



PREPARING YOUR CASE FOR TRIAL

DESKTOP REFERENCE

2014 EDITION



INTRODUCTION

Dear Clients and Friends,

Trial work is a true specialty. As a baseline, effective trial advocacy requires expertise in the relevant area of the law, excellent legal writing and oral advocacy skills, and deep litigation experience. But a great trial lawyer brings to bear many other, less obvious, skills. The best trial lawyers have the ability to cut through reams of pleadings, exhibits and transcripts to find the essence of the narrative that will persuade the jury. An excellent trial lawyer can explain an intricate legal point to the judge in the charge conference, and also convey the facts to lay jurors in terms that are authentic and compelling. Trial work requires the gut instinct for when to object and when to stay silent, the sense of which themes will resonate in a closing argument, and the experience to know what questions to ask, and not to ask, a witness. An excellent trial lawyer needs to be both fully present in the here-and-now of the trial unfolding before the jury, and yet be ever watchful of the record being created for appeal.

The recognition that trial work is a unique, complex specialty propelled Seyfarth Shaw LLP to develop its National Trial Team, which I am privileged to co-chair, together with Lynn Kappelman. The Trial Team consists of many of the most experienced trial lawyers from Seyfarth offices around the country and around the world. As part of the firm's trademark innovative, efficient *SeyfarthLean* approach, the team's members regularly share knowledge and best practices around every aspect of trial strategy. The investment has paid off: The Trial Team has an extensive track record of achieving successful outcomes in all types of employment and commercial jury and bench trials, in virtually every industry including the retail, hospitality, pharmaceutical, financial services, manufacturing and high-tech industries.

As leading trial lawyers, members of our Trial Team regularly publish articles on trial strategy and emerging trial issues, and are invited speakers at conferences and continuing legal education programs nationwide. We offer a popular Trial Education Series of webinars on trial practice that has been very well received, especially by in-house attorneys who are managing outside trial teams, as well as internal clients, in preparing for trial. We have collected some of our most popular pieces in the enclosed Desktop Reference.

In this Reference, we offer practical, battle-tested strategies for many aspects of trial practice, including motions in limine, opening statements, witness preparation, direct and cross examination, jury instructions, verdict forms, charge conferences, and closing arguments. Each of these phases of trial offers unique challenges and opportunities, and for each, we have gathered proven strategies that can help maximize the chances of a winning verdict.

We hope that this Reference proves to be a useful guide when your next case is heading to trial. Please do not hesitate to contact your Seyfarth attorney, me, or the authors of this Reference, should you have any questions.

Mike Levinson
National Trial Team Co-Chair



NATIONAL TRIAL TEAM

Seyfarth's National Trial Team provides clients of all sizes with significant first-chair experience in jury and bench trials in jurisdictions across the country. Its attorneys have represented clients in trials involving a variety of industries, including automotive, banking, chemical, construction, financial services, grocery, hospitality, insurance, manufacturing, medical device, pharmaceutical, retail and technology, among others. In the last few years, we have handled well over a hundred jury trials and several hundred arbitrations.

Whether clients hire us at the very beginning of the case or in the pre-trial phase (after settlement discussions fail, or the court denies summary judgment), Seyfarth quickly pulls together the most qualified team of trial lawyers to try the case successfully and to our clients' satisfaction.

Seyfarth's National Trial Team also serves as a key firm-wide resource and collaborator within the firm, providing attorneys with cutting-edge intelligence into trial best practices and emerging issues.

Our Trial Team members have tried cases involving:

- Employment class and collective actions (complex discrimination, wage and hour, ERISA litigation)
- Single- and multi-plaintiff employment (discrimination and harassment, wage and hour, safety/OSHA)
- Intellectual property (patent, trademark and copyright)
- Franchise, dealer and distributor disputes
- Complex corporate transaction disputes (contract disputes, business torts and unfair trade, breach of fiduciary duty, shareholder and director disputes)
- Trade secrets and unfair competition

In addition to our trial experience, Seyfarth knows how to manage effectively significant and complex cases. Our right-sized staffing models help you achieve your objectives for any given case and put forward the most persuasive argument at trial. A suite of cutting-edge technology solutions enable us to collaborate closely with our clients, manage litigation budgets and efficiently communicate with in-house and outside counsel teams. We pride ourselves on seamless collaboration with clients at every stage of the case.



TABLE OF CONTENTS

Leveraging Motions in Limine to Win Your Trial and Appeal.....	4
How to Prepare Fact Witnesses to Make (Not Break) Your Case at Trial.....	7
Have the Jury at “Hello”: Opening Statements.....	9
How to Alienate a Jury (Without Even Trying)	12
The Five Laws of Cross-Examination	14
The Trial Lawyer’s Guide to a Winning Direct Examination	17
An Appellate Lawyer’s Guide to the Special Verdict Form.....	21
Avoiding The Top Ten Pitfalls in a Jury Charge Conference	25
Close the Deal: Six Steps to a Knockout Closing Argument.....	29
Seyfarth Trial Education Series	33
About the Authors	34



Leveraging Motions in Limine to Win Your Trial and Appeal

Motions in limine, when used effectively, can help deliver a jury win. Trial lawyers file motions in limine at or before the start of a trial, and ask the judge to rule that certain evidence cannot be introduced during the trial. As a result, these motions present a unique opportunity for each side to shape the trial before it even begins. Motions in limine can help determine which exhibits the jurors see, what testimony is admitted, and which witnesses will appear at trial. Motions in limine are also an opportunity to help educate the judge on your case themes, explain what evidence is relevant to the legal issues at hand, and what prejudicial evidence your opponent would like to insert into the trial.

But not all trial lawyers use motions in limine effectively. Some see motions in limine as one more task to check off the list when preparing for trial, without realizing their tremendous power to determine the story the jurors will hear.

Here is how to make the most of motions in limine to increase your chance of a winning verdict, and create a strong record for appeal.

File Early. You may have a scheduling order that lists a deadline for motions in limine only weeks or days before your trial date. But just because you *can* file motions in limine on the eve of trial does not mean you *should*. In fact, filing your motions in limine early can pay big dividends. Most crucially, if you can get a ruling on the motions early, you can structure your trial presentation, including witness preparation and opening statement, around the rulings. In addition, your motions will be better if prepared in advance rather than in the rush of the week before trial. Opposing counsel may not have started trial preparation in earnest, and may not be as equipped to counter your arguments. The judge is more likely to read the motions with adequate time to do so. The judge may also be more likely to issue an actual ruling, rather than deferring a ruling to think about it further and see how the evidence comes in.

Be Creative. Many lawyers approach motions in limine by reviewing the opposing party's exhibits, and filing a motion or two to preclude those exhibits that are most objectionable. This is a fine piece of the strategy, but it should not be the *whole* strategy. Re-read the witnesses' deposition testimony and flag objectionable portions. Review the opposing party's theory of the case as stated in a summary judgment motion or pre-trial briefing, and flag evidence or arguments of concern. Scan opposing counsel's trial witness list for people whose testimony is not relevant, or will be overly prejudicial, or were not revealed properly in discovery; in the process of litigating the motion in limine, you may gain valuable insight into what opposing counsel expects the witness to say. Don't be shy about filing multiple motions if warranted in your case.



Keep It Simple. Keep your motions in limine short and to the point. Identify the rule (or rules) of evidence you are relying on, cite a few cases if they are directly on point, and explain what you want excluded and why. Unless you are dealing with a particularly esoteric or technical point of law, a few pages should do it. You are more likely to get, and hold, the Court's attention, and to get a ruling, if the motion is accessible and understandable.

Keep It Real. Many motions in limine cite well-worn rules of evidence to argue, for example, that a particular piece of evidence is more prejudicial than probative, or will confuse the jury. But a conclusory assertion that an exhibit is "prejudicial" or "confusing" is unlikely to persuade a judge. Explain why the exhibit is prejudicial, or will confuse the jury, in real terms. Identify precisely what you are afraid the jury will conclude, and why. Not only are you more likely to win your motion, but a more precise argument is preferable for your record on appeal.

