**Criminal Trial - The Steps In A Criminal Trial**

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**Jury selection.** While technically a trial begins when the jury is sworn in at the end of the jury selection process, jury selection is considered so important by trial lawyers that it is appropriate to consider jury selection as the first step in a criminal trial.

During jury selection either the lawyers or the trial judge will question potential jurors to make sure that they can be fair in deciding the case. As a result of such questioning, if the prosecutor or the defense attorney believes a certain juror cannot be fair and impartial either lawyer can challenge that juror *for cause*. If the trial judge agrees, the potential juror will be removed from the panel of jurors.

A second way a prosecutor or defense attorney can remove a potential juror is through a *peremptory challenge*. A peremptory challenge permits a lawyer to remove a possible juror without the necessity of showing a reason. Each jurisdiction allots a certain number of peremptory challenges to each side in a criminal case, and the number usually varies depending on factors such as the size of the jury or the seriousness of the crime. While the number varies from jurisdiction to jurisdiction, in a routine criminal case, such as a burglary or a theft case, the prosecutor and the defense attorney will often have five or six peremptory challenges at their disposal.

**Opening statements.** Because a trial can last days or even weeks, obviously it will be easier for jurors to understand how the bits and pieces of evidence that come to their attention fit together if they can be given an overview of the issues and evidence that will be central to the trial. This overview is provided by the opening statements that are delivered by the lawyers at the start of the trial.

The prosecution's opening takes place after the jury has been selected and sworn, but before the first witness has been called to testify. Although the opening does not supply the jury with any evidence (the evidence comes only from the witness stand and whatever exhibits are admitted at trial), nonetheless the prosecution's opening statement is very important. First, it provides an opportunity to explain the nature of the charge, or charges, for which the defendant is on trial. Some charges are easily understood by a jury, and in such instances it may be sufficient for the prosecutor simply to read the charging document as part of the opening. But other trials involving more complex charges, such as conspiracy or fraud, may require a more careful explanation of the elements involved.

A second function of the prosecutor's opening is to explain the evidence that will be produced in an attempt to prove the defendant's guilt beyond a reasonable doubt. This preliminary overview of the case is especially important if the trial will be protracted. But even in a trial lasting a relatively short time, an explanation of the prosecution's case can be important because witnesses may not always be able to testify in the order that a logical presentation of the evidence might suggest. For example, a fingerprint expert may have to testify early in the case, if other obligations make it impossible for the expert to appear later in the trial. But it may only be later in the trial that the gun which the fingerprint expert examined is connected to the defendant. An opening statement can help the jury understand how all the evidence fits together.

An opening statement is also important in a case that is based on a number of pieces of circumstantial evidence. In such a case, there may be no one witness who can tie the whole case together. A jury may grow bored or even frustrated as the prosecutor questions a witness at length about some apparently minor detail whose importance will be apparent only later in the trial. An opening statement helps the jury understand the significance of such pieces of evidence. It is easier for the jury to be patient while the prosecutor elicits testimony about a particular piece of evidence if the jury understands how that evidence fits into the mosaic.

Finally, opening statements are also exercises in persuasion. The opening and closing statements are the only opportunities the lawyers have to speak directly to the jury, and trial lawyers recognize the lasting impression that a clear, forceful, and logical opening statement can make on the jury.

Although the prosecutor always delivers his opening statement at the start of the trial, in many jurisdictions the defense attorney has a choice. The defense can present its opening after that of the prosecutor, or can reserve it until the prosecution has finished presenting its case and the defense is about to begin its own case.

**Calling witnesses.** The U.S. system of criminal trials is a part of the Anglo-American adversary system, under which trials are controlled to a large extent by the opposing sides. Each side presents its case and vigorously argues the merits of its evidence while attacking, as energetically as is proper, the evidence supporting the opposing side. The selection and questioning of witnesses is thus primarily the obligation of the opposing lawyers. Although a judge in a criminal case may occasionally call a witness and is permitted to ask questions of witnesses, by tradition the role of the judge is that of a neutral referee between the prosecution and the defense.

Both the prosecutor and the defendant have the power to subpoena witnesses who have relevant testimony to offer at trial. In fact, the Sixth Amendment specifically guarantees that a defendant have "compulsory process for obtaining witnesses in his favor." This subpoena power is necessary because many witnesses would prefer not to testify at trial, especially if there is likely to be a rigorous cross-examination.

Although subpoena power in criminal cases is broad, there are privileges that restrict the ability to call to the stand certain witnesses. For example, the Fifth Amendment privilege against self-incrimination bars the prosecution from calling the defendant as a witness as part of its case. Some states also have enacted laws providing for a marital privilege, which bars the prosecution from calling as a witness the spouse of the defendant if the defendant objects to having the spouse testify.

