B Steps in a Trial

Note to Students: Wherever the word "PLAINTIFF" appears below, substitute "PROSECUTOR" for a criminal case.

A number of events occur during a trial, and most must happen according to a particular sequence. (The sequence may vary slightly based on state or local rules or practice.)

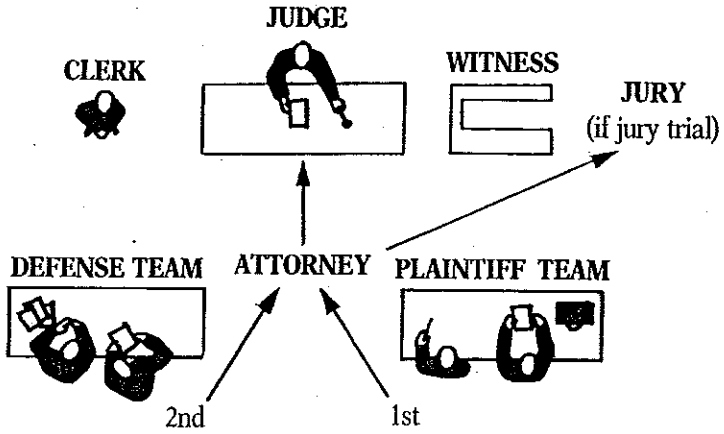
The following is the basic sequence in the trial process:

1. Judge enters and takes the Bench.
2. Clerk calls the case.
3. Plaintiff (Prosecutor in criminal case) makes an opening statement.
4. Defense makes an opening statement.
5. Plaintiff presents case:
   a. Plaintiff calls first witness and conducts direct examination.
   b. Defense cross examines the witness.
   c. Plaintiff conducts redirect examination, if desired.
   d. Steps a, b, and c completed for each of the plaintiff's other witnesses.
6. Plaintiff rests case.
7. Defense presents case in same manner as Plaintiff in #5 above, with Plaintiff cross examining each witness.
8. Defense rests.
9. Plaintiff makes closing argument.
10. Defense makes closing argument.
11. Plaintiff offers any rebuttal argument.
12. Jury instructions (if jury trial).
13. Jury/judge deliberations.
14. Verdict/decision/judgment.
15. Order (civil trial); Sentence (if found guilty in a criminal trial).

The *main* steps in the trial sequence above—before the judge or jury start deliberating—can be summarized as (1) opening statement by plaintiff; (2) opening statement by defense; (3) direct examination of plaintiff's witnesses; (4) cross examination of plaintiff's witnesses; (5) direct examination of defense witnesses; (6) cross examination of defense witnesses; (7) closing statement (argument) by plaintiff; and (8) closing statement by defense. Note how the sides take turns.

In the following sections, the four most critical stages of the trial are highlighted.

STEPS IN A TRIAL #1
The Opening Statement



DESCRIPTION: The opening statement is the introduction to the case, the very first time the attorneys for each side get to tell the judge and jury about what happened to their clients. The first impression is very important; it "paints a picture" of the case that will be presented for each side. Opening statements should include: (1) a summary of the facts according to each party; (2) a summary of the evidence that will be presented at the trial; and (3) a statement regarding what the party hopes to get out of the trial.

Style Points:

1. **Plaintiff's Attorney:** Since this attorney speaks first, it is very important for the plaintiff's opening statement to include a good summary of the facts, presented in a light most favorable to the plaintiff. If the opening statement presents a very convincing picture of the plaintiff's case, the defense team will have a much harder time changing the minds of the judge and jury.

2. **Defense Attorney:** The defense team always has the task of showing that the plaintiff's version of the facts is not correct. In preparing an opening statement, the defense attorney will have to guess how much detail and what kind of emphasis the plaintiff's attorney

will make in the plaintiff's opening statement. The defense attorney should be ready to make adjustments in his or her prepared statement while the plaintiff's attorney speaks. The defense attorney should highlight the facts that are in dispute, and emphasize the kinds of evidence the defense will present to show that the plaintiff is wrong.

Both attorneys should practice making eye-to-eye contact with the judge while speaking.

