

Table of Contents

Volume 1

PART I. ARRAIGNMENT AND BAIL

CHAPTER 1. INITIAL APPEARANCE

- § 1:1 Introduction
- § 1:2 Initial appearance—Federal courts
- § 1:3 —State courts
- § 1:4 Preliminary hearing—Federal courts—Nature of hearing
- § 1:5 ——Timing of hearing
- § 1:6 ——Purpose of hearing
- § 1:7 ——Appeal
- § 1:8 —State
- § 1:9 Tactical considerations

CHAPTER 2. BAIL AND PRETRIAL RELEASE

- § 2:1 Introduction
- § 2:2 Pretrial release standards
- § 2:3 —Risk of flight
- § 2:4 —Dangerousness
- § 2:5 Factors relevant to pretrial release
- § 2:6 —Nature and circumstances of the crime
- § 2:7 —Weight of evidence
- § 2:8 —Prior record, conduct while on release
- § 2:9 —History and characteristics of accused
- § 2:10 —Drug and alcohol abuse
- § 2:11 —Exceptional conditions
- § 2:12 Conditions placed on release—Financial conditions
- § 2:13 —Stay-away orders
- § 2:14 —Substance abuse programs
- § 2:15 —Supervised release
- § 2:16 —Restricting firearm possession
- § 2:17 Preventive detention—Procedure
- § 2:18 —Brutus hearing
- § 2:19 —Detention and release orders
- § 2:20 —Bases for challenge
- § 2:21 —Violation of conditions of release
- § 2:22 Bail pending appeal—Federal Act
- § 2:23 —State practice
- § 2:24 —Equitable considerations—Short sentences

CHAPTER 3. COMPETENCY

- § 3:1 Introduction
- § 3:2 Standard to determine competency
- § 3:3 Strategic concerns—Whether to raise issue
- § 3:4 —Alternatives to raising issue
- § 3:5 Competency procedure—Evaluation
- § 3:6 —Standard of proof

- § 3:7 —Counsel's evaluation
- § 3:8 —Self-represented defendants
- § 3:9 ——Caselaw illustrations
- § 3:10 Confinement period—Statutory mandate
- § 3:11 —Periodic review
- § 3:12 Retroactive/retrospective competency determinations
- § 3:13 Effects of particular conditions—Mental impairment/intellectual disability
- § 3:14 —Suicide attempts
- § 3:15 —Combination of handicaps
- § 3:16 —Schizophrenia
- § 3:17 —Forced medication of defendant
- § 3:18 ——Caselaw illustrations
- § 3:19 —Amnesia
- § 3:20 —Drug abuse
- § 3:21 Competency to waive rights—Standard
- § 3:22 —Waiver of insanity defense

CHAPTER 4. PRACTICE AIDS

- § 4:1 Emergency motion for revocation of pre-trial detention and incorporated memorandum of fact and law
- § 4:2 Motion to review conditions of release
- § 4:3 Competency hearing

PART II. INVESTIGATION

CHAPTER 5. INITIAL INTERVIEW

- § 5:1 Introduction
- § 5:2 Cellblock interview
- § 5:3 Special problems
- § 5:4 Full interview—Goals
- § 5:5 —Factual information
- § 5:6 —Statements
- § 5:7 —Fees
- § 5:8 The client's homework
- § 5:9 Subsequent interviews
- § 5:10 Surrender

CHAPTER 6. PROTECTING YOURSELF AGAINST INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

- § 6:1 Introduction
- § 6:2 The *Strickland* standard
- § 6:3 Procedure for bringing ineffective assistance of counsel claim
- § 6:4 Procedurally defaulted claims of ineffective assistance of counsel
- § 6:5 Pre-trial failure to investigate
- § 6:6 Obligations during the plea bargaining process
- § 6:7 —Duty to communicate offers and give advice
- § 6:8 —Timely communication
- § 6:9 —Negotiation and consideration of possibility of plea
- § 6:10 —Prejudice standard for errors committed during the plea negotiation and acceptance process
- § 6:11 ——Proof of prejudice
- § 6:12 —Inclusion of waiver of ineffective assistance claim
- § 6:13 Trial errors—Presenting a guilt-based defense
- § 6:14 —Deciding whether to call fact and character witnesses
- § 6:15 —Failure to object to prosecutor's closing statement

TABLE OF CONTENTS

- § 6:16 —Advice about the decision to testify
- § 6:17 —Challenging jury instructions
- § 6:18 —Use of stun belts
- § 6:19 —Leaving the courtroom during trial
- § 6:20 Mentally challenged clients
- § 6:21 —Competence
- § 6:22 —Mentally impaired client who seeks *pro se* status
- § 6:23 —Waiving an insanity defense
- § 6:24 Death penalty cases
- § 6:25 —Investigation
- § 6:26 —Requesting investigative or expert services
- § 6:27 —Failure to use experts
- § 6:28 —Failure to use psychological experts
- § 6:29 —Wrongful use of experts
- § 6:30 —Failure to present mitigation evidence
- § 6:31 Malpractice actions

CHAPTER 7. AVOIDING CONFLICTS OF INTEREST

- § 7:1 Introduction
- § 7:2 Standard of review
- § 7:3 Objection to representation
- § 7:4 Failure to object to conflict
- § 7:5 Actual conflicts
- § 7:6 Adverse effect
- § 7:7 Multiple representation
- § 7:8 Successive representation
- § 7:9 Conflicts arising from lawyer's professional or personal relationships—Public defender organizations
- § 7:10 —Business relationships
- § 7:11 —Partnerships and office sharing
- § 7:12 —Lawyers' personal lives
- § 7:13 Attorneys accused of misconduct—Attorney under investigation
- § 7:14 —Client complaints
- § 7:15 —Suspension from practice: Effect on subsequent cases
- § 7:16 ——Substantive/technical distinction

CHAPTER 8. CLIENT PERJURY

- § 8:1 Introduction
- § 8:2 Definition of perjury—Language of rules
- § 8:3 —Materiality
- § 8:4 Lawyer's knowledge—Degree of certainty
- § 8:5 ——Caselaw illustrations
- § 8:6 —Prospective perjury
- § 8:7 —Duty to investigate
- § 8:8 —Reasonable belief
- § 8:9 Remonstration—Future perjury
- § 8:10 —Past perjury
- § 8:11 Criminal cases—Prospective perjury—Supreme Court
- § 8:12 ——Constitutional considerations
- § 8:13 ——Right to effective assistance of counsel
- § 8:14 ——Criminal defendant's right to testify
- § 8:15 ——Privilege against self-incrimination
- § 8:16 ——Need for hearing
- § 8:17 ——Witnesses
- § 8:18 Withdrawal—Factors
- § 8:19 —Mandatory

- § 8:20 —Disclosure of reasons
- § 8:21 Approaches if withdrawal is denied
- § 8:22 —Disclosure
- § 8:23 ——Candor v. confidentiality
- § 8:24 ——Criticism of disclosure
- § 8:25 —Narrative
- § 8:26 ——Caselaw discussions
- § 8:27 ——Criticism of narrative
- § 8:28 —Full representation
- § 8:29 —Civil analysis/ABA approach
- § 8:30 Past perjury
- § 8:31 —Disclosure
- § 8:32 Surprise perjury
- § 8:33 Closing argument
- § 8:34 Termination of duty

CHAPTER 9. FACT WITNESSES

- § 9:1 Introduction
- § 9:2 The process of investigation—Who should do the investigation
- § 9:3 —Investigators for indigent defendants
- § 9:4 —Choosing an investigator
- § 9:5 —Timing and components of the investigation
- § 9:6 Approaching witnesses
- § 9:7 —Witnesses clearly allied with government
- § 9:8 —Codefendants, witnesses with self-incrimination problems
- § 9:9 —Neutral and professional witnesses
- § 9:10 Unnamed and unknown eyewitnesses—Leads to witnesses
- § 9:11 —Witnesses whose location is unknown
- § 9:12 Interviewing witnesses—Approach
- § 9:13 —Form of statement
- § 9:14 —Negative statements
- § 9:15 —Use of subterfuge
- § 9:16 —Interviewing witnesses separately
- § 9:17 —Keeping track of witnesses
- § 9:18 Witness tampering—Breadth of statute
- § 9:19 —Misleading conduct
- § 9:20 —Misdemeanor penalties
- § 9:21 —Affirmative defense
- § 9:22 —Additional provisions

CHAPTER 10. DOCUMENTS AND EXPERTS

- § 10:1 Introduction
- § 10:2 Sources of information—Official reports and records
- § 10:3 —Media coverage
- § 10:4 —Other proceedings
- § 10:5 —Hospital, school, employment, and military records
- § 10:6 —Scientific analyses
- § 10:7 Use of an expert
- § 10:8 Finding the right expert
- § 10:9 Experts for indigents
- § 10:10 —Constitutional right
- § 10:11 —State constitutional rights
- § 10:12 —Statutory right
- § 10:13 —“Necessary” defense expert
- § 10:14 —Timing of a motion for expert assistance or funds to obtain expert assistance
- § 10:15 —Components of a successful motion for public funding of experts

TABLE OF CONTENTS

- § 10:16 —Information to include in motion and supporting papers
- § 10:17 —*Ex parte* nature of motion
- § 10:18 —Defense hurdles

CHAPTER 11. JOINT DEFENSE AGREEMENTS

- § 11:1 Introduction
- § 11:2 Factual context
- § 11:3 Joint defense privilege—Origin and development
- § 11:4 —Basis and rationale
- § 11:5 —Confidentiality
- § 11:6 —Common interest
- § 11:7 —Parties and documents protected
- § 11:8 —Duration and waiver
- § 11:9 Joint defense agreements—Advantages
- § 11:10 —Written versus oral agreement
- § 11:11 —Components of an agreement
- § 11:12 Information exchange
- § 11:13 Internal investigations
- § 11:14 Cooperating witnesses; withdrawal
- § 11:15 Cooperating witnesses; Withdrawal—Protective provisions
- § 11:16 Government objections and challenges—Reasons
- § 11:17 —Requests for disclosure—Subpoena
- § 11:18 —Conflict of interest challenges
- § 11:19 ——*Bicoastal* inquiry
- § 11:20 ——*Bicoastal* ruling
- § 11:21 ——*Anderson* motion
- § 11:22 ——*Anderson* ruling
- § 11:23 ——Aftermath of *Anderson*
- § 11:24 —Conditions on immunity grants
- § 11:25 State law

CHAPTER 12. PRACTICE AIDS

- § 12:1 Initial interview checklist
- § 12:2 Ethical rules relating to client perjury
- § 12:3 Notice to prospective witnesses
- § 12:4 Requests for expert witnesses
- § 12:5 Obtaining funds for investigation
- § 12:6 Expert's checklist for attorneys
- § 12:7 Sample joint defense agreements

PART III. GRAND JURY

CHAPTER 13. CHALLENGES

- § 13:1 Introduction
- § 13:2 Composition and conduct
- § 13:3 Effect of irregularities—*U.S. v. Mechanik*
- § 13:4 —*Mechanik* problems
- § 13:5 —*Bank of Nova Scotia v. U.S.*
- § 13:6 —*Midland Asphalt Corp. v. U.S.*
- § 13:7 Remedy: Press for discovery
- § 13:8 Fair cross-section challenge to array
- § 13:9 Fair cross-section challenge: Standing
- § 13:10 Fair cross-section challenge: Showing of underrepresentation
- § 13:11 Challenge to particular grand jury
- § 13:12 Grand jury witnesses: Obligation to appear

- § 13:13 Grand jury witnesses: Privileges recognized
- § 13:14 Grand jury witnesses: Privileges not recognized
- § 13:15 Illegally obtained evidence
- § 13:16 Attorney subpoenas: Privileges
- § 13:17 Attorney subpoenas: Relevance and need test
- § 13:18 Attorney subpoenas: Abuse of process
- § 13:19 Attorney subpoenas: Controls—Court recognition of need
- § 13:20 —Justice Department guidelines
- § 13:21 —Ethics rules
- § 13:22 Attorney subpoenas: Motions to quash
- § 13:23 Grand jury secrecy—Rules
- § 13:24 —Disclosure by witnesses
- § 13:25 —Disclosure to other government agencies or employees
- § 13:26 —Other disclosures
- § 13:27 —Caselaw illustrations

CHAPTER 14. CHARGING DOCUMENTS

- § 14:1 Introduction
- § 14:2 General principles
- § 14:3 Formal requisites—Statement of facts
- § 14:4 —Exceptions essential to definition
- § 14:5 —Aggravating facts v. historical facts
- § 14:6 —Grades of crime
- § 14:7 Duplicity
- § 14:8 Multiplicity
- § 14:9 Superseding indictments: Legitimate purposes
- § 14:10 Superseding indictments: Vindictive purposes
- § 14:11 Superseding indictments: Additional counts
- § 14:12 Superseding indictments: Reindictment after dismissal or trial
- § 14:13 Superseding indictments: Timing of the indictment
- § 14:14 Superseding indictments: Speedy trial effects
- § 14:15 Amendment and variance

CHAPTER 15. FUNCTION AND OPERATION

- § 15:1 Introduction
- § 15:2 Function of the grand jury
- § 15:3 Operation of grand jury
- § 15:4 Role of prosecutor
- § 15:5 Successive grand juries
- § 15:6 Citizen's right to present evidence
- § 15:7 Defendant's right to present exculpatory evidence
- § 15:8 Attorneys in the grand jury room
- § 15:9 Prosecutor's duty to present exculpatory evidence
- § 15:10 General prosecutorial misconduct
- § 15:11 Strategy

CHAPTER 16. PARALLEL PROCEEDINGS

- § 16:1 Introduction
- § 16:2 Defining parallel proceedings
- § 16:3 Judicial tolerance of parallel proceedings—Unfair hardship: *U.S. v. Kordel*
- § 16:4 —Administrative subpoenas
- § 16:5 —Joint investigations
- § 16:6 —Grand jury secrecy
- § 16:7 Effects—Double jeopardy
- § 16:8 —Excessive fines
- § 16:9 —Collateral estoppel and res judicata

TABLE OF CONTENTS

- § 16:10 The Fifth Amendment—The target's Hobson's Choice
- § 16:11 —Adverse consequences
- § 16:12 —Withdrawal
- § 16:13 Stays and other alternatives—Different discovery provisions
- § 16:14 —Defendant's request for a stay
- § 16:15 —Post-indictment stay
- § 16:16 —Government's request for a stay
- § 16:17 —Protective orders
- § 16:18 —Immunity
- § 16:19 —Agency protocol
- § 16:20 Cooperation—Internal investigations
- § 16:21 —Federal sentencing guidelines
- § 16:22 —Agency requirements
- § 16:23 Settlements