Request a Hearing. Many judges do not routinely schedule hearings on motions in limine, but rather rely only on the written pleadings, and issue rulings as late as the morning of jury selection. Request a hearing, preferably well in advance of trial. This will allow you the opportunity to air fully your concerns about bad evidence, talk to the judge in practical terms about the potential for prejudice, and generally frame the case for the judge. Ask that the hearing be on the record, rather than in chambers. Get a transcript, which becomes part of your appellate record.

Get Clear and Specific Rulings. Frame your motion in limine so as to achieve a clear ruling that you can count on at trial. A simple rule applies here: ask for exactly the ruling you want. If you want the opposing party to be precluded not only from testifying about a particular subject, but also from mentioning it in opening statement, ask for that precise ruling. If you want the order to bar Exhibits 6 and 7, say that as well. Assume that opposing counsel will go right up to the line of what is permissible, and work hard to have the line drawn where you want it.

Put Your Good Rulings to Work. If you do obtain a favorable ruling on a motion in limine, leverage that ruling at trial. As soon as you sense opposing counsel is venturing into a danger zone, say on the record, "Objection, Motion in Limine," to signal to the judge that opposing counsel is entering prohibited territory, and then elaborate at sidebar on the record as necessary.

Keep Working Toward a Favorable Ruling. Sometimes you simply cannot persuade a judge to rule on a motion in limine prior to trial. Many judges prefer to see how the evidence develops before taking a position on the motion. If that happens, keep working toward a favorable ruling as trial proceeds. When the witness, testimony or exhibit at issue arises, ask to be heard at sidebar, and re-raise your motion in limine. Explain why and how the prejudice that you warned about before trial is now about to happen. For the cleanest appellate record, tie your objection back to the motion in limine (by docket number if possible) on the record.

Object to Bad Rulings. If your motion in limine is denied, you can still use that motion as a tool to build an effective appellate record. If the motion is denied in open court, put your objection to the ruling on the



record then and there. If the motion is denied prior to trial, ask to be heard briefly the morning of trial before the jury is seated to restate your objections to those rulings for the trial transcript. Make a clean record, citing the motion and the ruling by name and docket number.

Don't Let Your Objection Wither Away. If your motion in limine is denied, do not assume that the filing of that motion by itself has adequately preserved your objection. The best practice is to continue to object at trial to the introduction of the evidence that was the subject of the motion.

A successful motion in limine can dramatically change the trajectory of a trial. For example, you may be able to use a motion in limine to preclude the testimony of a witness who has an axe to grind against your client, but who in fact has no relevant first-hand knowledge of the specific facts at issue in the case. If plaintiff's counsel has listed senior executives, or in-house counsel, of your corporate client, as a harassment tactic, a motion in limine can prevent the plaintiff from calling that witness, or possibly even from issuing a subpoena.

A motion in limine may be effective in precluding irrelevant evidence of other "bad acts" by a party or witness that is offered only to tarnish his or her reputation with the jury, or of other, irrelevant lawsuits that have been brought against your client. Defense counsel may be able to use a motion in limine to preclude irrelevant and prejudicial exhibits or testimony that are solely intended to garner the jury's sympathy for the plaintiff. A motion in limine can also be helpful in ensuring that evidence regarding claims that have been dismissed earlier in the case, such as on summary judgment, do not reappear before the jury.

The best practice is to gather your trial team, as soon as you have a trial date, to brainstorm potential targets for motions in limine. Part of the challenge is anticipating what the other side will do at trial. Investing time into strategic thinking about how to use this important trial tool is a first step toward a winning verdict and appeal.



How to Prepare Fact Witnesses to Make (Not Break) Your Case at Trial

Preparing fact witnesses may be the single most challenging task in getting ready for a jury trial. The witnesses are the human face of your case, and the jury will watch them closely, weighing their credibility. Trial is notoriously unpredictable. Here are ten battle-proven strategies for getting your witnesses truly ready to present your side of the story to the jury, no matter what arises in the courtroom.

1. **Get Ready Early.** As soon as you get your trial date, reach out to the witnesses that you will, or may, call at trial. Advise them when and where the trial will be, whether to expect a subpoena, and when you will need them. Exchange contact information, and arrange to send them their deposition transcript, if any.
2. **Prepare Outlines, Not Scripts.** Before you meet with your witness, prepare an outline of what you expect to ask in direct examination, the key points you need to elicit, and which exhibits you will enter through that witness. Outline what you expect opposing counsel to ask. The operative word is “outline.” Do not get stuck in a rigid question-and-answer *script*. At trial, it is important to really listen to the witness’ answer, and adapt your questions in real time. Your questions may need to change due to a court ruling on an objection or motion in limine. You may want to cut a section that another witness has covered. Stay flexible.
3. **Enlist Witnesses in Shaping the Larger Narrative.** While each witness will testify to a piece of the overall facts, actively enlist the witness in shaping the larger narrative that you will present to the jury. For example, you might read your draft opening statement to the witness, to give her a sense of case themes, and provide an opportunity to correct or fine-tune any points.
4. **Practice Direct Examination.** The process of testifying in court is foreign to most witnesses, and positively terrifying for some. Practice direct examination for a polished presentation. Make the witness comfortable with the give and take of examination, and the topics that you expect to cover. For example, in one practice examination, a witness confessed with some embarrassment that she did not know the meaning of a word we used repeatedly, allowing us to pivot to language more accessible to her (and the jury).
5. **But Do Not Practice Too Much.** The goal of preparation is *not* to have the witness memorize a specific set of questions and answers. The witness must testify truthfully, in her own words, from her own memory, in a way that is organic and authentic to her. Too much preparation can make even the most earnest witness sound rehearsed and disingenuous.



6. **Practice a Realistically Unpleasant Cross-Examination.** Cross-examination is a withering experience for *any* witness, no matter how sophisticated or thick-skinned. Practice so that the witness gets a real feel for it. Have someone on your team (preferably not the person who will handle the direct) role-play the cross-examiner. If you expect the cross-examiner to yell, get in the witness' face, or use scathing sarcasm, do that in the practice. Practice how the witness can assert herself when opposing counsel demands a yes-or-no answer to a question that cannot be answered "yes" or "no." Practice how the witness can correct wrong assumptions by the cross-examiner. Preview for the witness the points that opposing counsel will try to score.
7. **Listen to What Will Make the Witness Comfortable.** Ask witnesses if there is *anything* that they are worried about. You may be surprised what you hear. A witness may worry aloud about how to explain a particular action she took, or a document, allowing you to work through those issues. Sometimes, what scares the witness the most has nothing to do with the substance. In one case, a witness who lived in a rural area was terrified to drive into the big city to the courthouse; arranging her a ride was all it took to make her comfortable. A witness with a bad back feared that she would be unable to sit in the witness stand for long stretches, so we arranged in advance with the judge for discreet breaks. A witness must be comfortable to be successful.
8. **Help a Witness Overcome a Poor Presentation.** When a witness performs poorly in the preparation, schedule additional practice. A witness who defaults into knee-jerk agreement on cross-examination may need practice asserting herself. A witness who struggles to remember the timeline may need extra time reviewing the exhibits. If the issue is fidgeting or poor eye contact, videotape the witness' practice, so that she can see the issue and correct the problem. If the witness is significant and your budget allows, consider hiring a presentation-skills expert for additional coaching. If all else fails, consider cutting back her testimony to the bare minimum. With a wild-card witness, shorter is nearly always better.
9. **Prepare for the Optics.** Absent direction, a witness unaccustomed to business attire may appear at trial in sweatpants, and a corporate executive may wear a Gucci suit. Neither is the look you want. Tell witnesses unfamiliar with corporate attire to wear what they wear to church. Tell corporate executives to leave the designer suits and handbags at home; the best look is conservative, professional, and accessible.
10. **Keep the Lines of Communication Open.** Check in with your witnesses often in the weeks before trial. Share updates on changing trial schedules, and the witnesses' schedules. The witnesses may alert you to new facts that impact the trial, may have received a call from opposing counsel, or may have heard who is planning to testify for the opposing party. Make sure they know how to reach you 24/7.

