.03.

The Minnesota Rules of Criminal Procedure provide for a preliminary hearing to address numerous questions. They include:

(b) evidence,

(c) discovery,

(d) admissibility of other crimes evidence,

(e) relationship evidence,

(f) Rape Shield evidence and

(j) any other issues related to the trial. Minn. R. Crim. P. 11.02.[13]

Be prepared; the prosecutor may not get a second bite at the apple.

[13] Rule 11 also encompasses determination of (a) probable cause; (g) constitutional issues; (h) procedural issues; and (i) aggravated sentences. All are beyond the scope of this manuscript.

Motions must be served on the defendant three days before the hearing, unless the court determines otherwise. Minn. R. Crim. P. 10.03, subd. 1.

> Requests to the court for an order must be by motion. A motion other than one made during a trial or hearing must be in writing, unless the court or these rules permit it to be made orally. The motion must state the grounds on which it is made and must set forth the relief or order sought.

Minn. R. Crim. P. 32. Failure to raise necessary objections, issues or requests by motion before the trial constitutes a waiver. Minn. R. Crim. P. 10.01. This applies to both sides. A prosecutor has as much right to the procedures laid out in the Rules as does a defendant. Insist on yours.[14]

Minnesota Rules of Evidence allow a judge to answer preliminary questions concerning the admissibility of evidence, among other things. Minn. R. Evid. 104(a). The rules prefer evidentiary matters be conducted outside the presence of the jury. Minn. R. Evid. 103(c). They don't specify how the judge determines admissibility, e.g. what constitutes a competent offer of proof. Minn. R. Evid. 103(b); see also, Peter Thompson & David Herr, Courtroom Handbook of Minnesota Evidence, 11A Minn. Prac. Rule 103 authors' comment (7). The rules of evidence do not apply. Minn. R. Evid. 104(a). Research your bench. Find out what a judge anticipates as a competent offer of proof, and know when witness testimony is required. Have witnesses ready.

And, to quote my evidence professor, the Hon. Edward Toussaint,[15] "On the record, on the record, on the record." If it isn't on the record, it did not happen.

A caution: the Minnesota Supreme Court discourages the use of motions in limine against defendants in criminal cases. State v. Horning, 511 N.W.2d 27, 29 n.1 (Minn. Ct. App. 1994). The use of broad motions in limine against a defendant in a criminal case may impinge upon the constitutional rights of a defendant. State v. Brechon, 352 N.W.2d 745, 748 (Minn. 1984) (motion in limine sought to preclude defense evidence of necessity or justification in trespassing charge).

Legal Writing

Tell the judge what you want her to do and give her the authority to do it:

> *Pursuant to Minnesota Rules of Evidence, Rule 104 and 103(c), and Minnesota Rules of Criminal Procedure, Rule 11.02(b), on November 17, 2020, or as soon thereafter as counsel for the prosecution may be heard, the State of Minnesota will move the Court for orders concerning the following preliminary questions. The State relies upon the authorities cited within the motions, a*

[14] Just because you have a right, doesn't mean you ought. Prosecutors are well advised to consider reopening the Omnibus to protect from later ineffective assistance of counsel claims.

[15] Judge Edward Toussaint was the chief judge of the Minnesota Court of Appeals from 1995 to 2011. He knows a few things about reviewing courts.

separately filed memorandum of law in support, and the arguments of counsel. [16]

Cite authority and contextualize the motion. Use the language of the rule, or as close an approximation as makes grammatical sense.

Colloquialisms

Daily use of language, of which the rules of rules of evidence and criminal procedure are composed, evolves into a colloquial shorthand. For instance, when making a motion to exclude prejudicial evidence, a defense attorney yells, "Objection: Prejudicial!" If it is really bad, he will strenuously object to highly prejudicial evidence! This places him in the general neighborhood of Rule 403, but the address is wrong. The prosecutor can fairly rejoin: "This whole trial is prejudicial; I hope to convict to the defendant!"

When colloquialisms are used consistently, they substitute for the actual text: they become the rule. The actual rule is: "Objection: the probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403.

Remaining true to the text of the rule is crucial. Close examination of the rule illuminates. We see even unfairly prejudicial evidence is admissible if the evidence is relevant. Relevance is to be liberally construed. Minn. R. Evid. 401, committee cmt 1977. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 404. "Unfair prejudice . . . is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." State v. Schulz, 691 N.W.2d 474, 478 (Minn. 2005). Unfairly prejudicial evidence is only barred if the danger of unfair prejudice substantially outweighs the relevance. 'Substantially' means considerable in quantity; significantly great; being largely but not wholly that which is specified. Meriam-Webster. As long as a proper inference is not swamped by the unfair inferences, the evidence is admissible. Therefore, the rejoinder to the defense attorney's objection is: "Even if relevant evidence is unfair, but not *that* unfair, it comes in, your honor!" See, Schultz, 691 N.W.2d at 478.

If you know the actual text of the rules, you can do this exercise all day and twice on Sunday with any rule.

You cannot be sure the judge's shorthand is the same as your shorthand; you can bet the farm the defense attorney's shorthand is different than yours. It pays to know the actual standard and not the colloquial shorthand.

She who knows the rules, wins. Or at least should.

[16] The text in these example motions come mostly from cases I have tried. Some come from my colleagues at the Stearns County Attorney's Office. Others I merely propose as templates, to be contextualized and drafted as the individual prosecutor sees fit.

IV. Rules of Evidence

Many attorneys think they know the Rules of Evidence, far fewer actually do. Some of those attorneys become judges.

Many prosecutors have the well-earned impression the Rules of Evidence are applicable only against the State. Many defense attorneys feign shock and insult to learn they have to follow the rules too. They do.

Article 2: Judicial Notice

Judicial notice of disputed facts is not normally appropriate in criminal cases. See Minn. R. Evid. 201(a); State v. Pierson, 368 N.W.2d 427, 434 (Minn. Ct. App. 1985), see however, State v. Norgaard, 899 N.W.2d 205, 207 (Minn. Ct. App. 2017) (rule precluding taking judicial notice in criminal cases does not extend to legislative facts: statutes, caselaw and regulations); State v. Gerdes, 191 N.W.2d 428, 431 (Minn. 1971) (appropriate for court to take judicial notice of radar's reliability without needing operator qualified as expert); In Re P.W.F., 625 N.W.2d 152, 154 (Minn. Ct. App. 2001) (a trial court may properly take judicial notice of facts in criminal proceedings aht are of common knowledge). As we can see, the law is settled and clear. Clear as mud.

If you have trouble establishing a fact, you have two choices: prove it, or don't use it.

If you find that everyone in the room agrees with your fact, the criminal law approach to 'judicial notice' is a stipulation.

> A "stipulation" is defined as "[a] voluntary agreement between opposing parties concerning some relevant point; esp., an agreement relating to a proceeding, made by attorneys representing adverse parties to the proceeding." A "fact" is "[s]omething that actually exists; ... [a]n actual or alleged event or circumstance." A stipulated fact is thus agreement between opposing parties regarding the actual event or circumstance.

Dereje v. State, 837 N.W.2d 714, 720 (Minn. 2013) (citations to Black's Law Dictionary omitted.). To stipulate, the defendant must consult with his attorney and agree the fact is true. The defendant must waive his rights to have prosecution witnesses establish the fact, cross-examine the prosecution witnesses, require his own witnesses contest the fact, or testify on his own behalf regarding the fact. See Minn. R. Crim. P. 26.01, subd. 3. This must be in writing or on the record. Id. I recommend both. Another prime example of a good use of the omnibus hearing.

Article 4: Relevancy and Its Limits

Rule 401, 402, 403

When the prosecutor anticipates a defendant will ask questions concerning irrelevant issues to drive the trial into a meandering collateral ditch, curtail it. Tell the judge you are on to them; and she should be on to them as well. There are rules.