CHAPTER 17. PRACTICE AIDS

- § 17:1 Justice Department guidelines regarding attorney subpoenas
- § 17:2 Motion to dismiss grand jury based on systematic exclusion
- § 17:3 Motion to dismiss indictment based on prosecutorial misconduct
- § 17:4 Plea agreement

PART IV. DISCOVERY

CHAPTER 18. RULES AND STATUTES

- § 18:1 Introduction
- § 18:2 Informal discovery by defense
- § 18:3 Bill of particulars
- § 18:4 —Drafting the motion
- § 18:5 —Shifts in theories or facts
- § 18:6 “*Rule 16*” discovery
- § 18:7 —Possession of prosecution
- § 18:8 —Defendant's statements
- § 18:9 ——Recorded or written statements
- § 18:10 ——Unrecorded oral statements
- § 18:11 ——Grand jury testimony
- § 18:12 —Codefendant's statements
- § 18:13 —Defendant's prior record
- § 18:14 —Documents/tangible objects
- § 18:15 ——Examinations, tests, and reports
- § 18:16 ——Police notes and memoranda
- § 18:17 ——Identification evidence
- § 18:18 ——Exculpatory information
- § 18:19 ——Expert witnesses
- § 18:20 ——Information regarding witnesses
- § 18:21 ——Court-ordered witness disclosure
- § 18:22 Informant witnesses
- § 18:23 “*Rule 16*” discovery—Continuing duty to disclose
- § 18:24 Open file discovery; “Document dump”
- § 18:25 Discovery by prosecutor—Discovery rules
- § 18:26 —“Reverse” Jencks
- § 18:27 —Notice of defense
- § 18:28 ——Alibi
- § 18:29 ——Insanity
- § 18:30 ——Public authority
- § 18:31 ——Battered spouse syndrome

- § 18:32 —Investigative identification
- § 18:33 Subpoena
- § 18:34 Discovery depositions
- § 18:35 Privileged information
- § 18:36 —Informants
- § 18:37 —Observation post privilege
- § 18:38 —Grand jury
- § 18:39 Court practice
- § 18:40 Sanctions for non-compliance
- § 18:41 —Order to comply
- § 18:42 —Continuance or recess
- § 18:43 —Exclusion
- § 18:44 ——Defense witnesses
- § 18:45 —Mistrial/dismissal
- § 18:46 —Jury instruction
- § 18:47 —Contempt
- § 18:48 —Other
- § 18:49 Tracking discovery
- § 18:50 —Document management
- § 18:51 —Security
- § 18:52 —Electronically stored information

CHAPTER 19. EXCULPATORY MATERIAL

- § 19:1 Introduction
- § 19:2 Background
- § 19:3 Materiality—*Brady v. Maryland*
- § 19:4 —*U.S. v. Agurs*
- § 19:5 —*U.S. v. Bagley*
- § 19:6 —*Kyles v. Whitley*
- § 19:7 —*Strickler v. Greene*
- § 19:8 —Recent cases
- § 19:9 Other approaches to materiality
- § 19:10 Examples of material information—Guilt of another
- § 19:11 —Identification issues
- § 19:12 —Impeachment of government witnesses
- § 19:13 —Corroboration of defense theory
- § 19:14 —Scientific evidence
- § 19:15 —Prior psychiatric and medical history
- § 19:16 —Application to suppression hearings
- § 19:17 —Police investigation
- § 19:18 —Effect on defense strategy
- § 19:19 Limitations on disclosure
- § 19:20 Exculpatory evidence
- § 19:21 Knowledge—Prosecutor's responsibility
- § 19:22 —Timing of disclosure
- § 19:23 Practical tips
- § 19:24 Destruction/failure to preserve—Bad faith requirement
- § 19:25 —*Youngblood* standard satisfied
- § 19:26 —*Youngblood* inapplicable or distinguishable
- § 19:27 —Requisite showing under *Youngblood*
- § 19:28 —Sanctions for destruction
- § 19:29 —State constitutional analysis
- § 19:30 Post-conviction discovery
- § 19:31 —Federal rules
- § 19:32 —State rules and decisions

CHAPTER 20. JENCKS STATEMENTS

- § 20:1 Introduction
- § 20:2 Background
- § 20:3 Elements—Witness
- § 20:4 —Statement
- § 20:5 ——Signed, adopted, or approved
- § 20:6 ——Contemporaneous verbatim recital
- § 20:7 ——Tape recordings
- § 20:8 ——Officer’s notes
- § 20:9 ——Prior grand jury testimony
- § 20:10 —Possession
- § 20:11 ——Illustrations
- § 20:12 —Relates to testimony
- § 20:13 Practice and procedure—Generating Jencks and reverse Jencks
- § 20:14 —Laying a foundation
- § 20:15 —Request
- § 20:16 —Timeliness
- § 20:17 —Relation to other discovery
- § 20:18 —Reciprocal discovery
- § 20:19 —Examination
- § 20:20 Sanctions
- § 20:21 —Mistrial
- § 20:22 —Striking testimony
- § 20:23 —Missing evidence instruction
- § 20:24 —Prejudice
- § 20:25 —Good faith

CHAPTER 21. FREEDOM OF INFORMATION ACT, CLASSIFIED INFORMATION PROCEDURES ACT, PRIVACY ACT

- § 21:1 Introduction
- § 21:2 Use of FOIA for discovery—Overview
- § 21:3 —What to seek—And why
- § 21:4 —Effect of law enforcement exemption
- § 21:5 —Use at pre-indictment phase
- § 21:6 —Use in multi-document cases
- § 21:7 —Use in surveillance cases
- § 21:8 —Use in other cases
- § 21:9 —Interplay with criminal case
- § 21:10 FOIA in the post-conviction setting
- § 21:11 Other uses
- § 21:12 Agencies and records—Covered agencies
- § 21:13 —Disclosable records
- § 21:14 —Possession and control
- § 21:15 Exemptions
- § 21:16 Exemptions—Exemption 1: Classified records
- § 21:17 Exemptions—Exemption 2: Internal personnel rules
- § 21:18 Exemptions—Exemption 3: Statutory protection
- § 21:19 Exemptions—Exemption 4: Business data and secrets
- § 21:20 —Exemption 5: Agency memoranda
- § 21:21 —Exemption 6: Personnel, medical, similar files
- § 21:22 —Exemption 7: Law enforcement records—Harm from disclosure
- § 21:23 ——Threshold requirement for coverage
- § 21:24 ——Interference with enforcement proceedings
- § 21:25 ——Deprivation of fair trial

- § 21:26 ——Unwarranted invasion of privacy
- § 21:27 ——Disclosure of confidential source or confidential information
- § 21:28 ——Disclosure of techniques and guidelines for investigations or prosecutions
- § 21:29 ——Endangerment of life or safety
- § 21:30 —Exemption 8: Financial institutions
- § 21:31 —Exemption 9: Wells
- § 21:32 Non-acknowledgement of records
- § 21:33 Agency regulations
- § 21:34 Disclosure requests—Requirements
- § 21:35 —Reasonable description of records
- § 21:36 —Format requests
- § 21:37 —Fees
- § 21:38 Agency response and administrative appeal
- § 21:39 The problem of delay
- § 21:40 Judicial actions to obtain *FOIA* disclosure—Statutory provision
- § 21:41 —Standard of review
- § 21:42 —Vaughn index
- § 21:43 —In camera review
- § 21:44 —Fee awards
- § 21:45 Limiting disclosure of confidential information under *FOIA*
- § 21:46 —Provide access to documents rather than control
- § 21:47 —Grand jury subpoena
- § 21:48 —Protective submissions and predisclosure notification
- § 21:49 —Reverse *FOIA* actions
- § 21:50 —Privacy Act
- § 21:51 Classified Information Procedures Act (CIPA)—Discovery of classified documents
- § 21:52 —Denial or restriction of discovery
- § 21:53 —Admissibility of classified documents
- § 21:54 —Security procedures
- § 21:55 Privacy Act
- § 21:56 —Requests for access; Civil actions
- § 21:57 —Exemptions
- § 21:58 State information laws
- § 21:59 Resources

CHAPTER 22. PRACTICE AIDS

- § 22:1 Checklist of motions for discovery
- § 22:2 Preservation of evidence request
- § 22:3 Requests for particulars
- § 22:4 Motion for issuance of subpoena duces tecum
- § 22:5 Motion seeking issuance of third party subpoena
- § 22:6 Motion seeking disclosure of government 17(c) subpoenas
- § 22:7 Ex parte motion for ballistic examination and points and authorities in support thereof
- § 22:8 Request for exculpatory material
- § 22:9 Freedom of Information Act practice aids

PART V. MOTIONS

CHAPTER 23. THE WARRANT REQUIREMENT

- § 23:1 Introduction
- § 23:2 Procedural matters—Federal search warrants
- § 23:3 ——Delayed notice
- § 23:4 ——Types of property which may be seized
- § 23:5 —Motion to suppress

TABLE OF CONTENTS

§ 23:6	— — Particularity
§ 23:7	— — Standing—Automatic standing
§ 23:8	— — — Ownership interest
§ 23:9	— — — Guests
§ 23:10	— — — Passengers
§ 23:11	— — — Vessels
§ 23:12	— — — Place of employment
§ 23:13	— — — Personal property/records
§ 23:14	— — Suppression hearing
§ 23:15	— — Burden of proof
§ 23:16	Meeting the warrant requirement—Fourth Amendment requirements
§ 23:17	— — Attached affidavit
§ 23:18	— — Particularity—Prohibition against rummaging
§ 23:19	— — Contraband
§ 23:20	— — Persons
§ 23:21	— — Instrumentalities of crime
§ 23:22	— — Place
§ 23:23	— — Business records
§ 23:24	— — Other objects
§ 23:25	— — Oath or affirmation
§ 23:26	— — Telephonic search warrants
§ 23:27	— — Statutory challenges
§ 23:28	Challenges to probable cause—Staleness
§ 23:29	— — <i>Franks v. Delaware</i> : False information in affidavit
§ 23:30	— — Reckless disregard
§ 23:31	— — Negligent error
§ 23:32	— — Literally true
§ 23:33	— — Outright lie
§ 23:34	— — False statements must be material
§ 23:35	— — Remedy
§ 23:36	— — Information from a third party—Aguilar/Spinelli two-pronged test
§ 23:37	— — — Veracity—Firsthand information
§ 23:38	— — — Informants
§ 23:39	— — — Independent corroboration
§ 23:40	— — — Dogs
§ 23:41	— — — Trash searches
§ 23:42	— — — Basis of knowledge
§ 23:43	— — Totality of circumstances: Gates
§ 23:44	— — Taint: Fruit of the poisonous tree
§ 23:45	Good faith— <i>U.S. v. Leon</i>
§ 23:46	— — Motive is deterrence
§ 23:47	— — Good faith extended beyond warrants
§ 23:48	— — Exceptions to <i>Leon</i> —Complete lack of probable cause
§ 23:49	— — — Basis to believe
§ 23:50	— — — Informant's reliability
§ 23:51	— — — False information in affidavit
§ 23:52	— — Facial deficiencies
§ 23:53	— — — Technical errors
§ 23:54	— — — Descriptions of evidence sought
§ 23:55	— — — Description of target location
§ 23:56	— — — Defects in executing the warrant
§ 23:57	Independent state grounds
§ 23:58	Anticipatory search warrants

CHAPTER 24. EXECUTION OF THE WARRANT

§ 24:1	Introduction
--------	--------------

- § 24:2 “Ministerial” violations—Rules
- § 24:3 —Delay in execution
- § 24:4 —Display and delivery; inventory and return
- § 24:5 —Surreptitious search warrants (“sneak and peek”)
- § 24:6 Substantial violations—Limits on searches
- § 24:7 —Nighttime searches
- § 24:8 —Knock and announce
- § 24:9 —Knock-and-announce exceptions—Scope, standing
- § 24:10 —Officer safety
- § 24:11 — — Destruction of evidence
- § 24:12 — — Drug exception
- § 24:13 — — Useless gesture
- § 24:14 — — Commercial businesses
- § 24:15 — — Open doors
- § 24:16 — — Ruse/consent
- § 24:17 —Knock and announce—Timing of entry
- § 24:18 —Knock and announce v. exclusionary rule
- § 24:19 — — Exceptions to the exclusionary rule
- § 24:20 — — — Inevitable discovery doctrine
- § 24:21 — — — Independent source doctrine
- § 24:22 —Good faith applicable?
- § 24:23 — — No knock warrant
- § 24:24 —The knock-and-talk rule
- § 24:25 —Permissible scope of search
- § 24:26 — — Caselaw illustrations
- § 24:27 Privileged information
- § 24:28 Media
- § 24:29 Visitors
- § 24:30 Occupant’s reentry into home
- § 24:31 Selective timing of execution
- § 24:32 Duration, scope of search
- § 24:33 Use of force
- § 24:34 Plain view—Prerequisites
- § 24:35 —Justification
- § 24:36 —“Immediately apparent”
- § 24:37 —Scope of “immediately apparent”

CHAPTER 25. EXCEPTIONS TO THE WARRANT REQUIREMENT

- § 25:1 Introduction
- § 25:2 Exceptions
- § 25:3 Stop and identify: *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*
- § 25:4 Stop and frisk: *Terry v. Ohio*
- § 25:5 —Anonymous tips
- § 25:6 Arrests—Definition of “arrest”
- § 25:7 —Definition of “arrest”—Relevant factors
- § 25:8 —*Pursuit v. seizure*
- § 25:9 —Misdemeanors
- § 25:10 —Felonies
- § 25:11 —Homes
- § 25:12 Probable cause to arrest
- § 25:13 —Nature of the area—High incidence of crime
- § 25:14 — — Public areas and probable cause
- § 25:15 —Proximity to crime
- § 25:16 —Time of day

