

Hello, this is Jay Leach. I'm an Emeritus Professor at the University of the Pacific, McGeorge School of Law. The topic of this In Practice is Components of a Trial.

I'm starting with the idea that you're listening to this podcast because you've seen a trial, perhaps in movies, perhaps on TV, Law & Order, or you've dropped by a courthouse and seen one in progress, and you'd become interested in how these trials work. I'm going to describe each segment of a trial.

In particular, I'm going to suggest to you the things that you might want to look for if you dropped down to another courthouse and sit in on the trial, so that you're looking at it with more knowledge of what skills we want to look for in the attorneys, and what you can use to judge how well they're doing their job and help you understand how the trial is running.

We'll take, as we go along, a sample case. Imagine that a woman was crossing a street and was hit by pickup truck and sadly killed. The suit is by her widower husband against the driver of the truck.

The husband, who sues, claims that the truck driver was driving negligently, that he was talking on his cell phone and was distracted at the time, and that his wife had been crossing legally in the crosswalk where she should have been safe.

The truck driver says that his witnesses can confirm that she was not in the crosswalk at all but was crossing halfway down the street, basically jaywalking across the street. Therefore, she had contributed to the accident, either in whole or in part, and he was not responsible.

If you're watching such a case, the first thing that would happen in the case is that there would be jury selection. Jury selection is called that, but it actually is not a time when the attorneys get to choose who they want on the jury. It's when they get to excuse, that is bounce off the jury, to throw off the jury in a polite way, the people who they think would be very bad for them in the case. It's the chance for the attorneys to talk to the prospected jurors and ask them questions about their views.

The things that you would want to watch for in jury selection is, first, to understand that it's the attorney's job to find out who might have a very bad attitude, very bad previously formed opinion about some issue in the case that would make that juror very hostile to that party's point of view.

For example, in the case that we're talking about with the woman who was killed, if there was someone on the jury who thought that money should not be used to compensate people who have lost a loved one, that would be someone that the plaintiff would very much not want to have on the jury.

Similarly, the truck driver would want to know if there was someone on the jury who thought that any use of a cell phone in a vehicle by the driver was automatically careless and negligent, and that person the truck driver would not want to have on the jury. The questions to the jurors would be to find out any viewpoints like that.

The things that I suggest you would look for when you when you watch the jury selection portion of a trial is, are the attorneys helping the jury understand why they're asking these questions?

It really helps the jurors be responsive and be candid about their answers if they have an understanding of why the questions are being asked, instead of them feeling that they're being intruded upon, and asked personal questions with no particular reason given for doing that. The second thing I'd suggest you to look for in a good attorney, who is doing a good job at jury selection is, are they courteous and respectful of the jurors? Do they get a good conversation going? Do they freely communicate with the jurors and start to form a courteous relationship with these people who may serve on their jury?

On the other side of the coin, the things that you would see that the attorney should not be doing that, unfortunately, we very often see in jury selection is they try to preach their case. They try to persuade these prospected jurors in advance to vote their way much too early, or they keep too many secrets.

They look like they are hiding things about the case and make the jurors wonder why they are asking these questions instead of being candid.

Once the jury has been selected, you move on to the opening statements where the attorney for each side gets to preview the case for the jury, and give an outline of what the case is going to present, what kind of evidence the case is going to present.

The things to watch for here are, is the lawyer giving a very clear road map to the jury, so it's easy for them to follow? In particular, are they giving a little capsule version of the case in a memorable way so that the jury always has in mind what the plaintiff's case is about in our sample case, or the defendant's case is about, so that it's easy to relate the evidence to the case.

For example, if the plaintiff were opening in the death case that we're talking about, the attorney might say, "You should be safe when you're in the safety zone. But the truck driver in this case, the defendant here, made it an unsafe place because he was on his phone."

The truck driver might say, "Yes, you stay safe if you're in the safety zone. But if you dart across the street, jaywalking halfway down the block, you're no longer counting on being safe." A little memorable statement like that would be a hallmark of a good opening statement.

The second thing you could watch for is, are the attorneys giving just enough facts for the jury to understand what's going to be in the case? But not fill them up with too many facts that they will try to remember and get very confused by if they try to remember everything. We often see attorneys get far too many facts and load the jury up too much in advance.

On the other side of the coin, what would be the hallmarks of a poorly done opening statement? The attorney who tries to sell the case, again, too soon, trying to get the jurors to buy in to a certain view of the case long before they've heard the evidence.

Just as I said, they might be giving too much information and making the jurors feel like they had to remember everything about the case right from the start.