> *The State moves the Court for an order precluding the defendant from questioning Victim A or Witness B concerning acts of alleged violence toward Witness B by Victim A. Evidence of purported other crimes, wrongs or acts committed by Victim A toward Witness B is irrelevant in determining whether the defendant assaulted Victim A. Minn. R. Evid. 401, 402.*
>
> *Any slight probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and/or misleading the jury. Minn. R. Evid. 403.*[17]

The traditional practice is to make a timely objection at trial. Sometimes the jury should not hear the question, "When did you stop beating your wife?"[18] Preclusion on the basis of relevance when you know it is coming prevents this.

Rule 404(a) (Character)

A related motion is to preclude inadmissible character and credibility attacks. "In order to determine whether a given proof is character evidence, courts must assess how it is relevant." Barrett J. Anderson, Recognizing Character: a New Perspective on Character Evidence, 121 Y.L.J. 1912, 1924 (May 2012).

> *The State moves the Court for an order limiting credibility/character attacks on the State's witnesses, specifically to exclude suggestions through questioning that Victim A has a history or character of violence toward Witness B. Propensity toward violence of the alleged victim toward a third party is not a pertinent character trait in a trial against the defendant for assault. Minn. R. Evid. 404(a)(2); see also, Minn. R. Evid. 608(a) and (b).*[19]

Rule 608(b) deals with the character of a witness. See Rule 608(b) below. Know the intricacies of character evidence.

Rule 405 (Methods of Proving Character)

If the trial is likely to devolve into character assassination, focus the judge on the appropriate method of demonstrating character.

> *The State moves the Court for an order instructing any introduction of evidence as to character or a trait of character be made in the form of an opinion or as to reputation. Specific instances of conduct is limited to cross-examination once a character trait is offered on direct examination. Further the cross-examination inquiry must be*

[17] See what I did there? I contextualized my motion and paraphrased the language of Rule 403, deemphasizing 'substantially' and giving the judge three pegs upon which to hang her ruling.
[18] The question is a classic example of a loaded question, which attempts to limit direct replies to those that serve the questioner's agenda. See Douglas Walton, Informal Logic: A Handbook for Critical Argumentation 36-37 (Cambridge University Press 1989).
[19] See infra, Rule 608.

relevant to the character trait at issue. Minn. R. Evid. 405(a); State v. Leutschaft, 759 N.W.2d 414, 424 (Minn. Ct. App. 2009).

The committee comment is edifying: "On cross-examination of a character witness the opposing party may inquire into specific instances in order to test the basis for the testimony on direct." Minn. R. Evid. 405(a) committee cmt. 1977.

Rule 412 (The Rape Shield)

Related to general character attacks are the persistent attempts to 'slut shame' a sexual abuse victim. In a criminal sexual conduct prosecution, absent a court order, a defendant cannot ask questions or introduce evidence concerning a victim's previous sexual conduct. The rule and statute are referred to as the Rape Shield.[20] Minn. R. Evid. 412; Minn. Stat. § 609.347, subd. 3.

The State moves the Court for an order precluding the defendant from introducing evidence of the victim's previous sexual conduct, or make any reference to such conduct in front of the jury. Such evidence is not relevant. Minn. R. Evid. 412(1), 401, 402, 403; Minn. Stat. § 609.347, subd. 3.

A variant may be:

The State moves the Court for an order precluding the defendant from introducing evidence of the victim's previous sexual conduct, or reference such conduct in front of the jury: Consent is not a defense. Minn. R. Evid. 412(1)(A); Minn. Stat. § 609.347, subd. 3; *Minn. Stat. § 609.344, subd. 1(b).*

A third variant:

The State moves the Court for an order precluding the defendant from introducing evidence of the victim's previous sexual conduct, or reference such conduct in front of the jury. The defendant has not demonstrated the evidence of the victim's previous sexual conduct establishes a common scheme or plan of similar sexual conduct relevant to the issue of consent. Minn. R. Evid. 412(1)(A)(i); Minn. Stat. § 609.347, subd. 3.

And a fourth variant may be:

The State moves the Court for an order precluding the defendant from introducing evidence of the victim's previous sexual conduct, or reference such conduct in front of the jury. The proffered evidence of the victim's previous sexual conduct was not with the accused. Minn. R. Evid. 412(1)(A)(ii); Minn. Stat. § 609.347, subd. 3.

[20] Use the term: Rape Shied. Criminal Sexual Conduct sanitizes what happened. What happened is rape.

These motions rely upon specific facts. A prosecutor's motion may be broader or narrower.

The prosecution is entitled to due process before a defendant may introduce Rape Shield evidence. Demand the defendant and Court follow the procedures articulated in Rule 412 and the statute, Minn. Stat. § 609.347, subd. 4.

> *The State moves the Court for an order precluding the defendant from introducing evidence of the victim's previous sexual conduct, or reference such conduct in front of the jury absent a Court order. Minn. R. Evid. 412(1)(A);* Minn. Stat. § 609.347, subd. 3.
>
> *The State demands the defendant file a motion with the Court before trial setting forth with particularity the offer of proof of the evidence the accused intends to odffer.*
>
> *If the Court determines the offer of proof sufficient, the State demands a hearing outside the presence of the jury, for the defendant to make a full presentation of the offer of proof.*
>
> *The State demands a Court order stating the extent to which the evidence is admissible. Minn. R. Evid. 412(2)(A),(B) and (C); Minn. Stat. § 609.347, subd. 4.*

Rule 412 and Section 609.347 generally mirror each other. There is a distinction, which may prove important. Rule 412 requires the defendant move to introduce evidence of a victim's previous sexual conduct made "prior to trial." The statute requires such a motion be made at least three business days before trial. Compare Minn. R. Evid. 412(2)(A), with Minn. Stat. § 609.347, subd. 4(a). The statute controls. Minn. Stat. § 609.347, subd. 7.

Extrinsic and Intrinsic Evidence of Other Conduct

There are two types of other crimes, wrongs or acts evidence. The analysis for admission differs.

Intrinsic evidence, or immediate episode evidence, is evidence of two or more offenses linked together in time or circumstances so that one cannot be fully shown without proving the other. State v. Riddley, 776 N.W.2d 419, 425 (Minn. 2009); see also State v. Wofford, 114 N.W.2d 267 (Minn. 1962). There must be a close causal and temporal connection to the other incident and the present offense. Riddley, 776 N.W.2d at 425-26. State v. Hollins provides the analysis for determining if the evidence is intrinsic:

> (1) the other crime arose out of the same transaction or series of transactions as the charged crime, and (2) either (a) the other crime is relevant to an element of the charged crime, or (b) excluding evidence of the other crime would present an incoherent or incomplete story of the charged crime.

765 N.W.2d 125, 131-32 (Minn. Ct. App. 2009). Intrinsic evidence does not require a 404(b) analysis. Id. at 131.

Extrinsic evidence of other crimes, wrongs or acts is Spreigl evidence. Id. Use of rule 404(b) evidence is restricted. Spreigl evidence is subject to a five part analysis:

> (1) the state must give notice of its intent to admit the evidence; (2) the state must clearly indicate what the evidence will be offered to prove; (3) there must be clear and convincing evidence that the defendant participated in the prior act; (4) the evidence must be relevant and material to the state's case; and (5) the probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

State v. Ness, 707 N.W.2d 676, 685-86 (Minn. 2006).

When in doubt, use both analyses in the alternative. See, e.g. State v. Diriye, No. A15-0869 2016 WL 208414 *6 (Minn. Ct. App. 2016) (unpublished). In other words: *caveat lector* (let the reader beware).

Rule 404(b) (Spreigl)

A great deal of ink has been shed on the issue of evidence of other crimes, wrongs and acts. A good nighttime read on the subject includes Peter N. Thompson, Evidence 11 Minn. Prac. § 404.06 (October 2020 update). This article is not the source for excess erudition on character evidence.[21] I will take a moment to outline the rule.

