



WRITING FOR TRIALS¹

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I. Introduction

Whether you are taking a trial practice class, competing in a mock trial tournament, representing a clinic client, or trying a case as an attorney, preparing for a trial is an intimidating experience. But with preparation and practice, anyone can deliver effective opening statements, direct examinations, cross examinations, and closing arguments. This handout will describe many of the basic tenets of trial work to help you prepare for your case.

II. Consider Your Audience Carefully

At the very start of your trial preparation, you should consider how your audience impacts the way you present your case. If you are preparing a jury trial, your audience is typically members of the community near that court. As a result, you will want to tailor your language, style, and demeanor to ensure that the members of the jury *like* you and trust you. Many trials are won and lost simply by the jury's impressions of each side's lawyers. For example, a jury pool from Manhattan will have different expectations of the lawyers' conduct than a jury pool from a rural area.

On the other hand, if you are preparing a bench trial, then only the judge will be deciding your client's fate.² In those circumstances, you may not need to analyze your vocabulary as closely. Similarly, for a trial practice class or a mock trial tournament, you are usually preparing a mock jury trial with trial lawyers pretending to be the jurors. The audience is tricky here. You need to prepare the case as you would for a real jury, but you might add in some more sophisticated legal language to show those trial lawyers that you have mastered your case. This handout primarily addresses trial strategies for a real jury trial or mock jury trial, but you should always make your own judgments on the substance and style of the various parts based on how you think your audience will perceive them.

¹ Written by Amarto Bhattacharyya consulting THOMAS A. MAUET, TRIAL TECHNIQUES AND TRIALS (10th ed. 2017).

² There are even wide varieties of bench trials. For example, many jurisdictions have separate courts for landlord-tenant disputes, small claims, family law, drug offenses, etc. Bench trials in these different courts will have different norms. Whenever you are trying a case in a court for the first time, you should consult with someone who has tried cases in that court before.

III. Theory and Theme³

Before you can start writing any parts for trial, you first should consider your theory of the case and your theme. A theory is a plain statement, typically one or two sentences, describing your client's story of what occurred or describing your best argument to win the case.⁴

Imagine a trial involving a metal recycling factory that was illegally dumping gasoline into the soil. One day that gasoline forms a puddle and causes an explosion that nearly kills one of the factory's employees. The owner of the company is charged with knowingly dumping gasoline in a way that endangered her employees' lives. A prosecutor's theory of the case might be: *To avoid the high costs of properly storing or disposing of gasoline, the defendant chose to dump gasoline, despite the risks to her employees.* The defendant's theory of the case could be: *If gasoline dumping was going on, the employees were doing it without the defendant's knowledge. Therefore, the defendant cannot be found guilty because she did not know this was happening.*

It is essential to start your trial preparation with a basic, simple statement of your overall theory because all of your writing should be oriented towards proving that theory. That way, when the jury leaves the courtroom to deliberate, they will have a clear understanding of your client's position.⁵

A theme is a catchy and memorable phrase or sentence that you will use throughout the trial to communicate your theory to the jury.⁶ For the gasoline trial above, the prosecutor's theme might be: *The defendant put profits over people. Dollars and cents over common sense.* A different prosecution theme could be: *The defendant played with fire and her employees got burned.*

These themes succinctly describe the theory mentioned above, but each one focuses on slightly different aspects of that theory. If that theme is then repeated multiple times throughout the trial, the jury will always remember your memorable theme and therefore always remember your theory. Choosing a theme can be very difficult. If you can settle on one before you write, that is ideal. However, if you have not yet decided a theme, you can start working on your other trial parts too. If you do that, you should always circle back to those parts and ensure that your theme has been fully incorporated.