Even if there is no bar to calling certain witnesses to the stand, privileges may still protect certain matters from being revealed at trial. Thus, a witness for either the prosecution or the defense may refuse to answer certain questions out of fear that his answers will incriminate him. (Sometimes the prosecution will avoid this problem by granting the witness immunity.) Or a witness may invoke a number of other privileges, for example, the doctor-patient privilege or the priest-penitent privilege. Such privileges are designed to protect confidential communications arising out of these relationships from subsequent disclosure, even at a trial.

**Exclusion of witnesses from the courtroom.** The prosecution has the burden of proving the defendant guilty beyond a reasonable doubt and always presents its case first. But before any witnesses are called to the stand, it is frequently moved by either the prosecution or the defense that all witnesses be sequestered. This means that all witnesses who will be called at the trial are ordered to remain outside the courtroom until it is time for a particular witness to take the stand. Thus, a witness who is called late in the trial will not have heard the testimony of earlier witnesses. It is believed that sequestration helps discourage fabrication or collusion and also helps expose any inaccuracies in testimony.

Motions for sequestration of witnesses are usually routinely granted, and in most jurisdictions there is a right to sequestration by either side. There are, however, some exceptions. Usually a person whose presence in the courtroom is essential to the presentation of the case, such as the police officer who investigated the case, will be permitted to remain in the courtroom. The defendant, of course, has a constitutional right to be present and thus must also be permitted to remain in the courtroom even if he or she intends to testify. Finally, some states have exempted crime victims from sequestration rules and permit the victim to remain in the courtroom throughout the trial.

**Examination of witnesses.** The general sequence of the witnesses at a trial is as follows. First, the prosecution presents its direct case, aimed at proving that the defendant committed the crime in question. When the prosecution has finished with the presentation of its case against the defendant, the defendant has an opportunity to call witnesses and put on a defense. If the defendant chooses to put on a defense, the prosecution is then permitted to call additional witnesses to rebut the defense witnesses.

For example, the prosecution may present a series of witnesses in an effort to show that the defendant robbed a certain bank on a certain date. The defense may then call witnesses with the aim of establishing that at the time of the robbery the defendant was bowling at a certain bowling alley and thus could not have robbed the bank. Finally, the prosecution may call employees of the bowling alley in question to try to prove that the defendant was not at that bowling alley at the time of the robbery.

Each witness called to testify is questioned first by the side that called the witness. This is known as the *direct examination* of the witness. When the direct examination is over, the lawyer for the opposing side is permitted to question the witness in what is called *cross-examination*. After cross-examination is completed, the side that originally called the witness may question him in what is called *redirect examination*. This is usually limited to explaining or developing matters that were raised during the cross-examination. In some instances, if new matter has come out in redirect examination, a judge has permission to permit *recross-examination*.

The main difference between direct examination and cross-examination is the manner of questioning. In cross-examination an attorney is permitted to ask leading questions, which suggest the desired answer and usually call for a yes or no response. But in direct examination the questions should not be leading. Thus, in direct examination of a witness to a robbery, it would be improper for the prosecutor to ask a series of questions such as "And the man you saw robbing the bank was six feet tall, wasn't he?" or "And he was dressed in jeans and a green sweater, wasn't he?" On the other hand, questions of the same form would be permitted in cross-examination, for example, "It's true, isn't it, that you only saw the robber for fifteen seconds?" and "Isn't it a fact that you were very frightened at that time?"

The distinction between the form of questions permitted in direct examination and the form permitted in cross-examination reflects the fact that the witness's testimony usually is favorable to the side calling the witness, and unfavorable to the other side. In examining a witness called by the other side whose testimony is damaging, leading questions are needed in order to make an effective challenge to the witness's perception, memory, or credibility.

In addition, since each side usually calls witnesses who are generally cooperative and whose testimony is helpful to it, leading questions are not needed in direct examination. The attorney for that side has generally gone over the questions with the witness outside the courtroom, and sometimes there have been several rehearsals of the trial testimony in the days before trial. Given the reality of extensive witness preparation that takes place prior to important trials, there is less need for leading questions in direct examination and more need for leeway in attacking testimony that is not as spontaneous as it may appear to a jury.

Of course, witnesses do not always cooperate with the side that called them, and the leeway permitted in both the scope of examination and the manner of questioning the witness is always a matter for the discretion of the trial judge.