First, any rule that starts with a prohibition must be exempted if the evidence is to be admitted. Rule 404(b) starts with a prohibition: "Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b)(1). An appropriate exception must be found. A prosecutor can use evidence of other crimes, wrongs or acts for a number of purposes, such as proof of motive, opportunity, intent, plan, knowledge, identity, or absence of mistake or accident. Id.[22]

A prosecutor must give notice of intent to offer the evidence with enough specificity to allow the defendant to prepare. Minn. R. Evid. 404(b)(2) and Minn. R. Crim. P. 7.01, subds. 1 and 3. Before the Rule 11.02 hearing is the time. Minn. R. Crim. P. 7.02, subd. 4. Notice must include a summary of the evidence and the specific purpose(s) for which it is offered. Minn. R. Evid. 404(b)(2). Ness cautions the prosecutor to be specific when stating the purpose for which the evidence is sought. The trial court is instructed to identify "the precise disputed fact to which the Spreigl evidence would be relevant." 707 N.W.2d at 686 quoting State v. Angus, 695 N.W.2d 109, 120 (Minn. 2005). A court may be more likely to admit evidence of other conduct if the prosecutor demonstrates a specific limited purpose and shows how the evidence proves that specific material issue.[23]

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[21] If I was to write a useful book on evidence, it would be entitled All the Good Stuff is Excluded. See supra Rule 404(a).

[22] All words in a statute and rule should be given meaning. See Goodman v. Best Buy, Inc., 755 N.W.2d 354, 357 (Minn. Ct. App. 2008). The phrase 'such as' means the list is not exclusive. Be creative.

[23] If the prosecutor succeeds in introducing the other conduct evidence for a specific purpose, she had best argue only that specific purpose in closing.

Admission depends upon the proffered evidence's relevance to a material issue; clear and convincing evidence the defendant participated in the other crime, wrong or act; and, the probative value not being outweighed by its potential for unfair prejudice. Minn. R. Evid. 404(b)(2)(a), (b) and (c). Note the shift in the admissibility threshold. Compare, Minn. R. Evid. 403. Gone is the word 'substantially'; probative evidence is excluded if it is merely outweighed by the potential for unfair prejudice. The word 'unfair' remains. Surely a prior incident as proof the defendant intended the present crime is prejudicial; but it does not necessarily persuade by an illegitimate inference, and therefore does not give the prosecution an unfair advantage. See supra, Colloquialisms at 7.

Also, gone is the need to demonstrate the prosecution's need for the evidence. Ness, 707 N.W.2d at 689 ("The focus on the relative strength of the prosecution's case, instead of the probative value of other-crimes evidence, highlights the irony inherent in admitting intrinsically prejudicial evidence only when it is most needed to convict.").

> *The State moves the Court for an order permitting the introduction of the following evidence of other crimes, wrongs or acts: The defendant, in conjunction with two co-defendants, assaulted an unknown male approximately 30 minutes prior to committing the alleged Aiding and Abetting Murder – 2nd Degree – Without Intent – While Committing a Felony. The victim in the present case intervened.*
>
> *The State offers the above-referenced evidence as proof of motive, intent, absence of mistake or accident, identity, and modus operandi.*
>
> *This other crime, wrong or act is caught on surveillance video.*
>
> *The evidence is relevant to a material issue, the defendant's intentional participation in the prior act is demonstrated by clear and convincing evidence, and the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant. Minn. R. Evid. 404(b); Minn. R. Crim. P. 7.02; Minn. Stat. § 609.05, subd. 1.*

Brief the issue. Calm an anxious judge by reminding her there is a cautionary jury instruction on the proper use of the evidence. Jury Instruction Guides—Criminal, 10 Minn. Prac., CRIMJIG 2.01 (September 2020 update)[24] As well as an instruction at the end of the trial. Id. CRIMJIG 3.16.

[24] You are about to hear evidence of occurrences on _____ at _____. This evidence is being offered for the limited purpose of assisting you in determining whether the defendant committed those acts with which the defendant is charged in the complaint. This evidence is not to be used to prove the character of the defendant or that defendant acted in conformity with such character.
The defendant is not being tried for and may not be convicted of any offenses other than the charged offenses. You are not to convict the defendant on the basis of occurrences on _____ at _____. To do so might result in unjust double punishment. CRIMJIG 2.01.

Immediate Episode Evidence

As discussed above, related to Rule 404(b) is immediate episode evidence, intrinsic evidence, episodic evidence or res gestae. Call it what you will.

The formative case is State v. Wofford.

> It is well recognized that the rule excluding evidence of the commission of other offenses does not necessarily deprive the state of the right to make out its whole case against the accused on any evidence which is otherwise relevant upon the issue of the defendant's guilt of the crime with which he was charged. The state may prove all relevant facts and circumstances which tend to establish any of the elements of the offense with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. . . . [E]vidence of other offenses may be admissible where such evidence is 'relevant and competent to the proof of the offense in issue.' Thus, where two or more offenses are linked together in point of time or circumstances so that one cannot be fully shown without proving the other, or where evidence of other crimes constitutes part of the res gestae, it is admissible. . . . Such evidence may be considered only for the purpose for which it is sought to be introduced, regardless of the fact that it may incidentally show commission of some other offense. Such evidence, however, must show a causal relation or connection between the two acts so that they may reasonably be said to be part of one transaction.

114 N.W.2d 267, 271-72 (Minn. 1962). Reading Rule 404(b) against episodic evidence, the smart prosecutor discerns the distinction in application, as well as evidentiary thresholds. Educate your judge on the distinction as well.

Where two acts are closely connected in time or circumstance, move introduction as immediate episode evidence.

> *The State moves the Court for the admission of immediate episode evidence that may constitute another offense. The State will demonstrate the defendant took Victim A on a walk into the woods, and once alone kissed her. The facts and circumstances are relevant to the issue of the defendant's planning, preparation, and grooming of Victim A in anticipation of the charged offense. The two acts share a close causal and temporal connection. Though tending to prove a separate act, the evidence is competent and relevant proof of the State's case. The one cannot be fully shown without proving the other. State v. Wofford, 114 N.W.2d 267, 271-72 (Minn. 1962); State v. Nunn, 561 N.W.2d 902, 907 (Minn. 1997).*

Article 5: Privileges

Nothing gets people to clam up like the threat of jail; nothing loosens the tongue like a court order threatening jail. Same cure, different symptoms.

A defendant may attempt to call a witness who was close enough to the crime to exonerate her. Sometimes a prosecutor has a good faith reason to believe the witness was a bit too close, and if the right words spoken, she could achieve co-defendant status. The existence of a Fifth Amendment privilege needs to be explored.[25]

Nothing seizes a trial like stumbling upon the tension between a defendant's right to present a complete defense, and her witness' right against self-inculpation. The appropriate process to follow is time consuming. The Court will need to find an independent lawyer to advise the witness, give the lawyer time to advise the witness, have the witness waive or invoke her rights on the record. All outside the presence of a jury. Minn. R. Evid. 103 and 104(a). A recipe for an unhappy judge when this occurs mid-trial.

Rule 501 (Privilege)

The author believes a prosecutor has an obligation to advise the court of a good faith belief any unrepresented witness may have a privilege against self-incrimination or intends to assert one. The Minnesota Board of Professional Responsibility disagrees. (Advisory Opinion. Nov. 18, 2020).

A witness may have an honestly held belief they may tend to inculpate themselves; and, a witness may be conveniently misperceived in the hope they do not have to respond to awkward questions. These issues are best cleared up before trial.

> *The State moves the Court for an order determining whether Witness J has a privilege preventing her from testifying under the Minnesota Constitution and/or the U.S. Constitution. The State further advises the Court that Witness J may be entitled to representation before being questioned under oath concerning her connection with the events of September 21, 2019, and a hearing outside the presence of the jury may be necessary to determine whether she intends to testify. Minn. R. Evid. 104(a) and 501, U.S. Const. amend V; Minn. Const. art. I, § 7.*

This can be tailored and modified to meet any anticipated assertion of any privilege. See Minn. Stat. § 595.02 for Minnesota's statutory privileges.