Once the opening statements have been given, then the evidence begins by calling witnesses to the witness stand and by introducing exhibits, documents, things like guns or diagrams to help the jury understand what the case is about.

Understand of course, I think you know that direct exam is when the attorney puts on his or her own witnesses who he has met with and prepared, so it should be easy for them to get the facts across and the story across.

Here's what we suggest you look for when you're watching direct examination. Does the attorney asking the questions seem interested in the information that he or she is getting? You might think that sounds strange, why would they not be? The answer is very simple. They're standing up in public asking questions that they already know the answers to.

I'm looking to the flip side now. The poorly rehearsed, poorly trained attorney stands up and sounds extremely bored. "Mr. Potter, where do you work? How long have you worked there? What do you do there? What are your duties? Who are you married to? When did she die? How do you feel about that?"

It just sounds bored and flat. You can ask yourself, does this attorney seem like they care about the information that's being conveyed to the jury? We think they need to look like they're interested in order for the jury to be interested. Is the attorney finding a way to be very clear and helpful in their use of exhibits?

If they put up a diagram, do they put it right in front of the jury, help the jury understand where the cars were, where the people were, move things around? Do they use them creatively, or do they simply shovel in the exhibits and hope that they'll sit there, and hope the jury will understand them when they take them into the jury room?

On the flip side, sometimes I find, of course, that I'm saying the same thing in a reverse way. The bored-sounding lawyer, the lawyer who sounds like he's just going through the routine, is not doing a good job.

Secondly, lawyers very often don't make it clear why they're asking certain questions in a certain area. That makes it harder for the jury to understand. How do we use this information, where do we put it in the organization of the case? Being clear about that is another hallmark.

Once the direct examination is done, the cross-examination begins when the opposing lawyer gets to see if they can do some damage to the case or the witnesses' testimony that has been presented by the direct examiner.

Here again, the hallmark would be, is the cross-examining lawyer making their point clear? Can the jury understand why these questions are being asked? As a subpart of that, are they using leading questions? That is basically the best cross-examination, the

lawyer tells the witness the answer and requires them to say, "Yes that's right," "No, that's not right."

Those are leading questions, and that's the best way to do a cross-examination. Open-ended questions. Tell us about this. Why did you do that? When did you do that? That leaves the witness free to answer, basically, what they want to, and that makes a free-flowing but ineffective cross-examination.

Second hallmark of the good cross-examination. Even while the attorney is doing his or her best to do damage to the other side's case and to the witness, are they, nevertheless, courteous even if they're hard-hitting? Are they treating the witness with due respect and not attacking them as if they are horrible liars who should never see the light of day?

On the other side, cross-examinations that are ineffective ask non-leading questions, as I preferred to, and they go on too long. They spend too much time on points. They basically hammer away things, do them three times, four times, or are not clear about where they're going, and they're wasting their time.

After all the examinations are done on both sides, both for the plaintiff, or in a criminal case, the prosecution, after the case has been presented and the evidence that the defense wishes to present, you then turn to closing arguments. When the lawyers sum up the case for the jury and organize it for them to take it at the jury room and deliberate.

Here, the hallmarks of a good closing argument are, is the lawyer helping the jury answer the hard questions that they will have to deal with? Are they zeroing in on the basic turning points of the case? So the jury is equipped to debate those points when they go into the jury room?

Are they talking to the jury in a lively conversational way in a down-to-earth way so that it's much more a conversation? Even though it's the attorney who's doing the talking, then a speech that is sounding like it's a speech to a gathering or a political convention.

On the flip side of it, what would be the hallmarks of a poor closing argument? If they tell the entire story from the beginning to the end, as if the jury had not been there to hear it at all, they are really going to bore the jury. The jury was there. They want to get down to the nuts and bolts when they go in through and wrestle with the questions. They need help with that.

The other hallmark of a closing argument that makes a bad closing argument is if it's boring, the flip side of lively and conversational. Does the attorney draw on listening more to his or her own words than thinking about how it is affecting the jury and their ability to deliberate?

With these tips, I hope you'll visit a courtroom. Sacramento County Courthouse is open to the public. The Federal Courthouse is open to the public. You can drop in any time and sit in on the trial. Pick up what's it about, see what's happening, and listen with interest and with some knowledge of how to judge the performances of the attorneys after you've listened to this podcast.

This concludes the In Practice on the topic of Components of Trial. This is Jay Leach of McGeorge School of Law in Sacramento signing off. Thank you for listening.