**The judge's screening function.** To understand criminal trials, it is necessary to understand the role of the trial judge in the admission of evidence. In the Anglo-American trial system the judge performs a screening function for the jury, making sure that the evidence brought before it is relevant and that it is not prejudicial to the defendant or to the state. Many items of evidence that are relevant in a broad sense are kept from the jury because the trial judge has decided that the danger of prejudice to the defendant outweighs the probative value of the piece of evidence in showing that the defendant committed the crime in question. Thus in a murder case, evidence offered by the prosecution showing past arrests of the defendant for assault will not be admitted, nor will evidence of the defendant's reputation as a violent person be admitted as part of the prosecution's direct case. Even gruesome pictures of the body of a murder victim that show the wounds may not be admitted for the jury's inspection if a trial judge feels that the pictures may inflame the jury and distract it from its job of carefully evaluating the evidence in the case. Of course, most evidentiary rulings can only be understood in context, taking into account the other evidence in the case and the legal and factual issues being contested. But it should be apparent that many major battles at a trial may take place outside the hearing of the jury because of the judge's obligation to rule on the admissibility of evidence. Thus one who observes a trial frequently sees the lawyers and the judge conferring at the side of the judge's bench in whispers discussing the admissibility of a piece of evidence or the propriety of a line of questions. Normally, judges try to resolve these questions quickly so they do not have to remove the jury from the courtroom and the trial can continue without a long interruption. Hence the convenience of arguing some evidentiary issues at the side of the judge's bench (so-called *sidebar conferences*). But sometimes the issue is too complicated or too important to be argued in that abbreviated way and the judge will order the jury to return to the jury assembly room so that a full discussion of the issue can take place in the courtroom. Often a substantial part of a trial is consumed by arguments on evidentiary and other legal issues outside of the hearing of the jury.

**Hearsay evidence.** Besides the general screening function performed by the trial judge in making sure that the probative value of an item of physical evidence or a line of questioning outweighs any prejudice to the defendant, there are many specific rules of evidence designed to enhance the reliability of trial verdicts. One rule that is central to the Anglo-American system of trials—both civil and criminal—is the rule that bars hearsay testimony.

A hearsay statement is defined as an out-of-court statement offered for the truth of the matter asserted. This rule is perhaps best understood by considering an example. Imagine a bank robbery trial in a case investigated by Federal Bureau of Investigation agent Mary Smith. At the trial of John Doe, the government calls Smith, who proceeds to tell the whole story of the robbery as she learned it from the witnesses. She explains that a bank teller, Johnson, described the robber and picked out Doe in a lineup; she testifies that a bank customer, King, said that the robber wore a green plaid suit and a red bow tie with white polka dots. Finally, Agent Smith testifies that she interviewed Doe's ex-girlfriend and that the girlfriend said Doe owned a green plaid suit and a red bow tie with white polka dots.

All of this evidence as testified to by Agent Smith would be hearsay evidence—it is a series of statements that were made out of court to Agent Smith, and they are being offered for their truth. The problem with such hearsay is that the jury hears only Agent Smith, when the crucial witnesses who should be examined in the jury's presence are the bank teller, the bank customer, and the ex-girlfriend. Because hearsay testimony is inadmissible unless it fits within a recognized exception, the government in this example cannot present its case through secondhand reports of what others said. Instead the prosecution must call the actual witnesses to testify to exactly what they observed and what they each know personally. The jury will then be in a better position to assess the credibility of the witnesses, especially when it is considered that the defense will have an opportunity to cross-examine each of the witnesses and to expose any weaknesses in their testimony.

The ban on the use of hearsay testimony is not absolute. There are many exceptions that would allow it, and, like rules of evidence in general, these exceptions vary from jurisdiction to jurisdiction. One common exception is the rule that permits the admission of a witness's prior testimony if he or she is unavailable. Thus, where a witness testified at the first trial of defendant Doe and there was a *hung jury* necessitating a second trial, the testimony of this witness could be introduced at the second trial under the hearsay exception if the witness had died before the second trial.

**Closing arguments.** At the conclusion of the presentation of all the evidence there remain two very important steps: *closing arguments* and the judge's instructions to the jury. In a majority of jurisdictions the closing arguments, or *summations*, precede the judge's instructions to the jury but in some jurisdictions the judge first instructs the jury and then closing arguments are made.

Closing arguments are vital because a good one can have a strong impact on the jury's deliberations, which begin shortly after the closings take place. For both prosecutor and defense counsel, the closing argument affords an important chance to review the testimony and exhibits that have been admitted during the trial, as well as to argue for any inferences that they may wish the jury to draw from the evidence. Closing arguments are supposed to be argumentative, and appeals to common sense, attacks on the motives and credibility of unfavorable witnesses, and rather emotional pleas for a certain result are common. Closings also provide the opportunity to remind the jury of how the evidence inter-twines with the law, and a good closing argument will weave together favorable evidence and the jury instructions that the lawyer giving the closing believes will support a favorable verdict.