Developing a relationship of trust with witnesses early on in the process, and having an open dialogue, will minimize surprise at trial. Solid preparation will put everyone at ease, and ensure that the jury really hears your client's story from the witnesses who know it best.



Have the Jury at “Hello”: Opening Statements

If you're an in-house counsel whose case is heading for trial, make it a priority to help shape the opening statement. If you think of the opening as more of an outside-counsel task, think again: In-house counsel can add enormous value in guiding the opening statement, and in doing so, play a key role in building the larger trial strategy.

In many ways, the opening statement encapsulates your entire case for trial. Constructing the opening requires your trial team to make crucial strategic decisions, including which themes to present, how to respond to challenging facts, and which witnesses to introduce.

The opening will introduce your case to the jurors, at least some of whom will make a preliminary decision about who should win the case based on the openings.

How do you take an active role in shaping the opening? Work with your outside counsel to ensure that you follow these strategies for a great opening statement.

Fair. Reasonable. Repeat.

No matter what claims you face at trial, the opening statement should stress that your client acted fairly and reasonably. As they listen to the openings, jurors size up the two sides — not by reference to legal arguments, but by common sense. Which side behaved reasonably? With which party can they identify?

Therefore, your opening statement should stress the evidence that shows that your client acted fairly and reasonably. Don't let members of your trial team get so bogged down in the legal theories that they lose sight of the basic theme of fairness. If you feel that the trial team is overly enamored with an argument that may not resonate with real jurors, say so.

For example, in employment litigation, no matter what the specific claim is, some jurors initially may be inclined to identify with the plaintiff. The jurors will want to know whether the company or supervisor dealt with the plaintiff fairly. If you can show that the supervisor gave the plaintiff many chances to improve performance, or that the plaintiff's chronic absences were causing big problems for co-workers or customers, you can show that the discipline was fair and that the company, not the employee, acted reasonably.

Tell a good story, complete with compelling characters.

Even if the case involves esoteric legal theories, the opening must be a compelling narrative. Any good story starts with good characters, so the opening should introduce your client and your witnesses not just by identifying them, but making them real.



Let the jury know what your company does, in real terms. For example, if your company is a retail chain, tell the jury what the stores are like, what the stores sell, and where the jurors might have seen the company's advertisements. If the case involves a complex corporate structure, use a simple visual to illustrate how it worked.

Avoid corporate-speak; terms like "dotted-line relationship" or "360-degree evaluation" may not resonate with a teacher or car mechanic in the juror pool.

Humanize the witnesses who will testify. Draw out relevant facts that show that your witnesses are real, likeable people.

Let the jury know if the witness is a single father or someone who is not much good with computers, if those facts are relevant. Explain what the witness's job is, in everyday terms. Explain what he does every day when he goes to work. Point to the witness in the courtroom: "Ms. Brown is the lady in the front row, in the red sweater. She was in charge of ordering all of the products that the grocery store sold and making sure they always had products on the shelves."

Show the jury with words and body language that you genuinely like and trust your witnesses.

Only promise what you (definitely) can deliver.

We once heard a plaintiff's lawyer tell the jury that an opening statement is like a check, and at the end of the trial, the jury has to decide whether they can cash the check each attorney has given to them. Did the attorney deliver on the evidence she promised? It is an apt analogy.

The jury will be listening closely to the opening and will notice if a piece of evidence that you promised does not materialize. If you say jurors will hear from a particular witness, you had better be sure that you call that witness. If you promise that Ms. Brown will testify that the crucial meeting was on May 25, you better be sure that Ms. Brown is going to so testify.

Before the opening statement, the trial team should determine which witnesses it will definitely call and weave those witnesses into the opening. Review the opening with each of your witnesses to be sure you have 100-percent factual accuracy and that every witness is fully comfortable with the narrative. Facts or witnesses that are not certain to materialize have no place in the opening statement and should be left for later in the trial.

As in-house counsel, you're the lawyer who knows your company best, and you can be very helpful when outside counsel reads the opening to you; if a fact in the draft opening does not sound exactly right or you're concerned that your witnesses may balk on a particular point, let the trial team know and help clarify the point.

Inoculate against known dangers.

By the time of trial, you are well aware of opposing counsel's themes and arguments. If there is a theme



that you feel sure opposing counsel will hit — and you fear it could have sway with the jury — inoculate against it in the opening statement. The same is true for a bad fact.

By directly confronting an opposing theme or bad fact, you may be able to influence the way the jury feels about the issue. You will also telegraph that you are not afraid of the argument, and that there are two sides to the story.

Tell the jury members what they will hear from opposing counsel. Ask them to listen very carefully to the evidence on that point. And tell them what evidence they will hear that refutes the theory. By the time they hear the plaintiff's evidence, it will have lost some of its luster, and the jury may remember to be skeptical.

No gimmicks.

Some trial lawyers are tempted to resort to gimmicks to make a splash in the opening. But that's almost always a mistake. Remember that most of the jurors were hoping to be dismissed, not empaneled, and at the time of the opening, the jurors are mainly concerned about how long they'll be stuck in the trial.

A joke that falls flat will almost certainly irritate the jurors. Anything off topic will make the jury resent counsel for wasting its time. Excessive theatrics can damage your credibility as trial counsel at a crucial moment, when you really need to be persuading the jury that your side has the more reasonable position.

Avoid any language in the opening that could even conceivably draw a rebuke from the judge, such as excessive argument or veering into a topic excluded by a motion in limine.

Keep it simple. An opening presentation that is authentic, straightforward and concise will put you in the best starting position as the trial gets underway.

Sell it like you mean it.

The trial lawyer who delivers the opening statement must actively sell a case to the jury. A dry reading of a written script will not cut it.

Instead, counsel should practice the opening and be completely comfortable with it by the time of trial, whether reading it or reciting it from memory. That kind of ease with the material will allow counsel to deliver the opening with animation and conviction.

Watch your trial counsel practice the opening and give feedback. The opening should leave the jury with no doubt that your trial counsel passionately believes in your case.

It's worth investing the time to get the opening statement right. A great opening will serve as a roadmap for the jury and for the trial team, and provide the jury the best possible introduction to the narrative of your case.



How to Alienate a Jury (Without Even Trying)

Winning a jury trial requires effective presentation of the evidence and argument, but let's face it – you are a lot more likely to win if the jurors like and trust you. Some lawyers get so focused on the exhibits and witnesses that they forget their audience. But jurors are evaluating you and your case at every stage of the trial. Here are the top ten ways to alienate the jury and place your case in peril.

1. **Be Disrespectful in Voir Dire.** Trial counsel often thinks about voir dire as a means to an end – picking the right jury – and as a pre-cursor to the main action of the trial. But remember that this is the first time you are meeting the people who may end up on your jury. Be polite and warm. When delicate issues must be discussed, as they sometimes must in voir dire, tread carefully. For example, depending on the case, voir dire might require a prospective juror to answer questions, in front of complete strangers, about medical issues, religion, or having been fired from a previous job. If you show respect and empathy with your words and body language, you will be off to a good start.
2. **Speak Legalese.** If you speak in Legalese, you will lose your jurors entirely. Remember that the jurors have varying levels of education, and of facility with English, and many have never been in a courtroom. If you talk about the “Plaintiff” and the “Defendant,” many will literally have no idea what you are talking about. Use the parties’ names. Translate legal terms into plain English. Use shorter words in place of longer ones. The jury has to be able to understand you to identify with you, and to hear your argument.
3. **Waste Their Time (with Repetition).** The jurors do not want to be in the courtroom. If you were paying attention during voir dire, you know why: the jurors had planned to be at work, or school, or caring for children, and not at jury duty. The fastest way to alienate the jury is to waste their time. Do not make the identical point over and over with multiple witnesses; establish it firmly and move on. Keep your opening and closing arguments tight; practice so that you are well within the court’s time limits. Efficiency telegraphs competence.
4. **Waste Their Time (Fumbling with Exhibits).** Another way to annoy your jury is to waste their time fumbling with the exhibits. Agree to as many stipulated exhibits as feasible with opposing counsel before the trial. Practice with courtroom technology so that you can work the technology without any hiccups. Ask the clerk if you can come to the courtroom to view the set-up the week before, or attend the training offered periodically by many courts. If your budget allows, hire a consultant to run the technology for you, which ensures a fluid presentation and allows you to focus on the substance.



