CHAPTER 1

The Trial Process

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Chapter Contents

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§ 1.01 Overview of the Trial Process

There was a time when guilt and innocence and right and wrong were not decided by juries or even judges. These decisions were at times settled by ordeal, such as subjecting the accused to a life-threatening experience, the survival of which would determine her fate. Legal process has come a long way since the times of trial by ordeal. Today, trials are not only an important mechanism for resolving disputes but also an important part of life in America.

This book describes essential elements of the trial process. It covers key parts in the process: jury selection, where the finders of fact are chosen; opening statements, where counsel explains what the evidence will show; direct examination, where witnesses tell their stories; cross-examination, where the parties further build their cases and impeach opposing witnesses; and closing arguments, where the facts and the law are woven together in a final persuasive plea. It also features important practice points, such as the effective use of exhibits; whether and when to object; dealing with expert witnesses; and the ethical rules that govern counsel's conduct during the course of trial.

Trials can vary greatly depending on whether they involve civil or criminal issues, whether they take place in state or federal court, and whether they are decided by a judge or by a jury. Even for a particular type of trial, there can be significant variation within a given state or federal court.[1] While this book discusses some of these differences, it is focused primarily on common elements, with the caution that it is critical to consult local rules and individual judicial practices.

By way of providing an overview, this chapter discusses the trial outline used to get started in the process of preparing for trial; considers preliminary matters such as the final pretrial conference and the final pretrial order; and introduces the basic elements of the trial itself, most of which are discussed in more detail in the chapters that follow.

§ 1.02 The Trial Outline/Notebook

Trial preparation begins well before jurors are selected, opening statements are delivered or witnesses are called.

Most effective trial lawyers begin early to prepare a trial outline (or "order of proof") to guide their pretrial and trial activities and to develop a viable "theory of the case." As early as practicable, counsel should prepare an outline of the claims and defenses at issue, the elements of those claims and defenses, and the evidence concerning them (e.g., exhibits or witness testimony). This outline should identify the legal authorities corresponding to each.

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[1] See, e.g., Uniform Civil Rules for the Supreme Court and the County Court § 202.70(g) (providing that the practice rules of the New York State Supreme Court Commercial Division differ from the rules of practice followed in the New York State county-level supreme courts).

The trial outline serves multiple purposes. Before trial, early versions of the outline can guide discovery activities and motion practice, helping to frame discovery requests, deposition questions, and legal argument. As the trial date approaches, the outline can serve as a means of organizing the evidence, such as by identifying which witnesses and which exhibits will be used to make which points. And as an outline of the legal elements and supporting evidence, the order of proof is a foundation for the preparation of pre- or post-trial briefs.

As the case progresses to trial, the outline generally becomes more detailed. For example, for each exhibit that is needed to support an element, the outline may indicate how that exhibit will be admitted into evidence (e.g., under which rules of evidence, and through which witness). When multiple exhibits support an element, the outline may indicate which are preferred and how "back-up" exhibits or testimony may be incorporated if the preferred exhibit is found inadmissible. Where witness testimony is necessary to support an element, the outline may contain a brief description of the anticipated testimony (with reference to deposition testimony where applicable), any exhibits that should accompany that testimony, and any anticipated evidentiary issues. It can also be helpful to note which lawyer is responsible for each witness (and exhibits associated with that witness) and information about demonstrative exhibits that will be prepared for trial.

Most effective trial lawyers also prepare and use a trial notebook, which typically includes the materials essential to conducting an efficient trial. The trial book may contain key orders, such as the final pretrial order, an overall outline of counsel's case, an ordered list of the witnesses, and key legal authorities. The trial notebook may also contain other information that counsel may wish to have handy, such as a chronology of key events, a list of standard objections, and key contacts.

§ 1.03 Preliminary Matters

The structure and organization of trial is determined before it begins. Before trial, the parties typically appear at a final pretrial conference to address any open issues relevant to trial. Following the conference, courts generally issue a pretrial order to govern the proceedings.[2] Rulings on motions *in limine* or *Daubert* motions may also shape the trial. Here is a brief discussion of these matters.

[1]—The Final Pretrial Conference

Most courts hold a final pretrial conference shortly before trial to finalize a trial plan with the attorneys who will be participating.[3] At the conference, the parties are free to raise any issues with the court that they believe to be necessary or appropriate for efficient resolution of the case. For example, the parties may wish to inquire as to the court's preferred procedure for objecting or to decide when a witness with limited availability will be examined. The parties may also raise more

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[2] Fed. R. Civ. P. 16(d).

[3] Fed. R. Civ. P. 16(e) (providing that in federal civil cases, final pretrial conferences, while not mandatory, "must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party").

substantive issues, to the extent they were not resolved by earlier motion practice.