IV. Opening Statements

Opening statements are an exercise in storytelling. This is your first opportunity to tell the jury what happened in the case from your client's perspective. Every piece of evidence that comes out in the trial will be viewed through the lens you craft in your opening statement. There is no single "correct" template for writing an effective opening statement. However, at some point in your opening statement, you usually should:

³ Themes and theories are used in various aspects of litigation. Note that the definitions of themes and theories in the context of trial advocacy may be different than the definitions used in appellate advocacy or legal briefs.

⁴ See THOMAS A. MAUET, TRIAL TECHNIQUES AND TRIALS, § 2.3.2 (10th ed. 2017).

⁵ *Id.*

⁶ *Id.* at § 2.3.3.

- 1) Tell a simple, easy-to-follow story of the case from your client’s perspective.⁷
- 2) Describe your theme and theory of the case. Repeat your theme at multiple points.⁸
- 3) Describe the *basic* standard of proof and elements that must be proven.⁹
- 4) Preview the witnesses you will be calling and how they fit into the overall story¹⁰
 - a. You can do this by introducing each witness as they “fit” into your story, or you can save a paragraph for later in the opening statement to briefly describe what each witness will say
- 5) Address any major bad facts for your side, so the jurors are not surprised by them later¹¹
- 6) Ask the jury to consider the case from your perspective¹²
 - a. This could be simply by emphasizing your theme and theory
 - b. This could also be done by presenting “questions” that the other side cannot answer
- 7) Use active voice and plain, simple English.¹³ A middle school student should be able to follow everything you say – even when you talk about experts or the law.
- 8) Make the jury relate to your case without overdramatizing it.¹⁴
- 9) You may not make arguments in opening statements. An argument occurs when you infer conclusions from the evidence. Instead, you may only preview what facts you think will come out during the trial.¹⁵

Argument (Not allowed): The fingerprints prove that the defendant lied about being at home that night.

Previewing evidence (allowed): The fingerprint evidence will show that the defendant was not at home that night, where he claimed to be.

The second example here is simply previewing facts, whereas the first example is arguing a conclusion that the defendant is a liar.
- 10) In general, you should not “preview” the testimony from the other side’s witnesses or rebut claims they have not yet made. Just stick to the “story” and your own witnesses’ testimony. Similarly, do not rely on evidence that you think will probably be excluded. If you mention a fact in opening statement that does not come out in trial, jurors may lose their trust in you.¹⁶
- 11) At some point near the end of your opening statement, let the jurors know what you would like them to do when they deliberate.¹⁷

⁷ *Id.* at § 4.4.4.

⁸ *Id.* at § 4.4.1.

⁹ *Id.* at § 4.2.3.

¹⁰ *Id.* at § 4.4.2.

¹¹ *Id.* at § 4.4.4.

¹² *Id.* at 4.3.

¹³ *Id.* at § 4.4.5.

¹⁴ *Id.* at § 4.4.4.

¹⁵ *Id.* at § 4.2.3.

¹⁶ *Id.* at § 4.4.4.

¹⁷ *Id.* at § 4.4.3.

V. Direct Examinations

In a direct examination, you will ask questions to people that you have brought to court to testify for your side. When these people are testifying, they are called “witnesses.” When writing a direct examination, some lawyers will write out the questions they will ask and other lawyers will write the answers they want to hear (and ad lib the questions during the direct). These are the various types of information you should consider eliciting from a witness in a direct examination:

- 1) Facts that establish the credibility/qualifications of the witness¹⁸
- 2) Background/foundational facts that show how your witness knows what he/she knows¹⁹
- 3) Facts that help demonstrate your theory and theme of the case. *Focus on what really matters.* You do not have to address every possible point that might help your side.²⁰
- 4) Harmful facts that will be brought out in cross examination by the opposing side (gives you the first chance to address it before the other side harps on it)²¹
- 5) For expert witnesses, see the foundation that must be established under Federal Rule of Evidence 702.
- 6) Typically organized chronologically for non-expert witnesses.²²
- 7) For experts, typical organization is: (1) Qualifications/background; (2) How got involved with case, what evidence examined; (3) What methods used; (4) What opinions reached; (5) Explanation of each opinion (often with a visual aid of some kind).²³