5. **Insult the Jurors.** As you question your witnesses and make your arguments, be careful that you do not inadvertently insult your jurors. For example, in one recent trial in an employment case, opposing counsel derisively asked a management witness if she expected an employee with “nothing but a high school education” to have understood a certain workplace policy. The courtroom went silent, as the insult sunk in with the jurors, most of whom themselves had a high school education. If the jurors feel you are looking down on them, they will not be open to your arguments.
6. **Be Boring.** If the jury is bored to tears by your dry presentation, they are not even paying attention, let alone finding your argument persuasive. Tell a story. Use humor (in small doses) to wake people up. Use technology to put exhibits on their screens in the jury box, and then highlight or enlarge a section that you want them to focus on. Mix it up with the visuals by offering an exhibit on the screen, and then a blown-up chalk on an easel, and then a flip-chart where you (with the judge’s permission) record key aspects of the testimony.
7. **Incur the Judge’s Wrath.** The jurors respect the judge, not only for her position, but because she is a neutral. If the judge rebukes you – for wasting time, for disregarding a motion in limine, for being argumentative with a witness – the jury will take note. If it happens repeatedly, and/or the rebuke is strongly worded, you will lose credibility with the jury.
8. **Bully the Witnesses.** There is a fine line in cross-examination between being appropriately assertive and acting like a bully. If you cross that line, you may lose your jury’s respect and trust. You can communicate with deft questioning, and your examination style, that a witness’ story does not add up, without belittling or sneering at the witness and damaging your own reputation in the process. Male lawyers have to be particularly careful cross-examining female witnesses, but the anti-bullying principle holds true regardless of gender.
9. **Make the Jury Uncomfortable.** People don’t like to go outside their comfort zone, and jurors are no exception. Be sensitive about gruesome medical or explicit sexual evidence, or asking highly private questions of witnesses. An odd-but-true example of how making jurors uncomfortable can backfire: at one trial, opposing counsel used a metaphor in closing argument about a violent car crash into the jury box, causing the jury visibly to squirm. This was not a path to success.
10. **Act Like A Jerk When You Think They’re Not Looking.** If you speak harshly to your paralegal at counsel table, or roll your eyes at a ruling, the jury will see it, and may hold it against you. Present yourself at all times as if the jurors are watching - because they are. This rule applies even at the elevators, in the hall, in the courtroom cafeteria and in the restroom.



The Five Laws of Cross-Examination

Cross-examination is not for the faint of heart. Even an experienced trial lawyer may feel a surge of adrenaline facing a hostile witness and the unpredictable exchange that is inherent in cross-examination. If you follow the five laws of cross-examination, you will have a better chance of controlling the exchange.

1. **Grab Control and Don't Let Go.**

In the battle between lawyer and witness, the one who establishes control in the first moments of the cross-examination will emerge the victor. Your questions must be leading, clear and short. *You* are testifying, and your goal is for the witness to say nothing but “yes.” If the witness veers into editorializing, use every resource available to get the witness back in line without appearing to cut off relevant or important testimony. Restate the question and politely insist on an answer. Ask the court to strike anything non-responsive. Keep your impeachment material at your fingertips, and use it swiftly. If you establish control in the first five minutes, you are likely to keep it, and you cannot afford not to win this battle.

2. **Stay on Message.**

You must go into cross-examination knowing exactly what you need from the witness. Have an outline of your questions, but also of the admissions you want from the witness. Hone your list down to the concessions that you are confident you can get, and that actually matter. Score your points, and sit down.

There is nothing worse than a lawyer who is bickering endlessly with the witness over some petty point, while the jurors are bored and annoyed. We once watched in disbelief as an opposing counsel tried repeatedly, and in vain, to get the witness to agree that there was a trivial contradiction between a company's two anti-discrimination policies. By the end of the exchange, the jury and witness were exchanging sympathetic looks. And if (God forbid), the judge asks you to move on, do it fast.

Note that with certain witnesses, your list of points may be very short. The witness may not have been deposed and may be just too unpredictable. Or the witness may be so incredibly sympathetic that the risks of an extensive examination are too great. Take for example, the grieving spouse or child of a plaintiff who claims to have been victimized by your client. In that event, there is a lot to be said for asking only a couple of relatively safe questions, and getting out.

3. **Be (A Lot) More Prepared Than the Witness.**

You need to go into the battle far more prepared than the witness is. Know exactly how he testified at his deposition, and what every relevant exhibit says. Next to every point you need from the witness, list the source for that answer, and have the document or deposition transcript ready to go. Have copies of



impeachment material ready quickly to hand up to the witness, opposing counsel, and the clerk and court reporter. Line up your trial technology so that you or your co-counsel can instantly highlight a line of the deposition transcript, or an exhibit, on the screen.

This organized process will keep you collected and the jury interested. The jury will begin to trust you, your client and your story. Better yet, the witness will learn to stay in line, because he knows that if he does not tell the truth, you will call him on it.

4. Don't Get Dragged into the Mud.

Do not let the process of cross-examination make you unlikable. Biting sarcasm, yelling, or physically crowding the witness stand are likely to alienate the jury, and/or draw a rebuke from the judge. We have seen many an opposing counsel appear red-faced and sweaty with anger or frustration during cross-examination. But by getting too hot, you lose control, and you may make even a dissembling witness appear reasonable or sympathetic by contrast.

Be particularly vigilant about your manner if the witness is sympathetic. A mean-spirited or condescending tone is never a good idea, particularly with a witness who appears vulnerable or unsophisticated, or with whom jurors may identify.

Similarly, if you are cross-examining a witness on a sensitive topic, modulate your voice and manner accordingly. Make sure your questions are grounded in the evidence. We have seen counsel ask salacious, accusatory questions of a witness, only to be reprimanded by the judge for mudslinging without foundation, leaving no one's reputation damaged but their own.

5. Be True to Your Own Style.

There are as many styles of cross-examination as there are trial lawyers. Some attorneys can pull off an aggressive, theatrical style. Some can use a strategically-raised voice to dramatically emphasize a central point. Others are more effective with an understated, intellectual approach that methodically scores admissions from the witness. Some lawyers adopt a folksy, quizzical tone, or use humor, to demonstrate that the witness' story just does not make sense. Any of these approaches can be equally effective; the key is to find the style that is authentically you. If it seems fake, the jurors will sense it. Junior lawyers should watch more seasoned practitioners for ideas, and try styles on for size in the safer environment of a trial training program or deposition, to see what works for them.

The style of cross-examination appropriate for a particular trial or witness may also depend on factors such as the age, gender, and physical stature of the examiner, and of the witness. We once watched an older male opposing counsel aggressively badger a young female manager, without seeming to realize that the jurors were aghast. By contrast, at one trial where the plaintiff showed up nine months pregnant, the cross-examiner adopted a gentlemanly tone that managed to gently but effectively reveal the many contradictions in the plaintiff's story.