Failure to examine a witness's privilege or willingness to testify may result in unpleasantness more significant than mere delay. A reviewing court may find reversible error if it finds the prosecutor acted in bad faith by calling a witness knowing they would refuse to answer

[25] See, Minnesota State Bar Assoc. v. Divorce Assistance Assoc., Inc., 248 N.W.2d 733, 737 (Minn. 1976) ("The privilege is properly invoked when the testimony . . . sought would tend to incriminate the witness. He need only show that the testimony or papers would provide a 'link in the chain of evidence' required for prosecution and that a chance of prosecution exists.").

in front of the jury. An appellate court may find reversible error even if the prosecutor acted in good faith, but her questions prejudiced the defendant to the extent he was denied a fair trial. State v. Morales, 788 N.W.2d 737, 752 (Minn. 2010) (where the invocation of privilege by witness was invalid); and State v. Mitchell, 130 N.W.2d 128 (Minn. 1964).

A well-timed motion to determine the existence of a privilege affords the prosecutor an opportunity to explore use-immunity, stripping a Fifth-amendment privilege and compelling the testimony. See Minn. Stat. § 609.09.

A witness who just learned the subtle and often disappointing contours of the Fifth Amendment or limitations of other privileges may require encouragement to testify. A prosecutor may wish to add:

> *After determining the absence of a privilege against self-incrimination, the State moves the Court for an order compelling Witness J to testify.*

A prosecutor may wish to follow this with a motion to treat the witness as hostile. See infra, Rule 611(c).

Article 6: Witnesses

Rule 602 (Lack of Knowledge)

A prosecutor may anticipate the defense will ask witnesses questions about things they did not see or experience. Preclude it until and unless the defense makes a competent offer of proof.[26] A judge's standard reply to a trial objection based on 602 is "She can answer if she knows." A witness favorable to the defense will always answer. You can impeach her until the cows come home; but the answer lingers. Demand an offer of proof.

> *The State moves the Court for an order precluding the defendant from questioning witnesses on issues they are not competent to testify due to lack of personal knowledge. Witness B and Witness V have not demonstrated personal knowledge about who punched Victim A. Neither witness claimed to have been in the room when the assault occurred, and therefore lack personal knowledge of who punched Victim A. Unless additional evidence that Witness B and Witness V were not elsewhere when the assault occurred is developed and disclosed, they are incompetent to testify as to who punched Victim A. Minn. R. Evid. 602.*

Rule 608 (Character Evidence)

Prosecutors should learn the permissible use of character evidence and its limitations.[27] "Evidence of character has a high potential for prejudice, especially for leading the jury to conclude that a defendant, victim, or witness is a 'bad' person undeserving of belief or deserving of

[26] See infra, discussion on motions in limine concerning Minn. R. Crim. P. Rule 9, the defendant's on-going duty to disclose.
[27] See Henry McCarr & Jack Nordby, Criminal Law and Procedure 8 Minn. Prac. §§ 32.30—32.32 (4th ed. 2019).

punishment regardless of the evidence, and is, therefore, narrowly restricted in its approved usages." McCarr at § 32.30.

Once learned, educate the judge and defense attorney.

> *The State moves the Court for an order precluding the defendant from attacking a witness' credibility other than by evidence referring only to their character for untruthfulness. Minn. R. Evid. 608(a)(1).*

The defendant cannot attack the character of a state's witness or victim with specific instances of conduct. Though they will try:

> Unless a trait of character is an essential element of an offense, the direct proof is limited to opinion and reputation evidence. Specific instances of conduct may be elicited only on cross-examination or to prove an essential element. A specific prior act is generally not admissible to prove or disprove a person was the aggressor on the particular occasion on trial.

McCarr and Nordby at § 32.32 (emphasis added). It is permissible to impeach a witness with specific instances of conduct, if the conduct is probative of truthfulness. Thompson at Rule 608 authors' comment (7).

> *The State moves the Court for an order precluding the introduction of extrinsic evidence of specific instances of conduct of a witness for the purposes of attacking or supporting the witness's character for truthfulness. Minn. R. Evid. 608(b).*

The Rules of Criminal Procedure require a prosecutor to notice the defense of a specific instance of conduct if the prosecutor intends to cross-examine the defendant or a defense witness under Minnesota Rules of Evidence 608(b). Minn. R. Crim. P. 7.02, subds. 2 and 3. An Omnibus Hearing is the time. Minn. R. Crim. P. 7.02, subd. 4. See also, McGuire & Finely at § 7.4.

Rule 609 (Impeachment with Evidence of Conviction)

The prosecutor does not need to give the defendant advance notice of crimes for which the defendant has been previously prosecuted. State v. Gravening, 182 N.W.2d 704, 706 (Minn. 1970). As a practical matter, however, failure to give notice makes it difficult for the judge to apply the Jones factors, infra. Prosecutors are required to notice a defendant of intent to impeach him with evidence of a conviction for a crime if the conviction is more than ten years old. State v. Kegg, 298 N.W.2d 298 (1980); Minn. R. Evid. 609. A Rule 11.02(b) evidentiary hearing is a good time to do so.

> *The prosecution intends to offer at trial evidence that the defendant was convicted of a crime punishable by death or imprisonment in excess of one year, or which involved dishonesty or false statement,*

> *for purposes of impeachment. Minn. R. Evid. 609(a)(1) and (2) and 609(b).*
>
> *The State moves the Court for an order permitting the prosecution to impeach the defendant with the following evidence of crimes:*
>
> *A. Providing False Information to Police, Minn. Stat. § 609.506, subd. 2, a crime of dishonesty, convicted on June 22, 2017.*
>
> *B. Controlled Substance Crime-fourth degree, Minn. Stat. § 152.024, subd. 2(2), a crime punishable by more than one year, convicted on June 22, 2017.*
>
> *A copy of the complaint and conviction for each has been requested and will be forwarded to the defendant.*
>
> *The State relies upon State v. Jones, 271 N.W.2d 534, 537-38 (Minn. 1978); State v. Ihnot, 575 N.W.2d 581, 586 (Minn. 1998).*

There are two types of crimes: those that directly involve dishonesty, State v. Darveaux, 318 N.W.2d 44, 48 (Minn. 1982), and those resulting in a felony conviction.

The determination of whether the prior crime is one of dishonestly focuses not just on the type of crime committed, but the manner in which the crime was carried out. State v. Ross, 491 N.W.2d 658, 659 (Minn. 1992). The mandatory language in Rule 609 concerning crimes of dishonestly overrides the court's discretion in admitting the evidence. State v. Head, 561 N.W.2d 182, 186 (Minn. 1997).

Permitting impeachment with felony convictions is discretionary. The trial court must examine the prior conviction and weigh its value. The factors a court are to consider are:

> (1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue.

State v. Jones, 271 N.W.2d 534, 537-38 (Minn. 1978). Do not assume the Court knows the Jones factors, or any other common factorial analysis, unless through experience and repetition, a comfort develops. Don't expect the Court, or her clerk, to remember your erudite disquisition of the multifactorial analysis orally presented at the hearing. Again, trial advocates use the rules so often, they develop shorthand, which then substitutes for the actual rule. One person's shorthand may not be the judge's. Better to use the actual law. Include the Jones factors either in an endnote

or in a footnote unless confident you will have an opportunity to submit a supporting brief. Write it down.[28]

Rule 610 (Religion)

Don't let anything close to this happen:

> *The State moves the Court for an order precluding the defendant from offering evidence of the beliefs or opinions of a witness on matters of religion for the purpose of enhancing or impairing the witness' credibility. Minn. R. Evid. 610.*

Rule 611(b) (Cross examination)

A defense attorney can cross-examine on any matter raised in direct or affecting a witness's credibility. Minn. R. Evid. 611(b). If they are not attacking credibility and are outside the scope of direct, the defense attorney must ask open-ended questions, unless they demonstrate the witness is hostile.[29] See infra, Rule 611(c). That's it. It's a rule.

> *The State moves the Court for an order limiting the scope of cross examination to those matters raised on direct examination or affecting the credibility of the witness. And, if the Court permits, additional matters to be inquired in as if on direct examination. Minn. R. Evid. Rule 611(b).*

Rule 611(c) (Hostile Witness)

If the prosecutor anticipates trouble, foreshadow a hostile witness.

