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LITIGATION IN THE UNITED STATES

**TRIAL PREPARATION
&
EXPERT WITNESSES**

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In a civil trial, a judge or jury examines the evidence to decide whether, by a "preponderance of the evidence," the defendant should be held legally responsible for the damages alleged by the plaintiff. A trial is the plaintiff's opportunity to argue his or her case, in the hope of obtaining a judgment against the defendant. A trial also represents the defendant's chance to refute the plaintiff's case, and to offer his or her own evidence related to the dispute at issue.

After both sides have presented their arguments, the judge or jury considers whether to find the defendant liable for the plaintiff's claimed damages, and if so, to what extent (i.e. the amount of money damages a defendant must pay, or some other remedy).

Although a trial is the most high-profile phase of the civil lawsuit process, the vast majority of civil disputes are resolved well before trial -- and in some cases before a lawsuit is even filed -- via settlement between the parties, alternative dispute resolution (ADR) processes like arbitration and mediation, or through dismissal of the case.

A complete civil trial typically consists of six main phases, each of which is described in more detail below:

- Choosing a Jury
- Opening Statements
- Witness Testimony and Cross-Examination
- Closing Arguments
- Jury Instruction
- Jury Deliberation and Verdict



Choosing a Jury

Except in cases that are tried only before a judge, one of the first steps in any civil trial is selection of a jury. During jury selection, the judge (and usually the plaintiff and the defendant through their respective attorneys) will question a pool of potential jurors generally and as to matters pertaining to the particular case -- including personal ideological predispositions or life experiences that may pertain to the case. The judge can excuse potential jurors at this stage, based on their responses to questioning.

Also at this stage, both the plaintiff and the defendant may exclude a certain number of jurors through use of "peremptory challenges" and challenges "for cause." A peremptory challenge can be used to exclude a juror for any reason (even gender and ethnicity in civil cases), and a challenge for cause can be used to exclude a juror who has shown that he or she cannot be truly objective in deciding the case.

Opening Statements

Once a jury is selected, the first "dialogue" in a trial comes in the form of two opening statements -- one from the plaintiff's attorney, and the other from an attorney representing the defendant. No witnesses testify at this stage, and no physical evidence is ordinarily utilized.

Because the plaintiff must demonstrate the defendant's legal liability based on the plaintiff's allegations, the plaintiff's opening statement is usually given first, and is often more detailed than that of the defendant. In some cases, the defendant may wait until the conclusion of the plaintiff's main case before making its own opening statement.

Regardless of when opening statements are made by either side in a case, during those statements:

- The plaintiff presents the facts of the case and the defendant's alleged role in causing the plaintiff's damages (or reasons to find for the plaintiff) -- basically walking the jury through what the plaintiff intends to demonstrate in order to get a civil judgment against the defendant.
- The defendant's attorney gives the jury the defense's own interpretation of the facts, and sets the stage for rebutting the plaintiff's key evidence and presenting any "affirmative" defenses to the plaintiff's allegations (or reasons to find for the defendant).



When a civil lawsuit involves multiple parties (i.e. where three individual plaintiffs sue one defendant, or one plaintiff sues two separate defendants), attorneys representing each party may give their own distinct opening arguments.

Witness Testimony and Cross-Examination

At the heart of any civil trial is what is often called the "case-in-chief," the stage at which each side presents its key evidence and arguments to the jury.

In its case-in-chief, the plaintiff methodically sets forth its evidence in an attempt to convince the jury that the defendant is legally responsible for the plaintiff's damages, or that judgment for the plaintiff is warranted under the circumstances. It is at this point that the plaintiff may call witnesses and experts to testify, in order to strengthen his or her case. The plaintiff may also introduce physical evidence, such as photographs, documents, and medical and technical reports. Especially in more complicated civil lawsuits such as employment discrimination and defective product claims, a plaintiff's utilization of expert testimony and documentary evidence will be crucial in proving the defendant's legal liability.

Whether a witness is called by the plaintiff or the defendant, the witness testimony process usually adheres to the following formula:

The witness is called to the stand and is "sworn in," taking an oath to tell the truth.

- The party who called the witness to the stand questions the witness through "direct" examination, eliciting information through question-and-answer, to strengthen the party's position in the dispute.
- After direct examination, the opposing party has an opportunity to question the witness through "cross-examination" -- attempting to poke holes in the witness's story, attack their credibility, or otherwise discredit the witness and his or her testimony.
- After cross-examination, the side that originally called the witness has a second opportunity to question him or her, through "re-direct examination," and attempt to remedy any damaging effects of cross-examination.