Great cross-examination is an art developed over years of experience. Finding a winning balance of the right questions and presentation style depends on the unique facts of the case, the witness in front of you, the limits set by the judge, and myriad other factors. But the five laws of cross-examination will serve you well no matter who you face in the courtroom.



The Trial Lawyer's Guide to a Winning Direct Examination

Direct examination is not the sexiest part of a jury trial; it rarely has the drama of a cross-examination, the novelty of the opening statement, or the punch of a closing argument. But the direct examination is critical. It is nothing short of how you make your case to the jury and the court. Follow these strategies for *before* trial, and *during* trial, to ensure your direct examination is the best that it can be.

Before Trial:

1. Start with the Big Picture.

The very first step in preparing for your witnesses' direct examination is figuring out what your story is, and what part of your story each witness needs to tell. Prepare an outline of your claims and defenses, drawing from sources such as the summary judgment pleadings, pre-trial memorandum, trial brief, and jury instructions. List each claim or defense, and break it down into the component parts you must prove. Then break out the testimony and exhibits you need to prove each point. From there, you can begin to outline each witness' expected testimony, and all of the exhibits you will need to introduce.

Taking the time to complete this process will ensure that you meet every element of your proof. Once you understand precisely what you must prove at trial, you can begin to prepare an outline of which testimony and exhibits you will seek to introduce through each witness.

2. Prepare a Strong Outline.

For a witness who has been deposed, the deposition transcript will be a good resource as to what relevant knowledge the witness has. For each point in your outline, note in brackets the page number of any relevant deposition testimony so that you can easily access it as needed during trial.

But don't stop at the witness' deposition transcript. Also search the other witnesses' deposition transcripts, and the exhibits, for material relevant to your witness. Incorporate your notes of witness interviews and other investigative sources. Make sure to include some personal background questions to give the jurors a sense of your witness as a whole person, as well as his or her education and work experience, to help the jury assess that the witness is credible and likeable.

While there is no harm in outlining the questions you might ask to elicit that testimony, don't be rigidly tied to specific questions. Instead, focus on general points. Trial is unpredictable: the Court may sustain an objection to a particular question, or the witness may not provide the testimony you expect. You will need to stay flexible so that you can pose the precise questions, in the moment, that will elicit the testimony you need.



3. Anticipate Objections.

Within your direct examination outline, carefully scaffold your questions so as to lay a proper foundation for each point you wish to elicit from the witness. As you do so, think hard about what objections you expect from the other side. You will likely have a preview of these objections during the process of exchanging exhibit lists and drafting the pre-trial memo.

For challenging objections, think through your response in advance, conducting research to shore up your argument as necessary. Particularly if you are not sure how the Court will rule, consider any available work-around. Can you build a better foundation that will get the document in? Is there another way to get the same point across while overcoming the objection? Could it come in through another witness or document?

4. Create an Organized Exhibit Plan.

Your direct examination will be much smoother and more effective if you are not bogged down with tedious introduction of many contested exhibits. To that end, try to agree in advance with opposing counsel about as many joint exhibits as is practical. The process of agreeing to exhibits works best when both sides confer at least several weeks before trial to narrow the issues. Rather than dig in your heels on every exhibit, limit your objections to those that matter. If you set a reasonable tone with opposing counsel, you are more likely to reach agreement on *your* exhibits.

For those contested exhibits that you will seek to introduce, take an organized approach. In each witness outline, note in bold type, by number and title, each exhibit you will seek to introduce through that witness. Check them off as they come into evidence, so that at the end of the direct, before you release the witness, you can make sure each is checked. Have multiple copies of the exhibit at your (or your co-counsel's) fingertips, so that you have plenty to hand the witness, the court reporter, any trial technologist, and opposing counsel.

The goal is to avoid any fumbling during the direct examination. That sort of time-wasting will annoy the jury and the judge, and detract from the salient points of the witness' testimony.

5. Choose Your Star Witnesses, and Your Cameos.

You will inevitably have some choices to make as to who to put forward as witnesses, and as to which witness will address which points. For example, in an employment case, multiple different witnesses may be able to testify as to the corporate structure of the defendant employer, or particular policies in the workplace.

Decide well in advance of trial who your most effective witnesses are—those who are comfortable in their own skin while testifying, to whom the jury will relate, who can convey facts and ideas to jurors in understandable terms, and who will not wither during cross-examination. Plan for those effective witnesses to cover as many of the key points as possible.



Those witnesses who are not as effective can be relegated to cameo roles, called only as needed to introduce a specific fact or exhibit as necessary.

At Trial:

6. Really Listen to Your Witness During Direct.

During direct examination, it is critical to actually *listen* to the witness' answers to your questions, rather than simply preparing for the next question. This is not as simple as it might sound. By the time of trial, you will be so familiar with the facts that it is easy—if you are not really listening—to think the witness has covered a point that she missed, or to overlook the fact that the witness has volunteered something that merits further follow-up. Be fully present in the moment as the witness testifies, so that you can react quickly and naturally with your next question.

7. Stand Ready to Slash, Even on the Fly.

A good trial lawyer must be willing to slash the direct examination outline, even as the witness is testifying. If you reach a topic in your outline, and feel that this witness, or a prior witness, has amply covered it, feel free to cut it. This is especially true if you sense that the jury is getting impatient. If a witness is cratering before your eyes, even before he or she has testified about a planned topic, you'll need to make a split-second decision. Can another upcoming witness on your list cover it? Can you get the required evidence in some other way? If so, cut it, and move on.

8. Use Technology to Your Advantage.

Technology is a powerful weapon in a direct examination. A witness' testimony about a document that the jury cannot see is unlikely to command their attention. But if you put that same exhibit up on each juror's screen in the jury box, and highlight each section as the witness testifies about it, the jury will naturally be a whole lot more interested, and more likely to remember it.

Similarly, if your witness is explaining something complicated during direct, use technology to put a visual before the jury that helps elucidate the point. Let's say you want to illustrate what a certain department at your client company looked like before, and after, a reduction in force. Consider making a graphical chart that shows the before and after visually, using colors or symbols to highlight particular affected employees or job titles.

Jurors are accustomed to seeing information presented in high quality digital form, both in their workplaces, and on TV and the Internet, and tend to have high expectations for such presentations at trial. If budget allows, consider retaining a trial technologist to run the technology during trial. With all of the exhibits uploaded beforehand, you will have an instant way to put them before the jury as you proceed with your direct, and neither you nor your co-counsel will be distracted with the mechanics.



9. Leverage Your Trial Team.

Enlist your co-counsel in the direct examination process. Co-counsel should listen carefully and take notes of key points in the witness' testimony, marking anything that needs clarification, or any important testimony that the witness omitted. Co-counsel can also help you keep track of which exhibits have been admitted, and will also be able to see, from body language, if the jury or judge has reacted negatively to any testimony that would benefit from follow-up.

At any breaks in the testimony, get a quick download as to those follow-up points. Just before releasing the witness, ask your co-counsel for a signal as to whether there is anything critical to add. Working as a team, you are much less likely to overlook anything.

10. Get Ready to Go with Re-Direct.

As your witness undergoes cross-examination, you need to simultaneously listen carefully to your witness' answers, and be ready to spring into action with the re-direct. Have a well-annotated copy of the witness' deposition transcript in hand, so that if opposing counsel tries to impeach your witness with it, you can easily follow along, and make sure that the testimony is not misread or taken out of context. Have a clean copy of the transcript uploaded into the trial technology system as well, so that you can simultaneously share pages as needed with the witness and jury on re-direct.

Make a system for recording what the witness said on cross, and what follow-up questions you want to ask. It can be as simple as a pad of paper with the testimony on one side, and your follow up questions on the other. Annotate your follow up questions with deposition page or exhibit numbers, as necessary. Have your co-counsel do the same.

The best re-direct is crisp and targeted, allowing your witness more fully to explain what opposing counsel may have put in a negative light on cross. With a strong re-direct, you can ensure that your witness gets the last word.