There are some important limitations on the scope of closing arguments. Although a lawyer may argue vigorously for a certain conclusion, it is unethical for a lawyer to assert the lawyer's personal opinion as to the guilt or innocence of an accused (American Bar Association, p. 325). Thus, a defense lawyer may not state in closing that he or she has a reasonable doubt of the client's guilt, but an argument that the evidence at trial clearly raises a reasonable doubt would be proper.

Another, perhaps obvious, restriction on final arguments is that the arguments in closing must be tied to the evidence developed at trial. Inferences and conclusions from the evidence at trial can be argued quite freely, but to mention evidence that was never presented (and perhaps even ruled inadmissible by the trial judge) would be improper.

Still another limitation on closings is related to the defendant's decision whether or not to testify. This decision is often a very important tactical one. For example, if a testifying defendant has been convicted of other serious crimes, the prosecution will often be permitted to attack the defendant's credibility by asking about these convictions and showing that the defendant has indeed been previously convicted. In such a situation a defendant thus must balance the importance of his or her testimony against the fact that the jury will learn of other convictions if he or she testifies.

If the defendant decides not to testify, a prosecutor may not comment in the closing argument on the fact that the defendant did not choose to testify. In *Griffin v. California,* 380 U.S. 609 (1965), the Supreme Court indicated that comment by the prosecution on the defendant's failure to testify would violate the Fifth Amendment privilege against compelled self-incrimination. Thus in the closing argument the prosecutor may not argue that an adverse inference should be drawn from the defendant's silence at the trial. To back up this prohibition, if requested by the defendant, the trial judge will specifically instruct the jury that no adverse inference should be drawn from the defendant's decision not to testify.

**Instructions to the jury.** In speaking of instructions to the jury, it is natural to think first of the instructions at the end of the trial. But although these instructions are of crucial importance, there are often other occasions during the trial when the jury is instructed by the judge. Some judges choose to give a brief instruction on the law controlling the case at the beginning of the trial. Even during the trial, a judge may stop the taking of testimony to instruct the jury about the law surrounding an item of evidence. Thus, to continue the example above, when a defendant is impeached with a prior conviction, a judge should immediately instruct the jury that the conviction can be considered only as it bears on the defendant's credibility and not as evidence of his guilt.

However, it is at the end of trial that the judge gives the complete body of instructions to the jury. The instructions, of course, go into careful detail on the meaning of each of the elements of the crime, but they also cover many other general matters. A jury is usually instructed on such varied matters as the prosecution's burden of proof and the presumption of innocence, the meaning of reasonable doubt, the use of circumstantial evidence, the credibility of witnesses, the jury's role as fact finder, any defenses that have been raised, and the procedures to be followed in the jury room.

Before the judge instructs the jury, the prosecution and the defense will have an opportunity to submit instructions they wish the judge to give the jury. There will also usually be a conference between the judge and the lawyers outside of the hearing of the jury at which the judge hears argument from the lawyers about the instructions to be given.

If, during its deliberations, the jury feels that it needs more guidance, it so informs the judge, and the judge may repeat or further clarify any of the earlier instructions. In addition, if the jury is having difficulty in reaching a verdict, the judge often gives a supplemental instruction asking members of the jury to listen carefully to the arguments of other jurors and encouraging them not to hesitate to reexamine their own views (*Lowenfeld v. Phelps,* 484 U.S. 231, 235 (1988)).

**The verdict.** In civil trials a jury may be instructed to return either a general verdict (in which the jury simply indicates that it has determined the case for one of the sides) or a special verdict (which can be a rather lengthy list of specific questions on which the jury must reach agreement). As a practical matter in criminal cases, however, juries are always asked to return a general verdict of guilty or not guilty. Indeed, it has even been suggested that a special verdict may be an unconstitutional interference with the right to a jury trial (*United States v. Spock,* 416 F.2d 165 (1st Cir. 1969)).

In federal courts and in the courts of most states, the verdict of the jury must be unanimous. This is not a constitutional requirement because the Supreme Court in *Apodaca v. Oregon,* 406 U.S. 404 (1972), upheld an Oregon constitutional provision that permitted ten members of a twelve-person jury to render a guilty verdict in a noncapital case. But only Oregon and Louisiana permit nonunanimous jury verdicts in criminal cases.

Of course, not all juries are able to reach a verdict. When a jury indicates that it is deadlocked, the judge usually asks it to continue deliberations until the judge is convinced that further deliberations would be futile. If no verdict can be reached despite continued deliberations, the judge will order the jury discharged. In the event that the first trial ended in a deadlocked ("hung") jury, there is no *double jeopardy* bar to trying the defendant again.