> *The State moves the Court for an order determining Witness B to be hostile toward the prosecution and identified with an adverse party, the defendant, thereby permitting the State to use leading questions. Witness B has repeatedly identified with the defendant. She has changed her version of events to benefit the defendant. However, she places the defendant at the scene in both statements and therefore has substantive evidence for the prosecution. Minn. R. Evid. 611(c).*

Rule 613 (Prior Statements)

Have the Court order the defense to disclose prior statements on which they intend to cross-examine a witness.

> *The State moves the Court for an order requiring the defendant to show or disclose to the prosecution prior statements made by a*

[28] An option for a reluctant judge is to offer to sanitize the conviction. Rather than have the jury hear the defendant was convicted of criminal sexual conduct involving a minor in 2013, the judge may allow the jury to know the defendant was convicted of a felony seven years ago.

[29] Defense attorneys expect prosecutors to be horrible at cross-examination. Likewise, prosecutors rightly figure a defense attorney will suffer during a direct, awkwardly exchanging "Isn't it true that . . . " for "And then what happened?"

> *witness upon which the defendant intends to examine the witness. Minn. R. Evid. 613(a).*

The rule requires prosecutors to request the prior statements. Do it in writing.

The defense attorney must afford the witness a chance to see and explain the same before extrinsic evidence can be introduced.

> *The State further moves the Court for an order requiring the defendant provide any witness examined on a prior statement the opportunity to explain the inconsistent statement or deny it, before being permitted to offer extrinsic evidence of said statement. Minn. R. Evid. Rule 613(b).*

I despair for the lost art of impeachment. Defense attorneys think they are impeaching a witness when they are refreshing her recollection with a writing, rather than confronting with a prior inconsistent statement. They then move to introduce extrinsic evidence of the statement through a later witness. All they have demonstrated is the first witness's failure to remember. The evidence is "I don't remember." Not "I didn't say that." Compare, Minn. R. Evid. 612 and 613(b).

This is improper foundation upon which to impeach through an extrinsic source. See Minn. R. Evid. 613(b). If the witness' recollection is merely refreshed as to a prior inconsistent statement, but the witness is not afforded an opportunity to explain or deny the same, extrinsic evidence of a prior inconsistent statement is objectionable. Keep notes on what questions or procedures the defense attorney used. If the criteria outlined in Rule 613(b) are not followed, extrinsic evidence of a prior inconsistent statement is not admissible. Know the difference.

Same said for when a witness acknowledges the prior inconsistent statement: you're done, enough said, move on. They are not allowed to beat the dead horse, even a lying dead horse, with an extrinsic source.

Rule 615 (Exclusion of Witnesses)

Add a motion to sequester witnesses, if only so not to forget until too late, say after learning dear Aunt Clara, a star defense witness, sat through the entire trial.

> *The State moves the Court for an order sequestering all trial witnesses. Minn. R. Evid. Rule 615; Minn. R. Crim. P. 26.02, subd. 8.*[30]

Rule 616 (Bias of a Witness)

If a defense attorney gifts us with a witness list, and the prosecutor determines persons on the list have biases, prejudices, or interests for or against any party, the prosecutor may cross-examine on that topic, and introduce extrinsic evidence to that effect. Minn. R. Evid. 616 cmt.

[30] Sequestration does not mean witnesses need to be put up in separate hotel rooms during the trial or otherwise separated from each other. They just need to be outside the courtroom while others testify. I did not think I needed to explain this, until a defense attorney painfully exposed how wrong I was in this belief.

1989. Discussion of a ten year old divorce decree may surprise a judge, leading to a surprising ruling. Clear the path ahead of time.

> *The State moves the Court for an order permitting the prosecution to introduce extrinsic evidence of the defendant's probationary status to show his bias and interest against the State. Minn. R. Evid. 616, State v. Johnson, 699 N.W.2d 335 (Minn. Ct. App. 2005).*

Another example:

> *The State moves the Court for an order permitting the prosecution to introduce extrinsic evidence of Witness B's relationship with the defendant to demonstrate her bias or interest and explain why she may change her story. Minn. R. Evid. 616, State v. Copeland, 656 N.W.2d 599, 602-603 (Minn. Ct. App. 2003).*

Article 7

Rule 701 (Lay Opinion)

Under the heading of 'order the defense to knock it off' ask for a ruling on opinion evidence.

> *The State moves the Court for an order prohibiting the defendant from asking for testimony from lay witnesses in the form of opinion, unless said opinions are rationally based upon the perception of the witness, helpful to a clear understanding of the witness' testimony, and not based on scientific, technical or other specialized knowledge. Minn. R. Evid. Rule 701.*

This forms a basis for objecting to the question, "If Witness A said X, is she lying?" It is insipid. A stupid, but oft repeated line of questioning. This is a lay opinion, and is not helpful to a clear understanding of this witness's testimony. The jury can determine whether, in light of contradicting testimony, a witness is to be believed.[31]

Rule 702 (Expert Testimony)

Rule 702 allows for the introduction of expert testimony; it does not mandate it simply because you added Dr. Heinz Doofenshmirtz[32] to a witness list. Get a ruling on the motion before you write the check.

> *The State moves the Court for an order permitting Dr. Summer Calendar, Ph.D.[33], to offer testimony concerning the nature of child sexual abuse, child disclosures of sexual abuse, recantation, grooming behaviors of adult abusers, and counter-intuitive post-abuse behaviors found in children. Minn. R. Evid. 702.*

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[31] Confession: I have strong feelings toward this and other exemplars of stupid advocacy.
[32] From Phinneas and Ferb, (Disney 2007-2015).
[33] An entirely made-up name.

A prosecutor may wish to consider challenging through motion a defendant's expert as to the foundational reliability of her opinion; the general acceptance of the scientific evidence in the relevant scientific community; or the knowledge, skill, experience, training or education of the expert.

> *The State moves the Court for an order precluding the defendant's expert, Dr. Ella Sandstrum, Ph.D.*[34]*, from testifying concerning the defendant's alleged sexsomnia. Dr. Sandstrum holds a doctorate in child-psychology, she is not a neurologist expert in sleep disorders or parasomnias necessary to diagnose sexsomnia; sexsomnia has not gained general acceptance within the relevant scientific community of neurologists; and, the foundational reliability of Dr. Sandstrum's opinion that the defendant suffers from sexsomnia is lacks a proper diagnosis. Minn. R. Evid. 702.*

The above motion, if granted, will set up a Frye-Mack hearing.[35] Have an expert ready to rebut any anticipated defense flimflammery.

Rule 705 (Facts and Data)

A prosecutor may wish to move the court for an order disclosing the data or facts the defendant's expert relied upon.

> *The State moves the Court for an order disclosing the facts and/or data underlying the opinion of the defendant's expert. Minn. R. Evid. 705. See also Minn. R. Crim. P. 9.02, subd. 1(a)(2) and 1(b).*

This may be useful in helping the prosecution expert rebut their expert's opinion. Sometimes they don't have any facts or data to disclose, and the expert question goes away.

Article 8

Books have been written on hearsay. This is not one of them. "Hearsay" is a statement made by someone other than the person testifying offered to prove the truth of the matter asserted. Minn. R. Evid. 801(c). It is generally prohibited. Minn. R. Evid. 802. Which means, like character evidence, the proponent of hearsay evidence needs to find an exception. Id.

Good news: the rule book is filled with exceptions from which you may choose.

Whether hearsay or not, if the person making the statement is not present when the statement is introduced, you have a confrontation clause issue. Modern hearsay jurisprudence requires 1) a determination of whether the statement is hearsay, 2) if it is hearsay, whether an exception to the hearsay rule applies, and 3) whether the defendant has a right to confront the

[34] Another entirely made-up name.

[35] See Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993), and State v. Mack, 292 N.W.2d 764, 768 (Minn. 1980), the substance of which are beyond the scope of this writing. See also, Michael Steenson, J. David Prince & Sarah Brew, Products Liability Law 27 Minn. Prac. § 11.13 (2019-2020).

declarant.[36] This work focuses on motions. Your analysis to the court should include whether Crawford applies.