After the plaintiff concludes its case-in-chief and "rests," the defendant can present its own evidence in the same proactive manner, seeking to show that it is not liable for the plaintiff's claimed harm. The defense may call its own witnesses to the stand, and can present any of its own independent evidence in an effort to refute or downplay the key elements of the plaintiff's legal allegations. Once the defense has rested, the plaintiff has an opportunity to respond to the defense's arguments through a process known as "rebuttal," a brief period during which the



plaintiff may only contradict the defense's evidence (rather than present new arguments). Sometimes, the defense may in turn have a chance to respond to the prosecution's rebuttal.

Once the plaintiff and defendant each have had an opportunity to present their case and to challenge the evidence presented by the other, both sides "rest," meaning that no more evidence will be presented to the jury before closing arguments are made.

Expert Witnesses

An expert witness is a witness who has knowledge beyond that of the ordinary lay person enabling him/her to give testimony regarding an issue that requires expertise to understand. Experts are allowed to give opinion testimony which a non-expert witness may be prohibited from testifying to. In court, the party offering the expert must lay a foundation for the expert's testimony. Laying the foundation involves testifying about the expert's credentials and experience that qualifies him/her as an expert. Sometimes the opposing party will stipulate (agree to) to the expert's qualifications in the interests of judicial economy.

Experts are qualified according to a number of factors, including but not limited to, the number of years they have practiced in their respective field, work experience related to the case, published works, certifications, licensing, training, education, awards, and peer recognition. They may be called as upon as consultants to a case and also used to give testimony at trial. Once listed as a witness for trial, the materials they rely upon in forming an opinion in the case is subject to discovery by the opposing parties. Expert testimony is subject to attack on cross-examination in the form of questioning designed to bring out any limitations in the witness's qualifications and experience, lack of witness's confidence in his opinions, lack of the preparation done, or unreliability of the expert's sources, tests, and methods, among other issues.

Experts in a wide variety of backgrounds may testify, such as product liability, construction, forensics, medical issues, and many more areas. They are allowed to be compensated for their time and expenses in preparing for and giving testimony.

For example, doctors in injury cases often serve as expert witnesses and may provide testimony regarding the following issues, among others:

- Physician Projected Future Medical Costs Analysis
- Vocational Assessments
- Loss of Future
- Earnings Capacity Analysis
- Reduction of Work Life Expectancy Analysis



- Disability Assessments
- Permanent and Total Disability Determination
- Independent Medical Evaluations

Closing Arguments

Similar to the opening statement, the closing argument offers the plaintiff and the defendant in a civil dispute a chance to "sum up" the case, recapping the evidence in a light favorable to their respective positions. This is the final chance for the parties to address the jury prior to deliberations, so in closing arguments the plaintiff seeks to show why the evidence requires the jury to find the defendant legally responsible for the plaintiff's damages, or why the plaintiff's case is stronger than the defendant's. In turn, the defendant tries to show that the plaintiff has fallen short of establishing the defendant's liability for any civil judgment in the plaintiff's favor.

Jury Instruction

After both sides of the case have had a chance to present their evidence and make a closing argument, the next step toward a verdict is jury instruction -- a process in which the judge gives the jury the set of legal standards it will need to decide whether the defendant should be held accountable for the plaintiff's alleged harm.

The judge decides what legal standards should apply to the defendant's case, based on the civil claims at issue and the evidence presented during the trial. Often, this process takes place with input and argument from both the plaintiff and the defendant. The judge then instructs the jury on those relevant legal principles decided upon, including findings the jury will need to make in order to arrive at certain conclusions. The judge also describes key concepts, such as the "preponderance of the evidence" legal standard; defines any specific claims the jury may consider (i.e. "fraud," "strict liability for products liability" "breach of contract," "emotional distress"); and discusses different types of damages (i.e. compensatory and punitive) -- all based on the evidence presented at trial.

The case then goes "to the jury."



Jury Deliberation and Verdict

After receiving instruction from the judge, the jurors as a group consider the case through a process called "deliberation," attempting to agree on whether the defendant should be held liable based on the plaintiff's claims, and if so, the appropriate compensation for any damages. Deliberation is the first opportunity for the jury to discuss the case -- a methodical process that can last from a few hours to several weeks. Once the jury reaches a decision, the jury foreperson informs the judge, and the judge usually announces the verdict in open court.

Most states require that a 12-person jury in a case be unanimous in finding for the plaintiff or the defendant, though some states allow for verdicts based on a majority as low as 9 to 3. If the jury fails to reach a unanimous (or sufficient majority) verdict and finds itself at a standstill (a "hung" jury), the judge may declare a "mistrial," after which the case may be dismissed or the trial may start over again from the jury selection stage.