In addition to the substance of your questions, the style of your presentation is critical for a successful direct examination. Consider these stylistic tips:

- 1) Your main goal is to keep the direct conversational and to progress from one fact to another in a logical way.²⁴ You should ask questions using the same type of language you use when you are talking to a friend or colleague. For example, instead of asking the witness “What is your current occupation?” just ask “Where do you work?”
- 2) Use transition phrases early and often – this signals to the jurors that you are moving to a new topic and helps to focus them if they stop paying attention. For example, “Now I’d like to discuss your conversations with the defendant...”²⁵
- 3) You may not ask leading questions on direct examination. A leading question is one that suggests its own answer.²⁶ For example, “You were at home that night, right?” This is particularly a problem on redirect examination, when you might be asking an impromptu question and you want the witness to give a specific response.
- 4) Looping is a very helpful tool to keep the jurors interested and to reinforce the organization of your direct examination. Looping occurs when you restate the witness’

¹⁸ *Id.* at § 5.4.1.

¹⁹ *Id.*

²⁰ *Id.* at § 5.18.2.

²¹ *Id.* at 5.4.1.

²² *Id.*

²³ *Id.* at § 8.2.1.

²⁴ *Id.* at § 5.5.

²⁵ *Id.* at § 5.4.1(d).

²⁶ *Id.* at § 5.5.

last answer as a transition into your next question.²⁷ Especially for important points, looping essentially allows you to repeat an answer that was helpful to you. However, you cannot just summarize the witness' testimony, because attorneys may not "testify" during examinations. Everything attorneys say must be in the form of a question. For example, pretend a witness just said he saw the defendant walk into a store, and you want to reemphasize that point:

- a. IMPROPER: Okay, so you saw the defendant walk into the store. What happened next?
- b. PROPER: After you saw the defendant walk into the store, what happened next?

VI. Cross Examination

In a cross examination, you will ask questions of the witnesses that the other side has brought to trial. When writing a cross examination, some lawyers write out the questions they will be asking, and some lawyers write out the answers they would like to hear (and then ad lib the questions during the cross). These are the various types of information you should consider eliciting from a witness during a cross examination:

- 1) Facts that help prove your theory²⁸
- 2) Facts that paint your client in a good light²⁹
- 3) Facts that show why the witness (or another witness from the other side) is not credible³⁰
- 4) When crossing experts, you can include facts indicating:³¹
 - a. Lack of qualifications
 - b. Unreliability of methods used
 - c. Insufficiency of evidence / lack of investigating important areas
 - d. Limitations of experts' conclusions
- 5) Always think big picture and think about your theory. You do not want to waste time asking questions on areas that do not matter very much to proving your case.³²

In addition to the substance of your questions, the style of your presentation is critical for a successful cross-examination. Consider these stylistic tips:

- 1) Above all else, the goal of cross-examination is to get the jury to focus on your statements and completely ignore what the witness has to say.³³
- 2) You should only ask leading questions, not open-ended questions. The question should be worded so that the only possible answer is "yes" or "no."³⁴
 - a. IMPROPER: What color was his shirt? (Any who, what, where, when, why, how question)
 - b. PROPER: His shirt was red, right?

²⁷ *Id.* at § 5.4.1(d).

²⁸ *Id.* at § 6.6.1.

²⁹ *Id.*

³⁰ *Id.* at § 6.7.1.

³¹ *Id.* at § 8.7.2.

³² *Id.* at § 6.14.

³³ *Id.* at § 6.5.5.

³⁴ *Id.* at § 6.5.1.