Some courts deal with many trial issues well in advance of the final pretrial conference. In these courts, the conference is more for housekeeping issues like reviewing the days and hours the court will sit; fixing time limits on openings and the presentation of proof generally; and determining how exhibits will be published.

If it has not done so already, at the final pretrial conference the court typically sets a schedule for submission of proposed *voir dire* questions, proposed verdict forms, trial memoranda, and pretrial motions.

[2]—The Pretrial Order

Following the final pretrial conference, courts usually issue a pretrial order to control the course of the trial.[4] In civil cases, this will usually take the form of a joint pretrial order, submitted by the parties, to be "so ordered" by the court. Pretrial orders may cover a large number of issues but typically address the following key points.

[a]—Nature of the Case/Jurisdiction/Counsel

A typical proposed final pretrial order describes the nature of the case (e.g., a contract case for damages), states the basis of the court's jurisdiction (e.g., diversity jurisdiction), and identifies trial counsel. Rarely are there disputes as to these matters by the time of trial.

[b]—Type and Length of Trial

The parties also specify in the proposed final pretrial order whether the case is to be tried to the court or to a jury.[5] For a jury trial, the parties may recommend the number of jurors to be selected and indicate whether they will accept a less than unanimous verdict.[6] In some instances, the parties may indicate their consent to the trial of a case by a magistrate judge.[7]

Because trial time is scarce, most courts limit the parties' trial time and require the time allocated to be shared. The proposed final pretrial order usually contains an estimate of the length of trial. It is important to provide a realistic time estimate, to be prepared to explain why the requested amount of time is necessary, and, once at trial, to carefully track the amount of time used and remaining.

[c]—Stipulated Facts and Uncontested Law

Proposed final pretrial orders generally include a statement of uncontested facts. Such facts may or may not include those already admitted by a party—for example, in an interrogatory response, request

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[4] Fed. R. Civ. P. 16(d); Fed. R. Crim. P. 17.1.

[5] Fed. R. Civ. P. 38, 39 ("When a jury trial has been demanded under Rule 38, . . . [t]he trial on all issues so demanded must be by jury unless: . . . the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record.").

[6] Fed. R. Civ. P. 48(a), (b).

[7] 28 U.S.C. § 636(c).

for admission, or answer to the complaint. Stipulated facts are removed from contention and deemed to be true. In most cases, they will become part of the trial record, although some courts prefer to consider their admissibility separately from their existence. In a jury trial, the stipulated facts may be read to the jury by the court or by the parties.

Some proposed final pretrial orders also include a statement of uncontested legal principles concerning claims and defenses in suit. These statements are usually limited to the key principles that will provide the overarching framework for decision or that will be helpful for the court to understand the parties' positions.

The process of negotiating stipulated facts and uncontested principles of law can simplify trial, bypass problematic evidentiary issues and avoid unnecessary sideshows. The process can also elucidate the opposing party's case.

[d]—Issues and Contentions

Most proposed final pretrial orders contain a description of factual and legal issues in dispute and the parties' contentions on those issues. These statements are usually more detailed than the parties' statement of uncontested facts and law. The length and content of the parties' statements of contested facts often depend on whether the parties are also submitting a trial brief.

The parties' statement of contested issues of fact and law may be agreed (i.e., joint) or prepared separately by each party. In a bench trial, the statements may be framed as proposed findings of fact and conclusions of law.

Statements of contested issues of fact may include citations to proposed exhibits and to anticipated witness testimony. Similarly, statements of contested issues of law may include citations to relevant supporting authority.

To avoid waiver and preclusion, counsel should take care that all issues of contested fact and law are included in the proposed final pretrial order. Frequently, the pretrial order has the effect of amending the pleadings, which can be deemed to embrace only the parties' stipulations and contentions.

[e]—Exhibit List

While in criminal cases the parties usually do not exchange exhibits or exhibit lists in advance of trial, in civil litigation courts generally require that the proposed final pretrial order include a list of the exhibits to be used at trial. The exhibit list is generally a straightforward list of the documents that may be used at trial. But it can, nonetheless, require considerable time and energy to prepare. In most civil trials, many exhibits are not controversial and will be received into evidence without objection. Some judges will encourage the parties to offer at the outset of the trial all the undisputed exhibits to save time.

Typically, each entry on the exhibit list includes the proposed exhibit's assigned exhibit number, a brief description of the contents of the exhibit, the relevant date of the exhibit (e.g., creation, publication, transmittal, where known), the range of any associated bates or other identification numbers and any objections (lodged by other parties) to the admission of the exhibit, including a brief description of the basis for the objections.

