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COMMENTARY FROM THE BENCH

"RUMMAGING THROUGH A WILDERNESS OF VERBIAGE"

The Charge Conference, Jury Argument and Instructions

THE HON. THOMAS S. WATTS*

Judges frequently assume that a lawyer who has engaged in the preparation of pleadings, the extensive discovery practice permitted by both civil and criminal statutes, and who has presented all of his or her evidence to a jury has also researched and understands the law applicable to the lawsuit. Lawyers frequently assume that a judge who has reviewed the court file and presided over the evidentiary portion of the trial also fully comprehends the law of the action. Unfortunately, neither assumption is completely correct, although both bar and trial bench correctly interpret and apply our complex and ever growing body of substantive law in a surprisingly high percentage of cases.

It follows that if judge and counsel know the law, each has the duty to be sure that accurate statements of pertinent legal principles are clearly communicated to the jury during the course of the lawyer’s argument and the court’s jury instructions so that the jury can properly carry out its function in the case. Hopefully this paper will assist both bar and bench to achieve such goals and, in the words of Judge Learned Hand, not require the jury to go “rum-

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maging through a wilderness of verbiage . . .”1

THE CHARGE CONFERENCE

Authority for a conference to settle the law of the action between court and counsel prior to the jury charge is found in N.C. Gen. Stat. § 1A-1 Rule 51(b), § 15A-1231 and in Rule 21 of the General Rules of Practice for the Superior and District Courts,2 adopted by the North Carolina Supreme Court pursuant to N.C. Gen. Stat. § 7A-34. Rule 21 reads, in pertinent part, as follows:

At the close of the evidence (or at such earlier time as the judge may reasonably direct) in every jury trial, civil and criminal, in the superior and district courts, the trial judge shall conduct a conference on instructions with the attorneys of record (or party, if not represented by counsel). Such conference shall be out of the presence of the jury, and shall be held for the purpose of discussing the proposed instructions to be given to the jury. An opportunity must be given to the attorneys . . . to request any additional instructions or to object to any of those instructions proposed by the judge. Such requests, objections and the rulings of the court thereon shall be placed in the record. If special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference.3

N.C. Gen. Stat. § 15A-1231 provides with regard to criminal trials:

(a) At the close of the evidence or at an earlier time directed by the judge, any party may tender written instructions. A party tendering instructions must furnish copies to the other parties at the time he tenders them to the judge.
(b) Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury. The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his fail-

1. United States v. Rowe, 56 F.2d. 747, 750 (2d Cir. 1932).
3. Id.
ure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.

(c) After the arguments are completed, the judge must instruct the jury in accordance with G.S. 15A-1232.
(d) All instructions given and tendered instructions which have been refused become a part of the record. Failure to object to an erroneous instruction or the erroneous failure to give an instruction does not constitute a waiver of the right to appeal on that error in accordance with G.S. 15A-1446(d)(13).

With regard to the civil charge conference, N.C. Gen. Stat. § 1A-1 Rule 51(b), states:

Requests for special instructions must be in writing, entitled in the cause, and signed by the counsel or party submitting them. Such requests for special instructions must be submitted to the judge before the judge's charge to the jury is begun. The judge may, in his discretion, consider such requests regardless of the time they are made. Written requests for special instructions shall, after their submission to the judge, be filed with the Clerk as a part of the record.

As noted by the Ohio Supreme Court 150 years ago, "...we think good would result from the practice of having the law settled before argument proceeds to the jury." Indeed, "good would result" more often if counsel would adopt the policy of preparing succinct pre-trial briefs in order to apprise the court of the specific issues involved in a case at the earliest possible time. A rotating superior court judge, moving from county to county and trial to trial, is frequently required to analyze and grasp the issues involved in a complex case solely upon the basis of a hasty reading of the pleadings and other pertinent items found in the clerk's file while counsel proceed with selection of the jury.

Is it too much to expect that a lawyer should be sufficiently well prepared to be an expert on the problems involved in his lawsuit? Good advocates do not "fly by the seat of their pants" and should always be ready to guide and refresh the court in unusual areas that arise during the trial. This is the lawyer's obligation; to his client, to the court, and to a fair administration of justice.