STEPS IN A TRIAL #2
The Direct Examination

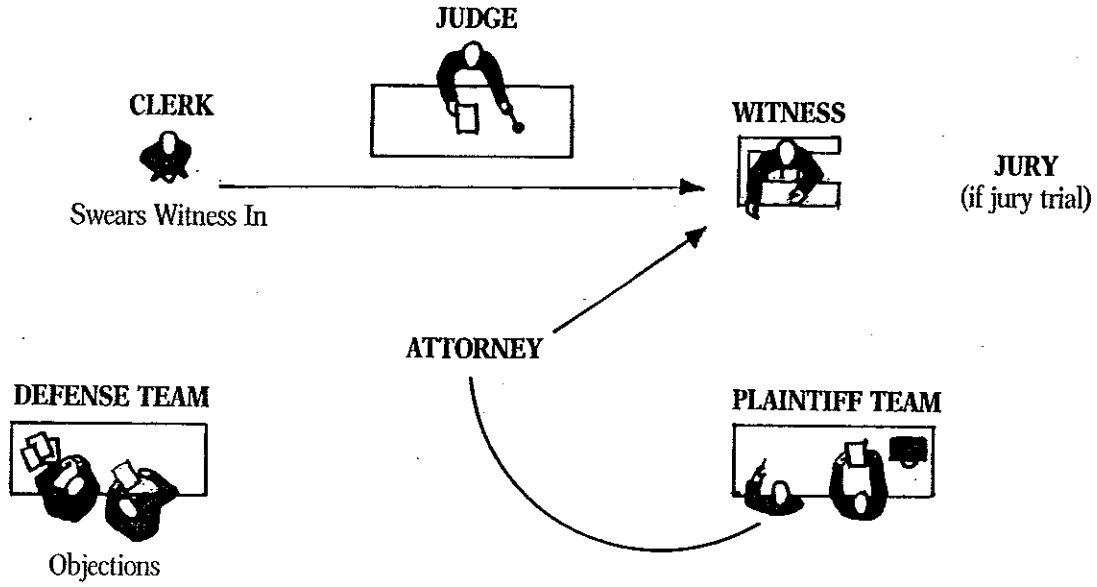
Diagram (at bottom of page) shows Plaintiff's direct examination of a witness.

DESCRIPTION: After the opening statements, the process of "witness examinations" begins. First, the plaintiff's team presents its witnesses, then the defense team. Each time a witness is called to the stand, the attorney who called the witness asks a series of questions called the "direct examination." These questions are designed to get the witness to tell a story, reciting what he or she saw, heard, experienced or knew about the case. The questions must ask only for facts, not for opinions (unless the witness has been declared to be an "expert" in a particular subject, such as a doctor or a police detective). In addition, the attorney may only ask questions and may not make any statements about the facts, even if the witness says something wrong. When the direct examination is completed, an attorney for the other side then asks questions to show weaknesses in the witness' testimony, a process called "cross examination."

Style Points:

1. **Attorney Conducting Direct Examination:** Questions should be designed to get the witness to tell the story in a logical manner. Avoid lengthy or complicated questions. Leading questions cannot be used on direct examination. (See Rules of Evidence section.) Be prepared to rephrase questions in case the witness does not understand a question or fails to remember facts accurately, or in case the other side objects to a question. (Grounds for objections are discussed in the Rules of Evidence section.)
2. **Opposing Attorney:** Listen carefully to the questions and answers, since cross examination must be limited to subjects discussed in the direct examination. Listen for violations of the Rules of Evidence, and be prepared to make good objections.
3. **Witnesses:** The most important factor in the trial is the *believability* (often called "credibility") of the witnesses. Witnesses should tell their stories clearly with as little hesitation as possible. It's important for witnesses to know the facts thoroughly.

NOTE: At the close of cross examination (see next section) the attorney who conducted the direct exam may do a "redirect." A redirect examination follows the same rules as direct. However, the questions are limited to subjects discussed in the cross examination.