The exhibit list generally takes the form of a table, though rule or individual practice sometimes requires otherwise. Table form permits the alignment of corresponding information and facilitates sorting of the exhibit list by specific parameters, such as bates number, date, and objection.[8] Some courts require that exhibits appear in a particular order (e.g., chronologically). But even if a particular ordering is not required, some kind of organizational scheme is advisable.

Exhibit lists may either be separate (one list for each party) or joint (a single list containing all parties' exhibits). This may be specified by rules of the court, or it may be subject to the parties' agreement. A single, integrated exhibit list is often preferred, as it avoids duplication and the risk of confusion. A single exhibit list eliminates the possibility that the same exhibit will be known by multiple exhibit numbers (e.g., a contract in issue will not be known as both Plaintiff's 23 and Defendant's 47) or that the same exhibit number will refer to multiple exhibits (e.g., "Exhibit 3" will not refer to both Plaintiff's email and Defendant's internal memorandum).

Preparation of an exhibit list requires a balance between ensuring that all of the necessary (or potentially necessary) exhibits appear on the list and avoiding overburdening the court and/or jury with large numbers of exhibits that are unlikely ever to be used. After the universe of potential exhibits is identified, the exhibit list should be whittled down to a manageable number of exhibits, each of which could realistically be expected to be used at trial. Most judges do not like trials with hundreds or thousands of exhibits, as neither the judge (in a bench trial) nor the jury can absorb huge amounts of information on an unfamiliar topic in a short time.

[f]—Witness List

The proposed final pretrial order typically also requires inclusion of a witness list. As with the exhibit list, the witness list must generally disclose all witnesses who may be called at trial (other than for impeachment or rebuttal purposes only) or risk their exclusion. The list should identify the witness and provide basic information about the witness, including whether the witness is a fact or expert witness and whether the witness will appear live or by deposition. The parties should indicate any objections to witnesses or their likely testimony. Significant issues should be raised in motions *in limine*.

Practices regarding the level of detail required for a witness list vary significantly. In addition to the above information, the witness list may specify which witnesses the party *will* call and which the party *may* call if necessary, the witness's contact information, and a brief identifying statement. Some pretrial orders also require a brief summary of the witness's expected testimony.

For purposes of the final pretrial order, most courts require similar disclosures for expert witnesses and fact witnesses. However, the parties are almost always required to make more pretrial disclosure regarding experts. In federal court, for example, experts are required well in advance of trial to submit a report containing: (1) a complete statement of all opinions the witness will express and the basis and reasons for

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[8] See § 7.02[1] *infra* (describing preparation of an exhibit list).

them; (2) the facts or data considered by the witness in forming them; and (3) any exhibits that will be used to summarize or support them.[9]

In addition to providing information about intended live witnesses, the proposed final pretrial order should specifically identify testimony to be offered by deposition. This generally requires that each party designate, by citation to transcript pages and lines, the deposition testimony that the party will offer at trial. The proposed final pretrial order should also include the counterdesignations identified by any other party, as well as any objections to the testimony.

[3]—Motions *in Limine* and *Daubert* Motions

In anticipation of trial, the parties should consider potential motions *in limine* and *Daubert* motions. A motion *in limine* is a motion filed prior to or during trial that is decided by the court before addressing the case on its merits.[10] Typical bases for such a request are that certain evidence or testimony is inadmissible because it is irrelevant, hearsay, or unduly prejudicial. Most judges will set the schedule for the filing of any motions *in limine*, which are usually heard and decided in advance of trial.

A *Daubert* motion, named after a standard established in the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[11] is a motion *in limine* directed to the admissibility of expert witness testimony.[12] Grounds for a *Daubert* motion include that a proposed expert has not employed reliable principles or methods in arriving at an opinion.[13] Some courts prefer these motions to be filed well in advance of trial, before or at the time that summary judgment motions are filed.

By determining the admissibility of evidence before trial, the parties avoid the problem of arguing key issues for the first time when the evidence is offered at trial. In a jury trial, this can prevent a "cat out of the bag" situation that would require a limiting instruction, avoids disruption of the flow of testimony and the waste of valuable trial time, and gives the parties the opportunity to brief their positions and the court the opportunity to decide the issue in a more fully informed manner.

§ 1.04 The Elements of the Trial Process

As stated, trials vary based on factors such as the nature of the case, the forum, and the applicable law. But there are common elements, as discussed below, in the context of the jury trial.

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[9] Fed. R. Civ. P. 26(a)(2)(B).

[10] E.g., 21 Federal Practice & Procedure § 5037.10 (2d ed. 2013).