Counsel’s failure to be properly prepared for the trial of the case can easily provoke error by the most competent judge. It is a rare judge who is offended when a lawyer properly and courteously offers guidance to the court, supported by appropriate citations of authority.

In every case it is the duty of the judge to prepare jury instructions which will clarify the issues, eliminate extraneous matters, and declare and explain the law arising upon the evidence of the case.8

As was said by Merrimon, C.J., in State v. Wilson, “The jury should see the issues stripped of all redundant and confusing matters, and in as clear a light as practicable,” and by Barnhill, C.J., in State v. Friddle, “The chief object contemplated in the charge is to explain the law of the case, to point out the essentials to be proved on the one side and on the other, and to bring into view the relation of the particular evidence adduced to the particular issue involved.”9

Attempting to fulfill this responsibility of drafting clear and succinct instructions (particularly in a complex civil action) is the bane of the trial judge’s existence. Counsel can greatly assist the court with appropriate suggestions in the form of requested instructions at the time of the charge conference, although the responsibility of the judge to properly present the issues to the jury cannot be delegated to or usurped by counsel.10

Requested jury instructions can serve several valid purposes not directly related to informing the jury. If properly formulated, counsel’s requested instructions can crystallize questions of law for the record on appeal, with the conference transcript revealing the opinion of the judge as the law of the case. A specific request requires the court to accept or reject the proposition advanced by counsel, alerts the judge to the issue at an appropriate time and, should the court err in its judgment, the request insures reversal and a new trial, provided the point raised is substantial and prejudicial.

Obviously, the best time for an attorney to prepare a requested jury instruction is before trial rather than in the midst of

courtroom combat. Competent counsel should be able to "zero in" upon the important issues of the lawsuit, research the authorities pertinent to such issues and develop a brief statement of law that accurately fits the facts of the case well in advance of trial. Indeed, efforts along these lines tend to enhance the value of trial preparation by insuring the presentation of evidence that is related to the applicable law. While the attorney should always retain sufficient flexibility to allow a speedy revision of proposed instructions based upon evidentiary developments at trial, much midnight oil will be saved and revision greatly simplified if the basic research has been completed before the trial has begun.

The function of requested jury instructions presented at the charge conference should not solely be to "coach" the judge (or counsel) in the law of the case; rather, the purpose of the conference is to eliminate differences among counsel, and between counsel and the court about areas of law which, although correct, may or may not be appropriate in the given case.

Chief Justice Branch, in *Wall v. Stout*, observed that Rule 21 of the *Rules of Practice* and Rule 10(b)(2) of the *Rules of Appellate Procedure* were deliberately designed to prevent unnecessary new trials caused by errors in instructions that the trial court could have corrected if such errors had been brought to the attention of the judge by counsel at an appropriate time. This goal is substantially achieved when a requested instruction is submitted and the trial judge has considered and either granted or refused the request.

Counsel naturally have a tendency to request instructions favorable to their clients' position in the proceeding. Unfortunately, this partisan approach frequently produces requests which are often calculated, sometimes recklessly, to present a strained or argumentative statement of law.

The procedure for settling requests is occasionally turned into a battle of wits, carried on by one or both parties in an effort to obtain favorably worded statements of law or argument in language subtly phrased to represent a partisan interest rather than the ends of justice, or failing in this, to provoke a reversal of judgment.

It takes an able and conscientious attorney to draft requested
instructions which conform to both the facts of the case and the law of North Carolina. The competent attorney who presents requests that are reasonable in number, reasonable in content, non-argumentative, and which fairly state the law may well be entitled to the designation of "Super Lawyer."

Requested instructions should be brief and few in number. Jurors are quick to grasp strong statements. They are skeptical and slow to respond to instructions that are long, complex or too numerous.\footnote{13}

Counsel should spare no effort to conform their requested instructions with the following guidelines, taken generally from McBride:

1. **Pertinent and Material:** Each request should be confined to a specific issue raised by the pleadings and developed by the evidence for a final determination by the jury. A request not supported by the evidence or deviating from the issues to be determined will not be approved, no matter how accurate a statement of the law it may contain.