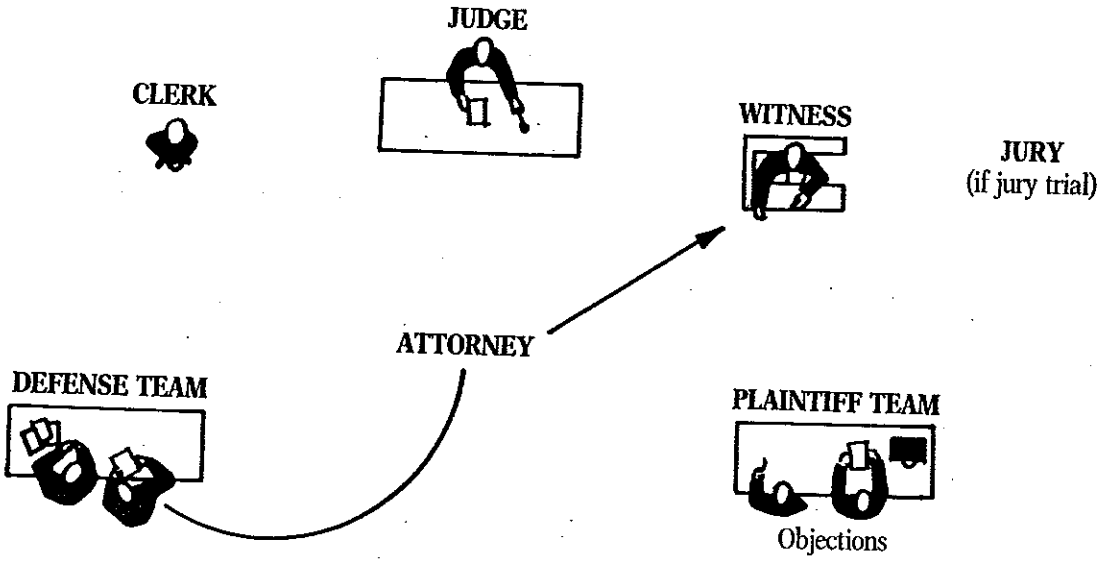
STEPS IN A TRIAL #3
The Cross Examination

Diagram (at bottom of page) shows Defense Attorney cross examining a Plaintiff's witness.

DESCRIPTION: The purpose of the cross examination is to show the judge and jury that a given witness should not be believed because that witness: (1) cannot remember facts; (2) did not give all of the facts in the direct examination; (3) told a different story at some other time; (4) has a reputation for lying; (5) has a special relationship to one of the parties (maybe a relative or close friend) or bears a grudge toward one of the parties. The cross examination questions are designed to bring out one or more of the above factors. These questions must be limited to subjects discussed in the direct examination or they can be objected to as "outside the scope of direct examination."

Style Points:

1. **Attorney Conducting Cross Examinations:** This attorney must know precisely what kind of weaknesses he or she wants to show in the witness, and then design the questions to point them out. Questions should be short; "leading" questions (discussed in the Rules of Evidence) are allowed (For example, the attorney may use questions with phrases like, "Isn't it true that . . .?") Questions should not be long or argumentative, nor should they ask the witness "How," "Why" or "Could you explain." Questions are best that call for a simple "yes" or "no" answer. Questions that give the witness a chance to make an explanation will usually not help the cross examiner's case.
2. **Opposing Attorney:** Listen carefully for violations of the Rules of Evidence, and be prepared to make objections. Listen carefully to the kind of attack the cross examiner is making; decide whether the attack is successful. After the cross examination, the opposing attorney may conduct a "redirect" examination, to give the witness a chance to explain or correct some points made in the cross examination.
3. **Witness:** Witnesses should try to give explanations whenever possible. Witnesses must pay close attention during cross examination, since the attorney *may* try to confuse the witness. They should try to stick to the facts they recited on direct examination.



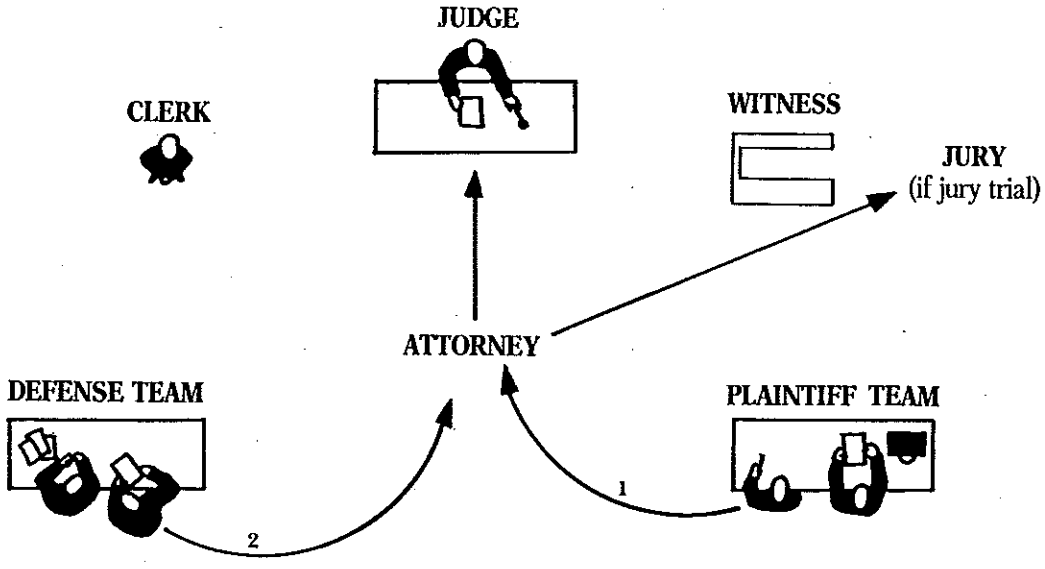
STEPS IN A TRIAL #4
The Closing Arguments

Diagram (at bottom of page) shows attorney (could be either defense or plaintiff's) presenting the closing argument.