[11] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[12] Although "*Daubert*" refers to federal law, similar motions can be brought in state court under the governing state standards for expert testimony. Courts may prefer these motions to be filed well in advance of trial, before or at the time that summary judgment motions are filed.

[13] See Fed. R. Evid. 702 (providing the four factors necessary to qualify an expert to offer testimony).

[1]—Jury Selection

In a jury case, the trial process begins with jury selection. Jury selection is the process by which eligible men and women are chosen for jury service. As one commentator puts it, "[h]ow a jury is selected in a particular courtroom varies greatly, probably more than any other phase of a trial."[14] Points of difference concern: how jurors are called and qualified for jury service; how many jurors will decide the case; whether alternate jurors will be selected;[15] the bases for challenges for cause; and the number of peremptory challenges that each party will have and how they will be exercised.[16]

In federal court, jury selection is governed by the Jury Selection and Service Act (the "JSSA")[17] and by the applicable federal procedural rules.[18] Although individual court practices can affect the jury selection procedure, the JSSA ensures a minimal level of uniformity among the district courts. In contrast, jury selection in state court systems varies by state, resulting in a wide range of practices.[19]

Jury selection involves the questioning of prospective jurors, a process known as *voir dire*. During *voir dire*, the court or the parties ask questions designed to elicit information from prospective jurors that will inform the exercise of challenges. In a civil case, typical questions might include:

- Do you know any of the lawyers? Do you know any of the parties? Do you know any of the potential witnesses? Do you know anyone else in the jury box?
- Do you have a bias for or against a plaintiff simply because he or she has brought a lawsuit? Do you have a bias for or against a defendant simply because a lawsuit has been brought against him or her?
- There has been a great deal of public discussion about something called Tort Reform (laws that restrict the right to sue or limit the amount recovered). Do you have an opinion, one way or the other, on this subject?
- If the law and evidence warranted, would you be able to render a verdict in favor of the plaintiff or the defendant regardless of any sympathy you may have for either party?
- Based on what I have told you, is there anything about this case or the nature of the claim itself that would interfere with your ability to be fair and impartial and to apply the law as instructed by the court?

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[14] Mauet, *Fundamentals of Trial Techniques*, at 3 (8th ed. 2010).

[15] Further, in civil cases in federal court, alternate jurors are no longer empanelled. Fed. R. Civ. P. 48(a). Although a minimum of six jurors are required, the practice is to empanel eight jurors and potentially more for longer cases; by contrast, alternate jurors are still empanelled in some state courts. E.g., Wash. Civ. R. 47(b) (2013) (setting out procedure for empanelling alternate jurors).

[16] Mauet, N. 14 *supra.*

[17] 28 U.S.C. §§ 1861-1878.

[18] Fed. R. Civ. P. 47; Fed. R. Crim. P. 24.

[19] National Center for State Courts, The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report, at 8 (April 2007).

Voir dire is conducted in open court, with the entire pool of potential jurors present. Where sensitive matters are raised (such as when a potential juror reveals a possible bias), follow-up questioning of an individual juror may be conducted at side bar or in the robing room. At least in complex cases, written questionnaires may be used to facilitate the selection process.

In federal court, judges generally lead *voir dire*, whereas attorneys are more likely to conduct *voir dire* in state court. Federal judges tend to take a narrow approach to *voir dire*, and in a simple civil trial, a jury can be selected in as little as an hour. On the other hand, many attorneys value the opportunity to interact directly with jurors and attorney-led *voir dire* generally takes longer.

The parties may ask the court to excuse potential jurors for cause and they will also have peremptory challenges, by which they can excuse jurors without providing a reason. The number of peremptory challenges available to the parties will depend on the size of the jury and whether the case is civil or criminal.

[2]—Preliminary Instructions

Following jury selection, many courts provide preliminary instructions on the law. The purpose of preliminary instructions is to give the jury a framework for understanding the case they are about to hear and their role as jurors.

Typically, courts that provide preliminary instructions give directions on issues such as juror conduct; the nature of the claims or charges; constitutional principles; the trial procedure; the function of the court and jury; the credibility of witnesses; objections; burdens of proof; what constitutes evidence; the use of an interpreter or translations; note-taking; and the use of the Internet and social media.

A California Superior court included the following directive in its preliminary instructions to the jury:

> All of the Court's instructions, whether given before, during or after the taking of testimony are of equal importance. You must base the decision you make on the facts and the law.
>
> First, you must determine the facts from the evidence received in the trial, and not from any other source. A fact is something proved by the evidence or by a stipulation. A stipulation is an agreement between the attorneys regarding the facts.
>
> Second, you must apply the law that I state to you to the facts as you determine them, and in this way arrive at your verdict and any finding you are instructed to include in your verdict. You must accept and follow the law as I state it to you regardless of whether you agree with it or not. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.[20]

[20] California v. Peterson, No. 1056770 (Cal. Super. Ct., June 1, 2004).