TABLE OF CONTENTS

§ 25:17	—Association with suspicious person
§ 25:18	—Street exchange
§ 25:19	—Furtive gestures
§ 25:20	—Flight
§ 25:21	—Response to questions
§ 25:22	—Experience of officer
§ 25:23	— —Officer's deductions sufficient
§ 25:24	— —Officer's deductions insufficient
§ 25:25	— —Familiarity with contraband odors
§ 25:26	— —Impact of officer errors
§ 25:27	—Timing of probable cause and arrest
§ 25:28	Searches incident to arrest
§ 25:29	—The “arrest”
§ 25:30	—The criteria for search incident to arrest
§ 25:31	— —Brief delay
§ 25:32	— —Not “roughly” contemporaneous
§ 25:33	— —Can the search precede arrest?
§ 25:34	—Search of a person's clothes or possessions
§ 25:35	— —Defendant's ability to access contraband
§ 25:36	— —Bags, briefcases and containers
§ 25:37	— — —Time of arrest
§ 25:38	— — —Exclusive control of police when searched
§ 25:39	— — —Nature of container
§ 25:40	—Traffic-related stops
§ 25:41	—Nature of the offense irrelevant
§ 25:42	—Search of residences incident to arrest
§ 25:43	— —Re-entry into home
§ 25:44	— —Search found unlawful
§ 25:45	—Broader protections under state law
§ 25:46	—Protective sweep of residence
§ 25:47	—Pretext arrest
§ 25:48	Search during the arrest process—Booking
§ 25:49	— —Lawful arrest
§ 25:50	— —Standard, routine police procedures
§ 25:51	— — —Bad faith or investigative motive
§ 25:52	— — —Scope of the search
§ 25:53	— — —State law limits on searches
§ 25:54	—Body inspections incident to arrest—Probable cause
§ 25:55	— — —Exigent circumstances
§ 25:56	— — —Reasonable procedures
§ 25:57	— — —The <i>Winston</i> impact on reasonableness
§ 25:58	— — —Blood
§ 25:59	— — —Urine testing
§ 25:60	— — —Saliva sampling
§ 25:61	— — —DNA sampling
§ 25:62	— — —Procedures
§ 25:63	— — —Strip searches—Definitions
§ 25:64	— — — —Reasonableness of search
§ 25:65	— — — —Justification: Reasonable suspicion
§ 25:66	— — — —Manner of search
§ 25:67	— — — —The place of the search
§ 25:68	— — — —Stage in the arrest process
§ 25:69	— — — —State law considerations
§ 25:70	Abandonment
§ 25:71	—Voluntary abandonment
§ 25:72	—Garbage—Homes, businesses

- § 25:73 — — State constitutions
- § 25:74 Consent
- § 25:75 — Waiver of rights
- § 25:76 — — Objective or subjective test?
- § 25:77 — Voluntariness
- § 25:78 — — Knowledge of right to refuse consent
- § 25:79 — — Personal characteristics of defendant
- § 25:80 — — — Familial vulnerabilities
- § 25:81 — — — Cultural vulnerabilities
- § 25:82 — — — Effect of intoxicants
- § 25:83 — — — Awareness of constitutional rights
- § 25:84 — — Police coercion
- § 25:85 — — — Arrest or custody
- § 25:86 — — — Presence of weapons
- § 25:87 — — — Show of authority
- § 25:88 — — — False representations re: warrants
- § 25:89 — — Likelihood of contraband
- § 25:90 — — Suspect's cooperation
- § 25:91 — Police use of deceit or ruse
- § 25:92 — Implied consent
- § 25:93 — Third party consent—Actual and “apparent authority”
- § 25:94 — — “Actual authority” rule
- § 25:95 — — Spouses
- § 25:96 — — Parents and children
- § 25:97 — — One consents, one objects
- § 25:98 — Scope of consent
- § 25:99 — — Containers
- § 25:100 — — “Look around” searches; “Complete searches”
- § 25:101 — — Open-ended consent
- § 25:102 — — Consent in medical context
- § 25:103 — Consent voluntary despite illegal act: when is “taint” purged?
- § 25:104 — Withdrawal of consent
- § 25:105 Plain view—Prerequisites
- § 25:106 — — Lawful right of access
- § 25:107 — — “Immediately apparent”
- § 25:108 — Plain smell
- § 25:109 — Plain hearing
- § 25:110 — Plain touch
- § 25:111 Emergency
- § 25:112 — “Hot” pursuit
- § 25:113 — “Warm” pursuit
- § 25:114 — Destruction of evidence
- § 25:115 — Protection of property
- § 25:116 — Persons in danger
- § 25:117 Borders—Reach of exception
- § 25:118 — Roving border patrols
- § 25:119 — Open seas
- § 25:120 — Packages
- § 25:121 Airports
- § 25:122 Trains and buses
- § 25:123 Automobiles
- § 25:124 — The automobile exception
- § 25:125 — — Probable cause to search
- § 25:126 — — Exigent circumstances
- § 25:127 — — — Closed containers
- § 25:128 — — “Terry” automobile stops

TABLE OF CONTENTS

§ 25:129	—Automobile searches incident to arrest
§ 25:130	—Search “contemporaneous” with arrest
§ 25:131	—State courts’ treatment of <i>Belton</i>
§ 25:132	—Immediate control: effect of walking away
§ 25:133	—Scope of search
§ 25:134	—Containers
§ 25:135	—Standing to challenge search
§ 25:136	—Boats and other vehicles
§ 25:137	— <i>Belton</i> applied to non-automobile context
§ 25:138	—Traffic stops incident to arrest
§ 25:139	—Pretext searches
§ 25:140	—Random stops
§ 25:141	—Consent searches
§ 25:142	—Inventory searches
§ 25:143	—“Caretaking function”
§ 25:144	Computer searches—How it’s done: DOJ guidelines on searching computers, obtaining electronic evidence
§ 25:145	—Statutory restrictions: Privacy Protection Act litigation
§ 25:146	—Basis for search—Consent
§ 25:147	—Probable cause—Insufficient allegations
§ 25:148	—Sufficient allegations
§ 25:149	—Scope of search
§ 25:150	—Privacy interests diminished
§ 25:151	Cell phones and other electronic devices
§ 25:152	Searches by private citizens
§ 25:153	Administrative searches
§ 25:154	—Housing
§ 25:155	—Probation and parole searches
§ 25:156	—Business
§ 25:157	—Schools
§ 25:158	—INS sweeps
§ 25:159	—Drug testing
§ 25:160	—Searches abroad

CHAPTER 26. SURVEILLANCE

§ 26:1	Introduction
§ 26:2	General overview—Reasonable expectation of privacy
§ 26:3	—Examples
§ 26:4	Residences
§ 26:5	—Curtilage
§ 26:6	—Proximity
§ 26:7	—Enclosure
§ 26:8	—Use
§ 26:9	—Visibility
§ 26:10	—Lawful vantage point
§ 26:11	Open fields
§ 26:12	Open skies—Aerial overflight
§ 26:13	—Visually assisted overflights
§ 26:14	—Helicopters
§ 26:15	Open view
§ 26:16	—Flashlight, nightscope
§ 26:17	—Binoculars, telescopes
§ 26:18	—Thermal imaging
§ 26:19	— <i>Kyllo</i> decision
§ 26:20	—General public use: a huge loophole
§ 26:21	Canine sniffs

- § 26:22 —Public places
- § 26:23 —Controlled delivery
- § 26:24 —Traffic stops
- § 26:25 —Limits on *Place*
- § 26:26 ——Roadblocks/checkpoints
- § 26:27 —Challenges to canines
- § 26:28 Electronic surveillance
- § 26:29 —Legislative authority for electronic surveillance
- § 26:30 ——The Federal Wiretap Statute
- § 26:31 ——Types of crimes
- § 26:32 ——Post-USA PATRIOT Act/Homeland Security Act wiretaps
- § 26:33 ——Types of intercept orders
- § 26:34 ——Limits on disclosure
- § 26:35 ——The Foreign Intelligence Security Act (FISA)
- § 26:36 —The procedural requirements
- § 26:37 ——Necessity; statement regarding other investigative procedures (tried, unlikely to succeed); identity of person whose communications are to be intercepted
- § 26:38 —Procedural requirements—Extension
- § 26:39 ——The order
- § 26:40 —The procedural requirements—Emergency exception
- § 26:41 ——The order—Suppression of evidence derived from
- § 26:42 —Conduct, scope and duration
- § 26:43 —Procedural requirements—Judicial sealing
- § 26:44 —Sanctions for violation of statute—Suppression
- § 26:45 ——Good faith
- § 26:46 ——Liability for violations of Wiretap Act: clean hands doctrine
- § 26:47 —Sharing of information obtained through electronic surveillance
- § 26:48 ——Grand jury information
- § 26:49 ——Title III intercepts
- § 26:50 ——FISA
- § 26:51 —Stored communications
- § 26:52 —Pen registers and “trap and trace” devices, 18 U.S.C.A. §§ 3121 to 3127
- § 26:53 —Clone pagers
- § 26:54 —Electronic tracking devices
- § 26:55 —Cellular and cordless telephones
- § 26:56 —Computers: search and seizure
- § 26:57 —Videotaping
- § 26:58 —Biometrics: an emerging trend
- § 26:59 Consent and voluntary disclosure to third parties—One party consent
- § 26:60 ——Notice
- § 26:61 ——Parents and children
- § 26:62 —Other surveillance techniques
- § 26:63 Additional statutory authority for electronic surveillance—The Electronic Communications Privacy Act (1986), 18 U.S.C.A. § 2511(c) (1994)
- § 26:64 —The Foreign Intelligence Surveillance Act, 50 U.S.C.A. §§ 1801 et seq.
- § 26:65 ——Fourth Amendment reasonableness inquiry
- § 26:66 ——Disclosure to parties
- § 26:67 —The Computer Fraud and Abuse Act, 18 U.S.C.A. § 1030 (1984)
- § 26:68 —Communications Assistance for Law Enforcement Act (CALEA), 47 U.S.C.A. §§ 1001 et seq.
- § 26:69 —Law enforcement surveillance programs
- § 26:70 ——Carnivore
- § 26:71 ——Magic lantern
- § 26:72 Post-911 legislation and the law of electronic surveillance—The USA PATRIOT Act
- § 26:73 ——Introduction

TABLE OF CONTENTS

§ 26:74	— — — Domestic law enforcement versus counter-intelligence/anti-terrorism
§ 26:75	— — — Different standards
§ 26:76	— — — Sharing of intelligence
§ 26:77	— — — Specific procedures—Wiretap orders
§ 26:78	— — — Search warrants
§ 26:79	— — — Court orders with discretion
§ 26:80	— — — Court orders without discretion
§ 26:81	— — — Administrative subpoena
§ 26:82	— — — Voluntary disclosure
§ 26:83	— — — Judicial reports and monitoring—Grand jury disclosures
§ 26:84	— — — Additional oversight
§ 26:85	— — — Civil liability—Ramifications of disclosure to law enforcement agencies
§ 26:86	— — — Impacts and implications on business going forward
§ 26:87	— — — The Homeland Security Act—Computer security
§ 26:88	— — — Pen registers, trap and trace
§ 26:89	— — — Role of ISPs
§ 26:90	— — — Sharing information
§ 26:91	— — — Wiretaps
§ 26:92	— — — Substantive criminal provisions
§ 26:93	Public disclosure of post-investigative search warrant applications, orders, and supporting materials

CHAPTER 27. CONFESSIONS

§ 27:1	Introduction
§ 27:2	“Due Process” vs. <i>Miranda</i> : history and policy
§ 27:3	“Due Process” vs. <i>Miranda</i> : the difference in consequences
§ 27:4	Voluntariness
§ 27:5	Condition of defendant—Youth
§ 27:6	— — Court rulings on voluntariness of juvenile confessions
§ 27:7	— — Intoxication
§ 27:8	— — Cases ruling on intoxication and voluntariness of confession
§ 27:9	— — Background
§ 27:10	— — Illness
§ 27:11	— — Mental condition
§ 27:12	— — Cases ruling on voluntariness of confession
§ 27:13	Nature of interrogation—Length of interview
§ 27:14	— — Court ruling on voluntariness of confession
§ 27:15	— — Physical abuse
§ 27:16	— — Tricks or promises
§ 27:17	— — Courts ruling on voluntariness of confession
§ 27:18	— — Lies
§ 27:19	— — Courts ruling on voluntariness of confession
§ 27:20	— — Threats
§ 27:21	— — Courts ruling on voluntariness of confessions
§ 27:22	— — Deprivation
§ 27:23	— — Courts ruling on voluntariness of confession
§ 27:24	— — Location
§ 27:25	False confessions
§ 27:26	— — Evolution of interrogation techniques
§ 27:27	— — Interrogation techniques
§ 27:28	— — Courts on the Reid technique
§ 27:29	— — Courts ruling on implementation of specific techniques
§ 27:30	Conduct of suppression hearing
§ 27:31	Contents of hearing—Grounds and burden of proof
§ 27:32	— — Recording the confession
§ 27:33	— — Expert testimony

- § 27:34 ——Courts ruling on need for expert testimony
- § 27:35 Harmless error
- § 27:36 Fourth Amendment
- § 27:37 Sixth Amendment—“Critical stage”
- § 27:38 —Deliberately elicited
- § 27:39 Delay in arraignment
- § 27:40 Fruit of involuntary confession—Taint
- § 27:41 ——Court rulings on dissipation of taint
- § 27:42 —Independent source an inevitable discovery
- § 27:43 Coercion by private parties
- § 27:44 State statutes governing voluntary confessions and court cases interpreting them

CHAPTER 28. *MIRANDA* VIOLATIONS

- § 28:1 Introduction
- § 28:2 *Miranda* warnings
- § 28:3 —Sufficiency of
- § 28:4 —Re-advising
- § 28:5 Custody—Factors
- § 28:6 ——Location
- § 28:7 ——Detention
- § 28:8 ——Restraint
- § 28:9 ——Tests
- § 28:10 Interrogation—Test
- § 28:11 —“Functional equivalent”
- § 28:12 —Booking questions
- § 28:13 —“Stale” warnings
- § 28:14 —Other state agents
- § 28:15 —Polygraphs
- § 28:16 Waiver—Factors
- § 28:17 —Implied waiver
- § 28:18 —Notice re crime being investigated
- § 28:19 —“Incommunicado” waivers
- § 28:20 —By juveniles
- § 28:21 Assertion of rights—Assertion of right to remain silent
- § 28:22 —Assertion of right to counsel
- § 28:23 —What constitutes an invocation
- § 28:24 —Anticipatory assertion
- § 28:25 Exceptions
- § 28:26 —Presence of an attorney
- § 28:27 —Volunteered statements
- § 28:28 —Statements to citizens
- § 28:29 —Emergency
- § 28:30 Impeachment—Use of *Miranda*-violative statements
- § 28:31 —With silence
- § 28:32 Other uses of *Miranda*-violative statements—Leads to other evidence
- § 28:33 —Use in insanity cases
- § 28:34 *Miranda* and civil actions

CHAPTER 29. IDENTIFICATION TESTIMONY

- § 29:1 Introduction
- § 29:2 Initial contact
- § 29:3 Motion to suppress
- § 29:4 Fifth Amendment—Due process
- § 29:5 Showup
- § 29:6 Lineup
- § 29:7 Photo identification

TABLE OF CONTENTS

- § 29:8 Voice, handwriting, and other identification
- § 29:9 In-court identification
- § 29:10 Out-of-court identification and bolstering
- § 29:11 Fifth Amendment—Self-incrimination
- § 29:12 Sixth Amendment—Right to counsel
- § 29:13 Fourth Amendment—Illegal detention
- § 29:14 Defense-requested lineup
- § 29:15 Suppression hearing