Rule 801(d) (Definitions)

A prosecutor may want to introduce statements made by someone other than the person testifying, which will require her to convince a judge the statements are not hearsay. Statements that are not hearsay include the following:[37]

Rule 801(d)(1)(A) (Prior Inconsistent Statements Under Oath)

Inconsistent statements taken under oath and subject to perjury are not hearsay.

> *The State moves the court for an order permitting the prosecution to offer Witness A's prior inconsistent statements made under oath and subject to perjury during a previous related trial involving these facts as substantive evidence in this trial. Minn. R. Evid. 801(d)(A).*

Provide the transcript.

Rule 801(d)(1)(B) (Prior Consistent Statements)

Consistent statements that are helpful to evaluating the witness' credibility are not hearsay.

> *The State moves the Court for an order permitting the prosecution to offer through Investigator Smith evidence of prior statements of Witnesses C made on January 27, 2019, made to Smith, which are consistent with the witness' testimony and helpful to the trier of fact in evaluating the witnesses' credibility and as substantive evidence. Minn. R. Evid. 801(d)(1)(B).*

Rule 801(d)(1)(C) (Identification)

A statement identifying a person if deemed reliable is not hearsay.[38]

Rule 801(d)(1)(D) (Immediate perception)

A statement describing or explaining an event while the declarant was perceiving the event or immediately thereafter is not hearsay.

> *The State moves the Court for an order permitting the introduction through Clare McQuire, an emergency dispatcher, of evidence of a recorded emergency communication made by declarant Witness T to Stearns County Emergency Dispatch, said statements of Witness T having been made while perceiving the event or immediately*

[36] Crawford v. Washington, 124 S.Ct. 1354, 1369 (2004) (testimonial statements are excluded unless the declarant is unavailable to testify at trial and the defendant has had a prior opportunity to cross-examine the declarant).

[37] Minn. R. Evid. 801(d)(1)(A), (B), (C) and (D).

[38] The constitutionality of out-of-court identification procedures is fodder for a contested Omnibus hearing, also beyond the scope of this work.

thereafter, and offered as substantive evidence. Minn. R. Evid. 801(d)(1)(D).

Rule 801(d)(2) (Party-Opponent)

Statements by party-opponents when offered against a party are not hearsay if: it is the party's own statement, Minn. R. Evid. 801(2)(A), a statement of which the party has adopted its truth, Minn. R. Evid. 801(2)(B), a statement made by a person authorized by the party, Minn. R. Evid. 801(2)(C), made by an agent, Minn. R. Evid. 801(2)(D), or by a co-conspirator made during the furtherance of the conspiracy.[39]

A select series of motions follows:

Rule 801(d)(2)(A) (party's own statement)

A defendant is not a party-opponent to himself. This phrase means, under Rule 801(d)(2), only an opponent's statement can be admitted as non-hearsay when offered against him. A defendant cannot admit his own statement through another witness, say your investigator, without a hearsay objection being sustained. Judges and defense attorneys (conveniently) often are befuddled by this. A prophylactic motion follows:

> *The State moves the Court for an order prohibiting the defendant from seeking to introduce self-serving hearsay evidence through prosecution witnesses or his own witnesses, which would have the effect of allowing the defendant to introduce his version of the facts while denying the prosecution the opportunity to cross-examine the defendant. Minn. R. Evid. 802(d)(2)(A); State v. Taylor, 258 N.W.2d 615, 622 (Minn. 1977); State v. Robertson, 884 N.W2d 864, 873 (Minn. 2016); State v. Mills, 562 N.W2d 276, 287 (Minn. 1997) overruled on other grounds by State v. McCoy, 682 N.W.2d 153 (Minn. 2004). The defendant is not a party-opponent unto himself.*

Rule 106 (Rule of Completeness)

A caution is advised. Few prosecutors want the jury to hear fifteen minutes of the defendant explaining, excusing or exonerating himself as he otherwise confesses. Nor are investigator's phrasings suitable for general consumption.

Minnesota Rules of Evidence allow a judge to require the introduction of any other part of the recorded statement or writing "which ought in fairness to be considered contemporaneously with it." Minn. R. Evid. 106. If the inculpating part of his taped confession is played, the Court may require the prosecution play the entire recording. I suggest you go old school: don't play the recording. A witness can testify to what the defendant said. Rule 106 only applies to writings and recordings, not testimony. Testimony is covered by Rule 801(d)(2)(A).

[39] All words of a rule must be given meaning. See Goodman, 755 N.W.2d at 357. This includes the phrase "party-opponent" and "against".

Rule 801(d)(2)(B) (Adoption)

A statement that the party manifested an adoption of its truth is not hearsay.

> *The State moves the Court for an order permitting the prosecution to introduce through Witness D evidence of the co-defendant's statement to Witness S manifesting adoption of the following statement's truth. Witness S stated to the co-defendant: "He stabbed that dude." The co-defendant replied: "Fuck that mother fucker. Fuck him." Whereupon the defendant raised his middle finger toward the bar entrance, adopting the truth of the assertion. State v. Flores, 595 N.W.2d 860, 867 (Minn. 1999).*

Rule 801(d)(2)(E) (Co-conspirator)

A statement of a co-conspirator is not hearsay. The prosecutor must show by a preponderance of the evidence there was a conspiracy with the declarant and the defendant, and the statement was made in the course of and in furtherance of the conspiracy. Minn. R. Evid. 801(d)(2)(E). Perhaps a motion is suggested:

> *The State moves the Court for an order permitting the prosecution to introduce through Agent Patrick Murray statements of co-conspirator A. Coconspirator A conspired with the defendant to sex traffic. The statements were made to Murray in the furtherance and course of the conspiracy: i.e. procuring an underage girl for Murray. Minn. R. Evid. 801(d)(2)(E).*

As we leave Rule 801, we enter the world of statements that are hearsay, but exempted from preclusion because of the statements' inherent reliability. There are three forms: the availability of the declarant does not matter, Rule 803, the declarant is unavailable, Rule 804, and the catch-all exception. Rule 807.

Rule 803: Unavailability Immaterial

Rule 803(3) (Excited Utterance)

An excited utterance may be introduced by a witness other than the excited utterer.

> *The State moves the Court for an order permitting the prosecution to introduce through Officer Pearson as substantive evidence the excited utterances of Witness A explaining her abuse by the defendant, heard by Officer Pearson, and made while Witness A was under the stress of excitement caused by the event or condition. Minn. R. Evid. 803(2).*

Rule 803(3) (Then Existing Condition)

A statement of then existing mental, emotional, or physical condition:

> *The State moves the Court for an order permitting the prosecution to introduce through Officer Pearson as substantive evidence*

statements concerning the then existing mental or emotional state of Witness A, related to Officer Pearson, that she was in great physical pain, that she was scared to death, that she thinks the defendant will kill her, and that she was going to leave him. Minn. R. Evid. 803(3).

Rule 803(4) (Medical Diagnosis)

The reader should be cognizant of a certain vagueness in the scope of the medical diagnosis exception. A doctor may ask what ails a patient. The patient may claim: My arm hurts. This is admissible as a statement for purposes of medical diagnosis or treatment.

The doctor may ask, how did you break your arm? The patient may answer: My husband hit me with a baseball bat. Statements identifying the perpetrator of domestic violence are not necessarily within the scope of the medical diagnosis and treatment exception. State v. Robinson, 699 N.W.2d 790, 794 (Minn. 2005). If the patient is a child, the opposite is true. Identification of the perpetrator of child abuse is within the scope of the medical diagnosis and treatment exception. State v. Larson, 453 N.W.2d 42, 47 (Minn. 1990). Go figure. No, seriously, go research it and figure it out. Eventually we all get to the residual exception. See infra, Rule 807.

The State moves the Court for an order permitting the prosecution to introduce through Dr. Amy Anderson as substantive evidence statements made by Witness M while seeking medical diagnoses or treatment. Minn. R. Evid. 803(4).