2. **Single Subject Matter:** A requested instruction should be complete within itself and confined to a single proposition of law, including every element pertaining to the single subject.

3. **Not Vague or Misleading:** The requested instruction should be definite and certain without ambiguities or contradictory statements. The jury should never be left to guess as to the meaning of the suggested language. Lawyers frequently lift requested instructions verbatim from appellate opinions. Such statements are usually intended by the appellate judges for guidance of bench and bar, with legal principles being couched in broad and/or abstract phraseology. Frequently, this language contained in appellate opinions is simply not susceptible to a thorough understanding by the "average" juror. Proposed instructions should always be drafted with clarity, simplicity and brevity in mind.

4. **Number and Length:** Requested instructions should not be unreasonable in either number or length. Frequently, counsel submit repetitive, cumulative instructions dealing with the same issue, although differing in phraseology. Acceptance of such repetitive requests may well lend undue emphasis to the issue and create prejudicial error. If required by the issue, length alone may not be objectionable; however, most long requests prove to be highly repetitious.

\footnote{13. R. McBride, supra note 12, at 260.}
5. **ARGUMENTATIVE:** Requested instructions should never include recitations of evidence or arguments of fact that properly belong in the closing statements of counsel.14

Generally speaking, the civil/criminal *Pattern Jury Instructions* prepared by a committee of The Conference of Superior Court Judges provide an excellent starting point for the drafting of specific instructions in a given case. Most good lawyers have the pattern instructions in their libraries and utilize them extensively in their trial practice. However, it must be recognized that the substantive law contained in the various pattern forms has been tailored to meet the most common factual situations and, therefore, may well not apply to the uncommon issues at trial. Accordingly, both bench and bar must exercise care in the utilization of the pattern instructions and not overly rely upon their applicability.

Some trial judges are satisfied when a lawyer urges the use of a particular pattern instruction cited by number, rather than requiring the attorney to reproduce the requested language. However, it is important to note that Rule 21 of the *Rules of Practice* carries forward the statutory mandate of both N.C. Gen. Stat. § 1A-1 Rule 51(b) and N.C. Gen. Stat. § 15A-1231(a)—requiring a special instruction request to be stated in writing and submitted to the court prior to the charge.15 If a request for a special instruction is not made in compliance with the statutes it is insufficient and may be disregarded by the trial judge without incurring the risk of committing prejudicial error, provided the court adequately charges the law on every material aspect of the case arising from the evidence and applies the law fairly to the various factual situations presented by the evidence.16 For example, in *State v. Moser*,17 the court of appeals found no error in the refusal of the trial judge to instruct the jury on the limited use of defendant’s prior record as evidence when defense counsel did not submit his request for such special instruction in writing pursuant to Rule 21. An attorney who utilizes an informal procedure which does not comply with the “written request” mandate of N.C. Gen. Stat. § 1A-1 Rule 51(b), N.C. Gen. Stat. § 15A-1231(a) and Rule 21 of the *Rules of Practice* runs the risk of falling into the *State v. Moser* trap.

14. *Id.*
15. **GENERAL R. OF PRACTICE FOR SUP. & DIST. CTS., Rule 21.**
Apparently as a result of appellate decisions in early 1983, the legislature modified N.C. Gen. Stat. § 15A-1231(b) to require a mandatory, recorded conference on jury instructions out of the presence of the jury in every criminal matter. Prior to the 1983 legislative action, the supreme court had held that a criminal charge conference was not required to be recorded absent a request from counsel. The court of appeals had held that a defendant could not assert the trial court's total failure to conduct a charge conference as error when the defendant had not requested an instruction conference. It is important to note that the 1983 amendment reversing these two decisions applied only to criminal instruction conferences and, by analogy, there is no equivalent requirement mandating a recorded civil instruction conference. Prudent counsel should always request that the civil charge conference be held upon the record, in the absence of the jury, if for no other reason than to insure that an accurate record is maintained of the requested instructions, objections and the trial court's rulings thereon.

The judge is not required to reduce his proposed charge to writing and submit it to counsel for review in advance.