Volume 2

CHAPTER 30. ROADBLOCKS/CHECKPOINTS

- § 30:1 Introduction
- § 30:2 The Fourth Amendment—Balancing test
- § 30:3 —Vulnerability of stops
- § 30:4 State constitutional challenges
- § 30:5 Gravity of public interest
- § 30:6 Discretion—Field officers' discretion limited
- § 30:7 —Selection of location and time
- § 30:8 —Selection of vehicles
- § 30:9 Intrusiveness of the stop—Level of intrusion; Length of detention
- § 30:10 —Apprehension and fear
- § 30:11 —Method of detecting inebriation
- § 30:12 —Safety
- § 30:13 Effectiveness of the stop—Public interest
- § 30:14 —Availability of less intrusive methods
- § 30:15 —Deterrent effect
- § 30:16 —Effectiveness of site selected
- § 30:17 Subterfuge
- § 30:18 Statutory authorization challenges

CHAPTER 31. SPEEDY TRIAL

- § 31:1 Introduction
- § 31:2 Speedy trial legislation—Federal and state legislation
- § 31:3 Remedies
- § 31:4 Time periods—When period begins
- § 31:5 —When period ends
- § 31:6 —Delay between arrest and indictment
- § 31:7 —Delay after trial
- § 31:8 Excludable periods
- § 31:9 —Other proceedings pending
- § 31:10 —Mental or physical examination of accused
- § 31:11 —Trial on other charges
- § 31:12 —Proceedings in other jurisdictions
- § 31:13 —Consideration by court of proposed plea
- § 31:14 —Trial motions
- § 31:15 —Other proceedings concerning defendant
- § 31:16 —Withdrawal of guilty plea and re indictment
- § 31:17 —Unavailability of witness
- § 31:18 —Unavailability of defendant
- § 31:19 —Unavailability of defense counsel
- § 31:20 —Joint trials
- § 31:21 —Continuances
- § 31:22 —Catch-all exceptions
- § 31:23 Special defendants

- § 31:24 —Persons charged with serious crimes
- § 31:25 —Persons detained in other jurisdictions: The Interstate Agreement on Detainers (IAD)
- § 31:26 —Incarcerated persons
- § 31:27 Waiver
- § 31:28 Bail
- § 31:29 Rules of court
- § 31:30 Constitution—Balancing test
- § 31:31 —Sixth Amendment
- § 31:32 —Length of delay
- § 31:33 —Justification for the delay
- § 31:34 —Assertion of right
- § 31:35 —Prejudice
- § 31:36 —Fifth Amendment
- § 31:37 —Waiver
- § 31:38 —State constitutions
- § 31:39 Procedure—Demands
- § 31:40 —Sanctions against counsel

CHAPTER 32. JOINDER AND SEVERANCE

- § 32:1 Introduction
- § 32:2 Joinder of defendants
- § 32:3 Joinder of charges—Rule 8(a)’s two options against single defendants
- § 32:4 —Same or similar character
- § 32:5 —Same episode, act, or transaction
- § 32:6 —Common scheme
- § 32:7 —Joinder of offenses under Rule 8(b)
- § 32:8 Relief from misjoinder
- § 32:9 Severance of defendants—Burden
- § 32:10 —Disproportionate proof
- § 32:11 —Reputation and conduct of codefendant
- § 32:12 —Codefendant’s confession—*Bruton* Rule
- § 32:13 —Interlocking confessions
- § 32:14 —Redaction
- § 32:15 —Hearsay
- § 32:16 —Misuse in government’s closing
- § 32:17 —Desire to call codefendant as witness
- § 32:18 —Antagonistic defenses—Burden
- § 32:19 —Showing of prejudice
- § 32:20 —Renewing motion
- § 32:21 —Antagonism between attorneys
- § 32:22 —Spouses
- § 32:23 —“Mega-trials”
- § 32:24 Severance of offenses
- § 32:25 Motion to sever by government
- § 32:26 Other remedies and rationales—Curing prejudice
- § 32:27 —Limiting instructions
- § 32:28 —Evidence of other crime admissible
- § 32:29 —Split verdicts
- § 32:30 —Separate juries—Same courtroom
- § 32:31 —Bifurcated trial
- § 32:32 —Separate tables
- § 32:33 —Bench trial
- § 32:34 —Harmless error
- § 32:35 —Waiver

CHAPTER 33. CHANGE OF VENUE

- § 33:1 Introduction
- § 33:2 Constitutional rights to venue and change of venue
- § 33:3 —Standard
- § 33:4 —Factors
 - § 33:5 ——Nature of the publicity
 - § 33:6 ——Degree of circulation
 - § 33:7 ——Role of government officials
 - § 33:8 ——Timing of dissemination
 - § 33:9 ——Severity and notoriety of charge
 - § 33:10 ——Selection of jury
 - § 33:11 ——Size of community
 - § 33:12 ——Other relevant factors
 - § 33:13 —Demonstrating prejudicial publicity
 - § 33:14 ——Voir dire
 - § 33:15 ——Caselaw illustrations
 - § 33:16 ——Media records
 - § 33:17 ——Opinion testimony
 - § 33:18 Federal statutory right—Rule 21
 - § 33:19 ——Location of defendant
 - § 33:20 ——Location of witnesses
 - § 33:21 ——Location of events in issue
 - § 33:22 ——Location of documents
 - § 33:23 ——Disruption of defendant's business
 - § 33:24 ——Expense to parties
 - § 33:25 ——Location of counsel
 - § 33:26 ——Accessibility of place of trial
 - § 33:27 ——Docket
 - § 33:28 —Time for determination
 - § 33:29 —Multiple defendants and charges
 - § 33:30 —Choice of venue
 - § 33:31 Prejudice arising from race
 - § 33:32 State statutory provisions
 - § 33:33 —Affidavit requirement
 - § 33:34 —Court addressed
 - § 33:35 —Absolute right to transfer
 - § 33:36 —Exhaustion of challenges
 - § 33:37 —Timing of motions
 - § 33:38 —Government motion
 - § 33:39 —Caselaw illustrations

CHAPTER 34. RECUSAL OF JUDGE

- § 34:1 Introduction
- § 34:2 Grounds for recusal
- § 34:3 The Due Process Clause
- § 34:4 Rules and statutes
- § 34:5 —“Peremptory challenge” of judge
- § 34:6 —Burden on movant
- § 34:7 Statutory standards
- § 34:8 Statute: Fact-based disqualification—Factual grounds
- § 34:9 —Pecuniary and other interests
- § 34:10 —Any other interest
- § 34:11 —Relationship to party or witness
- § 34:12 —Witness—Caselaw illustrations
- § 34:13 —Relationship to counsel
- § 34:14 ——Caselaw illustrations

- § 34:15 —Participation in action
- § 34:16 ——Caselaw illustrations
- § 34:17 —Witness
- § 34:18 —Knowledge of facts
- § 34:19 ——Caselaw illustrations
- § 34:20 —Personal bias and prejudice
- § 34:21 ——Caselaw illustrations
- § 34:22 —Conduct or relationships of court personnel
- § 34:23 Measuring bias
- § 34:24 Extrajudicial sources
- § 34:25 Procedure
- § 34:26 Judicial retaliation
- § 34:27 Waiver of disqualification
- § 34:28 Review of order granting or denying recusal

CHAPTER 35. STATE CONSTITUTIONAL CHALLENGES

- § 35:1 Introduction
- § 35:2 Judicial encouragement
- § 35:3 Federal law only a “safety net”—Focus on local interest
- § 35:4 —The case for consistency
- § 35:5 New federalism—State law first
- § 35:6 —*Michigan v. Long*: Plain statement
- § 35:7 State law mandates different result—Lists of criteria
- § 35:8 —Substantial textual difference
- § 35:9 —Unique state policy considerations
- § 35:10 —State constitution predates federal law
- § 35:11 —Roots traceable to pre-federal law
- § 35:12 —Federal law has become imbedded in state constitution
- § 35:13 —Framers’ intent
- § 35:14 —State law predates federal decision
- § 35:15 —Conflict with local rules
- § 35:16 —Approaches from sister states, dissents
- § 35:17 Federal rule wrong—Rejection of *Belton*
- § 35:18 —Rejection of *Gates* and *Leon*
- § 35:19 —Rejection of *Harris v. New York*
- § 35:20 —Appeal to state pride
- § 35:21 Rejection of states’ rights
- § 35:22 Topics for independent review
- § 35:23 —First Amendment
- § 35:24 —Second Amendment
- § 35:25 —Fourth Amendment
- § 35:26 ——Standing
- § 35:27 ——Consent/third parties
- § 35:28 ——“Seizure”
- § 35:29 ——Open fields
- § 35:30 ——Garbage
- § 35:31 ——Good faith exception to exclusionary rule
- § 35:32 ——Totality of circumstances analysis
- § 35:33 ——Dog sniffs
- § 35:34 ——Searches incident to arrest
- § 35:35 ——Automobile exceptions
- § 35:36 ——Roadblocks
- § 35:37 ——Wiretapping
- § 35:38 ——Thermal imaging
- § 35:39 —Fifth and Sixth Amendments
- § 35:40 ——Self-incrimination

TABLE OF CONTENTS

- § 35:41 ——Immunity
- § 35:42 ——Right to counsel
- § 35:43 ——Identification procedures
- § 35:44 ——*Miranda*: Assertion of right
- § 35:45 ——*Miranda*: Waiver
- § 35:46 ——*Miranda*: Juveniles
- § 35:47 ——*Miranda*: Impeachment
- § 35:48 ——Confrontation clause/hearsay
- § 35:49 ——Confrontation clause/facing witnesses
- § 35:50 ——Speedy trial
- § 35:51 ——Double jeopardy
- § 35:52 ——Jury
- § 35:53 ——Eighth Amendment
- § 35:54 ——Fourteenth Amendment—Peremptory strikes
- § 35:55 ——Discovery of privileged documents
- § 35:56 ——Destruction of evidence
- § 35:57 ——Failure to disclose evidence
- § 35:58 ——Confessions
- § 35:59 ——Sentencing
- § 35:60 ——Sodomy laws violate liberty interest

CHAPTER 36. PRACTICE AIDS

- § 36:1 Suppression motions checklist
- § 36:2 Criminal warrant checklist
- § 36:3 Cross-examination of search team leader
- § 36:4 Outline of motion to suppress statements
- § 36:5 Motion to suppress written statements for failure to record interrogation
- § 36:6 Standard identification questions
- § 36:7 Sobriety roadblock checklist
- § 36:8 General joinder and severance checklist: Defense
- § 36:9 Mega-trial joinder and severance checklist
- § 36:10 Motion for separate tables
- § 36:11 Recusal provisions
- § 36:12 Motion to recuse judge
- § 36:13 Motion urging reliance on state privacy provision
- § 36:14 Motion to suppress eyewitness identification
- § 36:15 Warrantless search checklist and proofs that consent to search was given under coercive circumstances

PART VI. DEFENSES

CHAPTER 37. ALIBI

- § 37:1 Introduction
- § 37:2 Investigation
- § 37:3 Preliminary hearing/grand jury
- § 37:4 Discovery
- § 37:5 Alibi notice rules—Notice and reciprocity
- § 37:6 ——Compliance
- § 37:7 ——Sanctions
- § 37:8 ——Illustrations of proper sanctions
- § 37:9 ——Illustrations of improper sanctions
- § 37:10 Presenting alibi defense
- § 37:11 ——Testimony of defendant
- § 37:12 ——Testimony of other witnesses
- § 37:13 ——Tangible proof

- § 37:14 —Codefendants
- § 37:15 Preparing alibi witnesses
- § 37:16 Jury instruction
- § 37:17 Summation—For the defense
- § 37:18 —For the prosecution
- § 37:19 Checklist for defense counsel

CHAPTER 38. SELF-DEFENSE AND RELATED DEFENSES

- § 38:1 Introduction
- § 38:2 Elements—Immediacy of harm
- § 38:3 —Fear of injury
- § 38:4 —Degree of force
- § 38:5 —Duty to retreat
- § 38:6 —Lack of provocation
- § 38:7 —Injury to third parties
- § 38:8 Imperfect self-defense
- § 38:9 Evidence—The victim
- § 38:10 —The defendant
- § 38:11 —Expert testimony
- § 38:12 Argument
- § 38:13 Defense of property—Home
- § 38:14 —Other property
- § 38:15 Defense of others
- § 38:16 Overview of state stand-your-ground laws
- § 38:17 Battered spouses—Nature of defense
- § 38:18 —Expert testimony
- § 38:19 Resisting arrest
- § 38:20 Burden of proof

CHAPTER 39. INSANITY

- § 39:1 Introduction
- § 39:2 Standards
- § 39:3 Burden of proof
- § 39:4 Pre-trial examination
- § 39:5 Decision to plead—Defendant
- § 39:6 —Court-imposed
- § 39:7 —Notice
- § 39:8 Preparation—Gathering information
- § 39:9 —Forced medication
- § 39:10 Presenting the defense—Concerns of jury
- § 39:11 —Voir dire
- § 39:12 —Lay testimony
- § 39:13 —Expert testimony
- § 39:14 —Cross examination
- § 39:15 Bifurcation
- § 39:16 Jury instructions
- § 39:17 Commitment and release—Length of commitment
- § 39:18 —Federal sentencing guidelines

CHAPTER 40. INTOXICATION

- § 40:1 Introduction
- § 40:2 Involuntary intoxication
- § 40:3 Voluntary intoxication
- § 40:4 —Caselaw discussion
- § 40:5 Defense and attempted crimes
- § 40:6 Evidence

TABLE OF CONTENTS

- § 40:7 Jury instructions
- § 40:8 Inconstancies with primary defense
- § 40:9 Instruction even though defense not asserted

CHAPTER 41. ENTRAPMENT

- § 41:1 Introduction
- § 41:2 Subjective test—Inducement
 - Predisposition
 - Evidence of prior bad acts, good acts
 - Entrapment as a matter of law
 - Burden of proof
- § 41:7 Objective test
- § 41:8 Inconsistent defenses
- § 41:9 Private persons—Agency relationship
- § 41:10 —Vicarious or derivative entrapment
- § 41:11 Raising the defense
- § 41:12 Due process/outrageous conduct
- § 41:13 Sentencing entrapment
- § 41:14 Entrapment by estoppel

CHAPTER 42. NECESSITY AND DURESS

- § 42:1 Introduction
- § 42:2 Duress—Elements
- § 42:3 —Murder exception
- § 42:4 —Recklessly placed self in situation exception
- § 42:5 —“Strict liability” offenses
- § 42:6 —Procedure and proof
- § 42:7 —Inconsistent offenses rule
- § 42:8 —Overlap with other offenses
- § 42:9 —Opening the door
- § 42:10 —Burden of proof
- § 42:11 —Prison escape
- § 42:12 —Drug couriers
- § 42:13 —Battered woman syndrome
- § 42:14 Necessity—Elements
- § 42:15 —Prison escape
- § 42:16 —Possession of weapons
- § 42:17 —Civil disobedience
- § 42:18 —“Nuremberg” defense
- § 42:19 —Medical necessity
- § 42:20 ——Medical marijuana statutes
- § 42:21 —Homelessness
- § 42:22 —Practice and procedure
- § 42:23 —Burden of proof
- § 42:24 —Inconsistent defenses