[3]—Opening Statements

After the jury has been sworn and preliminary instructions, if any, have been provided, the parties make opening statements. Opening statements are an opportunity to preview for the trier of fact what they expect the evidence will show.

Opening statements provide jurors with a framework to filter and organize the evidence that will be presented during trial.[21] They permit the parties, through counsel, to tell their stories and introduce their themes. A typical opening statement consists of a simple, but persuasive, chronology of what happened and a clear statement of what the party wants.

In the trial of Zacarias Moussaoui for his role in the September 11th attacks, for example, the prosecution opened by painting a poignant picture of an otherwise ordinary morning:

> September 11th, 2001 dawned clear, crisp and blue in the northeast United States. In lower Manhattan in the Twin Towers of the World Trade Center, workers sat down at their desks tending to e-mail and phone messages from the previous days.
>
> In the Pentagon in Arlington, Virginia, military and civilian personnel sat in briefings, were focused on their paperwork.
>
> In those clear blue skies over New York, over Virginia, and over Pennsylvania, in two American Airlines jets and in two United Airlines jets, weary travelers sipped their coffee and read their morning papers as flight attendants made their first rounds.
>
> And in fire and police stations all over New York City, the bravest among us reported for work. It started as an utterly normal day, but a day that started so normally and with such promise, soon became a day of abject horror. By morning's end, 2,972 people were slaughtered in cold blood.[22]

In addition to its persuasive power, such storytelling has the added benefit of avoiding argument and discussion of the law, which are almost always prohibited in opening statements.

Because jurors are most attentive during opening statements and because they can be eager to "pick a side," the opening statement often can leave an impression—positive or negative—that will shape the way that jurors receive the evidence going forward.[23] Thus, opening statements are rarely waived.

[4]—Plaintiff's Case-in-Chief

As the party with the burden of proof, the plaintiff generally presents its case first. There can be exceptions, such as where the plaintiff's facts are conceded and only affirmative defenses or counterclaims are to be tried, but they are infrequent.

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[21] Marriott & Sullivan, "Opening to Win," N.Y.L.J. (Nov. 14. 2011).

[22] United States v. Moussaoui, No. 1:01-cr-00455-ALL (E.D. Va. Mar. 6, 2006).

[23] Marriott & Sullivan, N. 21 *supra*.

To prove its case-in-chief, the plaintiff must adduce evidence sufficient to establish each element of each claim. Facts can sometimes be established by stipulation or judicial notice. But most cases are proven by testimony from witnesses and the admission of exhibits.

[a]—Witnesses

A party presents evidence from its own witnesses by direct examination. Direct examination generally consists of open-ended questions that allow the witness to tell his or her story; on direct examination, leading questions are generally limited to hostile or adverse witnesses.[24] While not as romanticized as cross-examination, direct examination is the principal means by which most cases are presented.

Direct testimony is, of course, subject to cross-examination. Cross-examination is the examination of a witness by a party that did not call the witness. Cross-examination generally consists of leading questions that are designed to elicit information supportive of the examiner's case and to impeach the witness's testimony on direct examination. In most cases, cross-examination is limited to the scope of the direct examination and impeachment.[25] Cross-examination is sometimes allowed on any relevant subject (the so-called "English rule").[26]

Following cross-examination, the direct examiner may further examine the witness through what is known as redirect examination. Redirect examination is usually limited to addressing matters brought out on cross.[27] Based on the redirect examination, the court may allow further cross-examination, which is called recross examination. Just as redirect examination is usually limited to the scope of the cross, recross examination is usually limited to the scope of the redirect examination. When all examination of the witness is concluded, the witness is then excused, and another witness may be called.

In some jurisdictions, the judge asks questions of the witness.[28] A few jurisdictions even allow jurors to ask the witness questions, frequently through written questions submitted to the judge for approval.[29]

[b]—Exhibits

In addition to witness testimony, a party puts on its case by presenting exhibits for admission in evidence. "The four principal types of exhibits are real objects (guns, blood, drugs, machinery), demonstrative exhibits (diagrams, models, maps), writings (contracts, promissory notes, checks, letters), and records (private business and public records)."[30]

The admission of documentary evidence requires a party to lay a "foundation." Generally, this requires presenting other evidence to

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[24] E.g., Fed. R. Evid. 611(c).

[25] E.g., Fed. R. Evid. 611(b).

[26] E.g., Ala. R. Evid. 611(b); Tenn. R. Evid. 611(b).

[27] See § 4.05 *infra* (describing the ordinary scope of redirect examination).