Most of the cases dealing with technical procedures at the charge conference have involved criminal matters. It has been said that instructions which relate only to the significance of the evidence and which do not relate to the elements of the crime or to the defendant's criminal responsibility are subordinate features of the case. The presiding judge commits no error when he omits instructions upon subordinate features, absent an appropriate request from counsel for a special instruction. Several examples of "subordinate features" are listed in State v. Witherspoon. The trial judge may use his discretion and elect to charge the jury upon a subordinate evidentiary matter in the absence of a request in order to assist the jury to understand the case. However, when such

a discretionary instruction is volunteered by the judge, it must be accurate and complete.\textsuperscript{26}

When counsel submits a written request for a particular instruction prior to argument, which is denied by the court, counsel is not required to repeat his objection under Rule 10(b)(2) of the Rules of Appellate Procedures in order to properly preserve an exception for appellate review.\textsuperscript{27}

When properly conducted, the charge conference is an invaluable tool, clearly delineating both the issues of fact and rules of law pertinent to the case for the lawyers, the judge and ultimately, the jury.

\textbf{JURY ARGUMENTS}

Statutory authority for permitting counsel to make a concluding argument in a jury trial is generally set out in N.C. Gen. Stat. § 84-14 which reads as follows:

\begin{quote}
In all trials in the superior courts there shall be allowed two addresses to the jury for the State or plaintiff and two for the defendant, except in capital felonies, when there shall be no limit as to number. The judges of the superior court are authorized to limit the time of argument of counsel to the jury on the trial of actions, civil and criminal as follows; to not less than one hour on each side in misdemeanors and appeals from justices of the peace; to not less than two hours on each side in all other civil actions and in felonies less than capital; in capital felonies, the time of argument of counsel may not be limited otherwise than by consent, except that the court may limit the number of those who may address the jury to three counsel on each side. Where any greater number of addresses or any extension of time are desired, motion shall be made, and it shall be in the discretion of the judge to allow the same or not, as the interests of justice may require. In jury trials the whole case as well of law as of fact may be argued to the jury.\textsuperscript{28}
\end{quote}

It has been said that the presiding judge possesses significant discretionary powers in controlling and directing the argument of counsel; however, N.C. Gen. Stat. § 84-14 does not permit the judge to deprive a litigant of the benefit of his attorney’s argument.

when such argument is confined within proper bounds and is addressed to the material facts of the case. 29 But when the remarks of counsel are not warranted by the evidence or the law, or have been calculated to mislead or prejudice the jury, it is the affirmative duty of the presiding judge to interfere by exercising his discretionary authority. 30

In a lengthy series of both criminal and civil cases, the supreme court has consistently held that the presiding judge must allow wide latitude in the argument of the law, the facts, and all reasonable inferences to be drawn from the facts; nevertheless, that court defers to the sound discretion of the trial judge for a determination of what constitutes an abuse of the privilege of argument. 31 In short, an attorney's freedom to argue his client's case should not be impaired without good reason but where both the impropriety and the prejudicial effect are clear the presiding judge should not hesitate to act upon his own motion. 32

Under the express provisions of N.C. Gen. Stat. § 84-14, counsel must be permitted to state during jury argument what the lawyer conceives to be the law of the case in addition to arguing the facts in evidence and all reasonable inferences to be drawn therefrom. 33 It is clearly reversible error to absolutely prohibit counsel from arguing law to the jury. 34 However, an attorney may not argue principles of law which are not relevant to the case or applicable to the facts. 35 As was noted by Justice Exum in State v. McMorris, 36 "[t]he whole corpus juris is not fair game."

When proceeding to present an argument with regard to the law, counsel may read or state to the jury a statute or other rele-

vant rule of law so long as such statement is made accurately. Counsel may not read or state to the jury a statutory provision which has been declared unconstitutional.

Counsel may read to the jury the statutory provision which sets the punishment for a given crime. However, it is improper for defendant's attorney to further argue that the jury should acquit because of the severity of punishment, or to question the wisdom or appropriateness of the statutory provision, or argue that the law should be otherwise. Neither the prosecutor nor defense counsel is permitted to speculate during argument upon the outcome of possible appeals, paroles, commutations or pardons.