CHAPTER 43. IMPOSSIBILITY

- § 43:1 Introduction
- § 43:2 Factual impossibility
- § 43:3 Legal impossibility—Definition
- § 43:4 —Modern view
- § 43:5 —Model penal code
- § 43:6 —Presentation of impossibility defense
- § 43:7 —Police “stings”
- § 43:8 “Inherent” impossibility—Definition
- § 43:9 —De minimus offense

- § 43:10 Impossibility as defense to completed crime
- § 43:11 “Logical” impossibility
- § 43:12 Impossibility by omission

CHAPTER 44. PRACTICE AIDS

- § 44:1 Alibi practice aids
- § 44:2 Self-defense practice aids
- § 44:3 Insanity practice aids
- § 44:4 Intoxication practice aids
- § 44:5 Entrapment practice aids
- § 44:6 Necessity and duress practice aids
- § 44:7 Proof of alibi

PART VII. PLEA BARGAINING AND GUILTY PLEAS

CHAPTER 45. BARGAINING

- § 45:1 Introduction
- § 45:2 Role of plea bargaining
- § 45:3 The client
- § 45:4 Evaluation of the case
- § 45:5 —Factual investigation
- § 45:6 —Legal investigation
- § 45:7 —Intelligence gathering—The prosecutor
- § 45:8 — —The judge
- § 45:9 — —The client
- § 45:10 — —The victim
- § 45:11 —Assessing the case
- § 45:12 Timing
- § 45:13 Preparing client for plea
- § 45:14 What can be bargained
- § 45:15 —Charge bargaining
- § 45:16 —Sentence bargaining
- § 45:17 —Other concessions by government
- § 45:18 —Concessions by the defendant
- § 45:19 Cooperation-immunity agreements

CHAPTER 46. ENTRY OF GUILTY PLEA

- § 46:1 Introduction
- § 46:2 The guilty plea family
- § 46:3 —Guilty plea
- § 46:4 —Alford plea
- § 46:5 —Nolo contendere
- § 46:6 —Conditional plea
- § 46:7 — —Limitations
- § 46:8 —Stipulated trial
- § 46:9 Inadmissibility of plea discussions
- § 46:10 Duty to advise defendant
- § 46:11 —Personally addressing defendant
- § 46:12 —Waiver of rights
- § 46:13 —Nature of charge
- § 46:14 —Consequences
- § 46:15 Voluntariness of plea
- § 46:16 The plea agreement
- § 46:17 Factual basis for plea
- § 46:18 Factual basis—Nolo plea

TABLE OF CONTENTS

- § 46:19 —Alford pleas
- § 46:20 Factual basis establishing defense

CHAPTER 47. BREACH OF AGREEMENT

- § 47:1 Introduction
- § 47:2 Broken promises
- § 47:3 Remedies for breach—Choice of remedies
- § 47:4 —Specific performance
- § 47:5 —Withdrawal of plea
- § 47:6 —Resentencing
- § 47:7 Reneging on the deal
- § 47:8 Raising a breach of plea agreement for the first time on appeal

CHAPTER 48. WITHDRAWAL OF PLEA

- § 48:1 Introduction
- § 48:2 Withdrawal, generally
- § 48:3 Post-sentence standard
- § 48:4 Pre-sentence standard
- § 48:5 Immigration consequences of a plea withdrawal

CHAPTER 49. PRACTICE AIDS

- § 49:1 Plea agreement
- § 49:2 Suggested questions for court to ask in taking a guilty plea
- § 49:3 Motion to compel specific performance of plea agreement
- § 49:4 Motion to withdraw guilty plea
- § 49:5 Response to defendant's motion to withdraw guilty plea
- § 49:6 Cooperation agreement
- § 49:7 Debriefing letter

PART VIII. JURY SELECTION

CHAPTER 50. OBTAINING INFORMATION ABOUT JURORS

- § 50:1 Introduction
- § 50:2 Information from the court
- § 50:3 Case-specific questionnaire
- § 50:4 Investigation of the jury panel—Ethical constraints
- § 50:5 —Size of community
- § 50:6 —Track record of panel
- § 50:7 —Public sources of information
- § 50:8 —Commercial jury services
- § 50:9 —Information about the community
- § 50:10 Use of jury consultants—Objectives
- § 50:11 —Systematic jury selection
- § 50:12 —Attitudinal surveys
- § 50:13 —Trial simulations and second trials
- § 50:14 Anonymous juries

CHAPTER 51. CHALLENGING THE ARRAY

- § 51:1 Introduction
- § 51:2 Procedure
- § 51:3 Fair cross section challenge—Origins
- § 51:4 —Distinctiveness—Undefined term
- § 51:5 ——Classifications—Blue collar workers
- § 51:6 ——Less-educated individuals

- § 51:7 ——Low-income individuals
- § 51:8 ——Students
- § 51:9 ——Young adults
- § 51:10 ——Elderly
- § 51:11 ——Transients
- § 51:12 ——Unemployed
- § 51:13 ——Resident aliens
- § 51:14 ——Union members
- § 51:15 ——Native Americans
- § 51:16 ——Caucasians
- § 51:17 ——Rural residents
- § 51:18 ——Nonreligious and religious citizens
- § 51:19 ——Deaf and blind citizens
- § 51:20 ——Nonvoters
- § 51:21 ——Non-native English speakers
- § 51:22 ——Attorneys
- § 51:23 Fair cross-section—Representativeness—Various standards
- § 51:24 ——Absolute disparity
- § 51:25 ——Comparative disparity
- § 51:26 ——Proportion of eligibles standard
- § 51:27 ——Statistical significance test
- § 51:28 ——Substantial impact test
- § 51:29 ——Systematic exclusion
- § 51:30 Equal protection challenge
- § 51:31 Statutory challenges—Federal statutes
- § 51:32 ——Source list selection
- § 51:33 ——Random selection
- § 51:34 ——Phase I: Source list compilation
- § 51:35 ——Phase II: Master list compilation
- § 51:36 ——Phase III: Pool compilation
- § 51:37 ——Phase IV: Panel assignments
- § 51:38 ——Stratified sampling
- § 51:39 ——Summoning and impaneling issues

CHAPTER 52. VOIR DIRE

- § 52:1 Introduction
- § 52:2 Purpose
- § 52:3 Content-based questioning
- § 52:4 Procedure—Statutes
- § 52:5 —Who conducts questioning?
- § 52:6 —Questioning of the venire panel as a whole or as individuals?
- § 52:7 —Advance exchange of questions, objections
- § 52:8 Scope
- § 52:9 —Context of case
- § 52:10 —Particular questions—Willingness to apply legal principles
- § 52:11 ——Racial prejudice
- § 52:12 ——Pretrial publicity
- § 52:13 ——Midtrial publicity
- § 52:14 ——Legal defenses
- § 52:15 ——Credibility of police officers and “official” witnesses
- § 52:16 ——Various controversial matters
- § 52:17 Style and phrasing of questions

CHAPTER 53. CHALLENGES FOR CAUSE

- § 53:1 Introduction
- § 53:2 Bases for cause—Statutory

TABLE OF CONTENTS

§ 53:3	—Bias
§ 53:4	—Presumed bias
§ 53:5	—Preconceived opinions
§ 53:6	—Other bases
§ 53:7	Procedure
§ 53:8	—Basis for ruling
§ 53:9	—Appellate review
§ 53:10	Strategy

CHAPTER 54. PEREMPTORY CHALLENGES

§ 54:1	Introduction
§ 54:2	Function
§ 54:3	Burden of proof under <i>Swain</i>
§ 54:4	State constitutions
§ 54:5	Burden of proof under <i>Batson</i>
§ 54:6	Extension of <i>Batson</i> (parties)—Racial identity
§ 54:7	—Extension to civil litigants
§ 54:8	—Extension to defense
§ 54:9	Extension of <i>Batson</i> to other groups—Definition of class
§ 54:10	—Gender
§ 54:11	—Ethnic and racial groups
§ 54:12	—Other groups—Groups recognized
§ 54:13	—Groups not recognized
§ 54:14	Establishing a <i>prima facie</i> case—Rebuttable presumption
§ 54:15	—“Relevant circumstances”
§ 54:16	—Nature of case
§ 54:17	—Numerical evidence
§ 54:18	—Bright-line rules rejected
§ 54:19	Overcoming presumption—Burden
§ 54:20	—Differences among state and federal courts
§ 54:21	—Subjective v. objective explanations
§ 54:22	—Facially discriminatory challenges
§ 54:23	—Facially neutral explanations
§ 54:24	—Profile or rating system
§ 54:25	Challenging the explanation
§ 54:26	—Disparate treatment of jurors
§ 54:27	Making the record
§ 54:28	—Panel members
§ 54:29	—Comparative analysis
§ 54:30	—Use of exhibits
§ 54:31	—Cross-examination
§ 54:32	—Record of reasons
§ 54:33	—Record of rebuttal
§ 54:34	<i>Batson</i> procedure—Nature of the hearing
§ 54:35	—Unitary procedure
§ 54:36	—Timing
§ 54:37	—Waiver
§ 54:38	—Concern for remedy
§ 54:39	—Role of trial court
§ 54:40	Remedy—Alternatives
§ 54:41	—Rights of jurors
§ 54:42	Fair cross-section challenges
§ 54:43	Future of peremptory challenge—Predictions of demise
§ 54:44	—Clues from Supreme Court
§ 54:45	—Calls for abolition
§ 54:46	—Proposal for ethical rule

- § 54:47 Working within *Batson*
- § 54:48 Argument for enhanced voir dire
- § 54:49 Procedure
- § 54:50 Systems for striking
- § 54:51 Number of challenges
- § 54:52 Multiple defendants
- § 54:53 Strategy

CHAPTER 55. PRACTICE AIDS

- § 55:1 Motion for attorney-conducted voir dire
- § 55:2 Motion for specification of jury selection procedures
- § 55:3 Motion to dismiss indictment and for discovery concerning jury selection
- § 55:4 Sample voir dire questions
- § 55:5 Jury questionnaire (O.J. Simpson)
- § 55:6 Sample voir dire questions
- § 55:7 Juror questionnaire and voir dire questions
- § 55:8 Voir dire questions
- § 55:9 Juror questionnaire
- § 55:10 Trial memorandum regarding additional peremptory challenges

PART IX. OPENING AND CLOSING

CHAPTER 56. OPENING STATEMENT

- § 56:1 Introduction
- § 56:2 Prosecution's opening statement
- § 56:3 Defense right to opening statement
- § 56:4 Reserving opening statement
- § 56:5 Control of opening
- § 56:6 Building rapport
- § 56:7 Motions for acquittal after government's opening statement
- § 56:8 Variance between opening statement and proof
- § 56:9 Objections
- § 56:10 Impermissible content
- § 56:11 Voices of experience
- § 56:12 Prosecutor's opening
- § 56:13 Defense opening
- § 56:14 —Substantial defense
- § 56:15 —No substantial defense

CHAPTER 57. CLOSING ARGUMENTS

- § 57:1 Introduction
- § 57:2 Planning closing argument
- § 57:3 Delivery of the argument—Tone
- § 57:4 —Content
- § 57:5 —Order of arguments
- § 57:6 —Demonstrative evidence
- § 57:7 —Ending
- § 57:8 Arguing the law
- § 57:9 —Proof beyond a reasonable doubt
- § 57:10 —Credibility
- § 57:11 —Illustrations
- § 57:12 Objections
- § 57:13 Improper argument and prosecutorial misconduct
- § 57:14 —Inflammatory remarks
- § 57:15 —Personal attacks on counsel, defendant

TABLE OF CONTENTS

- § 57:16 —Statements of personal opinion
- § 57:17 —Illustrations
- § 57:18 —Comments on defendant's testimonial right
- § 57:19 —Improper inferences and facts not in evidence
- § 57:20 —Illustrations
- § 57:21 "Invited argument"
- § 57:22 —Illustrations
- § 57:23 Defendant's presence

CHAPTER 58. PRACTICE AIDS

- § 58:1 Opening statement practice aids
- § 58:2 Closing arguments

PART X. EVIDENCE AND EXHIBITS

CHAPTER 59. CHARACTER EVIDENCE

- § 59:1 Introduction
- § 59:2 Character "in issue"
- § 59:3 Defendant's evidence of good character—Not necessarily "in issue"
- § 59:4 —Defendant's character traits—Truth and veracity
- § 59:5 —Honesty
- § 59:6 —Peacefulness and noncombativeness
- § 59:7 —Government's response
- § 59:8 Evidence of character of victim—Rules
- § 59:9 —Defense evidence of victim's violent character
- § 59:10 —Government's rebuttal when defense attacks victim's character
- § 59:11 Method of proof—Three methods
- § 59:12 —Reputation
- § 59:13 —Opinion
- § 59:14 —Specific acts
- § 59:15 Evidence of complaining witness's prior sexual behavior—Statutes
- § 59:16 Limitation on time and on number of witnesses
- § 59:17 Evidentiary use of complainant's sexual conduct
- § 59:18 Evidence of complaining witness's prior sexual behavior—Prior sexual relations with the defendant
- § 59:19 —Sexual relations with others to prove source of semen, pregnancy or disease
- § 59:20 —Evidence to rebut claim of chastity
- § 59:21 —Credibility of complaining witness
- § 59:22 —Examples of evidentiary use—Previous false reports of rape
- § 59:23 —Prior consensual relations with third parties
- § 59:24 —Evidence that shows accused reasonably believed complainant consented
- § 59:25 —Examples of evidentiary use—Evidence of complainant's fantasy
- § 59:26 —Evidence complainant has been convicted of prostitution
- § 59:27 —Evidence whose admissibility is constitutionally required
- § 59:28 —Examples of evidentiary use—"Catch-all" provisions
- § 59:29 —Kinds of proof allowed
- § 59:30 —Procedural requirements
- § 59:31 —Strategic concerns

CHAPTER 60. EVIDENCE OF OTHER CRIMES

- § 60:1 Introduction
- § 60:2 The rationale
- § 60:3 The rules
- § 60:4 Common exceptions
- § 60:5 Intent exception