An Appellate Lawyer's Guide to the Special Verdict Form

Ten Strategies for a Verdict Form That Will Help You Win Your Trial *And* Appeal

Just as the special verdict form plays a starring role in a jury trial, it can make or break your arguments on appeal. In fact, it is likely the first document that an appellate lawyer will want to see. To build a strong appellate record, you must use a thoughtful and strategic approach when crafting the language you propose for the special verdict form, and for any objections you make to the forms proposed by the court or opposing counsel. Here are ten strategies for crafting a special verdict form that will help you win at trial, and help position your client for any appeal.

1. **Say What You Mean.** Be clear and precise in your proposed verdict form. On appeal, you do not want any questions about what language you sought, or why. If your proposed verdict form is unclear, you will have little chance of persuading an appellate court that the trial court erred by not adopting it. See, e.g., *Lore v. City of Syracuse*, 670 F.3d 127, 160 (2d Cir. 2012) (holding it was “well within the court’s discretion not to adopt the [defendant’s] proposed blunderbuss” verdict-form questions). Explain terms of art directly in the question, if necessary; for example, “Has Mr. Smith proven that Mr. Thompson acted with ‘actual malice,’ meaning hatred or ill will?” Use straightforward language that a jury of laypeople can understand, to minimize any later claim of jury confusion, or an ambiguous verdict.
2. **Tell the Jury What Their Answers Mean.** A verdict form should tell the jury exactly what their answers mean, so that on appeal, there can be no claim of jury confusion or error. For example, explain: “If you answered ‘yes’ to number 6, you have found for Smith Corporation on the hostile-work-environment claim. If you answered ‘no’ to number 6, you have found for Laura Jones on the hostile-work-environment claim.” A clear roadmap in the form itself will minimize any ambiguity as to the jury’s intent on appeal, where the appellate court’s focus will be on ensuring that the verdict form is not “confusing, misleading or prejudicial,” and “accurately reflects the law.” *Coggins v. KLLM, Inc.*, 146 Fed. Appx. 9, 11-12 (6th Cir. 2005).
3. **Match Your Proposed Verdict Form and Jury Charge.** A common error that will damage your record for appeal is a proposed verdict form and jury charge that do not match. That is, you propose or object to language for the jury charge, but fail to follow through with a corresponding proposal or objection to the verdict form. This sort of mismatch can result in a waiver of an argument on appeal. Do a painstaking comparison to ensure you mirror your proposed



language, and objections, in both documents. In the charge conference, ask to take each of the verdict form's questions separately, on the record, so nothing is missed. Make your objections crisp and specific. Global objections may not be sufficient to preserve important arguments for appeal. See *Lore*, 670 F.3d 127, 160 (“An objection ‘to the entire verdict form’ does not suffice to alert the court to a specific error in a particular question”).

4. **Get It In Writing.** Document your proposed language and objections for the verdict form in writing. Do not rely solely on oral argument at the charge conference, because you may well end up forgetting—and waiving—an argument that may become important. File an initial proposed verdict form. If the evidence that comes in during trial requires a new question, or adjusted language, file a supplemental written submission. Consider filing a written objection to your opponent's proposed form, or the one the court ultimately adopts. Make sure the written submissions are filed on the docket, rather than simply handed up to the clerk or bench during argument. Date and number the filings so that the sequence is clear later. These written submissions will bolster your appellate record and guard against any inadvertent waiver. As one federal circuit court held: “A party who fails to bring to the trial court's attention ambiguities created by . . . special verdict forms may not seek to take advantage of such ambiguities on appeal.” *Northern Natural Gas Co. v. Trans Pacific Oil Corp.*, 248 Fed. Appx. 882, 888 (10th Cir. 2007).
5. **Keep It Simple.** The verdict form should be a roadmap, not a labyrinth. Keep it as straightforward—and short—as possible. An overly long or complex form increases the risk of the jury becoming confused or making a mistake, such as by giving inconsistent answers. By contrast, a succinct form is easier to defend to an appellate court. As the First Circuit has observed with respect to verdict forms: “Less is sometimes more.” *Santos v. Posadas de Puerto Rico Assoc., Inc.*, 452 F.3d 59, 65 (1st Cir. 2006) (rejecting claim of error in denying party's proposed verdict form as “too complicated”). A shorter and simpler form is also more palatable to the trial judge. Judges have been known to flip through a 10-page verdict form and reject it out of hand based solely on its length and apparent complexity. A shorter and simpler form is also easier for you to explain to the jury in the closing, or to enlarge and show to the jury as a demonstrative.
6. **Guard Against Duplication.** Defense counsel should look carefully for any possibility of duplication in the verdict form. If two causes of action are duplicative, object to any attempt to include them both in the verdict form, even if you lost the same argument at the summary-judgment or directed-verdict stage. Also be wary of verdict forms that invite the jury to award the same damages twice, since the consequences can be significant. See, e.g., *ClearOne Comm., Inc. v. Biamp Sys.*, 653 F.3d 1163 (10th Cir. 2011) (holding that verdict form, which asked how much the jury awarded against each defendant rather than how much the plaintiff had been damaged, created ambiguity over whether the jury intended to award a total of \$956,000 in lost



profits, or double that amount). If the verdict form invites duplication, object on the record and propose a written alternative that eliminates the risk.

7. **Beware of Compound Questions.** Be aware of the risk inherent in compound questions. Compound questions can later put an appellate court in the untenable position of having to “guess as to what the jury found.” See, e.g., *Fidelity & Guaranty Ins. Underwriters, Inc. v. Rodriguez*, 141 Fed. Appx. 11, 12-13 (2d Cir. 2005) (vacating judgment based on jury’s verdict in response to verdict form question that was “doubly or triply compound”). Look for ways to break down compound questions into simpler parts. Avoid the dreaded phrase “and/or” in any verdict-form questions; the phrase is an invitation to ambiguity.
8. **Don’t Overreach.** Keep your proposed verdict form reasonable. Use neutral language that credibly tracks the relevant cases and statutes. You do not want to find yourself in the unpleasant position of having to defend a stretch to the appellate court, or worse, having a favorable verdict reversed. See, e.g., *Malone v. ReliaStar Life Ins. Co.*, 558 F.3d 683, 685, 687-88, 694 (7th Cir. 2009) (remanding for new trial based on “flawed special verdict form” that misled the jury about the showing required for a key issue in the case). An overreaching form can also damage your credibility with the trial judge, who may then look to opposing counsel for a more sensible option.
9. **If You Don’t Want a Question Asked, Say So.** If you do not want the jury to be asked a particular question on the verdict form, make sure you say so clearly, and on the record. For example, if you argued unsuccessfully on summary judgment or directed verdict that the plaintiff should not recover punitive damages, object *again* in the context of the verdict form to the submission of the question to the jury. You can still propose your own version of the punitive-damages questions for the jury, but make clear that you do without waiving your objection, and only in case the judge gives the jury the question over your objection. You do not want your proposed verdict form to be taken as an implicit admission that you agreed to the jury getting the question. See, e.g., *Niemiec v. Union Pacific Railroad Co.* 449 F.3d 854, 858 (8th Cir. 2006) (finding no plain error in mitigation-of-damages instruction to jury, where plaintiff objected to the instruction’s language, but failed to object either to the instruction being given in the first place, or to the verdict-form question that incorporated a reduction for mitigation of damages).
10. **Pay Attention When There Are Multiple Defendants.** Special issues arise in crafting a special verdict form when you represent multiple defendants. It is imperative to make sure that your proposed verdict form asks the jury to provide a separate, specific answer for each defendant. Carefully think through, and make sure the verdict form accurately captures, the applicable law concerning joint-and-several liability or individual liability, as applicable.