Rule 803(5)(Recorded Recollection)

The State moves the Court for an order permitting the prosecution to introduce into evidence Exhibit 9, a calendar entry showing Victim A visited the defendant's cabin on August 14, 2012, as substantive evidence. Exhibit 9 is a memorandum or record concerning and detailing the date the abuse of Victim A occurred, for which Victim A once had knowledge but now has insufficient recollection to testify fully and accurately. Exhibit 9 was made or adopted by Victim A when the matter was fresh in the Victim A's memory and to reflect that knowledge correctly. Minn. R. Evid. 803(4).

Rule 804: Declarant Unavailable

To be determined unavailable, the witness must be privileged from testifying, refuse to testify despite court order, has a lack of memory, is dead, or is unable to testify due to a then existing physical or mental illness, or simply not able to attend court through reasonable means. Minn. R. Evid. 804(a)(1)-(5). A prosecutor cannot will a witness into being unavailable. I saw what you were thinking, no you cannot.

The exceptions are less in number and narrowly construed.

Rule 804(b)(2)(Impending Death)

The rule is severely circumscribed: it is limited to homicide prosecutions, and the statement must be 1) made while the declarant believes death is imminent, and 2) concerns the cause or circumstances of the impending death. Minn. R. Evid. 804(b)(2).

> The statement "must have been spoken without hope of recovery and in the shadow of impending death." Thus the decisive factor is the declarant's state of mind which must be shown by competent evidence and cannot be left to conjecture. "Fear or even belief that illness will end in death will not avail itself to make a dying declaration. There must be a 'settled hopeless expectation' that death is near at hand, and what is said must have been spoken in the hush of its impending presence."

State v. Buggs, 581 N.W.2d 329, 335 (Minn. 1998) overruled on other grounds State v. McCoy, 581 N.W.2d 329 (Minn. 1998) (citing State v. Elias, 285 N.W.2d 475 (Minn. 1939)).

> *The State moves the Court for an order permitting Officer Dahquist to testify to Victim A's statement describing the circumstances and cause of her death, said statements having been made by the declarant while fearing the imminence of death. Victim A is deceased. Minn. R. Evid. 804(b)(2).*

Not for the faint of heart this.

Rule 804(b)(3)(Statement against interest)

The analysis for statements against interest is whether "at the time of its making, [the statement] 'so far tended to subject the declarant to civil or criminal liability ... that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.'" State v. Morales, 788 N.W.2d 737, 763 (Minn. 2010). There are three findings the court must make:1) the declarant is unavailable, 2) the statement at the time of its making subjected the declarant to civil or criminal liability such that a reasonable person would not have made the statement unless they believed it to be true, and 3) the Confrontation Clause is not violated. Id.

> *The State moves the Court for an order permitting the State to elicit testimony from Witness A concerning statements made by Defendant 2 wherein Defendant 2 admitted committing the crime with Defendant 3 and the defendant. Said statements are statements against Defendant 2's penal interest, and, at the time of their utterance, subjected Defendant 2 to criminal liability such that a reasonable person would not have made the statement unless they believed them to be true. Defendant 2 is unavailable due to privilege. Minn. R. Evid. 804(b)(3)*

Rule 804(b)(6)(Forfeiture by wrongdoing)

The Constitution recognizes a narrow exception to the Confrontation Clause: forfeiture by wrongdoing. Crawford, 541 U.S. at 62. To allow hearsay testimony under the forfeiture by wrongdoing exception, the Court must find the following: 1) the declarant is unavailable, 2) the defendant engaged in wrongful conduct, 3) the wrongful conduct procured the unavailability of the witness, and 4) the defendant intended to procure the unavailability of the witness. State v. Cox, 779 N.W.2d 844, 851-52 (Minn. 2010) (citing Giles v. California, 554 U.S. 353 (2008)).

> *The State moves the Court for an order permitting Officer Smith to testify as to out-of-court statements made by Victim A, the declarant, during his investigation. Said statements are offered under the forfeiture by wrongdoing exception to the hearsay rule. Victim A refuses to testify and is therefore unavailable. The defendant threatened or procured family members to threaten Victim A. Due to the threats received by the defendant and his family, Victim A refuses to testify. The defendant intended to procure Victim A's unavailability. Minn. R. Evid. 804(b)(6); State v. Cox, 779 N.W.2d 844, 851-52 (Minn. 2010).*

Rule 807

The Rules of Evidence merged the catch-all exceptions found in Rules 803 and 804 and created a new rule, Rule 807, the Residual Exception. Minn. R. Evid. 807, advisory comm. cmt. 2006. The focus of the rule is whether statements have 'equivalent circumstantial guarantees of trustworthiness.' Minn. R. Evid. 807.

The prosecutor must announce her intent to use the statements, the statements' particulars, and the name, address and present whereabouts of the declarants with sufficient time for the defendant to prepare. Id.

The court must make three findings on the record: 1) the statement relates to a material fact, 2) the statement is more probative on that point than any other evidence capable of being secured by the reasonable methods, and 3) the admission of the statement serves the interests of justice and the general purpose of the rules. State v. Ahmed, 782 N.W.2d 253, 259 (Minn. Ct. App. 2010).

The court's inquiry should focus on the totality of the circumstances surrounding the making of statements. State v. Lanam, 459 N.W.2d 656, 661 (Minn. 1990). Obviously, when instructed to examine the totality of the circumstances, no singular list of factors is universally applicable. Many cases cite differing lists of factors. A useful guide is found in State v. Hallmark, 927 N.W.2d 281, 292-94 (2019).

In child abuse cases relevant factors may include:

1) Whether the statement was spontaneous,

2) Whether the questioner had a preconceived idea of what the child should say,

3) Whether the statement was in response to leading questions,

4) Whether the child had any apparent motive to fabricate,

5) Whether the statements are of the type one would expect a child of that age to fabricate,

6) Whether the statement remained consistent over time, and

7) The mental state of the child at the time of the statements.

Ahmed, 782 N.W.2d at 253.

> *The State moves the Court for an order permitting the State to elicit testimony concerning the following out-of-court statements made by the complaining witness:*
>
> *1) Statements made by C.E. to B.B. describing her fears of being pregnant because of the defendant*
>
> *2) Statements made by C.E. to H.E. disclosing the sexual abuse by the defendant*
>
> *3) Statements made by C.E. to law enforcement investigators detailing the sexual abuse by the defendant*
>
> *4) Statements made by C.E. to Deborah Schwiebert, R.N., explaining the reason for her medical examination*
>
> *Said statements are offered as evidence of material facts; are more probative on the points for which they are offered than any other evidence the prosecution can procure through reasonable efforts, and the general purposes of the rules of the Minnesota Rules of Evidence and the interests of justice will be best served by admission.*
>
> *The prosecution has made these statements known to the defendant sufficiently in advance of trial to provide the defendant with a fair opportunity to meet them, as well as the names, addresses and present whereabouts of the declarants. Minn. R. Evid. 807.*
>
> *In all cases, the declarant is expected to be available for confrontation. See Crawford v. Washington, 124 S.Ct. 1354, 1369 (2004).*

The Dexter Dilemma

There is a glitch in the matrix. Rule 607 allows any party to attack the credibility of a witness, including the party calling the witness. Minn. R. Evid. 607. Rule 801(d)(1)(A), however, says that prior inconsistent statements are admissible as substantive evidence only if made under oath. Minn. R. Evid. 801(d)(1)(A). Faced with a recanting witness, the prosecutor calls the witness

intending to impeach her with extrinsic evidence of her prior inconsistent statements. In effect, the responding officer testifies for the witness. The Supreme Court in Dexter was hip to this, "What the prosecution is seeking . . . is to present, in the guise of impeachment, evidence which his not otherwise admissible." 269 N.W.2d 721, 721 (Minn. 1978).

