# STEPS IN A TRIAL

*Note to Students:* For a civil case, substitute the word "plaintiff" for the word "prosecution".

A number of events occur during a trial, and most must happen according to a particular sequence.
(The sequence may vary slightly based on state or local rules or practice.)

1. The following is the basic sequence in the trial process:
2. Judge enters and takes the Bench.
3. Bailiff calls the case.
4. Prosecution (Prosecutor in criminal case) makes an opening statement.
5. Defense makes an opening statement.
6. Prosecution presents case:
7. Prosecution calls first witness and conducts direct examination.
8. Defense cross-examines the witness.
9. Prosecution conducts redirect examination, if desired.
10. Steps a, b, and c completed for each of the prosecutions other witnesses.
11. Prosecution rests case.
12. Defense presents case in same manner as Prosecution in #5 above, with Prosecution cross-examining each witness.
13. Defense rests.
14. Prosecution makes closing argument.
15. Defense makes closing argument.
16. Prosecution offers any rebuttal argument.
17. Jury instructions (if jury trial).
18. Jury and judge deliberations.
19. Verdict/decision/judgment.
20. Order (civil trial); Sentence (if found guilty in a criminal trial).

The *main* steps in this trial sequence, before the judge or jury start deliberating, can be summarized as: (Note how the sides take turns.)

1. opening statement by prosecution;
2. opening statement by defense;
3. direct examination of prosecution's witnesses,
4. cross-examination of prosecution's witnesses;
5. direct examination of defense witnesses;
6. cross-examination of defense witnesses;
7. closing statement (argument) by prosecution; and
8. closing statement by defense.

In the following sections on the next four pages, the four most critical stages of the trial are highlighted.

## THE OPENING STATEMENT

**OBJECTIVE:** To acquaint the judge with the case and outline what you are going to prove through the witness' testimony and the admission of evidence.

**DESCRIPTION:**
The opening statement is the introduction to the case. This first impression is critical to the trial since it's the first time the attorneys for each side get to tell the judge and jury about what happened to their clients. It "paints a picture" of the case. Your direct and cross-examinations work to reveal the picture's details in the best possible light.
In the opening statement the attorney should:

1) Identify themselves, co-counsel and their client,
2) Summarize the case in less than 30 words using key facts according to your party's case,
3) Summarize the evidence that will be presented at the trial,
4) Identify who has the burden of proof (the amount of evidence needed to prove a fact).
5) Tell the court what decision you want them to come to at the end of the trial.

**STYLE POINTS:**

1. **Prosecution's Attorney:** Since this attorney speaks first, it is very important for the prosecution's opening statement to include a good summary of the facts, presented in a light most favorable to the prosecution. If the opening statement presents a very convincing picture of the prosecution's case, the defense team will have a much harder time changing the minds of the judge and jury.

2. **Defense Attorney:** The defense team has the task of showing that the prosecution's version of the facts is not correct. The defense attorney prepares by predicting how much detail and what kind of emphasis the prosecution's attorney will make in his/her opening statement. The defense attorney should be ready to make adjustments in his or her prepared statement while the prosecution's attorney speaks. The defense attorney should highlight the facts that are in dispute and emphasize the kinds of evidence the defense will present to show that the prosecution is wrong.

3. **Hot Tips:**

- Know your case, inside and out. You will then appear confident in your case.
- Attorneys should make eye-to-eye contact with raters while speaking.
- Do not read your statement. The use of notes is discouraged and your score may reflect it. If necessary, however, do not read all the way through and look up as often as possible at the judge.

- Use the future tense in describing what you will do, for instance 'The facts will show…'.
- Don't emphasize evidence that might not get admitted. Never promise to prove something you can't.
- Call your client by name, but refer to your opponent as plaintiff or defendant.
- Don't be wordy – use concise and specific language to cast your case in the most positive light.
- Use an analogy, a phrase or word, or create some memorable image that you refer to in your closing.

## THE DIRECT EXAMINATION

**OBJECTIVE:** To obtain information from favorable witnesses to prove the facts of your case.

**DESCRIPTION:**
After the opening statements, the process of witness examination begins – a chance for witnesses to tell their story. First, the prosecution's team presents its witnesses, then the defense team. Each time a witness is called to the stand, the attorney who called the witness asks a series of questions called the direct examination. These questions reveal what the witness saw, heard, experienced or knew.
The questions must ask only for facts, not for opinions (unless the witness has been declared to be an 'expert' in a particular subject, such as a doctor or a police detective). When the direct examination is completed, an attorney for the other side then asks questions to show weaknesses in the witness' testimony, a process called 'cross-examination.'

**STYLE POINTS:**

1. **Attorney Conducting Direct Examination:**

- Before the trial decide the details each of your witnesses know that will help you prove the main points of your case. Then ask sequence questions in a logical manner that will reveal these details.
- The direct examination's aim is to protect your witness.
- Avoid lengthy or complicated questions. Ask who, what, when, what, where, how questions.
- Leading questions cannot be used on direct examination. (See Rules of Evidence section.)
- Be prepared to rephrase questions in case the witness does not understand a question or fails to remember facts accurately, or in case the other side objects to a question. (Grounds for objections are discussed in the Rule of Evidence section.)