[28] E.g., Fed. R. Evid. 614(b).

[29] See National Center for State Courts, The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report, at 35 (April 2007).

[30] Mauet, *Fundamentals of Trial Techniques*, at 6 (8th ed. 2010).

establish that the exhibit is relevant,[31] authentic,[32] and not subject to evidentiary or other rules that would bar its admissibility.[33] Foundation may be provided through witness testimony, certification, stipulation, judicial notice, party admissions (e.g., responses to interrogatories, to requests for admission or in pleadings) or other methods. Exact formalities vary by jurisdiction.

To be persuasive, exhibits may be published to the jury. This may be done in several different ways, including in a jury binder or via PowerPoint presentation. The contents of an exhibit may also be presented by computer graphics or other technology.

[c]—Order and Resting

Within its case-in-chief, the plaintiff may generally present witnesses and offer exhibits in whatever way it chooses. Plaintiff's counsel should, however, give careful consideration to timing and the sequence of proof. For example, there should be some logic to the presentation so that the jury can follow more easily. It can be effective to end a session on a strong note so that the jury goes home for the day with some vivid images in mind. Counsel should also always have a witness or other evidence ready to present in case the trial moves faster than anticipated.

After calling all of the witnesses and offering all of the exhibits and other evidence necessary to "make out" its case-in-chief, the plaintiff "rests." This is usually done simply by stating, "Plaintiff rests."

The close of the plaintiff's case is an important moment in any trial, as plaintiff has completed the presentation of its proof. Defense counsel must consider whether to move for a directed verdict or equivalent relief.[34]

[5]—Defendant's Case-in-Chief

Assuming the court does not direct a verdict in favor of the defendant after the plaintiff rests, the defendant may put on its case-in-chief. The defendant's case-in-chief proceeds in the same fashion as did the plaintiff's, primarily by calling witnesses and introducing exhibits.

By the time the defendant presents its case-in-chief, however, the trier of fact has heard the plaintiff's case-in-chief and the defendant's cross-examinations of the plaintiff's witnesses. Thus, the trier of fact often has a good sense of the parties' positions and evidence, allowing the defendant to focus less on background and more on disputed or new points. It is rarely wise for the defendant simply to repeat in its case points made during the course of the plaintiff's case.

Where both sides intend to call the same witnesses, it is common practice for the witness to be called to testify once. In such circumstances, the defense counsel is permitted to go beyond the scope of the direct in the cross-examination.

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[31] E.g., Fed. R. Evid. 402 ("Irrelevant evidence is not admissible.").

[32] E.g., Fed. R. Evid. 901(a) ("[T]he proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.").

[33] E.g., Fed. R. Evid. 608, 802, 1002; see also Fed. R. Evid. 402.

[34] See § 1.04[11] *infra*.

Upon completion of the defendant's case, the attorney will announce, "Defendant rests."

[6]—Rebuttal and Surrebuttal Cases

The parties are generally afforded the opportunity to present evidence in response to the case presented against them. The plaintiff is permitted to introduce evidence in response, or rebuttal, to the defendant's case-in-chief, and the defendant may offer evidence in reply, or surrebuttal, to the plaintiff's rebuttal case. Rebuttal and surrebuttal evidence often concerns affirmative defenses and counterclaims.

[7]—Instructions Conference

In a jury trial, the court holds a conference with the parties to "settle" the jury instructions.[35] The parties are usually required to submit proposed jury instructions before trial begins, often at the time of the final pretrial conference.[36] The court may permit or even require briefing on disputed points, and it may discuss the proposed instructions with the parties before and during trial.

At the charging conference, the parties may argue for or against a proposed instruction. The parties may also object to a proposed instruction or the court's refusal to provide a particular instruction. Generally, a party must make a specific objection to an instruction or a refusal to give an instruction on the record at the instructions conference, or risk forfeiting the right to appeal an erroneous instruction.[37] While the court may rule on the instructions at the conference, rulings are typically reserved until just before closing arguments, when both sides have rested.

In federal court, many judges give the lawyers a copy of the proposed charge to review before the charging conference. Once the charge is finalized, the court may give copies to the jurors so that they can follow along. While objections must be made at the charging conference, lawyers are usually given a final opportunity to object at a sidebar after the court gives the charge.

[8]—Closing Arguments

After the parties rest, counsel for the parties are permitted to make closing arguments. Closing arguments are for the lawyers to tell the jury what the evidence has been, how it ties into the jury instructions, and why the evidence and law compel a certain verdict.[38] Closing arguments are counsel's last chance to influence the jury.