My defense colleagues read If You Give A Mouse A Cookie as an aspirational tale.[40] They may object, claiming the prosecution cannot call a witness solely to impeach the witness. There are two replies: first, if the domestic abuse victim offers any evidence concerning her relationship with the defendant, where she lived, the date the police came to the house, or that she received a black eye, albeit from the dog, the witness has offered substantive evidence and has not been merely impeached.

Second, the Dexter Dilemma can be defeated. First, if you do not know that the witness is going to recant, you have not violated the rule prohibiting a prosecutor from calling a witness solely to impeach her. Moore v. State, 945 N.W.2d 421, 430 (Minn. Ct. App. 2020) rev. denied (Aug. 11, 2020). I do not recommend, however, you fly blind. Prep your witness. Know what they are going to say. The second attack on the Dexter Dilemma is to demonstrate that the prior inconsistent statement is itself admissible as substantive evidence. State v. Bobo, 770 N.W.2d 129, 138 (Minn. 2009) (citing State v. Ortlepp, 363 N.W.2d 39, 43-44 (Minn. 1985) (finding no Dexter violation given the prior inconsistent statement of the witness was what is now Rule 807)).

The best method is to make a motion at the Omnibus Hearing, highlighting the Dexter issue, and explaining that extrinsic evidence of the witness's prior inconsistent statement has equivalent circumstantial guarantees of trustworthiness of other traditional hearsay exceptions. This avoids a mistrial, acquittal or thorny appellate issue when the judge sustains an objection to the prosecutor's attempt to impeach her witness with a prior inconsistent statement not yet determined to be substantively admissible.

Article 9

Rule 901 (Foundation)

Occasionally a prosecutor will want to introduce an exhibit that requires atypical foundation. Rather than struggle through admission of the exhibit with an unsuspecting judge, foreshadow the issue with a motion to address the preliminary question: is the offer of proof legally sufficient? If so, then all the judge needs to see at trial is the factual adequacy of the foundation.

> *The State seeks to introduce evidence in the form of segments of video evidence. Rule 901(b)(9) of the Minnesota Rules of Evidence provides an alternative method of authenticating tangible evidence when no witnesses can testify they observed the recorded events. See also F.R.E. 901(b)(9); In re the Welfare of S.A.M., 570 N.W.2d 162, 165 (Minn. Ct. App. 1997) . This rule is commonly referred to as the 'silent witness theory'. "Under 901(b)(9), the 'silent witness theory', X-ray images or other photographic-type evidence may be*

[40] Laura Numeroff & Felicia Bond, If You Give a Mouse a Cookie, (Harper Collins 2015).

> *authenticated from evidence of the reliability of the process by which the image was made. Such evidence is properly authenticated if the proponent demonstrates 1) how the video is made, 2) that the process produces an accurate result, and 3) some evidence concerning the chain of custody. S.A.M., 570 N.W.2d at 166. The prosecution will make an offer of proof demonstrating the legal sufficiency of the evidence authentication. The Court may make a definitive ruling on the admissibility of evidence either before or during the trial. State v. Farah, 855 N.W.2d 317, 320 (Minn. Ct. App. 2014).*

I recommend a memorandum outlining the relevant law, with a detailed offer of proof as to the anticipated testimony of witnesses capable for establishing the reliability of the processes.

Rule 901(b) is not an exclusive list of how evidence is authenticated. "By way of illustration only" is pretty clear: use your legal acumen to educate the judge on the threshold of authentication, and creativity to demonstrate the thing you want in is the thing you claim it to be.

Rule 902 (Self-authentication)

This is a personal favorite:

> *The State moves the Court for an order permitting the introduction of Exhibit 15, an official publication created by the National Oceanic and Atmospheric Administration (NOAA), a public authority, detailing climate data for January 13, 2018, including sunset, sunrise, precipitation and temperature. Minn. R. Evid. 902(5).*

Or, this:

> *The State moves the Court for an order introducing Exhibits 17-35, the defendant's Immigration Customs Enforcement (ICE) A-File bearing the seal of the United States demonstrating the defendant was born in 1987, not 1985. Minn. R. Evid. 902(1).*

V. Criminal Procedure

What follows is a quick run through of a prophylactic list a defense attorney should provide the prosecution, but often enough conveniently forgets.

Rule 9 (Discovery)

For instance, a list of names and addresses of defense witnesses.

> *The prosecution renews its request for the names and addresses of defense witnesses who may be called at trial, and their records of convictions if known to defense. Minn. R. Crim. P. Rule 9.02, subd. 1(3).*

And written statements:

> *The State renews its demand for the disclosure of all relevant written or recorded statements of witnesses the defendant intends to call at trial; statements of prosecution witnesses obtained by the defendant, defense counsel, or persons participating in the defense within the defendant's possession or control; written summaries known to the defense of the substance of any oral statements made by prosecution witnesses made to defense counsel or person participating in the defense, or obtained by the defendant at the defense counsel's direction; and the substance of oral statements related to the case made by persons the defendant intends to call as a witness at trial, and that were made to the defense counsel or person participating in the defense. Minn. R. Crim. P. 9.02, subd. 1(4)(a)—(d).*

And a last call to notice defenses:

> *The State renews its demand for the defense to notice, in writing, any defense, other than not guilty, Minn. R. Crim. P. 9.02(5), including the specific place or places where the defendant was during the alleged offenses, and the names and addresses of witnesses the defendant intends to call at trial if the defendant intends to offer evidence of alibi. Minn. R. Crim. P. 9.02, subd. 2(7).*

Amendment of Complaint

Before Jeopardy Rule 3.02, subd. 2(b)

> The State moves the Court for an order permitting the initial complaint to be amended and a new complaint filed based on the ground that the evidence presented establishes probable cause to believe the defendant has committed a different offense than that charged, and the prosecutor intends to charge the defendant with the new charge. Minn. R. Crim. P. 3.02, subd. 2(b); State v. Bluhm, 460 N.W2d 22, 24 (Minn. 1990); State v. Pettee, 538 N.W.2d 126, 132

(Minn. 1995); State v. Alexander, 290 N.W.2d 745, 748 (Minn. 1980).

Referring to A Child Witness

When dealing with a child victim or witness, you may need to seek court approval to refer to the witness by first name.

> *The State moves the Court for an order permitting the prosecution to address the child witness, Victim A, by her first name. Minn. Gen. R. of Prac. Rule 2.03(b).*

V. Conclusion

As stated, everything about prosecution must be intentional. Pretrial litigation defines the trial, excises superfluous material, and best assures the introduction of persuasive evidence. While the prosecutor should aim for convictions, the result is outside the prosecutor's control. She may influence, she cannot control.

Measure your success not by the number of motions filed, or percentage granted, but by your fealty to the profession. Did you file the right motions? Did you argue them well? Did you place your case in the most favorable position to succeed? Jim Dedman, my mentor at the National College of District Attorneys, advised, "Do the right thing, to the right people, for the right reasons." I would only add, in the right way.

> For success, like happiness, cannot be pursued; it must ensue, and it only does so as the unintended side effect of one's personal dedication to a cause greater than oneself or as the by-product of one's surrender to a person other than oneself. Happiness must happen, and the same holds for success: you have to let it happen by not caring about it. I want you to listen to what your conscience commands you to do and go on to carry it out to the best of your knowledge. Then you will live to see that in the long-run—in the long-run, I say!—success will follow you precisely because you had forgotten to think about it.

Victor Frankl, Man's Search for Meaning (Beacon Press 2014). Focus on process; the result will follow. Have a plan. And when that fails, have another ready. As a veteran prosecutor taught me, never leave the room until you have everything you want. Or a judge tells you to move on. My first managing attorney gave me this, "I don't expect you to be the best attorney; I expect you to be the best attorney you can be right now." A wise attorney learns the right lessons from her losses; the fool the wrong ones from her victories.

Be precise. Be fair. Use every legitimate means to bring about a just conviction. Be a servant of the law with the dual aim that guilt shall not escape nor innocence suffer. Prosecute with earnestness and vigor. Strike hard, but fair. And bring about a just result. Berger v. U.S., 295 U.S. 78, 88 (1935).

Good luck.