DESCRIPTION: The purpose of the closing argument (or "statement") is to convince the trier of fact (judge or jury) that the evidence presented is sufficient to win the case for whichever side the attorney is representing. The closing argument should include: (1) a summary of the evidence presented that is favorable to the presenting attorney's side; (2) a summary of the case; and (3) a legal argument showing how the law requires the judge or jury to interpret the facts, and why that law requires them to rule in favor of the side for which the attorney is arguing. New information may *NOT* be introduced in the closing argument.

Style Points:

1. **Plaintiff's Attorney:** Remember, the plaintiff has the burden of proving the facts in a civil case by a preponderance of the evidence. Therefore, the plaintiff's summary of the favorable evidence presented is extremely important. Be sure to avoid claiming evidence that was not, in fact, presented; similarly, do not emphasize evidence that the defense successfully attacked, except to give a firm response to such an attack. Cite the law clearly and correctly, and make a clear argument regarding how the law requires the judge or jury to rule in the plaintiff's favor.
2. **Defense Attorney:** Summarize all of the evidence presented to weaken the plaintiff's case. Emphasize the inability of the plaintiff to meet the burden of proof, and stress that such inability must clearly lead to a decision in favor of the defendant.



C Simplified Rules of Evidence

So that each party to a trial can be assured of a fair hearing, certain rules have been developed to govern the types of evidence that may be introduced in a trial, as well as the manner in which evidence may be presented. These rules are called the "rules of evidence." The attorneys and the judge are responsible for enforcing these rules. Before the judge can apply a rule of evidence, an attorney must ask the judge to do so. Attorneys do this by making "objections" to the evidence or procedure employed by the opposing side. When an objection is raised, the attorney who asked the question being objected to will usually be asked by the judge to respond. A response should tell the judge why the question was not in violation of the rules of evidence.

The rules of evidence used in real trials can be very complicated. A few of the most important rules of evidence have been adapted for mock trial purposes, and these are presented below.

Rule 1. Leading Questions:

A "leading" question is one which suggests the answer desired by the questioner, usually by stating some facts not previously discussed and then asking the witness to give a "yes" or a "no" answer.

Example: "So, Mr. Smith, you took Ms. Jones to a movie that night, didn't you?"

Leading questions may not be asked on direct examination. Leading questions may be used on cross examination.

Objection: "Objection, Your Honor, counsel is leading the witness." (Opposing Attorney)

Possible Response: "Your Honor, leading is permissible on cross examination," or "I'll rephrase the question." For example, the above question would not be leading if rephrased as "Mr. Smith, where did you and Ms. Jones go that night?" (This would not ask for a "yes" or "no" answer.)

RULE 2. Narration:

"Narration" occurs when the witness provides more information than the question called for.

Example: Question, "What did you do when you reached the front door of the house?" Witness, "I opened the door and walked into the kitchen. I was afraid that he was in the house—you know he had been acting quite strangely the day before."

Witnesses' answers must respond to the questions. A narrative answer is objectionable.

Objection: "Objection, Your Honor, the witness is narrating."

Response: "Your Honor, the witness is telling us a complete sequence of events."

RULE 3. Relevance:

Questions and answers must relate to the subject matter of the case; this is called "relevance." Questions or answers that do not relate to the case are "irrelevant."

Example: (In a traffic accident case) "Mrs. Smith, how many times have you been married?"

Irrelevant questions or answers are objectionable.

Objection: "Your Honor, this question is irrelevant to this case."

Response: "Your Honor, this series of questions will show that Mrs. Smith's first husband was killed in an auto accident, and this fact has increased her mental suffering in this case."

Rule 4. Hearsay:

"Hearsay" is something the witness has heard someone say outside the courtroom.

Example: "Harry told me that he was going to visit Mr. Brown."

