



*The Women's Bar Association
of the State of New York*

presents

*Convention 2024
Continuing Legal Education Series*

**Trial and Error: Navigating
the Maze of Trial Practice**

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Presenter: Kathleen Feroletto, Esq.

TRIAL AND ERROR: Navigating the Maze of Trial Practice

FEROLETO LAW

INJURY ATTORNEYS

clients first.

Kate Feroletto
438 Main Street, Suite 910
Buffalo, NY 14202
Telephone: 716-854-0700 Fax: 716-854-0265
kate.feroletto@ferolettolaw.com
www.yourbuffalolawyer.com

Trying a case can be incredibly rewarding. It can also be challenging, but much less so with proper preparation. Start your trial preparation when the case comes in the door.

A. Pre-Suit

1. Recognize case flaws
2. Is your client likable?
3. Nightmare Clients.
4. Investigate.

B. Early in the Case

1. Pull the applicable Pattern Jury Instructions
 - i. You will use these from start to finish to guide your case and will need to be more than familiar with at the time of trial.
2. What do you need from discovery to prove your case and the elements in the PJI.
3. Retain Experts
4. Gather information on opposing counsel/venue/Judge

C. Discovery

1. What discovery do you need to prove your case at trial?

D. Summary Judgment

1. Can help narrow your issues at trial

2. Can help you better understand the opposing side's position/experts to give you extra time to prepare for trial
3. Ellis v. City of Buffalo 218 A.D.3d 1131 (2023)
 - i. Reckless standard breached by emergency vehicle.
 - ii. Damages only trial.
4. Rodriguez v. City of New York 31 N.Y.3d312 (2018)
 - i. Plaintiff can be partially at fault and still get summary judgment.

E. Jury Selection

1. Two to Three weeks before jury selection:
 - i. Determine how the jury examination is conducted in your jurisdiction. Typically, New York courts will use "White's" method or the "Struck" method. However, some Judges modify the above methods. Check to determine if the Judge has special rules or modified rules.
 - ii. Determine how many challenges will be exercised (CPLR § 4109), and if more than two parties, by whom. Discuss with the Judge, if there is any disagreement among the parties on the number of preemptory challenges per side.
 - iii. Determine favorable and unfavorable juror types, for your case.
 - iv. Organize your question/themes.

F. Voir Dire

1. Prepare your questions and phrasing.
2. Prepare the initial statement of the case to the jurors and review it with opposing counsel.
3. In a civil case, the plaintiff goes first. When all questioning is finished, the defendant begins questioning. If there are answers that need to be explored, additional questioning is allowed. If potential jurors are excused as unqualified, biased, pursuant to CPLR § 4109, etc. fill the seat and continue the questioning.
4. Challenges for cause will arise, some of which are obvious. Obviously unqualified jurors may be dismissed on the spot so the seat will be filled and questioning of six jurors can continue. Be cautious about jurors expressing bias to get out of jury duty. It won't take long for others who would rather not be there to pick up on an easy way to get out. Ask the clerk to excuse jurors.
5. When all challenges for cause are resolved and questioning of the first six seated jurors is completed by all parties, preemptory challenges are exercised. Under White's rules, plaintiff, exercises first, defendant next, then plaintiff may choose to exercise again, then defendant, etc. this is sometimes called, "*passing the board.*"

6. Building Rapport

- i. Jurors are initially skeptical of attorneys, both plaintiff and defense attorneys.
- ii. Start easy, with an introduction and good morning.
- iii. Ask a few general questions.
- iv. Explain that there is no right or wrong answer.
- v. Explain to the jurors in the back that many will likely be called.
- vi. Promote an atmosphere where the jurors feel comfortable talking, not you.
- vii. Let jurors know they can talk out of the presence of other, if there is something they feel uncomfortable about.
- viii. Address the weaknesses in your case.
- ix. Be cognizant to keep track of the challenges exercised by each party.
- x. Any appropriate question designed to elicit the prospective juror's state of mind concerning either parties or the subject of the action may appropriately be asked of the individual members of the panel or the entire body. *Fortune v. Trainor*, 141 N.Y. 605 (1892).
- xi. When appropriate make a Batson challenge - objection to the validity of a peremptory challenge, on grounds that the other party used it to exclude a potential juror based on race, ethnicity, or sex. *See, Batson v. Kentucky*, 476 U.S. 79 (U.S. 1986) (holding that the equal protection clause of the Fourteenth Amendment would be violated by a prosecutor's purposeful discrimination, exercised through peremptory challenges to remove from a jury members of the defendant's own race.); extended to civil cases through *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (U.S. 1991).