- 3) Primacy and recency – your first and last sections should be the most memorable³⁵
- 4) Use short, clear questions that only ask for one small fact at a time
 - a. IMPROPER: After you entered the store, you saw the defendant put an iPad inside his jacket and walk out of the store without paying.
 - b. PROPER:
 - i. You walked into the store?
 - ii. You saw the defendant?
 - iii. You saw the defendant put an iPad in his jacket?
 - iv. He walked out of the store?
 - v. Without paying?
- 5) You do not have to say “correct?” or similar phrase at the end of each question. In fact, your cross often flows better by asking facts without question words (like in the example above).
- 6) Avoid asking “one question too many.” Stick to the facts you know the witness *must* agree to. Save the argument and inferences for closing.³⁶
 - a. For example, imagine that a person claims to have seen something that nobody else claims to have seen. You are crossing this witness.
 - i. You claim that you saw this. –Yes.
 - ii. This was at a metro station. –Yes.
 - iii. A public metro station. –Yes.
 - iv. A public metro station in Washington, DC.
 - v. *So there must have been other people around, right?* –No, it was late at night and I was the only person at the train platform.

That last question is an example of one question too many, because it gave the witness an opportunity to re-explain his/her claims. It would have been stronger to end at question iv and just argue in closing that this witness’ story is not credible.

VII. Closing Arguments

The closing argument is essentially the climax of the trial. Closing arguments allow the lawyer to argue the case before the court. During closing, you can make any inferences you like to explain to the members of the jury why they should vote in your favor. This is the place where the law will be applied to the facts and where the rules are least restrictive in the attorney’s ability to argue his or her case. Typically lawyers will write out the opening and ending paragraphs and outline the rest.

The closing argument is also your chance to show the jury *you had a plan all along*. Sometimes, what you believe to be a really strong point on cross examination may not become clear to the jury until you discuss it in closing argument. In other words, the closing argument is your opportunity to show the jury that your theme is accurate and that your theory makes sense.

Your closing argument *should not sound like one big story*. That is what an opening statement sounds like. Rather, in the closing, you will typically organize your closing argument around the elements of the claims, but that is completely up to you. Consider some of these tips:

³⁵ *Id.* at § 6.4.

³⁶ *Id.* at § 6.5.1.

- 1) Feel free to use analogies or metaphors. These tools can help strengthen your arguments about the evidence.³⁷
- 2) Mention the law, the elements, and the burden of proof. Without jumping too far into legal-speak, it is important that the jury understand what needs to be proved and how that was or was not done.³⁸
- 3) Assert and compare the weight of the evidence.³⁹ If your side has DNA evidence and the other side has fingerprint evidence, describe why your evidence is more precise.
- 4) Similarly, point out the credibility of your witnesses and the lack of credibility of opposing witnesses.⁴⁰
- 5) Respond to the arguments made by the other side. Point out the flaws in their reasoning.⁴¹
- 6) Ask questions or highlight evidence that seriously undermines your opponent's theory.⁴²
- 7) Make sure your theme and theory are consistent and clear throughout the closing.⁴³ Your theme, and why your theme is correct, should be burned in the jury's mind by the end of the trial.
- 8) At the end, remember to ask the jury to return a verdict in your client's favor.⁴⁴

Most jurisdictions allow the prosecution/plaintiff to give a rebuttal after the defense closing argument. There are two main rules for rebuttal: 1) it should be *very short*; 2) it should address points made by the defense.⁴⁵ The rebuttal should address a maximum of two or three of the strongest points raised by the defense. Do not simply repeat what you have said in your initial closing. Remember, the purpose of the rebuttal is to respond to the defendant's case. After you have addressed these points, return to your theory and theme. Finally, ask the jury to return a verdict in your favor. A typical rebuttal is usually about three minutes.

VIII. Further Reading

STEVEN LUBET, *MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE* (National Institute for Trial Advocacy, 5th ed. 2015).

³⁷ *Id.* at § 9.5.2(b).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at § 9.5.1(a).

⁴⁴ *Id.* at § 9.5.3.

⁴⁵ *Id.* at § 9.8.