For well over one hundred years, it has been settled law in North Carolina that lawyers may read reported cases to the jury in the course of argument. Counsel can comment upon such cases, although the facts contained in the reported cases cannot be read as evidence of their existence in the instant case. Perhaps the leading case regarding the reading of published reports of the appellate division during jury argument is Wilcox v. Glover Motors Inc. In Wilcox, Justice Lake stated the pertinent rules as follows:

It is well settled that this statute [N.C. Gen. Stat. § 84-14] permits counsel, in his argument to the jury, to state his view of the law applicable to the case on trial and to read, in support thereof, from the published reports of decisions of this Court. It is often necessary for counsel to do so in order that the jury may understand the issue to which counsel's argument on the evidence is addressed.

In order to make meaningful a statement of a rule of law found in a reported decision, it is sometimes necessary to recount some of the facts which the court had before it when it pronounced the rule in question. For this purpose, counsel, in his argument in a subsequent case, may not only read the rule of law stated in the published opinion in the former case but may also state the facts before the court therein.

40. Id.; Britt, 285 N.C. 256, 204 S.E.2d 817.
41. McMorris, 290 N.C. 286, 225 S.E.2d 553.
42. Horah v. Knox, 87 N.C. 483 (1882); see also State v. Miller, 75 N.C. 73 (1876); Public Laws of 1844, Chapter 13.
Sel's freedom of argument should not be impaired without good reason, but where both the impropriety and the prejudicial effect are clear, the court should act.

It is not permissible argument for counsel to read, or otherwise state, the facts of another case, together with the decision therein, as premises leading to the conclusion that the jury should return a verdict favorable to his client in the case on trial. That is, counsel may not properly argue: the facts in the reported case were thus and so; in that case the decision was that there was no negligence (or was negligence); the facts in the present case are the same or stronger; therefore the verdict in this case should be the same as the decision there. [citing authority]. This is but an application of the rule that, in his argument to the jury, counsel may not go outside the record and inject into his argument facts of his own knowledge, or other facts not included in the evidence. [citing authority] The ultimate test is whether the reading from the reported case "would reasonably tend to prejudice either party upon the facts of the case on trial."  

Even under the broadest construction of N.C. Gen. Stat. § 84-14, lawyers are not permitted to read to the jury decisions which discuss principles of law irrelevant to the case and which have no application to the facts before the jury. 45 Similarly, counsel should never read a dissenting opinion during jury argument and the allowance of such over timely objection is clearly reversible error. 46

Perhaps the most frequent abuse of argument occurs when attorneys "travel outside the record" during the course of their jury summations. All too often, lawyers interject their personal beliefs, opinions and experiences into their presentation as they merrily proceed to testify on behalf of their client without benefit of either oath or cross examination. Usually, the opposing attorney stares at the ceiling, inspects his manicure or otherwise avoids the judge's eye rather than interposing a timely objection—probably because he anticipates embarking upon a similar voyage into uncharted seas not encompassed by the evidence. Such erroneous and prejudicial styles of arguing to the jury may well account for many incongruous verdicts which seemingly have no relationship to the competent evidence received during the trial. Such is also highly unethical. 47

44. Id. at 479-80, 53 S.E.2d 81-82.
46. Conn v. Railroad, 201 N.C. 157, 159 S.E. 331 (1931).
47. See Code of Professional Responsibility of the N.C. State Bar EC 7-

http://scholarship.law.campbell.edu/clr/vol8/iss2/4
Lawyers should also review N.C. Gen. Stat. § 15A-1230(a) for specific limitations imposed by the General Assembly upon the closing arguments of counsel in criminal matters. In the criminal area, grossly improper remarks by a lawyer during jury argument may also be punishable by contempt proceedings, as well as being unethical.\textsuperscript{48}

Justice Brogden, in \textit{Conn v. Railroad}, stated the rule as to the leeway to be given a lawyer's jury argument in this language:

[H]e may refer to well-known facts in history, literature, and science by way of illustration and ornament. He may argue matters of common knowledge, or matters of which the court will take judicial notice, and within the limits of the evidence the manner of presenting the case is left to his own judgment. He may indulge in impassioned bursts of oratory, or what he may consider oratory, so long as he introduces no facts not disclosed by the evidence. It is not impassioned oratory which the law condemns and discredits in the advocate, but the introduction of facts not disclosed by the evidence. It has been held that he may even shed tears during his argument, the only limitation on this right being that they must not be indulged in to such excess as to impede or delay the business of the court.\textsuperscript{49}

Opposing counsel should not hesitate to object to any improper argument in order to give the judge an opportunity to correct the transgression.\textsuperscript{50} Otherwise, the objection may be waived.\textsuperscript{51} It is the duty of the presiding judge both to sustain a proper objection and to immediately instruct the jury not to consider the improper remarks by counsel.\textsuperscript{52} Where the transgression is corrected by the court, any prejudicial effect is ordinarily obviated.\textsuperscript{53}

Where a gross impropriety occurs during closing argument by an attorney, it is proper for the judge to correct the abuse \textit{ex mero
If a party fails to object to a jury argument, the trial court may, in its discretion, correct improper arguments . . . . [W]e must decide whether the argument was so improper as to warrant the trial judge's intervention ex mero motu. 56

It is improper to categorize a party or witness in a trial in a manner calculated to prejudice the jury against him or it during argument.

Under our law it is the undoubted right of counsel to argue every phase of the case supported by the evidence without fear or favor, and to deduce from the evidence offered all reasonable inference which may flow therefrom. The testimony and conduct of witnesses and parties must at all times be subject to such criticism and attack as the circumstances reasonably justify. However, the baiting and badgering of witnesses and parties ought not be permitted by the court. Parties come into court, as they have a right to do, to have controversies determined according to the orderly processes of the law, and witnesses are compelled to come to court whether they desire to do so or not. At all events, as long as they demean themselves in a courteous manner they are entitled to the same courtesy in the courthouse as would be accorded to a citizen in any other business transaction.

The general principle, established by many authorities, is to the effect that the comment of counsel upon the testimony and conduct of parties and witnesses "must be left, ordinarily, to the sound discretion of the judge who tries the case; and this Court will not review his discretion, unless it is apparent that the impropriety of counsel was gross and well calculated to prejudice the jury." [citing authority]. "A party, or witness, should not be subjected unjustly to abuse, which is calculated to degrade him or to bring him into ridicule or contempt and when this occurs he is clearly entitled to the protection of the court, when he asks for it in proper time, and sometimes, perhaps, when he does not, the court should extend it voluntarily, in the exercise of its judgment and, if necessary, in order that the trial may proceed fairly and impartially and lead to a just result." 57

Nevertheless, when no objection was interposed before verdict, former Justice Copeland perceived no gross error in the following language used by a prosecutor upon the guilt phase of a first degree murder trial:

You've got to understand the nature of the animal you're dealing with here. I'm no zoologist, but I don't know of a single living species on this planet that kills for pleasure. Tigers kill to eat, sharks kill to eat. Michael Pinch kills for pleasure. 58

Indeed, Judge Copeland held that, "[t]his uncomplimentary and disparaging characterization of defendant was entirely warranted by the evidence." 59 During the sentencing phase of the same trial, the court found no error in the prosecutor's statements that defendant was "... not Jack the Ripper yet" and that defendant had a mind like a "cesspool." 60 The death sentence was affirmed.

A lawyer should never assert his opinion that a witness was lying during his testimony. 61 Counsel can argue to the jury that they should not believe what a witness has said. 62

Counsel should not argue matters which have been stricken from the record by the court during the trial. 63 Similarly counsel cannot exhibit to the jury items or exhibits which have not been offered into evidence. 64 However, in a civil action, counsel can read to the jury portions of the final pleadings which have not been introduced into evidence. 65 It is always improper for counsel to make any argument even indirectly referring to the possibility of insurance coverage or lack of insurance coverage in a civil case. 66 An attorney can never read the criminal indictment to the jury during argument or at any other time during the trial. 67

The supreme court has expressly warned lawyers against mak-
ing uncomplimentary references to opposing counsel during argument. All personalities between the opposing attorneys should be scrupulously avoided.68