Common Voir Dire questions include:

- This involves a dispute that you as jurors will decide, how do you feel about that?
- Do you have reservations about someone bringing a lawsuit? (You should be ready to follow up with questions indicating why your case warrants legal resolution.)
- Have there been prior claims by you, against you?
- Were you satisfied with resolution of prior claims?
- Have you ever had an experience with similar injuries to you or someone close to?

- If there are different recollections, how will you determine which is true?
- What would you consider when evaluating a doctor's testimony if two doctors "disagree"?
- Are doctors more believable than nonprofessional witnesses?
- Should everyone be treated equally under the law?
- Just because someone is sued it doesn't necessarily mean they are liable, agree?
- Are you able to set aside sympathy and look at facts?
- Can you look at all of the evidence and listen to both sides before you make up your mind?
- Do you find it important to follow the law, even if you disagree?
- Is there anything I missed that you feel is important?

G. Pre-Trial

1. Know Your Budget
2. Severance/Consolidation
 - i. Frank v. Y. Mommy Taxi, Inc. 2022 NY Slip Op 04151 (2nd Dept.)
 - ii. Kaladze v. Ocean Park Acquisition, L.P. 203 AD3d 1151 (2nd Dept)
3. Bifurcation
 - i. Rueda v. Elmhurst Woodside, LLC (2nd Dept.)
4. Attorney and Judicial Conduct
 - i. Valenti v. Gadomski 203 AD3d 783 (2nd Dept)

H. Creating Powerful Opening Statements

1. Introducing Case Theme and Key Case Parties
 - i. 80% of jurors have decided the case at the end of opening statements.
 - ii. Before trial, boil down your case to one sentence. Be able to send yourself a one sentence tweet describing the case. This may become your theme for the case. It should be something very easy for the jurors to understand. Example: A corporation which puts profits over people; a driver chose to speed and changed my client's life, etc.
 - iii. Introduce both parties and critical witnesses. Show the jury that your important witnesses are the kind of people who can responsibly and accurately relate a past event.
2. Laying out the Sequence of Events
 - i. Explain process – briefly.
 - ii. Explain evidence;
 - iii. Explain evidence through witnesses' testimony.

- iv. Explain evidence through visuals.
 - v. It is better not to try too hard to persuade/argue the merits of your case in the opening. The jurors want to make their own decision.
3. Introducing Supporting and Damaging Evidence
- i. The opening statement is where you have the opportunity to discuss with jurors what you expect the evidence to show.
 - ii. Discuss what the witnesses will say, what the experts will say. You can go into detail about what the doctors will say about the injuries. Talk in graphic terms if helpful for your case.
 - 1. Example: A comminuted fracture. "Dr. Smith will tell you a comminuted fracture is where the bone is actually shattered and there are multiple pieces of the bone, so much that Dr. Smith had to cut open Mrs. Jones' leg, through the skin and muscles, put in a plate to hold the pieces of her bone in place and screw stainless steel screws into the pieces of her bones to keep them together...."
 - iii. Reveal your weaknesses. If appropriate discuss that your client will accept his or her role, but the opposing side has not.

TYPICAL OPENING STATEMENT STRUCTURE

1. Introduction
2. Parties
3. Scene/Date/Weather
4. Issue
5. What happened
6. Basis of liability
7. Corroboration
8. Facts refuting opponent's claim
9. Instructions
10. Damages
11. Conclusion – simply and directly tell the jury that the facts of the case will support the side taken, respectively, and ask for a verdict in favor of that side.

