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Background Reading

CHAPTER I
THE STRUCTURE OF THE TRIAL

A. Order of Proceedings

The study of evidence involves the study of rules governing the admission of evidence at a trial before judge and jury, or before a judge alone. The attorney's role in preparing for the presentation of evidence at trial begins with his or her initial contact with the client. The preparatory process continues throughout the investigative stage with client and witness interviews and the acquisition of documents and other exhibits. Pretrial preparation next proceeds into the pleading and discovery stages, which ultimately lead to the day of trial. Rules applicable during pretrial stages form the subject matter of courses in civil and criminal procedure. Rules governing the admissibility of evidence at trial are explored in the course in evidence.

The trial of a lawsuit includes aspects involving and aspects not involving the presentation of evidence. Aspects not involving introduction of evidence are jury selection, opening statement, closing argument, and jury instruction. Not surprisingly customary patterns have developed over time in each of these areas, in some instances leading to the formulation of a statute or rule. The plaintiff/government, the party possessing the burden of production and burden of persuasion, is given the right to open the various aspects of the litigation such as voir dire (when counsel is permitted to question), opening statement and presentation of evidence. With respect to closing argument, a civil plaintiff most frequently has the right to both open and close while the government is almost always placed in that position. The normal pattern at trial with respect to voir dire, opening statements, and closing argument assists counsel and the court in conducting the trial in an orderly manner.

It is the responsibility of the court to control the mode and order of interrogating witnesses and the presentation of evidence so as to foster the ascertainment of truth, avoid needless consumption of time, and at the same time protect witnesses from harassment or undue embarrassment. As long as each party is afforded the opportunity to present his own evidence and to meet that of his opponent, he is scarcely in a position to complain of deviation or lack thereof from the normal pattern of witness examination, i.e., direct, cross-examination, redirect and recross, and the presentation of relevant evidence, i.e., plaintiff's or prosecution's case in chief, defendant's case in chief plus affirmative defenses and/or counterclaims, rebuttal, and surrebuttal. Thus occasionally a witness, such as an expert, may be examined by a party during his opponent's case in chief, or a party may request the opportunity to recall a witness for additional examination. At other times it is simply difficult to ascertain where a particular item fits within the normal pattern. Certain distortions of the normal pattern, such as the offering of evidence in rebuttal which is merely cumulative of plaintiff's case in chief or attempting to establish a new ground of liability in rebuttal, do not make for the ascertainment of truth and will not be countenanced. When the admissibility of evidence depends upon other evidence, the court has discretion to admit it subject to being "connected up".

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While ordinarily cross-examination is deferred until completion of direct examination, cross-examination of a witness as to his qualifications, personal knowledge or competency prior to giving his principal testimony, sometimes described as "voir dire", avoids exposing the jury to inadmissible evidence if the witness proves to be unqualified, lack personal knowledge or be incompetent. Hence, cross-examination as to an expert's qualifications, the personal knowledge of the witness, or competency of a witness to testify under a state's Dead Man's Statute, should be permitted prior to the witness' principal testimony if requested. Similar considerations surround the conducting of voir dire examination as to the foundation laid with respect to authenticity or identification as a condition precedent to admissibility of an exhibit or other item of evidence, Rule 901.

The entire matter of order of presentation of evidence and mode of witness examination rest largely in the discretion of the trial judge. Abuse of discretion is likely to arise only if opportunity is completely denied to present evidence, impeach witnesses, support the credibility of impeached witnesses, or refute new points raised by the opponent.

Voir dire. Jury selection, often referred to as voir dire, entails the questioning of jurors in open court. Examination of prospective jurors is conducted in civil cases pursuant to Fed.R.Civ.P. 47(a), and in criminal cases pursuant to Fed.R.Crim.Proc. 24(a). For all practical purposes the two rules are identical. Fed.R.Civ.Proc. 47(a) provides:

> The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

The predominant method employed in the federal courts in both civil and criminal cases is for the court alone to conduct the voir dire examination. If counsel wishes additional questions asked, he may tender them to the court for its consideration. Three judicially sanctioned purposes exist for voir dire. First, questioning jurors provides an opportunity to determine whether a prospective juror meets the statutory requirements for jury service. Second, questioning determines whether a prospective juror may be challenged for cause because he is not able to impartially decide the issues submitted to the jury solely on the law and evidence presented at trial. The final judicially sanctioned purpose of voir dire is to provide the attorney an opportunity to acquire information for intelligent exercise of peremptory challenges. A peremptory challenge is the right of a party to excuse a prospective juror for any reason, or for no reason at all. Federal statute in civil matters and federal rule in criminal proceedings fix the number of peremptory challenges allowed in federal trials. Non judicially sanctioned objectives of voir dire are many and varied. They include indoctrination of the jury and ingratiation of the attorney to the jury.

Opening statements. The opening statement by the plaintiff in civil cases and the government in criminal cases, the party with the burden of persuasion, is invariably made as soon as the jury is empanelled. This is ordinarily followed immediately by the defendant's opening statement. If requested, the court usually possesses discretion to permit the defendant to withhold the presentation of an opening statement until immediately prior to presentation of his or her case in chief.