- § 60:6 Knowledge exception
- § 60:7 Absence of mistake, inadvertence exception
- § 60:8 Motive exception
- § 60:9 Identity exception
- § 60:10 Common scheme or plan exception
- § 60:11 Other exceptions—Opportunity
 - Belief in consent
 - § 60:13 Balancing probative value against prejudice
 - § 60:14 Evidence outside the rule—Specially treated crimes
 - § 60:15 —Entrapment
 - § 60:16 —Impeachment
 - § 60:17 —Spoliation evidence
 - § 60:18 —Other cases not within rules' scope—Inseparable crimes
 - § 60:19 ——Conspiracy
 - § 60:20 —Second-offense statutes
 - § 60:21 —Crime that was subject of perjured testimony
 - § 60:22 —Corroboration
 - § 60:23 Uncovering other crimes evidence—Notice
 - § 60:24 —Discovery
 - § 60:25 —Self-help
 - § 60:26 Objecting to the evidence—Motion in limine
 - § 60:27 —Hearing during trial
 - § 60:28 —Cautionary instructions
 - § 60:29 Avoiding the evidence—Controversy requirement
 - § 60:30 —Stipulation
 - § 60:31 —Necessity
 - § 60:32 —Policy reasons for exclusion
 - § 60:33 Sufficiency of proof of other crimes—Rules
 - § 60:34 —Effect of acquittal
 - § 60:35 “Reverse 404(b)” evidence

CHAPTER 61. MISSING WITNESS RULE

- § 61:1 Introduction
- § 61:2 The doctrine
- § 61:3 Consequences: Argument, instruction
- § 61:4 “Equally available” witness
- § 61:5 Use against criminal defendants—Comment on failure to present testimony/burden of proof
 - Denial of confrontation rights
 - § 61:7 —Additional arguments
 - § 61:8 Control of the party—Differing interpretations
 - § 61:9 —Relationship of party and witness
 - § 61:10 —Categories of special relationships
 - § 61:11 —Characteristics of witness
 - § 61:12 Testimony must elucidate transaction
 - § 61:13 Procedure

CHAPTER 62. EXHIBITS

- § 62:1 Introduction
- § 62:2 General considerations
- § 62:3 Evidentiary concerns
- § 62:4 Alternatives

CHAPTER 63. REAL EVIDENCE

- § 63:1 Introduction
- § 63:2 Relevancy

TABLE OF CONTENTS

- § 63:3 Authentication
- § 63:4 —Chain of custody
- § 63:5 Unchanged condition
- § 63:6 Methods

CHAPTER 64. PHOTOGRAPHS, FILMS, AND X-RAYS

- § 64:1 Introduction
- § 64:2 Theories of admissibility
- § 64:3 Relevancy
- § 64:4 Authentication—Witness testimony
- § 64:5 —Silent witness
- § 64:6 ——X-rays
- § 64:7 ——Automatic cameras/Surveillance videos
- § 64:8 —Stipulation
- § 64:9 Best evidence rule
- § 64:10 Special photographs—Motion pictures
- § 64:11 —Mug shots
- § 64:12 ——Government need for photographs
- § 64:13 ——Implication of prior criminal record
- § 64:14 ——Drawing attention to source of photographs
- § 64:15 —Spark of life photographs
- § 64:16 Sources of photographic material—Existing material
- § 64:17 —Taken for the litigation
- § 64:18 Format—Black and white v. color
- § 64:19 —Slides, prints or film
- § 64:20 Cumulative nature of photographic evidence
- § 64:21 Computer enhancement and electronic imaging

CHAPTER 65. MODELS AND REPLICAS

- § 65:1 Introduction
- § 65:2 Replicas or duplicates
- § 65:3 Models
- § 65:4 Obtaining models

CHAPTER 66. DEMONSTRATIONS AND REENACTMENTS

- § 66:1 Introduction
- § 66:2 Displays
- § 66:3 Simple demonstrations
- § 66:4 Reenactments
- § 66:5 Computerized re-creations

CHAPTER 67. EXPERIMENTS

- § 67:1 Introduction
- § 67:2 Admissibility
- § 67:3 Objections: Similar conditions
- § 67:4 Other objections
- § 67:5 Demonstrations v. replications
- § 67:6 Conducting experiments

CHAPTER 68. VIEWS

- § 68:1 Introduction
- § 68:2 In judge's discretion
- § 68:3 Change in conditions of scene
- § 68:4 Procedure
- § 68:5 —Defendant's right to be present

- § 68:6 —Mere observation
- § 68:7 —Strategic concerns
- § 68:8 Unauthorized views

CHAPTER 69. DIAGRAMS, CHARTS, AND SUMMARIES

- § 69:1 Introduction
- § 69:2 Visual aids to illustrate testimony—Prepared exhibits
- § 69:3 —Computer-generated displays and exhibits
- § 69:4 —Drawings
- § 69:5 Choice of format
- § 69:6 Maps as substantive evidence
- § 69:7 Summaries and charts as substantive evidence—Court confusion
- § 69:8 —Preparation
- § 69:9 —Admissibility—Best evidence rule
- § 69:10 ——Hearsay
- § 69:11 ——Authentication
- § 69:12 —Challenges to the summary

CHAPTER 70. DOCUMENTS: BUSINESS AND OFFICIAL RECORDS

- § 70:1 Introduction
- § 70:2 Hearsay
- § 70:3 Business records
- § 70:4 Official or public records
- § 70:5 Former testimony
- § 70:6 Confrontation Clause considerations and admission of documents

CHAPTER 71. AUTHENTICATION

- § 71:1 Introduction
- § 71:2 Foundation for admissibility
- § 71:3 Methods of authenticating writings
- § 71:4 —Eyewitness
- § 71:5 —Admission
- § 71:6 —Recognition by one familiar with signature
- § 71:7 —Comparison by expert or trier of fact
- § 71:8 —Reply doctrine
- § 71:9 —Ancient documents
- § 71:10 Methods of authenticating records
- § 71:11 Methods of authenticating telephone messages and sound recordings
- § 71:12 Methods of authenticating writings—E-mails, texts, social media posts
- § 71:13 Methods of authenticating process or system
- § 71:14 Self-authentication
- § 71:15 Challenging authentication

CHAPTER 72. BEST EVIDENCE RULE

- § 72:1 Introduction
- § 72:2 Evidence falling within rule—Contents of writings
- § 72:3 —Chattels
- § 72:4 —X-rays and photographs
- § 72:5 Original v. copy v. duplicate—Preference for original
- § 72:6 —Preference for next-best evidence
- § 72:7 —Duplicates
- § 72:8 ——Caselaw application
- § 72:9 Excuses for not producing original—Question for jury
- § 72:10 —Lost or destroyed

TABLE OF CONTENTS

- § 72:11 —In possession of opponent
- § 72:12 —Other excuses—Certified copy
- § 72:13 ——Not subject to judicial process
- § 72:14 ——Collateral matter
- § 72:15 ——Admission as to terms of writing
- § 72:16 ——No dispute as to authenticity
- § 72:17 ——Fact independently proven
- § 72:18 Overcoming the excuse

CHAPTER 73. SCIENTIFIC EVIDENCE AND EXPERT TESTIMONY

- § 73:1 Introduction
- § 73:2 Admissibility
- § 73:3 Frye test—“General acceptance”
- § 73:4 Relevance test—Criticism of Frye
- § 73:5 —Daubert/Rule 702
- § 73:6 —State treatment of Daubert
- § 73:7 —Legislative approval
- § 73:8 —“Scientific” versus “technical”
- § 73:9 Experts for special purposes
- § 73:10 —“State of mind” experts
- § 73:11 —Cultural experts
- § 73:12 —Cultural expert for sentencing
- § 73:13 —“Cooperation” expert—Cooperating defendants
- § 73:14 —False confession
- § 73:15 —Dog alerts/cadaver dogs
- § 73:16 —Sentencing experts
- § 73:17 Controversial subject areas
- § 73:18 —Revisiting the polygraph—Admissibility
- § 73:19 ——Discovery
- § 73:20 ——Brady
- § 73:21 ——Sixth Amendment
- § 73:22 —HGN test
- § 73:23 —Drug testing
- § 73:24 —Eyewitness identification
- § 73:25 —Credibility of witness
- § 73:26 —Profile or syndrome evidence
- § 73:27 —Police drug culture experts
- § 73:28 —Voice identification experts
- § 73:29 —Blood splatter (spatter) experts
- § 73:30 —Handwriting identification experts
- § 73:31 —Ballistics experts
- § 73:32 —Fingerprint experts
- § 73:33 —Miscellaneous tests and other subject areas
- § 73:34 Relevance inquiry
- § 73:35 “Ultimate issue”
- § 73:36 Application of technique
- § 73:37 Statistical evidence
- § 73:38 DNA evidence—Procedure
- § 73:39 —Obtaining DNA samples from a suspect
- § 73:40 —Admissibility
- § 73:41 —History of admissibility litigation
- § 73:42 —Statistical probabilities
- § 73:43 —ABA Criminal Justice Standards on DNA Evidence
- § 73:44 —Caselaw discussion
- § 73:45 Confrontation Clause

CHAPTER 74. EXPERT TESTIMONY ON EYEWITNESS IDENTIFICATION

- § 74:1 Introduction
- § 74:2 Importance of eyewitness testimony
- § 74:3 Trial strategy
- § 74:4 Teachings of psychologists—Stages of process
- § 74:5 —Sample offer of proof
- § 74:6 Possible uses of experts—Preparation of questions
- § 74:7 —Seeking fairer identification procedures
- § 74:8 —Testifying at trial
- § 74:9 Who are the experts?
- § 74:10 Admissibility of expert testimony—Federal Rules of Evidence
- § 74:11 —“General acceptance”
- § 74:12 —*Frye* doesn’t apply
- § 74:13 Considerations for court—Factors to evaluate
- § 74:14 —Relevance-proffer and fit
- § 74:15 —Particular factors
- § 74:16 —Proper subject matter
- § 74:17 —Limitations on admissibility
- § 74:18 —Relevance
- § 74:19 —Types of cases
- § 74:20 —Caselaw illustrations
- § 74:21 Survey of experts—Topics deemed reliable
- § 74:22 —Topics lacking consensus
- § 74:23 —Criticism of “general acceptance”
- § 74:24 Survey of “jurors”
- § 74:25 Opposing expert testimony
- § 74:26 Lack of notice

CHAPTER 75. PRACTICE AIDS

- § 75:1 Mechanics of admission of photograph
- § 75:2 Demonstrations: computerized graphics and re-creations
- § 75:3 Using a model
- § 75:4 Defendant’s motion for jury view
- § 75:5 Jury view
- § 75:6 Cross-examination: charts and summaries
- § 75:7 Motion to preclude other crimes evidence
- § 75:8 Admission of evidence on battered woman syndrome
- § 75:9 Memorandum in support of defendant’s offer of expert testimony
- § 75:10 Direct examination of expert witness on eyewitness testimony

Volume 3

PART XI. EXAMINATION OF WITNESSES

CHAPTER 76. THE CARE AND HANDLING OF WITNESSES

- § 76:1 Introduction
- § 76:2 Preparation and advice to witness
- § 76:3 Special witnesses and problems—Young, elderly, or impaired witness
- § 76:4 —Frightened witness
- § 76:5 —Soft-spoken witness
- § 76:6 —Forgetful witness
- § 76:7 —Dull witness
- § 76:8 —Turncoat witness

TABLE OF CONTENTS

- § 76:9 —Biased witness
- § 76:10 —The “helpful” witness
- § 76:11 —Character witness
- § 76:12 —Impeachable witness
- § 76:13 —Accomplice/immunized witness

CHAPTER 77. THE FORM OF QUESTIONS

- § 77:1 Introduction
- § 77:2 Narrative v. question and answer
- § 77:3 Leading questions: Prohibition
- § 77:4 Leading questions: Exceptions—Rules
- § 77:5 —Preliminary matters
- § 77:6 —Witnesses with limited capacity
- § 77:7 —Refreshing recollection
- § 77:8 —Prior inconsistent statement
- § 77:9 —Hostile witness
- § 77:10 Cues and codes
- § 77:11 Breadth of questions
- § 77:12 Lay opinion—Permissibility
- § 77:13 —Handwriting
- § 77:14 —Footprints
- § 77:15 —Blood
- § 77:16 —Speed of a moving vehicle
- § 77:17 —Drugs
- § 77:18 —Sanity
- § 77:19 —Shorthand descriptions
- § 77:20 —Ultimate issue

CHAPTER 78. RELEVANCY

- § 78:1 Introduction
- § 78:2 Definition of relevancy
- § 78:3 Limitations on relevance
- § 78:4 Unfair prejudice
- § 78:5 Confusion of issues, misleading jury
- § 78:6 Waste of time, cumulative evidence
- § 78:7 “Connecting up” or conditional relevance

CHAPTER 79. IMPEACHMENT OF OWN WITNESS

- § 79:1 Introduction
- § 79:2 Modern trend
- § 79:3 Circumventing the rule—Statutes and rules
- § 79:4 —Subterfuge
- § 79:5 Strategic concerns
- § 79:6 Caselaw application

CHAPTER 80. REFRESHING RECOLLECTION, PAST RECOLLECTION RECORDED

- § 80:1 Introduction
- § 80:2 Refreshing recollection: Requirements
- § 80:3 Refreshing recollection: Safeguards
- § 80:4 Hypnotically refreshed witnesses
- § 80:5 Problems with hypnosis—Hyper-suggestibility and hyper-compliance
- § 80:6 —Intentional lying
- § 80:7 —Difficulty of detecting inaccuracies
- § 80:8 —Juror faith in “science”

- § 80:9 Admissibility of hypnotically refreshed testimony
- § 80:10 Admissibility of pre-hypnosis recollections
- § 80:11 Admissibility of hypnotically refreshed testimony: Practice and procedure
- § 80:12 Defense use of hypnotically refreshed testimony
- § 80:13 Past recollection recorded—Requirements
 - Caselaw illustrations
- § 80:15 —Lack of present recollection
- § 80:16 —Firsthand knowledge
- § 80:17 —In writing, when memory was clear
- § 80:18 —Verifying accuracy
- § 80:19 —Evidentiary status

CHAPTER 81. OBJECTIONS

- § 81:1 Introduction
- § 81:2 Tactics of objecting
- § 81:3 Motions in advance of trial: In general
- § 81:4 Kinds of motions in limine
- § 81:5 Status of motions in limine
- § 81:6 Timing of objections
- § 81:7 Waiver of objections
- § 81:8 Bases for objections
- § 81:9 Specificity of objections; Making a record
- § 81:10 Renewal of objections
- § 81:11 Offer of proof
- § 81:12 Responding to objections
- § 81:13 Interrogation by court—Witness called by court
- § 81:14 —Witness questioned by court
- § 81:15 Interrogation by the court—Improper judicial intervention
- § 81:16 Interrogation by court—Objections

CHAPTER 82. PREPARATION FOR CROSS-EXAMINATION

- § 82:1 Introduction
- § 82:2 Structuring cross-examination
- § 82:3 Demeanor of the cross-examiner
- § 82:4 Special witnesses and problems—Evasive witness
 - § 82:5 —Timid or limited witness
 - § 82:6 —Talkative witness
 - § 82:7 —Hypnotized witness