In the trial of Timothy McVeigh for his role in the Oklahoma City bombing, the prosecution used its closing argument to remind the jury of the testimony of a number of witnesses:

> We took you first to the bomb scene, through sight and sound, through Lou Klaver. You remember her. She was the first witness,

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[35] E.g., Fed. R. Civ. P. 51(b); Fed. R. Crim. P. 30(b).
[36] E.g., Fed. R. Civ. P. 51(a); Fed. R. Crim. P. 30(a).
[37] E.g., Fed. R. Civ. P. 51(c), (d); Fed. R. Crim. P. 30(c), (d).
[38] Mauet, *Fundamentals of Trial Techniques*, at 9 (8th ed. 2010).

> the lawyer for the Water Resources Board across the street from the Murrah Building. She just so happened to be conducting a hearing that morning and was tape-recording it, and that tape recording captured the incredible sound of the blast, the silence that fell just momentarily, and then the screams of people who began to realize exactly what had happened. No one at the Water Resources Building worked for the federal government, no one. Lou Klaver didn't. This bomber did not care.
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> . . .
>
> And numerous witnesses described how the sky went black with smoke and debris, and you heard Mike Shannon, the fire chief, who said there was so much smoke in the air that they had no idea which building had been bombed, so much rubble in the streets it was impossible to tell where the sidewalk began and the street ended and vice versa.
>
> Let me show you Exhibit 1003. This is the scene that a number of the witnesses who testified before you personally experienced, the people like Susan Hunt, the office manager from HUD, who testified that on the morning of the blast, even though her office was on the 8th floor and even though it was on the opposite side of the building, she was thrown against the wall. In the course of her testimony, she stood before you, and with real dignity, name after name announced the 35 fellow employees at HUD who fell to their death that day.
>
> This is the same scene that Florence Rogers experienced. Remember her? She was the lady in the credit union. Same scene she lived through that morning as she watched, literally watched seven of her co-employees disappear, literally disappear from a space no wider than her desk. When the smoke cleared, what the people saw was much, much worse than the fires and the smoke. The building's nine floors had pancaked into the space of three.[39]

Whereas most opening statements are focused on the facts alone, the closing "argument" integrates the facts, the law, logic, inference, rhetoric and all other available tools of reason to construct a persuasive case for a particular verdict. An effective closing argument not only repeats many of the thematic and storytelling elements found in the opening statement (and the witness examinations), but also refers back to the testimony of the trial witnesses and the exhibits that were admitted into evidence. As the above excerpt demonstrates, emotion can play an important role. These days, many lawyers use slides in their closing arguments, displaying, for example, photographs received in evidence, other exhibits, and excerpts from trial transcripts.

As the party with the burden of proof, the plaintiff usually argues first, followed by the defendant, with the plaintiff usually being permitted a rebuttal argument.[40] This varies by jurisdiction, however. For example, in civil litigation in the U.S. District Court for the Southern District of New York, the party with the burden of proof argues last and rebuttal argument is not permitted. In criminal cases in the Southern District of

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[39] United States v. McVeigh, No. 96-CR-68-M (D. Colo. May 29, 1997).

[40] Where the only issue for the trier of fact concerns an affirmative defense or counterclaim on which the defendant bears the burden of proof, the defendant generally has the right to argue first and last.

New York, the Government delivers the opening summation and also has the right to a rebuttal summation.

In bench trials, many courts dispense with closing argument in favor of post-trial briefs. Some courts hold oral arguments following that briefing. In bench trials, especially ones in which the court received post-trial briefs, closing arguments often consist of counsel answering the questions raised by the parties' submissions.

[9]—Jury Instructions and Verdict Form

In a jury trial, the court must instruct the jury on the law that will govern its decision; these are the instructions addressed at the charging conference. Courts generally provide these instructions immediately either before or after the parties make their closing arguments.[41] The instructions may be provided orally, in written form, or both.

Jury instructions typically include general directives on issues like the burden of proof, credibility of witnesses, and substantive instructions on the elements of the specific causes of action and any affirmative defenses. Most courts have "usual" or "customary" general instructions, which the parties can request. Courts often look to the parties for guidance concerning substantive instructions. Some courts require the parties to work together on a joint request to charge.

The instructions are accompanied by a verdict form to be given to the jury.[42] Lawyers should pay close attention to the verdict form and plan their proof with it in mind, as the jury will be asked to answer the questions on the form.

[10]—Deliberations and Verdict

After receiving instructions on the law, the jury retires to deliberate. One member of the jury is selected as the foreperson and leads the deliberations, which are conducted in secret. When the jury has reached a verdict, the judge, parties and jury return to the courtroom and the verdict is read.