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Plaintiff's case in chief. The plaintiff in a civil case or prosecution in a criminal matter, possessing the burden of production, must initially present his case in chief, i.e., introduce facts sufficient to establish each controverted element of the claim asserted or the offense charged. This is known as a prima facie case. Thus at the first stage the plaintiff/prosecution will bring forward successively all the witnesses on whom it will rely to establish these facts together with the documents and other tangible evidence pertinent for this purpose, which will be offered when they have been authenticated by the testimony of the witnesses. During this stage each witness of the plaintiff/prosecution will first be questioned by plaintiff/prosecution counsel upon direct examination, then cross-examined by opposing counsel. These examinations may be followed by redirect and recross examination. When all of the plaintiff/prosecution witnesses to his main case have been subjected each in turn to this process of questioning and cross-questioning, the plaintiff/prosecution signifies the completion of his case in chief by announcing that he rests.

Defendant's denials and affirmative defenses. The defendant then presents his witnesses and offers into evidence documents and other tangible evidence in support of his case including those items authenticated during cross-examination of plaintiff's witnesses. At this stage the defendant produces evidence that denies, explains, counteracts, qualifies, disproves, repels, or otherwise sheds light on the plaintiff/prosecution's claims. In addition, the civil defendant will introduce evidence in support of any affirmative defense raised in the answer; the criminal defendant will introduce evidence of any so-called or true affirmative defense including those as to which the giving of notice of intent to assert is required. Here again each witness' story on direct examination is subject to be tested by cross-examination and supplemented on redirect, etc., before he leaves the stand. When the defendant has thus completed the presentation of his proof of so-called and true affirmative defenses, if any, and his evidence in denial of the plaintiff's claims, the defendant announces that he rests.

Plaintiff's rebuttal and defendant's surrebuttal. The plaintiff/prosecution now is entitled to present its case in rebuttal. The plaintiff/prosecution may not at this stage present witnesses who merely lend support to the evidence originally presented as to the elements of the offense or claim for relief, but is confined to testimony directed to refuting the defendant's evidence. The proper scope and function of rebuttal is thus refutation, which involves evidence which denies, explains, counteracts, qualifies, disproves, repels or otherwise sheds light on evidence offered by the defense including evidence rehabilitating the credibility of witnesses. To answer points first raised by the defendant's witnesses, the plaintiff/prosecution in rebuttal may present new witnesses or it may recall witnesses who have testified on the case in chief. The admissibility of evidence on rebuttal is committed to the discretion of the trial court. In the court's discretion, evidence tending to refute is admissible in rebuttal even if it would also have been admissible as part of the plaintiff/prosecution's case in chief, and even if repetitive of matters actually introduced during the case in chief. In this, as in the other stages, the witness may not only be examined on direct, but cross-examined and re-examined. When the plaintiff/prosecution's case in rebuttal is finished, he closes his case. If new points are brought out during rebuttal, the defendant may meet them by evidence in surrebuttal, sometimes called rejoinder. In addition, defendant may offer evidence to rehabilitate witnesses whose credibility has been attacked in plaintiff/prosecution's rebuttal. The defendant then closes his case.

Defendant's counterclaim. Where the defendant has interposed a counterclaim, the defendant's case in chief with respect to the counterclaim is normally presented together with defendant's evidence in opposition to plaintiff's main case and in support of defendant's affirmative defenses. Plaintiff presents his evidence in opposition and affirmative defenses to the counterclaim when he presents rebuttal evidence. Such evidence is responded to by defendant on surrebuttal.

Both sides close. When both parties have announced that they have closed, the hearing on the facts comes to an end and the trial proceeds with the closing arguments of counsel and the court's instructions to the jury. The procedure for closing argument, mandated in federal criminal proceedings and generally followed in civil cases, consists of the opening final argument of the plaintiff/prosecution, the defendant's closing argument, and by a rebuttal argument of the plaintiff/prosecution. The rebuttal argument is limited to responding to arguments made by the defendant. If defendant waives closing argument, the plaintiff/prosecution has no right to offer further argument. The court may, however, in its discretion permit further argument or argument not in the nature of rebuttal if, for example, counsel by inadvertence has omitted something he intended to state.

Reopening a case. The court's discretion extends to reopening a case for the taking of further evidence after a party or even both parties have closed. Discretion may be exercised in favor of reopening the case even after argument and instruction, and the opposite party seems not to be in a position to complain unless he is denied the opportunity to meet the additional evidence. While liberality in favor of reopening is to be encouraged to afford the fullest possible hearing (particularly in nonjury cases), the additional evidence should not be allowed absent a showing of diligence and most certainly should not be allowed if deliberately withheld in an attempt to deprive the opponent of an opportunity to meet it. Where reopening is denied, the nature of the additional evidence sought to be introduced should be disclosed in the form of an offer of proof to preserve possible error for review.

Jury Instruction. The trial judge has the responsibility of instructing the jury regarding the law to be applied to the facts as the jury finds them in reaching its verdict. In most jurisdictions, including the federal court, the court's instruction to the jury concerning the law follows closing argument by counsel. The court holds a jury instruction conference prior to closing argument thus forewarning counsel as to the court's instruction on the law to the jury. In federal courts and a minority of state jurisdictions, the trial judge may, in his discretion, fairly and impartially sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses. The court must also, however, clearly instruct the jury that they are the ultimate arbitrator of the facts. The right to sum up and comment is, however, generally not exercised by judges sitting in federal court.