CHAPTER 83. SCOPE AND OBJECTIVES OF CROSS-EXAMINATION

- § 83:1 Introduction
- § 83:2 Scope of cross-examination—Confrontation
 - § 83:3 —Face-to-face confrontation
 - § 83:4 —State constitutional and statutory arguments
- § 83:5 Justified curtailments—Judicial discretion
- § 83:6 —Memory
- § 83:7 Yielding to Sixth Amendment—Privileges
- § 83:8 —Pretrial discovery
- § 83:9 Limitations
- § 83:10 —Impeachment
- § 83:11 —Rules and statutes
- § 83:12 —Opening the door
- § 83:13 Objectives of cross-examination
- § 83:14 —Affirmative use of the witness

TABLE OF CONTENTS

- § 83:15 —Discrediting the witness
- § 83:16 —Discrediting the testimony
- § 83:17 —Laying a foundation
- § 83:18 —Limiting the damage
- § 83:19 —Skipping cross-examination
- § 83:20 —Setting the course

CHAPTER 84. CROSS-EXAMINATION TECHNIQUES

- § 84:1 Introduction
- § 84:2 Prepare
- § 84:3 Keep it simple
- § 84:4 Leading questions
- § 84:5 Contradictions
- § 84:6 Prior inconsistent statements
- § 84:7 Improbabilities
- § 84:8 Bias, motive, interest
 - § 84:9 —Kinds of bias
 - § 84:10 ——Favor
 - § 84:11 ——Hostility
 - § 84:12 ——Financial stake
 - § 84:13 ——Self-interest
 - § 84:14 ——Corruption
 - § 84:15 ——Hostile acts
 - § 84:16 Exploration

CHAPTER 85. IMPEACHMENT WITH CHARACTER EVIDENCE

- § 85:1 Introduction
- § 85:2 Character evidence; generally
- § 85:3 Using character evidence to impeach a witness; generally
- § 85:4 Method and scope of impeaching character; generally
- § 85:5 Use of character evidence to impeach defendant
- § 85:6 Use of character evidence to impeach alleged victim
- § 85:7 Use of character evidence to impeach a witness
- § 85:8 Use of character evidence to impeach witness; Specific instances of conduct
- § 85:9 Use of character evidence to impeach witness; Bad acts

CHAPTER 86. QUALIFYING AND EXAMINING EXPERT WITNESS

- § 86:1 Introduction
- § 86:2 Experts
- § 86:3 Helpfulness
- § 86:4 Relevance
- § 86:5 Qualifying, challenging the expert—Qualifications
 - § 86:6 —Expertise through experience
 - § 86:7 —Voir dire as to qualifications
 - § 86:8 —Stipulating to credentials
- § 86:9 Preparing the expert
- § 86:10 Discovery of reports
- § 86:11 Expert's conclusions
- § 86:12 Defusing cross-examination
- § 86:13 Ultimate issue
- § 86:14 Basis for opinion
- § 86:15 Use of otherwise inadmissible evidence
- § 86:16 Confrontation Clause arguments

- § 86:17 When basis must be stated
- § 86:18 Use of hypothetical questions
- § 86:19 Attacking the expert—Preparation
- § 86:20 —Checklist for subpoena
- § 86:21 —Checking credentials
- § 86:22 Effect of *Daubert*
- § 86:23 Deciding whether to cross-examine
- § 86:24 Lines of direct attack
- § 86:25 Specific subject areas
- § 86:26 Planning the cross-examination
- § 86:27 Use of treatises

CHAPTER 87. REDIRECT AND RECROSS-EXAMINATION

- § 87:1 Introduction
- § 87:2 Purpose and scope
- § 87:3 Preparation, structure, strategy
- § 87:4 Prior consistent statements—Rule
- § 87:5 —Substantive effect
- § 87:6 Character evidence
- § 87:7 Explanation or clarification

CHAPTER 88. PRIVILEGES

- § 88:1 Introduction
- § 88:2 Sources
- § 88:3 The Fifth Amendment—Application
- § 88:4 —Business records
- § 88:5 —Corporate entities
- § 88:6 —Analogies from trilogy
- § 88:7 —Corporate “self-evaluative” privilege
- § 88:8 —Duration of Fifth Amendment privilege
- § 88:9 —Invoking the privilege
- § 88:10 —Waiver
- § 88:11 —Grand jury
- § 88:12 Attorney-client privilege—Applicability to communications
- § 88:13 —Applicability to physical evidence
- § 88:14 —Applicability to “facts”
- § 88:15 —Confidentiality
- § 88:16 ——Psychiatrist
- § 88:17 ——Waiver
- § 88:18 ——Death of client
- § 88:19 —Crime or fraud exception
- § 88:20 ——Application
- § 88:21 —Client whereabouts
- § 88:22 —Corporate clients
- § 88:23 —Conflict with Sixth Amendment
- § 88:24 Work product privilege
- § 88:25 Physician-patient privilege
- § 88:26 Therapist-patient privilege
- § 88:27 Priest-penitent privilege
- § 88:28 Accountant-client privilege
- § 88:29 Journalist-source privilege
- § 88:30 Marital privilege—Applicability
- § 88:31 —Valid marriage requirement
- § 88:32 —Communication to third parties
- § 88:33 —Other exceptions
- § 88:34 Parent-child privilege

TABLE OF CONTENTS

§ 88:35 Other privileges

CHAPTER 89. IMMUNITY

- § 89:1 Introduction
- § 89:2 Fifth Amendment privilege not absolute
- § 89:3 Formal and informal immunity
- § 89:4 Transactional v. use immunity—Definitions
 - State requirements
 - Limitations of use immunity
 - Impeachment use forbidden
 - Perjury, false statements not protected
 - Nonevidentiary uses
 - Permissible nonevidentiary use
- § 89:11 Burden of proof as to use—Nature of hearing
 - Standard
 - Government procedure
- § 89:14 Choosing between formal and informal immunity—Formal
 - Informal
 - Protections under informal immunity
- § 89:17 Contract law
- § 89:18 Binding effect in other jurisdictions
- § 89:19 Potential problems
 - Whether to surface
 - —Avoid non-immunized interviews
 - —Proffers
 - —Blind immunity
 - —Off-the-record interviews and “queen for a day” immunity
- § 89:25 Potential pitfalls
 - —Preserving the record
 - —Ancillary proceedings
 - —Forfeiture
- § 89:29 Sentencing guidelines—Use of certain information
- § 89:30 Remedies for government breach
- § 89:31 Congressional immunity—Statutory requirements
 - Practical considerations
- § 89:33 Defense witness immunity
 - Ask the prosecutor
 - —Judicial immunity
 - —Government misconduct
 - —Inherent power
 - —Government opposition
 - Courts declining relief
 - Debriefing procedure
 - Other means

CHAPTER 90. PRACTICE AIDS

- § 90:1 Examination of character witness
- § 90:2 Impeaching own witness
- § 90:3 Past recollection recorded
- § 90:4 Checklist of objections
- § 90:5 Leading questions
- § 90:6 Impeachment with reputation testimony
- § 90:7 Impeachment with prior bad acts
- § 90:8 Sample engagement letter for experts
- § 90:9 Jury instruction on the use of expert testimony
- § 90:10 Cross-examination of expert witness

§ 90:11 Motion seeking defense witness immunity

PART XII. TRIAL

CHAPTER 91. PREPARATION FOR TRIAL

- § 91:1 Introduction
- § 91:2 Files
- § 91:3 Document control
- § 91:4 Use of a computer
- § 91:5 Gathering intelligence on opponent and judge
- § 91:6 Design of the case—Government
- § 91:7 Designing the case—Defense—Flexibility
- § 91:8 ——Strategy decisions
- § 91:9 ——Codefendant cases
- § 91:10 ——Testimony of defendant
- § 91:11 Preparation of witnesses
- § 91:12 Getting the witnesses to court
- § 91:13 Preparing exhibits
- § 91:14 Anticipating evidentiary problems
- § 91:15 Motions in limine
- § 91:16 Trial notebook
- § 91:17 Status or pretrial hearing

CHAPTER 92. DOUBLE JEOPARDY

- § 92:1 Introduction
- § 92:2 Scope of protection
- § 92:3 Applicability to the states
- § 92:4 Criminal vs. civil penalties
- § 92:5 Attachment of jeopardy
- § 92:6 Retrial following mistrial
- § 92:7 —Manifest necessity—Exercise of discretion by trial judge
- § 92:8 ——Hung jury
- § 92:9 —Mistrial on defendant's motion—Misconduct of prosecutor
- § 92:10 ——Misconduct by judge
- § 92:11 Dismissal and acquittal
- § 92:12 Multiple prosecutions for single or related acts and the *Blockburger* test
- § 92:13 Multiple charges and punishments in single prosecutions
- § 92:14 Sentencing—Cumulative punishments
- § 92:15 —Consideration of uncharged conduct
- § 92:16 —Due process protection
- § 92:17 —Post-sentence restraint
- § 92:18 Retrial after appeal—Trial error v. sufficiency of evidence
- § 92:19 Collateral estoppel
- § 92:20 —Proof that issue “necessarily determined”
- § 92:21 —Collateral estoppel as evidentiary bar
- § 92:22 Dual sovereignty
- § 92:23 —Local-state prosecutions
- § 92:24 Government appeals
- § 92:25 Waiver

CHAPTER 93. RIGHT TO JURY TRIAL

- § 93:1 Introduction
- § 93:2 The right to jury trial—Entitlement
- § 93:3 —Size of jury
- § 93:4 Waiver of jury trial—Factors to consider

TABLE OF CONTENTS

- § 93:5 —Validity of waiver
- § 93:6 —“Right” to bench trial
- § 93:7 —Waiver of full jury
- § 93:8 —Waiver of unanimity

CHAPTER 94. JUROR CONDUCT DURING TRIAL

- § 94:1 Introduction
- § 94:2 Prejudicial publicity/sequestration—Requests and remedies
- § 94:3 —Showing of need
- § 94:4 Note-taking by jurors
- § 94:5 Questions by jurors—Discretion of court
- § 94:6 —Prophylactic measures
- § 94:7 —Practice barred
- § 94:8 —Oral questioning not favored
- § 94:9 —Claimed advantages
- § 94:10 —Disadvantages
- § 94:11 Disqualification of juror during trial—Inattention/distraction
- § 94:12 —Intoxication
- § 94:13 —Deafness
- § 94:14 —Undisclosed bias
- § 94:15 Unauthorized communications with jurors during trial—Communication with third parties
- § 94:16 —Communication with each other

CHAPTER 95. MOTION FOR JUDGMENT OF ACQUITTAL AND FAILURE OF PROOF

- § 95:1 Introduction
- § 95:2 Standard for the trial court
- § 95:3 Double jeopardy
- § 95:4 Motion practice—Timing
- § 95:5 —Evidence after motion denied
- § 95:6 —Reserving ruling
- § 95:7 —Specificity of motion
- § 95:8 Eyewitness identification
- § 95:9 Circumstantial evidence
- § 95:10 Fingerprint evidence
- § 95:11 Aiding and abetting—Required showing
- § 95:12 —Drug sales
- § 95:13 —Modus operandi
- § 95:14 —Membership in a conspiracy
- § 95:15 —Post-crime conduct
- § 95:16 Constructive possession
- § 95:17 —Proximity
- § 95:18 —Control
- § 95:19 —Shared access
- § 95:20 Premeditation
- § 95:21 Conspiracy

CHAPTER 96. JUROR CONDUCT DURING DELIBERATIONS

- § 96:1 Introduction
- § 96:2 Extraneous matters considered by the jury—Unauthorized views
- § 96:3 —Contact with court personnel
- § 96:4 —Communications with others
- § 96:5 —Communications with each other
- § 96:6 —Experiments
- § 96:7 —Internet research

- § 96:8 —Miscellaneous
- § 96:9 Propriety of use of “jury aids”—Exhibits
- § 96:10 —Books
- § 96:11 —Replay of testimony
- § 96:12 —Written instructions

CHAPTER 97. TRIAL PUBLICITY

- § 97:1 Introduction
- § 97:2 No bright line
- § 97:3 Why speak at all?
- § 97:4 Origins of rule
- § 97:5 Rule v. code
- § 97:6 ABA standards for criminal justice
- § 97:7 *Gentile v. Nevada State Bar*—Shifting majorities
- § 97:8 —Justice Kennedy’s majority
- § 97:9 —Chief Justice Rehnquist’s majority
- § 97:10 —The dissents
- § 97:11 1994 Model Rule Amendments
- § 97:12 Special duties of prosecutors
- § 97:13 Factors indicating potential prejudice—Nature of the proceeding
- § 97:14 —Timing
- § 97:15 —Previous dissemination of the information
- § 97:16 —Reasonable reliance on other measures
- § 97:17 —Lawyer’s intent
- § 97:18 Gag orders
- § 97:19 Cases finding violations
- § 97:20 Cases finding no violations

CHAPTER 98. PRACTICE AIDS

- § 98:1 Motion for appointment of interpreter
- § 98:2 Jury instruction regarding use of interpreter
- § 98:3 Motion to allow defendant to appear in court in civilian clothes
- § 98:4 Instructions on juror note taking (Texas)
- § 98:5 Instructions on juror note taking (D.C.)
- § 98:6 Jury instructions regarding questioning by jurors
- § 98:7 Motion for judgment of acquittal
- § 98:8 Post-verdict motion for judgment of acquittal
- § 98:9 Rules pertaining to trial publicity
- § 98:10 District attorney’s policy on statements to the news media
- § 98:11 Motion to dismiss for deliberate creation of prejudicial publicity

PART XIII. JURY INSTRUCTIONS

CHAPTER 99. SUBMISSIONS AND OBJECTIONS

- § 99:1 Introduction
- § 99:2 Timing—Preliminary instructions
- § 99:3 —Closing instructions
- § 99:4 Form of instructions—Written v. taped
- § 99:5 —Jury interrogatories (special verdicts)
- § 99:6 Requesting closing instructions
- § 99:7 Ruling on instructions
- § 99:8 Entitlement to instructions—Required *sua sponte*
- § 99:9 —Mandatory upon request
- § 99:10 —Discretionary
- § 99:11 —Basis in the evidence

TABLE OF CONTENTS

- § 99:12 Submitting instructions—Preparation
- § 99:13 —Language of instructions
- § 99:14 —Pattern v. drafted instructions
- § 99:15 —Tailoring instructions
- § 99:16 Objections and appellate review
- § 99:17 Requests for re-instruction