Be sure to have all documents marked for identification before you refer to them at a trial. Then refer to them as Exhibit A, etc. After you have finished using an exhibit, if it at all helps your case, ask the judge to admit it as evidence.

2. **Opposing Attorney:**

- Listen carefully to the questions and answers since cross-examination must be limited to subjects discussed in the direct examination.
- Listen for violations of the Rules of Evidence.
- Be prepared to make good objections. It's often more beneficial to you to take up 'objectionable' issues during cross-examination, rather than objecting too much. You don't want to alienate the raters.

3. **Witness:**

- Know the questions that your side's attorney will ask and prepare clear and convincing answers that contain the information that the attorney is trying to elicit from your testimony.
- The most important factor in the trial is the believability (often called "credibility") of the witnesses.
- Witnesses should tell their stories clearly with as little hesitation as possible.
- It's important for witnesses to know the facts thoroughly.
  **NOTE**: The attorney who conducted the direct examination may do a 'redirect' at the close of cross-examination (see next section). A redirect examination follows the same rules as direct. However, the questions are limited to subjects discussed in the cross-examination. ***Ask that time you don't use in your direct be reserved for redirect***.

4. **Hot Tips:**

**Attorney:**

- Focus the attention on the witness not on yourself.
- Allow your witness to explain some facts that may be detrimental to your case. This will minimize the opposing counsel's attempt to 'sting' you with it in cross-examination.
- Think quickly if the witness gives you an unexpected answer. Add a short follow-up to be sure you obtain the testimony you wanted and needed.
- Do not make any statements about the facts, even if the witness says something wrong.
- If you need a moment to think, ask the judge if you can discuss a point with your co-counsel for a moment.

**Witness:**

- Know what your witness doesn't know. Be very familiar with the facts.
- Direct your eye contact to the audience raters. They're the ones you have to convince.
- Use gestures sparingly and strategically to emphasize key moments in your testimony.
- Don't panic if the attorney or judge asks you a question you haven't rehearsed.
- Don't argue with the attorney.

## THE CROSS-EXAMINATION

**OBJECTIVE:** To make the other side's witnesses less believable.

**DESCRIPTION:**
The purpose of the cross-examination is to show the judge and jury that a given witness should not be believed. The attorney will try to cast doubt on the evidence and witness credibility. They'll work to prove that the witness:

1) cannot remember facts;
2) did not give all of the facts in the direct examination;
3) told a different story at some other time;
4) has a reputation for lying;
5) has a special relationship to one of the parties (maybe a relative or close friend) or bears a grudge.

**QUESTIONS TO ASK:**

1) **Witness credibility**: Show that he has given a contrary statement at another time
   Example: The witness testifies to the exact opposite of what he testified to during the pre-trial hearing). Ask the witness, "Did you make this statement on June 1st?" Then read it or show a signed statement to the witness and ask, "Is this your statement?" Then ask the witness to read part of it aloud or read it to the witness yourself and ask, "Did you say that?"
2) **Witness competence or qualifications**: Show that an expert witness or even a lay witness who has testified to an opinion lacks training or experience.
   Example: A psychiatrist testifying to the defendant's need for dental work, or a high school graduate testifying that in his opinion the defendant suffers from a chronic blood disease.
3) **Witness is lying**: Show the contradiction.
   Example: The witness first testifies to not being at the scene of the accident and soon after admits to being there.
4) **Witness is prejudiced or biased**: Show the place in testimony where the witness showed bias.
   Example: The witness testifies that he has hated the defendant since childhood.
5) **Witness opinion is questionable**: This could be because of poor eyesight, hearing etc.
   Example: The witness with poor eyesight claims to have observed all the details of a fight that took place 500 feet away in a crowded bar.

**STYLE POINTS:**

1. **Attorney Conducting Cross-examinations:**

- This attorney must know precisely what kind of weaknesses he or she wants to show in the witness.
- Ask short, "leading" questions (discussed in the Rules of Evidence). For example, "Isn't it true...?
- Be brief. Don't ask so many questions that well-made points are lost.
- Pin down a witness by asking a question requiring a yes or no. Tactfully interject on an explanation which may hurt your case. Say "You may stop there, thank you," or "That's enough, thank you."
- Questions must be limited to subjects discussed in the direct examination or they can be objected to as "outside the scope of direct examination."
- Always listen to the witness's answer.
- Don't give the witness the opportunity to re-emphasize the strong points made during the direct exam.
- Don't harass or intimidate or argue with the witness through your questions.

2. **Opposing Attorney**:

- Listen carefully for violations of the Rules of Evidence and be prepared to make objections.
- Listen carefully for the kind of attack the cross-examiner is making; decide if the attack is successful and what to do about it if it was damaging to your case.
- After the cross-examination, the opposing attorney may conduct a "redirect" examination, to give the witness a chance to explain or correct some points made in the cross-examination.
- Be relaxed and ready to adapt your prepared questions to the testimony that is actually heard during the direct examination.