To reach a verdict, a specified number of jurors—all or some majority—must reach a consensus.[43]

During deliberations, the jury may seek guidance by sending a note to the judge asking questions about an issue it must resolve. In such a situation, the judge will convene counsel to consider the jury's question, and then bring in the jury to address the question. The jury may also send a note asking to hear certain testimony again and, in appropriate circumstances, the court may have a portion of the transcript read back to the jury or the court may even submit redacted pages of the transcript into the jury room.

If and when the jury reports that it is deadlocked, the court may choose to provide an *Allen* charge,[44] an instruction urging the jury "to continue deliberating and for the jurors in the minority to listen to the

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[41] E.g., Fed. R. Civ. P. 51(b)(3); Fed. R. Crim. P. 30(c).

[42] E.g., Fed. R. Civ. P. 49.

[43] *E.g.*, Fed. R. Civ. P. 48(a), (b); Fed. R. Crim. P. 31(a).

[44] Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

majority's arguments and ask themselves whether their own views were reasonable under the circumstances."[45]

After the verdict is announced, the parties will usually have an opportunity to "poll" the jury, i.e., to ask each juror individually whether he or she shares the verdict.[46]

[11]—Motions

After the close of a non-moving party's evidence, but before submission of the case to the jury, a party may file a motion for judgment as a matter of law (in civil trials) or for judgment of acquittal (in criminal trials) on any claim or offense for which there is insufficient evidence to sustain a verdict in favor of the non-moving party.[47]

If the court does not decide the motion prior to the close of all evidence and submission to the jury, the motion may be renewed after the jury renders a verdict.[48] In some circumstances, this may be the first time the motion is made.[49] If the motion is granted, the jury's verdict will be set aside and judgment entered in favor of the moving party. Alternatively or in addition, the parties may also move for a new trial on the basis of errors that were made during trial.

In certain limited circumstances during the course of a trial, a party may also move for a mistrial. These motions are almost never made in a civil case and are rarely made in a criminal case, and they should be reserved for those exceptional circumstances where the jury has been exposed to evidence that is so prejudicial that a mistrial is warranted.

[12]—Objections

Throughout the trial, counsel may want or need to object to certain testimony or exhibits. Significant or difficult issues should generally be raised before trial, in written motions *in limine*.

Counsel may also want or need to object to legal rulings of the court, including, for example, with respect to such matters as whether to strike a proposed juror for cause, how to respond to a note of the jury, and whether to give an *Allen* charge.

The making of objections is not a simple exercise; it requires both preparation (anticipating what might be objectionable) and quick thinking (when something unexpected arises). Some lawyers object too much and some not enough; it is important to strike the right balance. If an objection to evidence is overruled, counsel may want to ask for a limiting instruction in some instances to minimize any prejudice. Some courts permit argument on objections (usually outside the presence of the jury), while others do not permit "speaking objections" and allow only one-word objections (e.g., "hearsay") or reference to a rule ("Rule 802"), without any argument. Counsel may want to keep on hand a list of common objections.

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[45] Spears v. Greiner, 459 F.3d 200, 204 (2d Cir. 2006).
[46] E.g., Fed. R. Civ. P. 48(c); Fed. R. Crim. P. 31(d).
[47] E.g., Fed. R. Civ. P. 50(a); Fed. R. Crim. P. 29(a).
[48] E.g., Fed. R. Civ. P. 50(b).
[49] E.g., Fed. R. Crim. P. 29(c).

§ 1.05 Conclusion

Conducting an effective trial is no easy undertaking. It requires collecting all relevant facts; developing a theory that combines those facts with the applicable legal principles; preparing a trial plan to establish key points efficiently; delivering an opening statement that sets the stage for the evidence to come; preparing witnesses to testify and presenting their stories; incorporating visual aids to enhance learning; subjecting adverse witnesses to a vigorous cross-examination; making split-second decisions whether to object or to conduct redirect or recross examination; and delivering a closing argument that brings together all of the elements of the case. At the same time, it requires real-time strategic decisionmaking and an in-court presentation that conveys confidence, likeability, and trustworthiness.

Properly done, the trial is an effective means of resolving the parties' dispute. It brings to a close a dispute that could not be resolved as a matter of law and may have required substantial discovery and the involvement of numerous intermediaries (e.g., the court, the jury).

Trials, however, are much more than a means of resolving the parties' disputes. Trials are an opportunity for the parties to have their version of the underlying dispute heard by a neutral fact-finder. They embody the highest ideal of the American legal system, by offering a public forum to anyone who seeks justice under the law. As one federal judge has observed, "[i]t is often said that the rule of law is America's secular god and the courthouse its temples."[50]

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[50] Higginbotham, The Disappearing Trial and Why We Should Care (Rand Corp. 2004).