CHAPTER 100. LESSER-INCLUDED OFFENSES

- § 100:1 Introduction
- § 100:2 Definition of lesser-included offense—Statutory definitions
- § 100:3 —“Elements” v. “Inherent Relationship”
- § 100:4 —Model Penal Code definition
- § 100:5 Definition of lesser-included offense—Other approaches
- § 100:6 Limitations on doctrine
- § 100:7 Entitlement to instruction—Analysis of the elements
- § 100:8 Entitlement to instruction—Due process underpinnings
- § 100:9 —Standard for entitlement
- § 100:10 —Theories of entitlement
- § 100:11 Entitlement to instruction—Choice of defense
- § 100:12 On request or sua sponte—Disagreement in courts
- § 100:13 On request or sua sponte—Parties should decide
- § 100:14 Over defense objection
- § 100:15 Procedure

CHAPTER 101. VERDICT-URGING INSTRUCTIONS

- § 101:1 Introduction
- § 101:2 The “dynamite” charge—History
- § 101:3 —Criticism
- § 101:4 The “dynamite” charge—Risk of coercion
- § 101:5 The “dynamite” charge—Discounting hung jury
- § 101:6 The “dynamite” charge—Repeating original instruction
- § 101:7 Compounding the coercion
- § 101:8 Alternatives
- § 101:9 Strategic concerns
- § 101:10 Appellate review

PART XIV. SENTENCING

CHAPTER 102. PROVISIONS AND OPTIONS

- § 102:1 Introduction
- § 102:2 Provisions
- § 102:3 Statutory structures
- § 102:4 Determinate v. indeterminate sentences
- § 102:5 —Indeterminate sentences—Statutory maximums and minimums
- § 102:6 ——Specified minimum term
- § 102:7 ——Minimum maximum term
- § 102:8 ——Mandatory minimum term
- § 102:9 —Determinate sentences—Flat time
- § 102:10 ——Presumptive sentences
- § 102:11 *Apprendi v. New Jersey*—The constitutionality of sentence enhancements
- § 102:12 ——Continued vitality of U.S. Sentencing Guidelines after *Apprendi*
- § 102:13 *Apprendi v. New Jersey*—The constitutionality of sentence enhancements—Impact on drug cases
- § 102:14 *Apprendi v. New Jersey*—The constitutionality of sentence enhancements—Nondrug crimes affected by *Apprendi*

- § 102:15 —The constitutionality of sentence enhancements—Impact on death penalty statutes
- § 102:16 ——Impact on mandatory minimum sentences
- § 102:17 ——Impact on plea agreements
- § 102:18 ——Impact on consecutive v. concurrent sentencing
- § 102:19 ——Timely claim on direct appeal—Harmless error
- § 102:20 ——Untimely claim on direct appeal—Plain error
- § 102:21 ——Collateral appeal—Retroactivity of *Apprendi*
- § 102:22 Enhancement provisions
- § 102:23 —Prior offenses—State statutes
- § 102:24 ——Federal statutes
- § 102:25 ——Challenging prior convictions
- § 102:26 ——Challenges to habitual offender penalty
- § 102:27 ——*Solem v. Helm* Analysis
- § 102:28 ——Challenges to habitual offender penalty
- § 102:29 —Characteristics of victim
- § 102:30 Concurrent, consecutive terms
- § 102:31 Probation—Eligibility
- § 102:32 —Conditions
- § 102:33 —Scrutiny of conditions
- § 102:34 —Other conditions—Community service
- § 102:35 ——Medical or substance abuse treatment or therapy
- § 102:36 —Revocation of probation
- § 102:37 Restitution—Victim and Witness Protection Act
- § 102:38 —Mandatory Victim Restitution Act
- § 102:39 —Constitutional challenges
- § 102:40 —Scope—State restitution orders
- § 102:41 —Ability to pay—State restitution orders
- § 102:42 Other incarceration alternatives—Split sentence
- § 102:43 —Work release
- § 102:44 —House incarceration
- § 102:45 —Fines
- § 102:46 —Deportation
- § 102:47 —Sex offender registration and notification laws
- § 102:48 —Offense of failing to register
- § 102:49 —Prohibition of possession of firearms
- § 102:50 Double jeopardy and merger
- § 102:51 State sentencing guidelines—Mandatory guidelines
- § 102:52 —Non-mandatory guidelines
- § 102:53 Capital sentencing
- § 102:54 —Mandatory death penalties
- § 102:55 —No *per se* rules
- § 102:56 —Responsibility for sentencing
- § 102:57 —Insanity of defendant
- § 102:58 —Mentally retarded defendants
- § 102:59 —Juvenile status of defendant
- § 102:60 —Close scrutiny warranted
- § 102:61 —Aggravating and mitigating factors
- § 102:62 —Double jeopardy
- § 102:63 —Cruel and unusual punishment

CHAPTER 103. FEDERAL SENTENCING GUIDELINES

- § 103:1 Preface
- § 103:2 Introduction
- § 103:3 Promulgation of guidelines
- § 103:4 Amendment of guidelines

TABLE OF CONTENTS

§ 103:5	General principles for application of guidelines—Individuals
§ 103:6	—Organizations
§ 103:7	Applicability of guideline—Date of offense
§ 103:8	Applicability of guidelines—“Straddle crimes”
§ 103:9	—Juvenile proceedings
§ 103:10	Discovery; Required disclosures
§ 103:11	Discovery—Request for Jencks Act material
§ 103:12	Plea bargaining and agreements
§ 103:13	Plea bargaining—Charge bargaining
§ 103:14	—Recommendation bargaining
§ 103:15	—Sentence bargaining
§ 103:16	—Factual stipulations
§ 103:17	—Effective assistance of counsel
§ 103:18	Presentence considerations—Presentence report
§ 103:19	Offense level calculation
§ 103:20	—Relevant conduct—Guidelines provisions
§ 103:21	— —Acquitted conduct
§ 103:22	— —Same course of conduct; Common scheme or plan
§ 103:23	— —Exclusionary rule
§ 103:24	—Narcotics cases
§ 103:25	—Monetary offenses
§ 103:26	— —Money laundering
§ 103:27	— —Tax offenses
§ 103:28	—Other offenses
§ 103:29	Adjustments to offense level—Victim-related
§ 103:30	—Role of defendant—Aggravating or mitigating
§ 103:31	— —Abuse of trust
§ 103:32	—Obstruction of justice—Reckless endangerment during flight
§ 103:33	—Multiple count adjustment
§ 103:34	—Acceptance of responsibility
§ 103:35	Criminal history category
§ 103:36	—Career offenders and criminal livelihood
§ 103:37	—Chapter Four departures—Inadequacy of criminal history
§ 103:38	Determining sentence
§ 103:39	—Effect of statutory limitations—Safety-valve provisions
§ 103:40	—Imposition of term of imprisonment
§ 103:41	—Imposition of probation—Probation terms
§ 103:42	—Imposition of supervised release—Conditions
§ 103:43	—Other sentencing options
§ 103:44	—Restitution, fines, assessments, and forfeitures
§ 103:45	Chapter five departures—Special offender characteristics
§ 103:46	—Substantial assistance
§ 103:47	— —Remedy for breach of plea
§ 103:48	—Other grounds for departure—“Fast-track” disposition
§ 103:49	—Other downward departures—Aberrant behavior
§ 103:50	— —Effect of victim’s conduct
§ 103:51	— —Coercion and duress
§ 103:52	—Upward departures
§ 103:53	—Departure for combination of factors
§ 103:54	Post- <i>Booker</i> guideline departures
§ 103:55	Post-sentencing proceedings—Correction or reduction of sentence
§ 103:56	—Revocation of supervised release or probation
§ 103:57	Organizations
§ 103:58	—Order to remedy harm—Restitution
§ 103:59	—Fines
§ 103:60	—Probation

- § 103:61 Appeals—Notice of appeal
- § 103:62 —Scope and standard of review
- § 103:63 —Unpreserved errors
- § 103:64 —Review of departure decisions—Disposition of appeal
- § 103:65 —Sentencing upon remand
- § 103:66 —Waiver of appeal rights

CHAPTER 104. PROCEDURE

- § 104:1 Introduction
- § 104:2 Presentence report
- § 104:3 —Disclosure—Notice to victims
- § 104:4 —Objections
- § 104:5 —Dealing with probation officer
- § 104:6 Defense role at sentencing
- § 104:7 Sentencing hearing—Allocution
- § 104:8 —Evidence and burden of proof
- § 104:9 —Statements of and testimony by victim
- § 104:10 —Consideration of victim impact evidence
- § 104:11 —Effect of public outcry
- § 104:12 —Findings and determination
- § 104:13 —Imposition of sentence
- § 104:14 Procedure of an appeal of sentence

CHAPTER 105. PRACTICE AIDS

- § 105:1 Checklists for engaging a sentencing specialist
- § 105:2 Memorandum of Attorney General Reno
- § 105:3 Memorandum of Attorney General Thornburgh
- § 105:4 Motion to compel production of Federal Sentencing Guidelines information
- § 105:5 Sample paragraphs for inclusion in plea agreements under Federal Sentencing Guidelines
- § 105:6 Amendments to the sentencing guidelines

PART XV. FORFEITURE

CHAPTER 106. CRIMINAL FORFEITURE

- § 106:1 Introduction
- § 106:2 History of criminal forfeiture
- § 106:3 Nature of criminal forfeiture
- § 106:4 Scope of criminal forfeiture
- § 106:5 Consequences of guilty plea
- § 106:6 Third-party protection
- § 106:7 Substitute assets
- § 106:8 Pre-conviction procedures—Notice
- § 106:9 Due process challenges—Rejections
- § 106:10 Due process not satisfied
- § 106:11 Attempt to reconcile statute with rule
- § 106:12 Issue left open by Supreme Court
- § 106:13 Standard of proof
- § 106:14 Proportionality—Eighth Amendment
- § 106:15 “Grossly disproportionate”
- § 106:16 Proportionality under statute
- § 106:17 Jury nullification
- § 106:18 Joint and several liability
- § 106:19 Bifurcation of proceedings
- § 106:20 Third party claims—Ancillary proceedings

TABLE OF CONTENTS

- § 106:21 Attorney's fees
- § 106:22 Statutory arguments
- § 106:23 Constitutional arguments
- § 106:24 Criminal Justice Act
- § 106:25 Conditional appearance
- § 106:26 Untainted assets
- § 106:27 Bona fide transfers
- § 106:28 Expended fees/preemption
- § 106:29 Third parties
- § 106:30 State constitution
- § 106:31 Money laundering
- § 106:32 Ethical dilemmas—Contingent fees
- § 106:33 Conflict of interest
- § 106:34 Disclosure of confidences

CHAPTER 107. CIVIL FORFEITURE

- § 107:1 Overview
- § 107:2 History
- § 107:3 Federal forfeiture statutes
- § 107:4 Comparison of civil and criminal forfeiture
- § 107:5 Procedure, generally—Statutes; rules; regulations
 - Seizures
 - Warrantless seizures
 - Motion for return of property
 - Forfeitures of real property
- § 107:10 Procedure in administrative forfeiture—Generally
 - Notice
 - Claim; complaint
 - Remission and mitigation—In general
 - Claimants
 - Mitigation
 - Petition
 - Terms and conditions
 - Procedure in judicial forfeiture—Jurisdiction and venue
 - Representation
 - Restraining order
 - Complaint
 - Notice; service of process
 - Disposition of property
 - Statement of interest
 - Caselaw discussions of standing
 - Answer; default
 - Discovery
 - Summary judgment
 - Settlement
 - Trial
 - Appeals
 - Burden of proof
 - Scope of civil forfeiture—Required nexus
 - Future criminal activity
 - Facilitation; commingled funds
 - Proceeds
 - Caselaw discussion
 - Realty
 - Limiting the scope of forfeiture
 - Relation back doctrine

- § 107:41 Innocent owners—History of defense
- § 107:42 Scope of civil forfeiture—Ownership interest
 - Caselaw illustrations
- § 107:44 —Lack of knowledge; efforts to prevent illegal use
- § 107:45 —Spouses as innocent owners
- § 107:46 —Secured creditors
- § 107:47 Relation between criminal case and civil forfeiture—In general
- § 107:48 —Preclusive effect of prior proceedings
- § 107:49 —Immunized disclosures
- § 107:50 —Plea agreements
- § 107:51 —Sentencing
- § 107:52 —Stay of civil forfeiture
- § 107:53 Self-incrimination privilege in civil forfeiture—In general
- § 107:54 —Adverse inference
- § 107:55 Forfeiture of attorney's fees
- § 107:56 Constitutional limitations on civil forfeiture—In general
- § 107:57 —Applicability of constitutional provisions
- § 107:58 —Due process: Taking; pre-seizure hearing
- § 107:59 —Caselaw discussion
- § 107:60 —Due process: Delay
- § 107:61 —Due process: Outrageous conduct
- § 107:62 —Fourth Amendment
- § 107:63 —Double jeopardy
- § 107:64 —Excessive fines
- § 107:65 Compensation for claimants
- § 107:66 State forfeitures—In general
- § 107:67 —Model forfeiture statutes
- § 107:68 —State statutes
- § 107:69 —State law protections for owners
- § 107:70 Relation between state and federal forfeiture proceedings—In general
- § 107:71 —Adoptive seizures
- § 107:72 —Limits on adoptive seizures
- § 107:73 —Consecutive state and federal forfeiture proceedings

CHAPTER 108. CIVIL FORFEITURE OF ATTORNEY'S FEES AND RESTRAINT OF ASSETS SOUGHT TO BE USED FOR FEES

- § 108:1 Overview
- § 108:2 Statutory authority for fee forfeiture and its practical limitations—Statutes authorizing civil forfeiture of fees
 - Department of Justice guidelines governing fee forfeiture
 - Practical considerations to protect against fee forfeiture—In general
 - Payment from a different source
 - Draft fee agreements that establish lack of knowledge and untainted source
 - “Flat fee” or earned upon receipt fee agreements
 - Exemption from government
- § 108:9 Obtaining release of restrained funds and assets for payment of legal fees—Restraint of assets—Problem presented
 - Statutory authority for post-indictment, pre-trial restraint of assets
 - Obtaining release of restrained assets—Legal authority
 - Equitable arguments and practical considerations

CHAPTER 109. PRACTICE AIDS

- § 109:1 Complaint *in rem* for forfeiture of motor vehicle and other property
- § 109:2 Claimant's original answer to complaint *in rem* for forfeiture of motor vehicle and other property

TABLE OF CONTENTS

- § 109:3 Checklist of possible affirmative defenses
- § 109:4 Motion for temporary restraining order and preliminary injunction
- § 109:5 Affidavit in support of motion for temporary restraining order and preliminary injunction
- § 109:6 Motion to dismiss complaint for forfeiture *in rem*
- § 109:7 Memorandum in support of claimant's motion to dismiss complaint for forfeiture *in rem*
- § 109:8 Motion to bifurcate
- § 109:9 Jury instruction on forfeiture

Table of Cases

Index

