

## SO YOU'RE HEADED FOR TRIAL . . . NOW WHAT?

By the time you've decided you're heading for trial, you should be getting a better focus on your issues, and you have a better idea of what you want to say to the Court, it's time to be thinking about trial. You can't start organizing your thinking for trial preparation too early, and it can be very helpful to start sketching out your courtroom presentation. You'll want to put similar claims & defenses together, of course. You might consider focusing your defenses & counterclaims and figure out which ones might really do some good. Let's suppose you have four distinct issues/defenses/claims to present and prove together with witness testimony and exhibits. That would be fifteen minutes apiece (*assuming you've got an hour for your side of the case*).

Once you've decided the matter needs to go to trial, then you better get to work on your trial preparations. I like to have all of my trial preps *'in the can'* as best I can no less than thirty days before trial. The last thirty days before trial is always distracting, loosely organized mayhem. Moreover, your trial preparation will help guide you through the preliminaries, including any discovery, witness selection, and your choices for your trial exhibits.

**Getting Organized.** Most of the time, folks find it easiest to start with their Closing Argument, and then work backwards from there, putting together the Case in Chief, and then finally their Opening Statement. Closing Argument is about telling the judge what you want them to do, and you probably have a very good idea of what that is. The rest of your case is about helping the judge understand why the Court should do what you've asked it to do.

Starting off, typically, your Closing Argument script will go:

"Your Honor, the evidence has shown that ...[*whatever your case proves*]" and "Here's what I'm asking the Court to do today . . . [explain *exactly what you want the court to do*]". This is a good time to come up with a simple statement of what the case is about, which I call a "*bumper sticker*". This is a very brief description of your case, such as "*Mom and kids deserve to be safe*", or "*If the glove don't fit, you must acquit*" or "*Tenant's don't forfeit their free speech rights at the Landlord's door*".

Naturally, your Closing Argument defines exactly what your Case in Chief has to prove [ A, B, C. . . ], and exactly what evidence you have to present to prove A, B, C.

It's very important to know what you have to prove (or dis-prove) in order to win. Start by looking up the elements to be proved in the Civil Jury Instructions, or in one of these references (which you might be able to get through interlibrary loan at your local library:

*"Elements of Colorado Civil Causes of Action"*, by Douglas S. MacGregor; Bradford Publishing, 2004  
*"Colorado Civil Claims"*, Steven C Choquette; Colorado Bar Association, 2019

Build your script for your Case in Chief around your Exhibit Book, first with a very brief introduction, and then start talking about Exhibit 1 first, then work your way into Exhibit 2, and Exhibit 3, and so forth until all your exhibits have been explained and admitted into evidence. Put together your Exhibit Book early,

with a clear idea of exactly what you want from the judge, and what you have prove to get there. No need to make the duplicate copies of the Exhibit Book until the week before trial.

Once your Case in Chief is put together, you can start it all off with your Opening Statement, that goes something like: "Your Honor, this is a case about . . . [*'bumper sticker'*; whatever the case is really about], and the evidence will show that the Plaintiff . . . [*'bumper sticker'*; *whatever your defenses are, and whatever your counterclaims are*]. This is where you'd like to first introduce your '*bumper sticker*' which captures the essence of your case, and then repeat the '*bumper sticker*' every chance you get throughout your Case in Chief, and of course, in your Closing Argument.

**Trial Preparations.** Time yourself carefully, and practice all of it, over and over, out loud. Two minutes for Opening Statement, probably an hour for your Case-in-Chief, and three minutes for Closing Argument. It's not unusual for the judge to say that your Trial Management Certificate (TMC) will serve as your Opening Statement, so your Opening Statement script would go directly into your Trial Management Certificate. Practice it anyway. Generally, your Opening Statement, your exhibit list, witness list, and your exhibits will all go into the TMC too.

Now practice, practice, practice.

**Cross Examination.** After you're comfortable with the structure, timing and flow of your case, it's time to talk about cross-examination. Normally, cross-examination is something worth focusing on in the last weeks before trial. Many trials may be lost on cross examination, but they are rarely won on cross. If your Case in Chief does what it's supposed to, that's where you'll win, and not on cross. Instead, cross examination is a chance to limit the damage done by hostile witnesses, if their testimony is genuinely catastrophic to your case. All time you spend on cross comes out of your time for your Case in Chief. If you spend time chasing '*it don't matter*' testimony, you've squandered precious time. Cross examination preparation will include selection of impeachment evidence (*if any*), as well as anticipating the testimony to be offered by opposing counsel's witnesses.

Hope this helps, and good luck,

Ric Morgan