Hearsay evidence is objectionable. However, there are a number of exceptions to the hearsay rule and if an exception applies, the court will allow hearsay evidence to be testified to. One exception is permitting hearsay evidence when the witness is repeating a statement made by one of the parties in the case. (For mock trials, other exceptions to the hearsay rule usually are not used.) Another example of an exception is when the witness who made the statement has died or is otherwise unable to testify.

Objection: "Objection, Your Honor, this is hearsay."
Response: "Your Honor, since Harry is the defendant, the witness can testify to a statement he heard Harry make."

Rule 5. Firsthand Knowledge:

Witnesses must have directly seen, heard, or experienced whatever it is they are testifying about.

Example: "I know Harry well enough to know that two beers usually make him drunk, so I'm sure he was drunk that night, too."

A lack of firsthand knowledge is objectionable.

Objection: "Your Honor, the witness has no firsthand knowledge of Harry's condition that night."
Response: "The witness is just generally describing her usual experience with Harry."

Rule 6. Opinions:

Unless a witness is qualified as an expert in the appropriate field, such as medicine or ballistics, the witness may not give an opinion about matters relating to that field.

Example: (Said by a witness who is not a doctor) "The doctor put my cast on wrong. That's why I have a limp now."

Opinions are objectionable unless given by an expert. As an exception to this rule, a lay witness may give an opinion about something in common experience, e.g., "He seemed to be driving pretty fast for a residential street."

Objection: "Objection, Your Honor, the witness is giving an opinion."
Response: "Your Honor, the witness may answer the question because ordinary persons can judge if a car is speeding."

Special Procedures

Procedure 1. Introduction of Documents or Physical Evidence:

Sometimes the parties wish to offer as evidence letters, affidavits, contracts, or other documents, or even physical evidence such as a murder weapon, broken consumer goods, etc. Special procedures must be followed before these items can be used in trial.

Step 1: Introducing the Item for Identification

a. The attorney says to the judge, "Your Honor, I wish to have this (letter, document, item) marked for identification as (Plaintiff's Exhibit A, Defense Exhibit I, etc.)."
b. Attorney takes the item to the clerk who makes the appropriate marking.
c. Attorney shows the item to the opposing counsel.
d. Attorney shows the item to the witness and says, "Do you recognize this item marked as Plaintiff's Exhibit A?".
   Witness: "Yes."
   Attorney: "Could you please identify this item?"
   Witness: "This is a letter I wrote to John Doe on September 1." (Or witness gives other appropriate identification.)
e. Attorney may then proceed to ask the witness questions about the document or item.

Step 2: Moving the Document or Item into Evidence

If the attorney wishes the judge or jury to consider the document or item itself as part of the evidence, and not just the testimony about it, the attorney must ask to move the item into evidence at the end of the witness examination. The attorney proceeds as follows:

a. Attorney says, "Your Honor, I offer this (document/item) into evidence as Plaintiff's Exhibit A, and ask that the Court so admit it."
b. Opposing counsel may look at the evidence and make objections at this time.
c. Judge rules on whether the item may be admitted into evidence.

Procedure 2. Impeachment:

On cross examination, the attorney wants to show that the witness should not be believed. This is best accomplished through a process called "impeachment" which may use one of the following tactics: (1) asking questions about prior conduct of the witness that makes the witness' truth-telling ability doubtful (e.g., "Isn't it true that you once lost a job because you falsified expense reports?"); (2) asking about evidence of certain types of criminal convictions (e.g., "You were convicted of shoplifting, weren't you?"); or (3) showing that the witness has contradicted a prior statement, particularly one made by the witness in an affidavit.

In order to impeach the witness by comparing information in the affidavit to the witness' testimony, attorneys should use this procedure:

Step 1: Introduce the affidavit for identification, using the procedure described in Procedure 1.

Step 2: Repeat the statement the witness made on direct examination that contradicts the affidavit.

Example: "Now, Mrs. Burke, on direct examination you testified that you were out of town on the night in question, didn't you?" (Witness responds, "Yes.")

Step 3: Ask the witness to read from his or her affidavit that part which contradicts the statement made on direct.

Example: "All right, Mrs. Burke, could you read paragraph 3?"
(Witness reads, "Harry and I decided to stay in town and go to the theatre.")

Step 4: Dramatize the conflict in the statements. (Remember, the point of this line of questioning is to demonstrate the contradiction in the statements, not to determine whether Mrs. Burke was in town or out of town.)

Example: "So, Mrs. Burke, you testified that you were out of town on the night in question. Yet, in your affidavit you said you were in town, didn't you? There seems to be a conflict here, doesn't there? If you can't remember that fact correctly, it's possible you can't remember the others, isn't it?"