[T]he liberty of argument must not degenerate into license, and the trial judge should not permit counsel . . . to indulge in vulgarities; he should, therefore, refrain from abusive, vituperative, and opprobrious language, or from indulging in invectives, or from making any statements or reflections which have no place in argument but are only calculated to cause prejudice.69

The order of jury arguments is generally determined by the trial judge under the provisions of Rule 10,70 which reads as follows:

In all cases, civil or criminal, if no evidence is introduced by the defendant, the right to open and close argument to the jury shall belong to him. If a question arises as to whether the plaintiff or the defendant has the final argument to the jury, the court shall decide who is so entitled and its decision shall be final.

In a criminal case, where there are multiple defendants, if any defendant introduces evidence, the closing argument shall belong to the solicitor.

In a civil case where there are multiple defendants, if any defendant introduces evidence, the closing arguments shall belong to the plaintiff, unless the trial judge shall order otherwise.71

In effect, the order of jury argument is determined by the trial court pursuant to Rule 10 and the decision of the judge is final.72 The trial judge is not required to rule upon the sequence of arguments until the close of the evidence.73

The only exception to the specific order of argument set out in Rule 10 is stated in N.C. Gen. Stat. § 15A-2000(a)(4) which provides that the defendant's counsel shall always have the last argument during the sentencing portion of a capital trial; however, the defense is not entitled under this statute to the opening sentencing argument.74

71. Id.
When there are several defendants and only one of them offers evidence, the closing argument belongs to the prosecutor. This is true even when the cases have been consolidated over the non-testifying defendant's objection. Where the defendant calls a witness who refuses to testify (and thus incriminate himself) and the defendant gains no helpful information from such witness, the State is still allowed the concluding jury argument.

If a defendant offers evidence during the State's case in chief by introducing an exhibit identified by the State's witness, the defendant loses the final argument.

A trial judge does not commit error when he grants a civil defendant the right to both open and close the final jury argument in the situation where the defendant was called to testify by the plaintiff as an adverse witness, but offered no evidence of his own.

Many astute observers of the adversary justice system have reached the startling conclusion that more cases are lost during final jury arguments than are won. Other observers counter that a well-prepared lawyer can materially advance his client's cause by his final summation. The author of this article stands in the latter camp. While remaining totally within the confines of the rules and limitations regarding the conduct of counsel during arguments set out above, a thoughtful attorney can clarify the issues for the jury, can logically marshall the evidence supporting his theory of the case from the morass of testimony and can emphasize the appropriate law to be applied to the issues. Counsel does not do this by engaging in bombast, vilification, great pretense of emotion or by displaying the broadness of his vocabulary. The most effective advocates are those lawyers who treat their opponents with genuine courtesy and consideration, possess genuine moral conviction as to the rightness of their cause and use language susceptible of understanding by the average juror. Abraham Lincoln is quoted as saying that, "A lawyer's time and knowledge are his only stock in trade." In making closing jury arguments, the lawyer is a salesman whose only product consists of the facts of the lawsuit under the appropriate law. The convincing salesman closes the deal when the

76. Id.
jury renders a verdict in favor of his or her client.

**INSTRUCTIONS TO THE JURY**

Judge Robert L. McBride of the Court of Common Pleas of Montgomery County, Ohio, in his book, *The Art of Instructing The Jury*, sets the stage for the jury charge as follows:

Counsel have their last opportunity to clear up confusion in final arguments. Counsel may help, and some do, but their energy is directed toward a favorable verdict or, failing in that, to create error upon which to avoid an unfavorable verdict. Regardless of how well or how poorly counsel perform, the stage is set for the final act when the judge undertakes the key role in the trial.

The jury files back into the box. It leans forward in anticipation of receiving guidance that will provide a reasonable and just verdict.

Counsel lean back, hopeful of victory, but searching for error that may provide an excuse for appeal.