The verdict form’s importance cannot be overstated. Start preparing your proposed verdict form as soon as you have a trial date, even months before trial. Consider all the ways that a jury could respond to the form, to minimize the chance of inconsistency or ambiguity. If you use a mock jury, have them complete



your proposed form to see how it works. In the flurry of activity before and during trial, do not let your attention to the verdict form wane. Carefully review each proposal from opposing counsel, and from the court, and note detailed objections. Submit counter-proposals if necessary. Filing written proposals and objections help promote clear, thorough thinking about the issues, and will provide the clarity you need on appeal.

One way to ensure that you have your appellate bases covered despite the frenzy of trial is to have an appellate specialist review your proposed verdict form for preservation issues. This modest investment at the trial stage can help ensure that any appellate arguments you may make will have a solid basis in the record, and will withstand the scrutiny of an appellate court.

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Avoiding The Top Ten Pitfalls in a Jury Charge Conference

Seasoned trial lawyers know that the jury charge conference is high-stakes and fraught with peril. The charge conference requires a delicate balance between two goals: persuading the Court to give the jury a charge that will help you win your case, and preserving all appellate issues in the event that the jury returns the wrong verdict. There is often limited time to prepare for the conference, which comes toward the end of trial while you are also preparing for final witnesses and closing arguments. You may also face an impatient judge who is focused primarily on getting the case to the jury, and does not share your interest in preserving arguments for appeal. Being aware of the major pitfalls of the charge conference, and how to avoid them, can help you make the most of the conference.

1. **Don't Start with Bad Instructions.** Make sure that the written, proposed jury instructions that you file with the Court are a clear, practical model for what the charge should look like. Use straightforward language that jurors can easily understand. For example, refer to the parties by name rather than by "Plaintiff" or "Defendant," which are unfamiliar terms to most jurors. Frame the jury instructions in terms of your own case and facts, rather than in generic legal terms. Also, keep in mind that your proposed instructions are your own roadmap for your arguments at the charge conference. Include parentheticals with your citations to case law, so that you can remember the holding of each case when you are arguing at the conference. Also consider filing a written objection to opposing counsel's instructions. Those objections will become part of the record for appeal, and can serve as a written outline for your argument against opposing counsel's proposed instructions at the conference.
2. **Don't Get Trapped into Submitting Instructions You Don't Really Want.** Here is a common trap for the unwary: The judge makes clear that she is going to give a certain instruction over your objection. Since you want to at least influence the instruction's wording, to try to minimize the damage, you submit your own proposed language. The problem is that you have now proposed an instruction that you do not actually want to go to the jury, and the opposing party can claim that your client, having proposed such an instruction, has waived any objection to it. There is a simple fix: make clear within your written proposed instruction, and verbally on the record at the conference, that you object to the instruction being given at all, and that without waiving that objection, you are asking that, at a minimum, the Court use your proposed language.
3. **Don't Go In Unprepared.** There is no substitute for serious preparation for the charge conference. If the judge has given you a written draft charge to review, sit down in advance of the conference with the judge's proposed charge, your own proposed charge, and that of opposing counsel, and painstakingly compare them. Mark up the judge's proposed instruction as



if you are editing it, noting exactly what you would cut and what you would add. This process will enable you to be clear and efficient in your argument at the conference. Having specific proposed language ready to offer the Court increases the likelihood that the judge will grant your request, and helps build a clear record for appeal. Know the relevant pattern jury instructions for your issue and jurisdiction, and have them with you at the conference. Have copies of key cases and pattern instructions so you can hand them up to the bench as needed. If the judge does not allow you to see his draft charge in writing (as some do not), it is even more critical to know your own proposed charge cold, so that you can react quickly when hearing the verbal charge and make a record of your objections.

4. **Don't Lose Sight of Your Most Important Issues.** Time is scarce at the charge conference, and there is invariably a lot of ground to cover. You will not have time to argue every little point at length. Therefore, it is critical that you know what your most important issues are, both for persuading the jury, and for preserving your appellate record. At the conference, give those key issues the focus they deserve. If one objection is of preeminent importance, tell the judge that, on the record. For less-important objections, state them clearly and succinctly, and move on.
5. **Don't Be Pressured Into Not Making Your Record.** The charge conference is very pressured. The judge's interest in getting through the conference, with as much agreement between the parties as possible, is in direct conflict with your interest in making your record. But do not let that environment force you to give ground where you will regret it later. For example, do not say, in response to a proposed instruction by the Court, "It's not what I wanted, but it looks fair to me." Such a statement effectively waives any post-trial or appellate argument on the point. If the instruction is not what you want, say so, and say why. Further, insist on making your appellate record. This is where preparation is key; you have to know exactly what you want, and be ready to make your points quickly and effectively. Be polite but assertive. If the judge is making it difficult to state your position, ask, "Your honor, may I briefly make a record of my objection to Instruction 10?" The answer will usually be yes, and asking the question re-focuses the judge on the fact that you are simply doing your job.
6. **Don't Give Opposing Counsel Unnecessary Appellate Hooks.** It is important to know when *not* to push too hard at the charge conference, so that if you win the trial, you have not given the other side an effective appellate hook. Let's say you represent the defendant, and you know that there is a split of authority in your Circuit as to whether the plaintiff's standard of proof is a "preponderance of the evidence" or "clear and convincing" standard. Of course, as the defendant, you would rather have the instruction include the higher "clear and convincing" standard. But you might decide that the standard is unlikely to change the jury's verdict, and that if you win, you do not want the opposing party to have a potentially promising appellate issue. In that case, you might decide the best strategy is simply to note briefly for the record your request for the higher standard of proof, with little argument. This strategy effectively denies the



opposing party a strong appellate issue in the event you win, but preserves the issue for you on appeal if you should lose.

7. **Don't Assume that General Objections Are Sufficient.** It can be tempting in a long charge conference, where the judge's patience is wearing thin, to rely too heavily on general objections in lieu of specific objections to the charge. But beware of general, catchall objections. If you say, "We object to all of the instructions on malice," it may later be ambiguous which instructions precisely were included in that objection. Instead, offer the general *and* the specific. For example, say, "We object to all of the instructions on malice, including but not limited to Instructions 2 and 3," and then clearly state the specific grounds for your objection. Carefully laying this groundwork will provide you a much better record on appeal.
8. **Don't Speak in Generalities about Prejudice and Confusion.** At the charge conference, a general objection that a proposed instruction is prejudicial, or that it will confuse the jury, will not get you very far. The objection sounds like boilerplate, and the judge is likely to ignore it as such. Instead, paint a picture. Explain to the judge precisely *how* the jury will be confused, or *why* the instruction will hurt your client. Not only will the judge be more likely to change the instruction, but if the verdict comes out the wrong way, you will have a far stronger appellate argument about prejudice or confusion if the record shows that you warned the trial judge of precisely this problem at the conference.
9. **Don't Let Your Objection Fade Away.** Repeat and reincorporate your objections to eliminate any danger of waiver. For example, even if you have made detailed objections at the charge conference, after the judge gives the actual charge, ask to be heard briefly at sidebar (on the record) to reincorporate your objections from the conference, and repeat the most salient objections. Be sure to make all objections on the record. If a colloquy occurs about the jury charge when the court reporter is not present, repeat it when you are on the record. If there is no court reporter at sidebar during argument on an instruction, insist on going on the record.
10. **Don't Let Your Record Get Muddy.** Charge conferences can be long, and they happen at the end of trial, when everyone is tired. Don't let this make you lazy about making your record. Avoid statements like, "On the next instruction, we have the same objection we discussed earlier, your honor, on the definition of a hostile work environment." This may make sense to the judge and the parties at the moment, but it looks like a mess in the record later. Which instruction is "next," and what exactly is the "same objection," and precisely which issue were you discussing earlier? Instead, be crisp and specific: "On Instruction 11, we object to the proposed definition of hostile environment, and instead request that the term be defined as an environment 'sufficiently severe and pervasive as to alter the conditions of employment.'" Eliminate from the record any doubt as to what your position is.