I. Trial Evidence

1. Any type of proof through the medium of witnesses, records, documents, exhibits or concrete objects.
2. Witnesses
 - i. People v. Parker (2nd Dept)
 - ii. Lopez v. City of New York (1st Dept)
3. Hearsay – Not admissible, but many exceptions
 - i. Business Records
 1. DeBenedetto v. Kingswood Partners (2nd Dept.) - co-worker's statement in an incident report was properly excluded. Incident report made by the General Contractor that plaintiff and his co-worker did not work for so no business duty to report the information at issue.
 2. Rucigay v. Wyckoff Heights Medical Center (2nd Dept.) – opinion expressed in the autopsy report regarding cause of death was inadmissible.
 3. Young v. Heller (2nd Dept.) – Admission of a textbook into evidence for the truth of what was contained constituted error, but the error was harmless.
 4. Doe 44 v. Erik P.R. (4th Dept.) – CVA case – Collateral Estoppel in Civil case after decision in Family Court
4. Photos/Videos
 - i. Wilt v. Montvel-Cohen (2nd Dept.) – plaintiff bit by Rhodesian Ridgeback while jogging. Plaintiff admitted a photo depicting the same breed of dog, but not the offending dog. Defendants appealed saying the dog looked too aggressive. Court held it was not so inflammatory to warrant a new trial.
 - ii. People v. Amarillo (2nd Dept) – Criminal defendant accused of killing his girlfriend and her daughter. He appealed on based on the admission of inflammatory autopsy photos. Appeal denied.
5. Habit and Custom & Practice
 - i. Bonnett v. Rose Associates, Inc. (1st Dept.)
 1. Plaintiff injured when he unlocked a window in his apartment and the top window slammed down on his fingers. Repair company previously came to repair the window. Repairman couldn't recall inspecting this window, but stated it was his habit and routine practice to inspect the top part of the window and that he wrote on the work ticket that balances needed to be ordered for plaintiff's window.

2. Court held that the employee's testimony was properly considered in support of Defendant's MSJ, but still not enough to overcome the question of fact.
- ii. Guido v. Fielding (1st Dept.)
 1. Medical Malpractice case. Doctor couldn't recall the plaintiff's particular LAP-Band surgery, but testified as to his process for performing this type of surgery.
 2. Plaintiff argued deposition testimony about defendant's custom and practice is not admissible.
 3. Court held a foundation must be laid that the practice is deliberative and repetitive practice that does not vary from time to time depending on circumstances.
 4. Habit evidence solely provides a basis for the jury to draw an inference, but it cannot be the basis for judgment as a matter of law.

J. Closing Statements

1. Review the important parts of the testimony and proof, blending the facts in with the jury instruction. The jury instruction is what the jurors must decide the case on.
 - i. These are the rules of the case; we all have to follow rules. This can be made into a very good discussion about the opposing party not following rules. It helps the jury understand why they must find against the rule breaker.
 - ii. Spend some time in your closing on the key instructions such as burden of proof. Arm your favorable jurors on the standard in a civil case.
 - iii. Discuss proximate cause (PJI 2:70). There may be more than one cause of an injury, accident, or occurrence but to be substantial, it cannot be slight or trivial. You may, however, decide that a cause is substantial *even if you assign a relatively small percentage to it*.
 - iv. The failure to admit and recognize responsibility makes a party's position worse. Addressing their refusal to accept responsibility can be very effective.
 - v. Let the jurors know they can look at the evidence, or have part of the testimony or instruction read back to them if another juror is unsure of what the evidence or law is.
 - vi. Let jurors know they should have a verdict they could be proud of.
 - vii. Explain while showing the jury verdict form

SAMPLE CLOSING STATEMENT STRUCTURE- PLAINTIFF

1. Introduction
2. Parties
3. Scene/Date/Weather
4. Issue
5. What happened
6. Basis of liability
7. Corroboration
8. Facts refuting opponent's claim
9. Instructions
- 10. Damages**
11. Conclusion

SAMPLE CLOSING STATEMENT STRUCTURE- DEFENDANT

1. Introduction
2. Parties
3. Scene/Date/Weather
- 4. Damages**
5. Issue
6. What happened
7. Basis of liability
8. Corroboration
9. Facts refuting opponent's claim
10. Instructions
11. Damages
12. Conclusion

K. Jury Instructions and Deliberations

1. Sattar v. City of New York (2nd Dept.)
2. Moore v. City of New York (2nd Dept.)
3. Make sure to make a record
 - i. Ortiz v. City of New York