How well justice is administered is determined by how well the judge performs his role of outlining the issues precisely and explaining the law accurately within the comprehension of the jury. Like a surgeon who makes an incision to find an unexpected condition, the judge must cut through the facts and select only the determinative issues presented by the evidence. However, unlike the surgeon, the judge must tell the jury what he finds and then explain to the jury how it must complete the operation by rendering justice by a logical and intellectual process with which the jurors are not familiar.

Justice is determined by the skill of the trial judge in preparing the jury for its sovereign function in this judicial operation. If he is a master—or should I say doctor—of justice he meets his responsibility. If he is just another civil servant who walks the stage, his mission fails, the climactic moment passes and the jury wanders into the jury room, disappointed and confused, to gamble on the rights of the parties.80

It is the principle business of the trial judge to reduce the language of the law expressed by statute and appellate decisions to simple and concise English, i.e. to take high sounding and general pronouncements of law and translate them into the language of the layman. This is not a task to be hastily undertaken or lightly considered.

The law prescribes and defines this duty. It declares that a judge in delivering his charge to the jury shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon.

Our jurors are plain, practical men, who, to their credit be it said, most uniformly have intelligence and judgment sufficient to deal with the facts of a case, but they are not versed in the law, and must look to the presiding judge for the principles of law governing the case, and for his aid in making their application to the facts. 81

The 1985 General Assembly enacted House Bill 698, codified as Chapter 537, 1985 Session Laws. 82 This legislation (affectionately known as the Trial Judge's Relief Act of 1985) completely rewrote N.C. Gen. Stat. § 1A-1 Rule 51(a) and § 15A-1232 so as to relieve the trial judges of the former statutory requirements that they state, summarize or recapitulate the evidence and explain the application of the law to the evidence.

This legislative act constitutes a major modification to our previous North Carolina law which required the trial judge to perform two positive acts: (a) declare and explain the law arising on the evidence presented in the case; and (b) review such evidence to the extent necessary to explain the application of that law to the particular facts and circumstances of the case. 83

It is not difficult to eliminate a detailed evidence recapitulation from the jury charge. It is considerably more difficult to undertake an instruction in a complex civil or criminal action without explaining the application of the law to the evidence before the jury.

Even with the changes wrought by H.B. 698, certain appellate decisions give substantial guidance to the trial judge in drafting jury instructions. The jury charge must encompass all substantial features of the case arising on the evidence, even without a prayer for special instructions. 84 It is error for the court to charge the jury upon an abstract principle of the law which is not presented by

allegations and evidence.\textsuperscript{65}

Both N.C. Gen. Stat. § 15A-1232 and Rule 51(a), as amended, continue to prohibit the judge from expressing any opinion, either directly or by implication, upon the facts in evidence.

As a result of his exalted station and the respect for his opinion which jurors are presumed to hold, the trial judge must abstain from conduct or language which tends to discredit or prejudice the accused or his cause. It is of no consequence whether the opinion of the trial judge is conveyed to the jury directly or indirectly . . . .\textsuperscript{66}

The slightest intimation from the judge as to the weight, importance or effect of the evidence has great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial. [citing authority]. Every suitor is entitled by law to have his cause considered with the 'cold neutrality of the impartial judge' and the equally unbiased mind of properly instructed jury. This right can neither be denied or abridged.\textsuperscript{67}

In reality the only purpose of the jury charge is to aid the jury to clearly understand the case and to arrive at a correct verdict.\textsuperscript{68}

In essence, the artistry of the trial judge is to outline the issues to be decided by the jury and fairly and impartially relate the correct substantive law pertinent to such issues to the jury. In the words of Judge McBride, "Instructions represent the frame for the complete picture, pieced together from the opening to the closing of the trial. Understanding and comprehension requires exposure to clear facts and precise law."\textsuperscript{88} When the instructions of the court are appropriately phrased the jury will understand them and experience the moral obligation, so essential to our adversary jury system, to reach a fair and just verdict.


\textsuperscript{86} State v. Whitted, 38 N.C. App. 603, 605, 248 S.E.2d 442, 444 (1978).

\textsuperscript{87} Upchurch v. Funeral Home, 263 N.C. 560, 567, 140 S.E.2d 17, 24 (1965).


\textsuperscript{89} R. McBride, supra note 12, at 37.