It can be a challenge even for experienced trial lawyers to keep one eye on the present trial, and one eye on the future appellate record, as the charge conference requires. If you have more than one



attorney on your trial team, consider designating one person to handle the charge conference, while the other attends to the closing argument and other end-of-trial matters. Taking the time to prepare well for the conference will pay big dividends, both in persuading your judge to adopt your instructions here and now, and building an appellate record you will be thankful for later.



Close the Deal: Six Steps to a Knockout Closing Argument

In a jury trial, a great closing argument can seal the deal. The goal is to synthesize all of the evidence for the jurors into a convincing, coherent narrative. But that may be easier said than done, since the flurry of a trial offers little time to pull it all together. Following these six steps will help you prepare and deliver a knockout closing argument.

1. Avoid the Re-Run.

The worst closing arguments are long, tedious recountings of *all* of the evidence, witness by witness, exhibit by exhibit, in the order in which they appeared. For the jurors, it's like watching a re-run of a show they never really wanted to watch the first time.

It is far more compelling and persuasive to present the argument thematically. Make a list of the key conclusions that you need the jurors to reach in order to arrive at the desired verdict. As you argue each conclusion, weave together the key testimony or other evidence that supports the point.

As you argue each point, confront important contrary evidence head on. Explain why the jury should discount it. By dealing with such evidence directly, you show the jury that you are not afraid of it, and offer the jurors a way to reach your desired verdict despite the inevitably imperfect evidence.

2. Use the Verdict Form and Instructions to Your Advantage.

Ultimately, the jury will need to translate the evidence and arguments into answers on a verdict form. Don't leave that process to chance. Instead, use the verdict form and jury charge expressly in the closing to guide the jurors to the right verdict.

If you have a final verdict form in hand, walk through it with the jury. Consider putting an enlarged version of the verdict form before the jury, on a screen or in a chalk on an easel, and walking through it as you make your argument. Explain how the jurors should answer each question, and why.

If your case turns on a legal definition or rule, tell the jury what the court will instruct them on that point in the jury charge, and use that language in your closing. For example, in a discrimination trial, you might argue:

“You will be deciding whether BIGRETAILER had a legitimate business reason for terminating Mrs. Jones or whether they terminated her because she is Asian-American as she suggests. That really means that you need to decide whether BIGRETAILER terminated Mrs. Jones for another reason that is not discriminatory



and makes sense in light of BIGRETAILER's business model. Remember what Mr. Smith said about the fact that Mrs. Jones refused to ever work on Friday, Saturday or Sunday, and the data that you saw showing that BIGRETAILER made 90% of its sales on those three days each week. When you are deciding whether that reason was just a pretext or mask for discrimination, remember what Mr. Davis said about the number of Asian-Americans in high level management positions at BIGRETAILER.”

Jury instructions can be byzantine, especially for a lay jury. Highlighting a key portion of the charge, and using the key terms in your closing, can help the jury understand the instruction, and arm them with a way to relate it to your particular case.

3. **Make It Dynamic.**

By the time of the closing argument, the jurors have sat through many days of trial, and are itching to be released. To break through to the jury, the closing must be dynamic.

Use rhetorical devices to make your closing compelling. Break down your themes into memorable sound bites. Think about arming a juror who believes the verdict should go your way with ammunition in the form of testimony and documents to convince her fellow jurors. No matter what claims are at issue, emphasize why a verdict for your client is *fair*. Use plain language accessible to any juror and appeal to the jurors' common sense.

Once you have your sound bites, consider using repetition to drive the point home throughout the closing, as Johnny Cochran famously did in the O.J. Simpson trial with his line, “If it doesn't fit, you must acquit.”

Using visuals can help break up a long argument and help the jury understand how the evidence fits together. If a particular exhibit is critical, remind them of it and put it front and center. If you have trial technology available, put the exhibit on the jurors' screens, highlighting the key portions in real time in order to keep the presentation interactive. Remind them of the explosive moment in the trial when they saw this exhibit and the key portion. Tell jurors what the exhibit number is, especially if they are taking notes, so that they can find it easily in the deliberations room.

Find out in advance from the Court how long you will have for the closing, and practice so that you can finish well within the timeframe. The jury will be grateful that you respected the time limit, and you will not be rushing your finale. The practice will ensure a convincing presentation that does not sound rehearsed.

4. **Stay Safe.**

Make sure that your closing avoids danger zones that could lead to a mistrial, judicial admonishment, or appellate hook for opposing counsel.



The closing should stick to the argument about the evidence presented, and avoid any opinions of trial counsel, or personal attacks on opposing counsel. Counsel should avoid reference to any evidence that has been excluded, or areas prohibited by the court in a motion in limine ruling or otherwise. Know and abide by the rules of your jurisdiction regarding improper argument, such as those prohibiting personally vouching for a witness, or asking the jury to stand in the shoes of the victim in a manner that creates a biased perspective on the case.

Make sure any statements about the applicable legal standard are scrupulously accurate. In one trial, we watched the judge interrupt opposing counsel's closing to admonish him that he was misrepresenting the key legal standard. Such an admonishment can fatally undermine the impact of the closing and counsel's credibility with the jury.

Trial counsel for both the plaintiff and defense should make sure to understand the applicable rules in their jurisdiction regarding "anchoring." Anchoring is when counsel suggests to the jury the monetary range for emotional distress or other compensatory damages. Plaintiff's counsel must be sure to stay carefully within guidelines. Defense counsel should be ready to preserve an objection if appropriate, and decide in advance how to respond if plaintiff's counsel suggests a number to the jury.

5. Don't Procrastinate.

When preparing the closing, you will rarely have the luxury of time. It can be hard to predict when you will deliver the closing, since it can depend on how long witnesses' testimony takes, when the defense rests, and the Court's schedule. The reality is that you may end up finalizing the closing in the courthouse, and having to incorporate testimony and evidence that has come before the jury that very same day.

Some trial attorneys keep a separate pad at trial marked "Closing" and use it to write down during the trial, as it is unfolding, important evidence to discuss or discount, along with key documents to emphasize during the closing.

Given these realities, the best practice is to start the closing ahead of time. You might even start a shell of the closing argument before trial, in conjunction with preparing the opening statement. Develop your themes and give thought to rhetorical devices. Each night during the trial, add the most important testimony that came in during that trial day. That way, if the judge suddenly announces that closing arguments will begin in 30 minutes, and you find yourself drafting on a legal pad in the courthouse, you will be refining rather than starting from scratch.

It also helps to decide in advance how to divide up the critical end-of-trial tasks. For example, one member of the trial team may take on the jury instructions and verdict form, while another concentrates on the closing. Since both are complex and require focused concentration, it is wise to divide and conquer.



6. **Paint Yourself As Trustworthy And Opposing Counsel As A Snake Oil Salesman.**

Remind the jury in your closing about how you kept the promises you made to them during your opening statement about what your case was about. Weave in a theme or catch phrase that you first planted in your opening to tie the whole case together, as if to say that the evidence turned out exactly as you had planned. Spend time pointing out those instances in which your opposing counsel did not keep her promises from her opening because the evidence was not as she suggested it would be. By following these strategies, you will emphasize to the jury that your story, not that of your opponent, adds up and can be trusted.



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Seyfarth's Trial Team offers a popular Trial Education Series of webinars on various trial practice topics. Below are links to recordings of some of our recent webinars:

- [Test-Drive Your Trial Strategy: When and How to Use Mock Juries and Focus Groups](#)
August 2013
- [Roadmap for the In-House Lawyer Going to Trial](#)
October 2013
- [Ready or Not, Here Comes Trial: How to Prepare Your Witnesses for the Courtroom](#)
November 2013
- [Show Them the Way \(to the Right Verdict\): Preparing Winning Special Verdict Forms and Jury Instructions](#)
January 2014
- [Leveraging Motions in Limine to Win Your Trial and Appeal](#)
May 2014



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