L. Verdicts

1. Directed Verdicts
 - i. Thompson v. Rodney
 - ii. Nemeth v. Brenntag North America
2. Weight of Evidence v. Legal Insufficiency
 - i. Weight of Evidence (CPLR 4404(a))
 - ii. Legal Insufficiency (CPLR 4401)

M. Damages

1. Additur
2. Remittitur

JUROR QUESTIONNAIRE

Please answer all questions. Your answers will be used to assist in selecting a jury. If there is anything you prefer to discuss in private, please ask to speak with the judge out of the hearing of other jurors by answering yes to Question 17. **THE QUESTIONNAIRE IS IN FOUR PARTS. PLEASE PRINT FIRMLY.**

1. Name _____

2. Age _____
3. Male Female
4. Town/village or geographical area (neighborhood) where you live?

5. Number of years
 - a. living at current address? _____
 - b. living in this county? _____
6. Where were you born? _____
7. Are you currently:

 Single Married Other
8. What is the highest level of education you completed?

 Less than high school

 High school graduate

 More than high school
 - a. number of years _____
 - b. course of study _____
9. Are you currently employed? No

 Yes – If yes:
 - a. who is your employer? _____
 - b. what is your occupation? _____
10. Occupations and relationship to you of other adults in your household:

11. Gender and age of your children:

12. Did you ever sit on a jury before? No

 Yes – If yes:
 - a. When? _____
 - b. Where? _____
 - c. Type of jury:

 Grand jury Trial Jury Both
 - d. Type of case(s):

 Criminal Civil Both
 - e. Did the jury reach a verdict?

 Yes No Both
13. Have you or someone close to you ever:

(check all that apply)

 Been the victim of a crime

 Been accused of a crime

 Been convicted of a crime

 Been a witness to a crime

 Testified in court

 Sued someone else

 Been sued by someone else.
14. Have you or someone close to you (relative or close friend) ever been employed by: *(check all that apply)*

 Law Office

 Medical profession

 Law enforcement or criminal justice agency

 Insurance industry

 Local municipality (city/county worker)
15. Are you actively involved in any civic, social, union, professional or other organizations? No

 Yes: _____
16. What are your hobbies or recreational activities?

17. Is there anything relevant to your jury service that you prefer to discuss in private?

 Yes No

I affirm that the statements made on this questionnaire are true and I understand that any false statements made on this questionnaire are punishable under Article 210 of the Penal Law.

Signature of Prospective Juror

Date

Appendix C
Procedures for Implementing Voir Dire Openings
Recommended by the Jury Trial Project

1. Each counsel shall be given a brief period of time (about five minutes) to summarize the case from their side's point of view. The time allotted for the voir dire openings should be added to the usual time allotted for voir dire.
2. Counsel should be given notice as early as possible of the court's intent to use the voir dire openings procedure. When counsel is first informed of the procedure at the start of jury selection, which is usually the case, reasonable time should be given to allow the attorneys to collect their thoughts and prepare.
3. Counsel can be invited to give voir dire openings to the entire panel.
4. The procedure should be used only with consent of counsel for both sides and with both sides' participation.
5. Special considerations for criminal matters:
 - (1) Rosario material ought to be provided to the defense before counsel is asked to deliver a voir dire opening.
 - (2) A defender's decision to make a voir dire opening does not preclude exercising the defendant's right not to make an opening statement at the start of the trial.
 - (3) The People's voir dire should be first and there should be no rebuttal.

Suggested Judge's Introduction

Before we begin the process of asking you questions about your qualifications to serve in this case, each attorney will give a brief statement about the case. I've asked them to limit their remarks to a brief presentation. Of course, what the attorneys say to you by way of their opening remarks both now, and again later just before we begin hearing from the witnesses, is not evidence. These statements are offered to you now as a kind of "preview" of the case. The purpose in doing so is to allow us a greater opportunity to explore with you anything that might impact your ability to serve fairly and impartially as a juror in this case.

References

<https://ww2.nycourts.gov/sites/default/files/document/files/2018-06/ImplementingVoiDire2009.pdf>