3. **Witness**:

- Witnesses should try to give explanations whenever possible.
- Witnesses must pay close attention during cross-examination. The attorney may try to confuse them.
- Memorize the facts and make sure that any digression from your testimony is consistent with the facts.
- Be natural and in character emotionally and in your mannerisms and speech.
- Prior to the trial, isolate all possible weaknesses, inconsistencies, problems in your testimony, and be prepared to explain them.
- Be as relaxed and in control as possible. An appearance of confidence and truthfulness is important.
- Don't read or recite your witness statement word for word.

4. **Hot Tips**:

**For attorneys**:

- Phrase your questions so you know how the witness will answer them. Ask the question in a different way if you don't get the answer you were seeking.

- Be quick to spell out to the raters through your questioning the times when the witness shows bias, contradicts their testimony, is lying or being uncooperative.
- Make your presence so compelling that attention is focused on you rather than on witness' answers.
- Make sure you have the gender of the witnesses in mind when you refer to them as him or her.
- Never ask the witness "How," "Why" or "Could you explain" questions.

**For witnesses:**

- Know what your witness doesn't know.
- Direct your eye contact to the audience raters. Use gestures naturally and strategically for emphasis.
- Don't argue with the attorney. Cross-examination can be tough, so don't get flustered.
- Predict the opposing party's cross-examination questions. You'll know what to say and this will help you keep your composure under pressure.

## OBJECTIONS

The purpose of objections is to protect your witness. You want to keep the court record clean of information that is out of bounds. When an attorney hears a question that is out of bounds, she/he stands and says, "I object, your honor." Then the attorney must state what she/he is objecting to and the Rules of Evidence it violates (if they know it). The judge will often allow the opposing attorney to respond to the objection, before making a ruling.

**The Judge can say:**

- Objection Sustained – The question is thrown out. The attorney can rephrase the question or move on.
- Objection Overruled – The question does prevail. The questioning attorney can repeat the question to get back on track.
- Your Objection is Noted – The judge will listen to the answer, but take the objection into account.
- Objection Overruled as Made – The judge is overruling because the objection was made incorrectly. The objecting attorney should try to restate the objection correctly.

**Hot Tips:**

- Keep your objections impersonal. Try to resist clashing with your opponent.
- Some trials can get messy with lots of objections and even antagonism. This will pointlessly draw both teams away from the focus of the trial. Resist getting drawn into this type of engagement.
- It's best to hide emotions based on the ruling of the judge. Never disagree with the judge.

- After the judge has made his/her decision, move on. When the judge overrules an objection, don't lose heart and stop objecting. Just choose your objections carefully.
- Plan your strategy with your co-counsel. Predict opinion and hearsay objections. Plan what you'll say when the opposing team makes a legitimate objection.

## THE CLOSING ARGUMENTS

**OBJECTIVE:** Make your final case about what evidence is credible or not and which witnesses should be believed or not. Summarize the application of the law to your case and ask that your case prevail.

**DESCRIPTION:**
The purpose of the closing argument is to convince the trier of fact (judge or jury) that the evidence presented is sufficient to win the case for whichever side the attorney is representing.
The closing argument should include:
1) a summary of the evidence presented that is favorable to the presenting attorney's side,
2) a summary of the case, and
3) a legal argument showing how the law requires the judge or jury to interpret the facts, and why that law requires them to rule in favor of the side for which the attorney is arguing.

**STYLE POINTS:**
1. **Prosecution Attorney:**
- The prosecution has the burden of proving the facts in a civil case by a preponderance of the evidence. Tell the jury how you met that burden. Your compelling summary of the favorable evidence presented is extremely important.
- Be sure to avoid claiming evidence that was not, in fact, presented; similarly, do not emphasize evidence that the defense successfully attacked, except to give a firm response to such an attack.

Cite the law clearly and correctly and make a clear argument regarding how the law requires the judge or jury to rule in the prosecution's favor.

2. **Defense Attorney:**
- Summarize all of the evidence presented to weaken the prosecution's case.
- Emphasize the inability of the prosecution to meet the burden of proof and stress that such inability must clearly lead to a decision in favor of the defendant.

3. **Both Attorneys:**

- Thank the judge and raters for their time and attention.
- Isolate the issues and describe briefly how your presentation resolved these issues.
- Review the witness testimony. Outline the strengths of your side's witnesses and also the weaknesses of the other side's witnesses. (Remember to adapt your statement at the end of the trial to reflect what the witnesses actually said as opposed to the anticipated weaknesses of the other side.)
- Review the physical evidence. Outline the strengths of your evidence and the anticipated weaknesses of the other side's evidence. (This section must be adapted at trial.)
- State the applicable statutes and any cases to show it supports your side.

4. **Hot Tips:**

- Tie your opening and closing thematically together.
- Show adaptability/flexibility. If the opposing counsel successfully used an analogy, visual, or a turn of a phrase that can be twisted or adopted in your favor, do so in your closing.
- Don't forget to request the verdict/remedy you desire.